



## POLICY ROUNDTABLES

# Information Exchanges Between Competitors under Competition Law 2010

### Introduction

The OECD Competition Committee debated competition aspects of information exchanges between competitors under competition law in October 2010. This document includes an executive summary and the documents from the meeting: a background paper by Antonio Capobianco for the OECD Secretariat, written submissions from Australia, Belgium, Bulgaria, Chile, the Czech Republic, Denmark, the European Union, Finland, France, Germany, Greece, Indonesia, Israel, Japan, Korea, Lithuania, Mexico, the Netherlands, Poland, Romania, the Russian Federation, Slovenia, South Africa, Spain, Chinese Taipei, Turkey, the United Kingdom, the United States and BIAC, as well as contributions from Professors Alberto Heimler, Kai-Uwe Kuhn and Jorge Padilla.

### Overview

Information exchanges among competitors increase transparency in the market, which can lead to efficiency enhancing benefits but may also present competition risks. The challenge for competition enforcers is how to approach this conduct within the context of traditional competition laws. The assessment of the legality of information sharing is generally carried out within the context of traditional competition law prohibitions against cartels.

Increased transparency in the market as a result of information sharing may both benefit consumers directly as well as produce efficiencies for the companies involved, resulting in improved consumer welfare. However, enhanced transparency can also facilitate the attainment of collusive equilibria among competitors or result in non-coordinated anticompetitive effects. The potential for anticompetitive effects depends on a number of key factors, such as the type of information exchanged and the structural characteristics of the market involved.

The utilization of safe harbours and presumptions may be beneficial in the interest of legal certainty and enforcement efficiency. Safe harbours may be based either on market share, industry or the type of information exchanged.

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**INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMPETITION LAW**

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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Information Exchanges between Competitors under Competition Law held by the Competition Committee in October 2010.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur l'Échange d'informations entre concurrents en droit de la concurrence qui s'est tenue en octobre 2010 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*By the Secretariat*

From the background paper and the discussion at the roundtable on information exchanges between competitors under competition law, the following points emerge:

- (1) *Information exchanges among competitors increase transparency in the market, which can lead to efficiency enhancing benefits but may also present competition risks. The challenge for competition enforcers is how to approach this conduct within the context of traditional competition laws since generally jurisdictions around the world do not have specific rules dealing with exchanges of information.*

Exchanges of information are interactions among competitors that, from a competition law perspective, fall between the universally condemned hard-core “naked” cartels and tacit collusion arising from oligopolistic interdependence, generally considered legal. In the course of doing business, companies can - and often do - exchange various types of information through different channels, which leads to increased transparency in the market which can both bolster allocative and productive efficiencies as well as facilitate collusive outcomes among competitors.

Generally, information exchanges among competitors may fall into three different scenarios under competition rules: (i) as a part of a wider price fixing or market sharing agreement whereby the exchange of information functions as a facilitating factor; (ii) in the context of broader efficiency enhancing cooperation agreements such as joint venture, standardization or R&D agreements; or (iii) as a stand-alone practice, whereby the exchange of information is the only cooperation among competitors.

The competition assessment of information exchanges in the first two scenarios is relatively straightforward. Competition agencies assess the possible restrictive effects of such practices in the broader context of the cartel or the agreement to which they are ancillary. The stand-alone exchange of information raises, however, significant challenges as it is crucial to recognize whether it resembles more a cartel-type infringement or an efficiency enhancing cooperation. This is ever more important in the context of the steadily increasing anti-cartel enforcement activity, as a result of which fully-fledged explicit cartel agreements are giving way to looser and more insidious ways of collusive cooperation among competitors.

Generally, competition laws of different jurisdictions around the world do not have specific provisions dealing with exchanges of information. Instead, these are dealt within the framework of traditional prohibitions against cartel agreements and/or concerted practices. However, this may pose particular challenges depending on the elements which need to be proven.

- (2) *Increased transparency in the market as a result of information sharing may both benefit consumers directly as well as produce efficiencies for the companies involved, resulting in improved consumer welfare.*

In economic literature, market transparency is traditionally considered pro-competitive as it eliminates information asymmetries, enhances informed choice on the part of market participants and in some

instances even allows for certain markets to function (as is the case, for example, in insurance markets). Whether the information is shared among all the market participants or remains limited only to those on the supply side determines much of the benefits that will be derived from the information exchange.

For suppliers, the benefits of information exchanges generally accrue, irrespective of whether the information is shared only among them or with the whole market. The potential benefits are wide-ranging and they include, for example, the following:

- Better understanding of the market and of the demand structure, which enables suppliers to develop more effective marketing strategies and efficient distribution systems. Increased market transparency may also facilitate entry into the market for new competitors in that it allows potential entrants to better evaluate business opportunities in a given sector.
- In markets with high fluctuations in demand, where suppliers have to maintain high inventory levels to satisfy demand peaks, information exchanges can lead to better demand forecasting resulting in inventory optimization.
- The sharing of information on costs enables companies to compare their performance to that of their competitors (benchmarking), which can lead them to adopt productive efficiency increasing initiatives.
- Information exchanges may also have beneficial effects on technology innovation markets characterized by high investment costs, where any uncertainty as to future developments of demand may stymie investment into new products.

Also, the sharing of information enables certain markets to function effectively. This is the case, for example, in retail credit markets, where the sharing of data on the creditworthiness of borrowers amongst banks, results in better access to credit for good customers. Similarly, in the insurance sector the sharing of certain information such as tables, calculations and studies allows for a better risk assessment of individual companies. In this context the sharing of information may not only lead to increased competition among insurers but may also facilitate entry if such information is readily available to potential entrants.

There are also significant benefits for consumers and customers when information stemming from an information exchange is shared with the whole market. The discussed benefits include:

- Elimination of the costs of searching for the best possible product or service alternatives, which can bring about a non-negligible increase in consumer surplus. Moreover, being better informed about available products, their characteristics and prices allows customers to make informed choices about their purchases and results in increased competition among suppliers.
  - Increased market transparency can also play a role in deterring collusive outcomes due to the availability of information to potential complainants and enforcers, who can then more easily detect potential parallel behavior.
- (3) *Notwithstanding its benefits, enhanced transparency can also facilitate the attainment of collusive equilibria among competitors or result in non-coordinated anticompetitive effects.*

Increased market transparency produces not only benefits but can also result in significant anti-competitive effects. There are various ways in which competition can be harmed as a consequence of information sharing among competitors. The theories of harm are based principally on coordinated effects and to a lesser extent on non-coordinated effects of information exchanges.

As regards coordinated effects, the exchange of information can facilitate collusion among competitors by allowing them to establish coordination, monitor adherence to coordinated behaviour and effectively punish any deviations.

With respect to theories of harm based on non-coordinated effects, information exchanges may lead to market foreclosure. Theoretically, potential new entrants may be placed at a significant disadvantage in comparison to the present competitors involved in an information exchange scheme. However, it was generally felt that this risk is not particularly high and no problematic cases of this type were reported.

(4) *The potential for anti-competitive effects depends on a number of key factors, such as the type of information exchanged and the structural characteristics of the market involved.*

Competition agencies have identified a number of factors that they examine when assessing the legality of information exchanges. These relate to the (i) structure of the affected market, (ii) characteristics of the information exchanged and (iii) the modalities in which the information exchange takes place.

- The structure of the market and levels of concentration is an important factor in determining how anti-competitive information exchanges are, given that achieving and sustaining collusion is easier in more concentrated markets with a small number of players. Competition agencies have thus traditionally paid close attention to exchanges of information in oligopolistic markets. In addition, some have noted that the extent of the market covered by information exchange is another important criterion examined in competitive assessments, as the fact that information is shared amongst all players on the market may facilitate the reduction of uncertainty among firms in a whole sector, hence enabling the attainment of a collusive equilibrium.
- The nature of the information exchanged is another crucial factor in competitive assessment because not all information has the same collusive potential or necessarily has to be exchanged in order for the benefits of increased transparency to be reaped. In this respect, competition agencies in their assessment distinguish between the various characteristics of the information exchanged, such as the subject matter, the information age and level of aggregation. In terms of the subject matter, exchanges of information on future pricing intentions carry the greatest risk. On the other hand, information about costs or demand forecasts has very little coordination potential. The age of the information also plays an important role in the assessment, with past and historical information having much lesser collusive potential than current or even future information. Finally, the level of aggregation is an important factor: the exchange of disaggregated information has the greatest anticompetitive potential. Moreover, the efficiencies that companies may potentially obtain through information exchanges do not require the sharing of highly disaggregated data, which is extremely conducive to coordination.
- The way in which information is exchanged is also generally considered by competition agencies in their assessment. Companies can exchange information either directly, through third parties or they may establish public information sharing schemes. While some suggested that whether an information exchange is public or is limited only to the competitors involved is immaterial for its coordination potential, competition agencies generally view private information exchanges with greater suspicion. It was also noted that the fact that information exchange may occur via a third party (e.g. a trade association) does not lessen its ability to facilitate coordination. Indirect exchanges or vertical exchanges may be used for coordination just as well as direct information sharing among competitors.

(5) *To deal with the risks associated with anti-competitive information exchanges, competition authorities will not only make use of their enforcement powers, but also engage in activities*

*aimed at providing companies with guidance as to the legality of various information exchange schemes.*

It was agreed that information sharing among competitors can seriously harm competition, in particular due to its potential to facilitate collusion. However, the practice is particularly difficult to evaluate under competition rules since information sharing may take a number of shapes and forms, and its effects are hard to ascertain as many may be pro-competitive. Adding to this difficulty, the elements required to establish an information exchange as a competition law violation are hard to prove.

When dealing with the sharing of information, competition authorities may make use of both their guidance and enforcement roles. The importance of guidance is particularly significant in the context of information exchanges because their assessment under competition rules is not straightforward. The exchanges have the potential both to create efficiencies and lead to anti-competitive effects. However, it is crucial that this potential uncertainty does not discourage efficiency enhancing information sharing. Therefore, competition authorities in a number of jurisdictions publish guidelines on their approach to enforcement in this respect. In addition, *ex ante* guidance may be provided to companies on a case by case basis.

(6) *The assessment of the legality of information sharing is generally carried out within the context of traditional competition law prohibitions against cartels. The utilization of safe harbours and presumptions may be beneficial in the interest of legal certainty and enforcement efficiency.*

The approach to the legal assessment of information exchanges differs between jurisdictions. In some countries, an agreement among competitors is required to prove a violation whilst in others, the concept of concerted practice is sufficient.

In jurisdictions requiring proof of an agreement among competitors, it is markedly more difficult to sanction harmful information exchanges that are not part of a broader cartel agreement. On the other hand, the sanctioning of collusion within the context of information exchanges is more commonplace in jurisdictions that rely on the concept of concerted practice, such as the European Union. This concept covers coordination that has not yet reached the stage of an agreement, encompassing conduct intended to enhance cooperation among competitors by reducing uncertainty regarding present or future behaviour. Nevertheless, some suggested that while information exchanges may be found to constitute an illegal concerted practice, they should not be treated in the same manner as hard-core price fixing or market-sharing cartels when it comes to fining.

The usefulness of safe harbours and legal presumptions when dealing with information exchanges was also discussed during the roundtable. The benefits of *per se* prohibitions and safe harbours in increasing legal certainty and reducing enforcement costs were stressed by several participants. When determining whether certain exchanges should be either *per se* prohibited or covered by a safe harbour, competition authorities must consider the typical effects of a given type of exchange. The costs of avoidance for businesses and error costs must also be taken into account.

It was suggested that private information exchanges and discussion about future intentions may be suitable for *per se* prohibitions. While rarely necessary for the attainment of efficiencies generated by information sharing, these forms of information exchanges have great potential for coordination and as such should be deterred. Other types of exchanges should be considered on a case by case basis following a rule of reason type of analysis with a full evaluation of their effects and due deference to potential efficiencies.

- (7) *Safe harbours may be based either on market share, industry or the type of information exchanged.*

As important tools for increasing legal certainty and for providing predictability for businesses, safe harbours may be based on several possible factors. The market shares of the parties to an information exchange system, the characteristics of the information exchanged and the nature of the sector affected have all been suggested as possible criteria for devising a safe harbour.

Some jurisdictions use or contemplate using safe harbours based on the aggregate market share of the competitors involved in an information exchange. This approach mirrors the so-called *de minimis* criterion used by some competition agencies in assessing the harmfulness of agreements between companies.

Others have presented safe harbours based on the type of information exchanged as more suitable. For example exchanges of highly aggregated cost information used for benchmarking could be beneficial due to their great efficiency enhancing potential and as such could be considered for coverage by a safe harbour. Other types of information, the exchange of which could be considered as potentially innocuous, include information on delivery data or cost information exchanged within product swap agreements.

Finally, some competition agencies use safe harbours for particular sectors, such as health care, while placing strict eligibility limits as to market shares and the type of information that may be exchanged.



## SYNTHÈSE

*Par le Secrétariat*

Les points suivants se dégagent des documents de référence et des discussions qui ont eu lieu lors de la table ronde sur les échanges d'informations entre concurrents en droit de la concurrence :

- (1) *Les échanges d'informations entre concurrents améliorent la transparence sur le marché, ce qui peut générer des gains d'efficacité, mais présentent également des risques en termes de concurrence. Pour les autorités de la concurrence, le défi consiste à en tenir compte dans le cadre du droit de la concurrence traditionnel étant donné qu'en général, les États ne disposent pas de règles spécifiques en matière d'échanges d'informations.*

Les échanges d'informations sont des contacts entre concurrents qui, du point de vue du droit de la concurrence, se situent entre les ententes injustifiables pures, qui sont interdites partout, et les collusions tacites qui résultent d'une interdépendance oligopolistique, lesquelles sont en général considérées comme licites. Dans le cadre de leurs activités, les entreprises peuvent échanger — et bien souvent échangent effectivement — divers types d'informations de plusieurs manières. Cela améliore la transparence sur le marché, ce qui peut se traduire par une meilleure efficacité allocative et productive aussi bien que par une collusion entre concurrents.

Généralement, il y a trois cas de figure possibles pour un échange d'informations entre concurrents en droit de la concurrence : i) il fait partie d'un accord plus vaste d'entente sur les prix ou de répartition des marchés dont l'échange d'informations facilite l'application ; ii) il intervient dans le cadre d'un accord de coopération qui vise à améliorer l'efficacité, par exemple une coentreprise, une démarche de normalisation ou un accord de recherche-développement ; iii) il s'agit d'une pratique autonome, pour laquelle l'échange d'informations constitue la seule forme de coopération entre concurrents.

Dans les deux premiers cas, le bilan concurrentiel de l'échange d'informations est relativement facile à effectuer. Les autorités de la concurrence apprécient les éventuels effets anticoncurrentiels de telles pratiques dans le cadre plus vaste de l'entente ou de l'accord dont elles dépendent. En revanche, l'échange autonome d'informations pose de sérieux problèmes, car il est essentiel de déterminer s'il ressemble davantage à une infraction de type entente ou à une coopération visant à améliorer l'efficacité. Cela prend d'autant plus d'importance que la lutte contre les cartels s'intensifie avec le temps et que, par conséquent, les ententes explicites proprement dites cèdent la place à d'autres méthodes moins structurées et plus insidieuses de collusion entre concurrents.

Dans la plupart des pays, la législation sur la concurrence ne prévoit pas de dispositions spécifiques s'agissant des échanges d'informations. Ces échanges sont alors traités dans le cadre de l'interdiction classique des ententes et/ou des pratiques concertées. Cela peut cependant poser certains problèmes, en fonction des éléments qui doivent être établis.



- (2) *Une amélioration de la transparence sur le marché consécutive à un échange d'informations peut à la fois bénéficier directement au consommateur et entraîner des gains d'efficience pour les entreprises concernées, ce qui accroît le bien-être du consommateur.*

Dans les publications économiques, la transparence du marché est en général considérée comme bénéfique pour la concurrence, car elle supprime les asymétries de l'information, permet aux acteurs du marché de faire des choix plus éclairés et assure même dans certains cas le fonctionnement du marché (c'est le cas, par exemple, pour les marchés de l'assurance). Le fait que les informations soient partagées par tous les acteurs du marché ou seulement par ceux que situent du côté de l'offre détermine, pour une large part, les avantages qui résulteront de l'échange d'informations.

Pour les vendeurs, les échanges d'informations sont généralement bénéfiques, qu'ils soient les seuls à disposer de ces informations ou qu'elles soient accessibles à tout le marché. Les avantages éventuels sont très divers ; on peut citer notamment :

- une meilleure compréhension du marché et de la structure de la demande, ce qui permet aux vendeurs de mettre en place des stratégies de commercialisation plus efficace et des systèmes de distribution plus efficaces. Une transparence accrue peut également faciliter l'arrivée de nouveaux concurrents sur le marché dans la mesure où elle permet aux entrants éventuels de mieux évaluer les opportunités commerciales dans un secteur donné ;
- sur les marchés où la demande connaît de fortes fluctuations et où les vendeurs doivent disposer de stocks importants pour satisfaire la demande lorsque celle-ci est élevée, les échanges d'informations peuvent contribuer à mieux anticiper la demande, ce qui se traduit par une optimisation des stocks ;
- un partage d'informations portant sur les coûts permet aux entreprises de comparer leurs performances à celle de leurs concurrents, ce qui peut les conduire à prendre des initiatives qui visent à améliorer l'efficience productive ;
- les échanges d'informations peuvent également avoir des effets bénéfiques sur les marchés d'innovation technologique, marchés qui se caractérisent par des coûts d'investissement élevés et pour lesquels toute incertitude sur l'évolution future de la demande peut entraîner un gel des investissements dans de nouveaux produits.

En outre, le partage d'informations permet à certains marchés de fonctionner efficacement. C'est le cas, par exemple, du marché du crédit aux particuliers, pour lequel le partage des données relatives à la solvabilité de l'emprunteur entre les banques facilite l'accès au crédit pour les bons clients. De même, dans le secteur des assurances, le partage de certaines informations, notamment des tableaux, des calculs ou des études, permet une meilleure évaluation des risques associés à chaque entreprise. Dans ce contexte, le partage d'informations ne favorise pas seulement la concurrence entre assureurs, il facilite l'arrivée de nouveaux concurrents si ces informations sont aisément accessibles à d'éventuels entrants.

Lorsque l'ensemble du marché dispose d'une information obtenue dans le cadre d'un échange d'informations, cela a des effets bénéfiques notables pour les consommateurs comme pour les clients. Parmi les avantages évoqués, on peut citer :

- la disparition des coûts de recherche des meilleurs substituts possibles à un produit ou à un service, ce qui peut entraîner une augmentation non négligeable du surplus du consommateur. De plus, lorsque qu'ils sont mieux informés sur les produits disponibles, leurs caractéristiques et leur

prix, les clients effectuent leurs achats en toute connaissance de cause et cela avive la concurrence entre les vendeurs ;

- une plus grande transparence du marché peut également dissuader les entreprises d'établir une collusion, en raison des informations accessibles aux éventuels plaignants et aux autorités de la concurrence, lesquels peuvent ainsi plus facilement mettre en évidence des comportements parallèles.

(3) *Même si elle présente des avantages, une meilleure transparence peut également permettre à des concurrents d'atteindre un équilibre collusif ou avoir des effets anticoncurrentiels non coordonnés.*

Une transparence accrue du marché n'a pas que des avantages : elle peut également engendrer des effets anticoncurrentiels importants. Un partage d'informations entre concurrents peut être dommageable à la concurrence de plusieurs manières. Les théories du préjudice reposent principalement sur les effets coordonnés et, dans une moindre mesure, sur les effets non coordonnés des échanges d'informations.

S'agissant des effets coordonnés, un échange d'informations peut faciliter la collusion entre concurrents en leur permettant de mettre en place une coordination, de surveiller que les entreprises en respectent les termes et de sanctionner efficacement tout écart.

Pour ce qui est des théories du préjudice qui reposent sur les effets non coordonnés, les échanges d'informations peuvent entraîner un verrouillage du marché. En théorie, les éventuels nouveaux entrants peuvent se retrouver nettement désavantagés par rapport à des concurrents actuels qui échangent des informations. Cependant, on a d'une manière générale estimé que ce risque n'était guère élevé. De plus, aucune affaire de cette nature n'a été signalée.

(4) *Les éventuels effets anticoncurrentiels dépendent de plusieurs facteurs essentiels, notamment du type d'informations échangées et des caractéristiques structurelles du marché en cause.*

Les autorités de la concurrence ont retenu plusieurs facteurs qu'elles examinent lorsqu'elles apprécient la licéité d'un échange d'informations. Ils concernent la structure du marché en question, les caractéristiques des informations échangées et les modalités de l'échange d'informations.

- La structure du marché et le degré de concentration jouent un rôle important lorsque l'on veut évaluer à quel point un échange d'informations nuit à la concurrence, établir et maintenir une collusion étant plus facile sur un marché concentré qui compte peu d'intervenants. Les autorités de la concurrence surveillent donc depuis longtemps les échanges d'informations sur les marchés oligopolistiques. De plus, certaines autorités soulignent que la part du marché concernée par l'échange d'informations constitue également un critère important qui est examiné dans le cadre d'un bilan concurrentiel, car le fait qu'une information soit partagée par tous les acteurs d'un marché peut contribuer à réduire l'incertitude pour les entreprises de tout un secteur, ce qui permet d'atteindre un équilibre collusif.
- La nature des informations échangées constitue également un élément essentiel lorsque l'on examine une situation du point de vue concurrentiel, étant donné que toutes les informations n'ont pas la même capacité à entraîner une collusion et ne doivent pas nécessairement être échangées pour que l'amélioration de la transparence produise ses effets. À cet égard, les autorités de la concurrence opèrent une distinction entre les diverses caractéristiques des informations échangées, notamment leur contenu, la période correspondant aux informations et le degré d'agrégation des données. S'agissant du contenu, les échanges d'informations qui portent

sur les intentions futures en matière de tarification sont ceux qui présentent le plus de risques. En revanche, les informations relatives aux coûts ou à la prévision de la demande sont peu susceptibles d'entraîner une coordination. La période correspondant aux informations joue également un rôle important dans l'évaluation, les informations portant sur le passé étant beaucoup moins susceptibles d'entraîner une collusion que celles concernant le présent ou le futur. Enfin, le degré d'agrégation constitue un paramètre important : ce sont les échanges d'informations détaillées qui sont les plus néfastes pour la concurrence. En outre, les gains d'efficacité que les entreprises peuvent obtenir grâce à un échange d'informations n'imposent pas un partage de données très détaillées, lesquelles sont extrêmement propices à une coordination.

- Lors de leur examen, les autorités de la concurrence s'intéressent aussi, en règle générale, à la manière dont les informations sont échangées. Les entreprises peuvent échanger des informations directement ou via des tiers ou encore mettre en place des mécanismes qui rendent certaines informations accessibles à tous. Même si selon certains, le fait qu'un échange d'informations soit public ou limité aux concurrents ne change rien quant à la coordination qui pourrait en résulter, les autorités de la concurrence sont en général plus méfiantes vis-à-vis des échanges privés. Certains ont également relevé que le fait qu'un échange d'informations s'effectue par l'intermédiaire d'un tiers (par exemple, une organisation professionnelle) ne diminue pas le risque qu'il puisse faciliter une coordination. Des concurrents peuvent aussi bien utiliser des échanges indirects ou verticaux que des échanges directs pour mettre en place une coordination.

(5) *Pour réduire les risques associés à des échanges d'informations anticoncurrentiels, les autorités de la concurrence ne se contentent pas de faire usage de leur pouvoir de sanction ; elles mènent également des actions qui visent à guider les entreprises quant à la licéité de divers dispositifs d'échanges d'informations.*

Les participants sont convenus qu'un partage d'informations entre concurrents pouvait gravement nuire à la concurrence, en raison notamment de sa capacité à faciliter une collusion. Toutefois, cette activité est très difficile à apprécier en droit de la concurrence étant donné qu'un partage d'informations peut prendre plusieurs formes différentes et que ses effets sont difficiles à mesurer, car beaucoup d'entre eux sont bénéfiques pour la concurrence. Difficulté supplémentaire, il est difficile d'apporter les éléments matériels prouvant qu'il y a eu infraction à la législation sur la concurrence.

Lorsqu'elles s'intéressent à un partage d'informations, les autorités de la concurrence peuvent faire usage à la fois de leur pouvoir de conseil et de leur pouvoir de sanction. Les avis jouent un rôle particulièrement important pour les échanges d'informations, car leur appréciation au regard du droit de la concurrence est délicate. Ces échanges peuvent à la fois être source d'efficacité économique et avoir des effets anticoncurrentiels. Toutefois, il est essentiel que cette incertitude ne dissuade pas les entreprises de partager des informations qui permettent d'améliorer l'efficacité. Par conséquent, dans plusieurs pays, les autorités de la concurrence publient des lignes directrices relatives à la manière dont elles font usage de leur pouvoir de sanction sur ces questions. De plus, les sociétés peuvent bénéficier de conseils *a priori* au cas par cas.

- (6) *L'appréciation de la licéité d'un partage d'informations est généralement menée dans le cadre des interdictions classiques des ententes en droit de la concurrence. L'utilisation de zones de sécurité et de présomptions peut contribuer à la sécurité juridique et à l'efficacité des pouvoirs de sanction.*

Sur un plan juridique, tous les États n'apprécient pas les échanges d'informations de la même manière. Dans certains pays, l'infraction n'est constituée que si l'on peut établir qu'il y a eu accord entre concurrents alors que dans d'autres, l'existence d'une pratique concertée suffit.

Dans les pays où la preuve d'un accord entre concurrents est exigée, il est nettement plus difficile de sanctionner les échanges d'informations néfastes qui ne font pas partie d'une entente plus large. En revanche, les espaces juridiques (par exemple l'Union européenne) où la législation repose sur la notion de pratique concertée sanctionnent plus fréquemment les collusions établies dans le cadre d'un échange d'informations. Les pratiques concertées englobent les coordinations qui n'ont pas atteint le stade d'un accord et les activités qui visent à améliorer la coopération entre concurrents en diminuant l'incertitude quant aux comportements présents ou futurs. Cependant, certains ont avancé que même si un échange d'informations pouvait être qualifié de pratique concertée illicite, ce type d'échanges ne devait pas être traité de la même manière que les ententes injustifiables sur les prix ou sur un partage du marché s'agissant des amendes infligées aux contrevenants.

Au cours de la table ronde, l'intérêt des zones de sécurité et des présomptions légales en matière d'échanges d'informations a également été évoqué. Plusieurs participants ont insisté sur les avantages des interdictions *per se* et des zones de sécurité en termes de renforcement de la sécurité juridique et de diminution des coûts d'application de la législation. Lorsque qu'elles doivent déterminer si un certain type d'échanges doit être interdit en tant que tel ou rentrer dans le cadre d'une zone de sécurité, les autorités de la concurrence doivent s'intéresser aux effets habituels de ce type d'échanges. Il convient également de prendre en compte le coût des stratégies de contournement conduites par les entreprises et des erreurs éventuelles.

Certains ont avancé qu'il pourrait être opportun d'interdire les échanges d'informations non accessibles au public et les discussions portant sur les intentions futures en toutes circonstances. Alors qu'ils sont rarement nécessaires pour obtenir les gains d'efficacité résultant d'un partage d'informations, ces types d'échanges sont fortement susceptibles d'engendrer une coordination. Il convient donc de dissuader les entreprises d'y avoir recours. Les autres formes d'échange d'informations doivent être appréciées au cas par cas en appliquant la règle de raison et en évaluant en détail leurs effets tout comme les gains d'efficacité possibles.

- (7) *Les zones de sécurité peuvent être établies à partir des parts de marché, du secteur d'activité ou du type d'informations échangées.*

Moyen très efficace pour accroître la sécurité juridique et apporter de la prévisibilité aux entreprises, les zones de sécurité peuvent reposer sur plusieurs éléments. Les parts de marché des participants à un système d'échange d'informations, les caractéristiques des informations échangées ou encore le secteur d'activité concerné ont été cités comme critères possibles pour concevoir une zone de sécurité.

Certains pays ont recours ou envisagent d'avoir recours à des zones de sécurité établies à partir de la part de marché cumulée des concurrents qui participent à l'échange d'informations. Cette démarche reflète le critère *de minimis* utilisé par certaines autorités de la concurrence pour apprécier le caractère néfaste d'un accord entre sociétés.

D'autres ont estimé qu'établir des zones de sécurité en fonction du type d'informations échangées était plus pertinent. Ainsi, les échanges d'informations très synthétiques portant sur les coûts à des fins d'étalonnage concurrentiel peuvent être bénéfiques car ils sont susceptibles d'entraîner des gains d'efficacité et, à ce titre, ils pourraient être couverts par une zone de sécurité. Parmi les autres types d'informations qui peuvent être échangées sans effets néfastes, on peut citer les informations qui portent sur les données de livraison ou encore les informations relatives aux coûts et échangées dans le cadre de contrats d'échanges de produits.

Enfin, certaines autorités de la concurrence définissent des zones de sécurité dans des secteurs particuliers comme la santé, tout en fixant des conditions strictes en termes de parts de marché et de types d'informations qui peuvent être échangées pour en bénéficier.

## BACKGROUND PAPER

*By the Secretariat<sup>1</sup>*

### 1. Introduction

Explicit, "naked" cartels are almost universally condemned as unlawful. Conversely, conduct resulting purely from oligopolistic interdependence (tacit collusion) is not seen as a competition law violation. In between, firms can engage in a range of practices to reduce strategic uncertainty and more effectively coordinate their conduct. These strategies may include unilateral communication to the market about future strategies, information exchanges, such as "cheap talk" about planned price increases, capacity, or other future conduct, and more formalized industry wide information sharing systems.

Information exchanges among firms increase transparency in the market to the benefit of consumers, for example, by reducing search costs and helping consumers to choose products more effectively. But transparency might have the opposite effect. In some situations, such as in sufficiently concentrated markets, transparency can harm consumers if it enables firms to tacitly collude to increase prices, share or allocate markets or if it makes it easier for co-operating firms to detect and therefore punish deviating firms. Such negative impact is likely in markets already prone to anti-competitive coordination because of their structural characteristics.

Making a distinction between purely unilateral conduct, such as unilateral communications, that falls outside the reach of laws against restrictive agreements and coordinated conduct which could in principle fall within these laws, can be a difficult task for competition enforcers. In the past, many competition agencies have assessed information exchanges as instruments of anti-competitive cartelisation or of pro-competitive market transparency, taking into account a number of key factors including the type and nature of the information exchanged and the structure of the market involved.

With few exceptions,<sup>2</sup> competition laws on horizontal agreements do not explicitly list the exchange of information among anti-competitive practices. The law on information exchange therefore originates predominantly from the agencies' enforcement practice and from the jurisprudence of the courts. Information exchanges can be looked at in a number of contexts,<sup>3</sup> but generally speaking competition agencies have assessed information exchange schemes in three specific situations:<sup>4</sup> (i) when the information sharing is part of a broader cartel infringement; (ii) when the information exchange is part of a

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<sup>1</sup> This paper was prepared by Antonio Capobianco of the OECD Secretariat.

<sup>2</sup> In Mexico, for example, Article 9 of the Mexican Competition Act has a direct reference to "exchange of information" which is explicitly forbidden when the object or effect of the exchange is to fix, increase or manipulate prices.

<sup>3</sup> Kühn and Vives (1994) suggest that information exchange under European law could potentially be covered in the following ways: (i) as part of a larger prohibited agreement like price fixing; (ii) as an indirect way of price fixing; (iii) as sufficient evidence of the existence of an illegal agreement; (iv) as a necessary condition for sustaining the illegal agreement and illegal as a facilitating device; (v) as an illegal agreement in itself that restricts or distorts competition.

<sup>4</sup> See Bennett and Collins, 2010.

wider cooperation agreement, such as a joint venture agreement, a standardisation or a R&D agreement; (iii) when the information sharing is a stand-alone practice, *i.e.*, it is not part of a cartel or of a wider arrangement.

The analysis of the first two types of information exchanges is relatively straightforward. Competition agencies assess the possible restrictive effects of such practices in the broader context of the cartel or the agreement to which they are ancillary. This paper focuses principally on the third type of exchanges, *i.e.*, stand alone information sharing schemes.<sup>5</sup> The approach to these types of information exchanges is more complex, because prohibiting them implies that these information exchanges are anti-competitive in themselves, without there being any other evidence of collusion (*e.g.*, a price fixing or another hard core restriction). Many agencies concur in concluding that an agreement between competitors to exchange confidential information, which has as its object or effect to distort competition, would normally be considered as incompatible with rules that prohibit anti-competitive agreements and practices. However, often there is no *agreement* to exchange information for anticompetitive purposes. The issue is thus to determine in which cases the exchange of information would effectively violate those rules. The concept of a *concerted practice* is often used to address these situations.<sup>6</sup>

This paper is structured along the following lines:

- First, it will describe the pro-competitive effects of enhanced transparency due to information sharing for both suppliers and consumers, and the risks that, in certain circumstance, this enhanced transparency may raise for competition.
- Second, it will discuss the various forms which information sharing can take and how these various forms can affect the enforcement of competition rules.
- Third, the paper will look at the experience with the enforcement of competition rules against information exchange practices in selected jurisdictions.
- Fourth, it will review the main factors that agencies take into account when determining if an exchange of information has anticompetitive effects or not.

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<sup>5</sup> It will not deal with information sharing schemes in the context of unilateral conduct rules within the context of merger negotiations. Concerning contacts between the merging parties in the planning stage of the merger, it is sufficient to note that they could lead to anti-competitive coordination, should the merger negotiation fall apart. Competition agencies recognize the importance of these pre-merger contacts, and have provided a large volume of guidance over the years on appropriate premerger activities. See for example, Blumenthal, 2005; Morse, 2002; Sipple, 2000.

<sup>6</sup> Paragraph 56 of the Draft Guidelines on the application of Article 101 Treaty on the Functioning of the European Union (the 'TFEU') to horizontal agreements: "*In line with the jurisprudence of the Court of Justice of the European Union, the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition*<sup>6</sup>. *If there is no agreement on information exchange, it will have to be assessed on a case-by-case basis whether a concerted practice can be found or whether, for example, the regular dissemination of information of a company is a truly unilateral action which does not fall within the scope of Article 101(1).*" However, where only one undertaking discloses information and (an)other undertaking(s) accept(s) it, there can also be a concerted practice. See for example Joined Cases T-25/95 etc., *Cimenteries CBR and Others v Commission*, [2000] ECR II-491, paragraph 1849: "*[...] the concept of concerted practice does in fact imply the existence of reciprocal contacts [...]. That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it.*"

- Finally, the paper will draw some conclusions from a competition policy perspective.

## 2. Benefits and risks of enhanced market transparency

The economic literature has historically placed the role of transparency and access to information at the centre of the competition process and of the economic benefits generated. The economic thinking on market transparency and its relevance for antitrust purposes is two-sided. In 1776 Adam Smith warned us about the possible consequences on competition of competitors communications,<sup>7</sup> but in order for the invisible hand to produce benefits for the whole society it is necessary that independent actors can plan and conduct their economic activity by relying on price signals. Market transparency, therefore, is a factor which can promote or restrict competition depending on the circumstances.<sup>8</sup>

Increased market transparency is perceived as a factor to be encouraged; after all, the ideal model of perfect competition is premised on demand-side and supply-side perfect information about the market. On the supply-side, the knowledge of the market and its key features (*e.g.*, characteristics of demand, available production capacity, investment plans, etc.) facilitates the development of efficient and effective commercial strategies by market players. New entrants or fringe players may benefit from this information and enter the market more effectively and compete more fiercely against incumbents. Increased knowledge of market conditions also benefits consumers, who can choose between competing products with a better understanding of the product characteristics; customers can also compare terms and conditions of the various offerings and freely choose the most suitable one for their needs. In addition, enhanced transparency benefits consumers by lowering search costs.<sup>9</sup>

Increased transparency, on the other hand, is one of the facilitating factors required for tacit collusion to be sustainable. In order to reach terms of coordination, to monitor compliance with such terms and to effectively punish deviations, companies need to acquire detailed knowledge of competitors' pricing and/or output strategies. The artificial removal of the uncertainty about competitors' actions, which is at the basis of the competitive process, can in itself eliminate the normal competitive rivalry.<sup>10</sup> This is particularly the case in highly concentrated markets where increased transparency enables companies to better predict or anticipate the conduct of their competitors and thus align themselves to it .

In the next paragraphs, the potential pro- and anti-competitive effects of information exchanges will be discussed in turn.

### 2.1 Possible pro-competitive effects of information exchanges

If information exchange does not give rise to the competition concerns which will be discussed further below, it will almost always be positive to welfare. Indeed, the benefits from information exchange can be significant both for suppliers and customers.

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<sup>7</sup> In *The Wealth of Nation* of 1776, Adam Smith observed: “*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*” (Vol. I, Bk. I, Ch. 10 (1776).

<sup>8</sup> See Møllgaard and Overgaard, 2001; Philips, 1988.

<sup>9</sup> See OECD, 2001.

<sup>10</sup> See, Court of Justice of the European Union (the ‘CJEU’) in Case C-8/08, *T-Mobile*, of 4 June 2009, para 33.



### 2.1.1 *Potential benefits for suppliers*

In numerous circumstances, information exchange between competitors can help to make markets work better. These benefits should in turn help firms to compete more effectively in the market, ultimately resulting in an increased social welfare. However, as it will be discussed below, the existence of such benefits should not justify information exchanges under any circumstance, but should be taken into consideration by competition agencies when assessing if an information exchange has pro or anti-competitive effects. Some of the potential benefits of transparency for suppliers are discussed below.

- An in-depth knowledge of the market and of its key features facilitates the development of efficient and effective commercial strategies by market players and enables firms to make pricing decisions on the basis of a more complete understanding of the market. Similarly, increased transparency benefits new entrants or fringe players and enables them to enter the market more effectively and to compete more fiercely. Better information allows companies to better understand market trends and to adapt their strategy to better match supply with demand.<sup>11</sup> Information exchange can also improve the distribution system and the marketing strategies of firms, leading to beneficial effects.
- Information exchange can improve product positioning, particularly in industries with product differentiation or in multimarket industries. Experimental evidence indicates that lack of information may induce firms to position their products in a way that neither maximises their profits nor consumer welfare.<sup>12</sup> Allowing information exchange in these settings can therefore improve consumer surplus and welfare.
- In markets characterised by large fluctuations of demand, firms tend to keep substantial inventories in order to be able to meet demand at peak times.<sup>13</sup> If information exchange increase firms' ability to forecast demand fluctuations, they can increase economic efficiency by enabling firms to optimise inventories and to avoid shortages or overproduction.<sup>14</sup>
- Better information flows allow firms to benchmark themselves in critical areas against their competitors.<sup>15</sup> Benchmarking (*i.e.*, comparing individual performance with the aggregated performance of the industry)<sup>16</sup> is an example of how information can be used by companies to enhance their internal efficiency.<sup>17</sup> Whether benchmarking may result in an illegal exchange of sensitive information depends on how the benchmarking study is structured. In general, to

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<sup>11</sup> In a world without information about demand and rivals' activities, firms would have to permanently adapt to changing circumstances by a trial and error process. As stated by a Commissioner of the US Federal Trade Commission: "*Information about prices helps businesses make informed decisions about the prices at which they will offer their products and services, eliminating the need for a more costly trial and error process. Price information is useful to both consumers and businesses to inform buying decisions.*" (Azcuenaga 1994, p. 4).

<sup>12</sup> See Kruse and Schenk, 2000.

<sup>13</sup> See Novshek, 1996.

<sup>14</sup> See Matutes, 2001; see also RBB Economics, 2009.

<sup>15</sup> See Bennett and Collins, 2010; Capobianco, 2004; Vives, 2002.

<sup>16</sup> For example, where an independent company collects and processes individual sale data from the market players and then provides this information, including their individual market share, back to each of them separately

<sup>17</sup> See Kühn, 2001.

prepare a benchmarking system only a limited degree of disaggregation of the information is needed; this makes dissemination of sensitive information a minor threat compared to the apparent efficiency gains that such a practice has on firms' performance.

- Although there is little empirical evidence in the economic literature on this, information exchange may also improve companies' investment decisions.<sup>18</sup> As Hovenkamp points out: *"firms respond to uncertainty by being less aggressive. If the manufacturer has no idea about future demand for its product, it will hedge its bets, which in this case means building a smaller plant or making fewer purchases of inputs. By contrast, good market information reduces uncertainty and gives sellers more confidence about their investment and, accordingly, more incentive to invest"* and *"generalised pricing, output and inventory data can be useful in guiding firms to make intelligent decisions about how much to invest in plant and equipment, how much to plan on producing the following year, and the like."*<sup>19</sup>
- There are industry sectors where a certain degree of transparency is required for the industry to work effectively. For example, in the banking and insurance industries, information sharing on individual consumers' risks can reduce the problems of adverse selection (where firms cannot tell good consumers from bad consumers) and moral hazard (where a consumer who is protected from risk may behave differently than if fully exposed to the risk). In these circumstances, information sharing mechanisms fill an asymmetry of information about customers and thus allow the industry to operate efficiently.<sup>20</sup>

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<sup>18</sup> Christiansen and Caves (1997) have looked at the impact of the exchange of information on capacity expansion in the pulp and paper industry and at its effect on the investment rivalry. They note that if markets are not too concentrated, non-binding information exchange ("cheap talk") can solve the strategic uncertainty about rivals' investment decisions and may therefore improve economic efficiency overall.

<sup>19</sup> See, Hovenkamp, 1999, p. 43 et seq. It has also been argued that *"neglecting the role of information exchange on investment decisions implies neglecting potentially large costs for consumers leading to distortions with respect to product quality, product variety, location and the future ability to respond to demand changes"*(see Nitsche and von Hinten-Reed, 2004).

<sup>20</sup> See Padilla and Pagano, 1999. The authors, however, conclude that sharing more detailed information can reduce the disciplinary effect of the information exchange and that borrowers' incentives to perform may be greater when lenders only disclose past defaults than when they share all their information.

### **Box 1. Information exchanges in the insurance sector**

It is recognized that in the insurance sector a certain degree of cooperation between competitors is necessary to the correct functioning of the industry itself and, furthermore, it leads to an increase of competition between the insurance companies. For this reason, the European Commission has adopted a Block Exemption Regulation to exempt categories of horizontal agreements between insurance companies.<sup>21</sup> The rationale for block exempting certain information flows within the insurance sector is that calculations, tables and studies make it possible to improve the knowledge of risks and facilitate the rating of risks for individual companies. This can in turn facilitate market entry and thus ultimately benefit consumers. However, no unnecessary restrictions of competition are covered by the block exemption. For instance, agreements on commercial premiums are not exempted; and calculations, tables or studies are only exempted if they (a) do not identify the insurance companies concerned or any insured party; (b) when compiled and distributed, include a statement that they are non-binding; and (c) are made available on reasonable and non-discriminatory terms, to any insurance undertaking which requests a copy of them, including insurance undertakings which are not active on the geographical or product market to which those calculations, tables or study results refer.

### **Box 2. Information exchanges in the banking industry**

A similar rationale in the banking industry lead to the creation of public and private credit registers across the EU between 1997 and 2007. The establishment of these registers can facilitate direct entry through a reduction of information asymmetries, which in turn intensifies competition.<sup>22</sup> In the *Asnef-Equifax* case,<sup>23</sup> the Court of Justice for the European Union (the 'CJEU') was asked to review the compatibility with the European competition rules of an online register set up by the Spanish association of financial institutions. The register contained sensitive information on existing and potential borrowers, such as past credit history, failures to pay, outstanding credit balances etc. The purpose of the register was to better inform lenders as to risks connected with granting loans, leading to greater and more efficient availability of credit. The CJEU concluded that the information exchanged on the creditworthiness of potential borrowers served to reduce the risk of lending by reducing the disparity between the information available to credit institutions and that held by potential borrowers. Therefore, the information exchange was capable of reducing the number of borrowers who default on repayments, and hence improved the functioning of the credit supply system as a whole, leading to a more efficient market outcome. As the credit register was designed to limit risks of credit institutions in granting loans, the Court concluded that the exchange of information did not have the object of restricting or distorting competition.

- Finally, information sharing can prove particularly useful in markets where innovation is a significant driver and where significant technological changes occur often or where consumer

<sup>21</sup> See Regulation 267/2010 on the application of Article 101(3) of the TFEU to certain categories of agreements, decisions and concerted practices in the insurance sector, in [2010] OJ L 83/1. The Regulation replaces the old block exemption regulations on the insurance sector (Regulation 358/2003, in [1986] OJ L 378/4; and Regulation 3932/92, in [1992] OJ L 398/7). In particular, Article 101 TFEU does not apply to agreements whose object or effect is the joint establishment and distribution of calculations and tables and to the joint carrying-out of studies on the probable impact of general circumstances external to the interested undertakings, either on the frequency or scale of future claims for a given risk or risk category or on the profitability of different types of investments and the distribution of the results of such studies. The term 'calculation' refers to calculations of the average cost of covering a specified risk in the past. The term 'tables' refers to mortality tables, and tables showing the frequency of illness, accident and invalidity, in connection with insurance involving an element of capitalization.

<sup>22</sup> See Gianetti, Jentsch and Spagnolo, 2010.

<sup>23</sup> Case C-238/05 of 23 November 2006.

tastes and preferences evolve rapidly. In these conditions, uncertainty affects investment decisions, with greater uncertainty generating a reluctance to invest even when market fundamentals are favourable.<sup>24</sup> The literature on the dynamics of competition in innovation markets has revealed that forms of cooperation between competitors, including the exchange of information, may be a factor enhancing the innovation process itself and the technological development.<sup>25</sup> In particular, it has been argued that antitrust agencies should not object to the exchange of sensitive data on individual firms in innovation markets, because the flow of such knowledge in the industry reduces the high degree of uncertainty related to research and development processes.<sup>26</sup> The reduction of such uncertainty, which can ultimately hamper investments in technology, favours the individual firms' competitiveness and the overall development of the industry sector. On the other hand, the information flow in these very dynamic markets has very little competitive value and does not allow coordination to take place.

### 2.1.2 Potential benefits for consumers

Increased transparency and better knowledge of market conditions may also benefit consumers. In 1961, Stigler emphasised the importance of search costs for consumers.<sup>27</sup> Buyers need to identify sellers and their prices, customers need to search for knowledge on the quality of goods. The more information available on the market, *i.e.*, on the products and services and their suppliers, the better placed consumers are to choose between competing products, as they will have a greater understanding of the product characteristics. Consumers can knowledgeably compare terms and conditions of the various offerings and freely choose the most suitable one for their needs. In these circumstances, enhanced transparency can benefit consumers by lowering consumers' search costs. Behavioural economics has shown that better informed consumers can be instrumental in developing vigorous competition between suppliers.<sup>28</sup> Economic literature has also shown that information asymmetries and absence of information may not only

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<sup>24</sup> See Berti, 1996.

<sup>25</sup> See Teece, 1994; Jorde and Teece, 1993; Jorde and Teece, 1990.

<sup>26</sup> An example of such an approach can be found in the European Commission's Guidelines on the applicability of Article 81[now Article 101 TFEU] of the EC Treaty to horizontal cooperation agreements (in [2001] OJ C 3/2). In the context of standard setting agreements, the Commission recognizes that to materialize the economic benefits of such type of cooperation "*the necessary information to apply the standard must be available to those wishing to enter the market [...]*" (see para. 169; similar language is included in the Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, SEC(2010) 528/2, para 301). Similarly, the Technology Transfer Block Exemption (See Commission Regulation 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (in [2004] OJ L 123/11.) allows the licensor to transfer, together with the licensing of know-how, that "*practical information, resulting from experience and testing, which is: (i) secret, that is to say, not generally known or easily accessible, (ii) substantial, that is to say, significant and useful for the production of the contract products, and (iii) identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality*" (see Article 1(i)) (emphasis added). In the Guidelines accompanying the Technology Transfer Block Exemption (in [2004] OJ C 101/2.) the Commission states that it "*will take into account to what extent safeguards have been put in place, which ensure that sensitive information is not exchanged. An independent expert or licensing body may play an important role in this respect by ensuring that output and sales data, which may be necessary for the purposes of calculating and verifying royalties is not disclosed to undertakings that compete on affected markets*" (see para. 234).

<sup>27</sup> See Stigler, 1961.

<sup>28</sup> For a further discussion of this, see Bennett, Fingleton, Fletcher, Hurley and Ruck, 2010.

distort consumer behaviour but may also adversely impact competition and competitive outcomes.<sup>29</sup> In these circumstances, artificially increased transparency may improve consumer welfare.<sup>30</sup>

### Box 3. OECD roundtable on competition and regulation in retail banking

The retail banking sector is an example where the degree of competition is positively correlated to the degree of information available to consumers in the market. The OECD 2006 Roundtable on Competition and Regulation in Retail Banking<sup>31</sup> concluded that customer mobility and customer choice are essential to stimulate retail-banking competition. In the banking sector, consumers may be tied to their bankers due to the existence of switching costs. This lock-in provides banks with considerable market power.<sup>32</sup> Banks may compete aggressively *ex ante* for consumers to benefit from *ex post* market power. For this reason, markets with switching costs may overall be less competitive as the presence of such costs tends to soften competition. The Roundtable also indicated that, in order to promote greater willingness of consumers to switch from one financial institution to another and reduce bank rents from switching costs, policy makers should take positive actions including actions aimed at increasing transparency and facilitating the dissemination of information about prices of financial products as a desirable measure to promote consumers' possibilities to compare financial institutions. Greater consumer education and literacy about financial alternatives may help to promote greater willingness of consumers to switch from one institution to another and reduce bank rents from switching costs.

## 2.2 Possible anti-competitive effects of information exchanges

Despite the many pro-competitive aspects of information sharing schemes between competitors, the literature also points out that such schemes may substantially harm consumers. The main way in which information exchanges can harm consumers is by facilitating collusion. Artificially increased transparency can allow firms to engage in, and sustain coordinated behaviour over time. However, whilst the primary concern is coordination, there are other non-coordinated theories of harm.

### 2.2.1 Theories of harm based on coordinated effects

To achieve and maintain over time a successful collusive equilibrium, three conditions must be *cumulatively* present.<sup>33</sup>

- *First*, the colluding parties must be able to agree on a “common policy” and to monitor whether the other firms are adopting this common policy. It is not enough for each participant to be aware that interdependent market conduct is profitable for all of them, each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they

<sup>29</sup> See Klemperer, 1995, according to which high switching cost allow firms to maintain higher prices and earn higher profits.

<sup>30</sup> Bennett and Collins (2010) have, however, emphasised the importance that access to the information must be accompanied by the ability of the consumer to assess it and to act upon it. In this respect, some have warned of the effects on consumer choices and consequently on consumer welfare of firms' strategies to “overflow” consumers with information on products and services, the only purpose being to complicate the assessment of the information and therefore making consumer choice more difficult. See, for example, Ellison and Ellison, 2009; Gabaix and Laibson, 2006.

<sup>31</sup> See OECD, 2006.

<sup>32</sup> See Farrell and Klemperer (2006) for a recent overview of switching costs.

<sup>33</sup> For further details, see Stigler, 1964; Carlton and Perloff, 1990; Philips, 1995; Ivaldi, Rey, and Tirole, 2003; Scherer and Ross, 1990 and the extensive literature cited in these texts.

are maintaining it. In order to reach terms of coordination and to monitor adherence to them, market transparency is essential.

- *Second*, coordination must be sustainable – *i.e.*, firms need to have an incentive not to depart from the agreed common policy. This in turn requires an effective retaliation mechanism. Thus, collusion is viable in the long-term only if there are adequate credible deterrence and punishment mechanisms that the cartel can put in place to ensure that no one departs from the common policy.
- *Third*, the foreseeable reactions of both customers and competitors must not be such as to undermine the common policy. If the jointly achieved price increase is likely to attract new firms in the market, or if customers are sufficiently strong or sophisticated to resist any attempt to jointly raise prices, it is unlikely that a collusive outcome can be achieved. Thus, reactions of current and future competitors, as well as of consumers, can jeopardize the results expected from the common policy.

Various factors may facilitate the formation of collusive outcomes. Such factors include the concentrated structure of the market, the homogeneous nature of the product, costs symmetry, high entry/exit barriers, stability of demand and supply conditions, repeated interaction between the firms and multi-market contacts. But collusion can be reached and sustained if firms have complete and perfect information on the main variables of competition, such as the structure of the market, costs of the participants, their market strategies, etc.. In this respect, market transparency is therefore a key factor that allows firms to align their strategy more easily and to promptly detect and punish any deviation from the agreed collusive terms. It follows that an information exchange may facilitate collusion if (i) it facilitates the reaching of a common understanding on the terms of coordination; (ii) it helps monitoring whether the terms of coordination are being followed; and (iii) it improves the ability or reduces the cost of punishing deviations from the terms of coordination.

- (i) Reaching terms of coordination on prices or volumes may not be easy, particularly when a number of different collusive equilibria are possible. Information sharing arrangements artificially increase market transparency and thus are one of the facilitating factors for collusion.<sup>34</sup> Information exchanges can facilitate this exercise as they offer firms points of coordination or focal points.<sup>35</sup> In this way, it can help firms to coordinate their behaviour even in the absence of an explicit anti-competitive agreement.
- (ii) Artificially increased transparency allows firms to monitor adherence to the collusive arrangement, and provides better information on when and how to punish firms when they deviate.<sup>36</sup> For collusion to be sustainable it is necessary that firms can detect deviations from the collusive equilibrium. The sharing of information may therefore support the internal stability of the collusive arrangement through greater precision in punishments of deviations. Firms will be

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<sup>34</sup> Albaek et al. 1997, for example, discusses the 1993 decision of the Danish competition authority in the concrete market, where firms decided to gather and publish firm-specific transactions prices for two grades of ready-mixed concrete in three regions of Denmark. Following initial publication, average prices of reported grades increased by 15-20% within one year. The authors investigate whether this was due to a business upturn and/or capacity constraints, but argue that a better explanation is that publication of prices allowed firms to reduce the intensity of oligopoly price competition and, hence, led to increased prices.

<sup>35</sup> See Levenstein and Suslow, 2006.

<sup>36</sup> See Genesove and Mullin, 2001.

in a better position to identify which firm has deviated and on what product, if they have access to precise and individualised information on their competitors.

- (iii) Artificially increased transparency also allows existing firms to better identify opportunities for new entrants to enter the market and coordinate a response. This will increase the stability of the collusive understanding.

In light of the above, information exchanges between competing firms can be expected to facilitate collusion when they diminish an existing information asymmetry, improve the accuracy in observing rival behaviour and improve transparency about future strategic intention of rivals.

### 2.2.2 *Theories of harm based on non-coordinated effects*

Information exchange can also lead to foreclosure effects. This may occur if sharing information between a limited number of competitors gives them a significant competitive advantage over rivals.<sup>37</sup> According to the European Commission's draft Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, for example, “[a]n exclusive exchange of information could lead to anti-competitive foreclosure on the same market where the exchange takes place. This can occur when the exchange of commercially sensitive information places unaffiliated competitors at a significant competitive disadvantage as compared to the companies affiliated within the exchange system. This type of foreclosure is only possible if the information concerned is very strategic for competition and covers a significant part of the relevant market.”<sup>38</sup>

## 3. **Different forms of information sharing**

The exchange of information between competing companies may take various forms. The following paragraphs we will briefly discuss some of the most common ways for companies to establish flows of information. As for other ways of communicating, the form rarely has a bearing on the key question in this area, *i.e.*, whether there is any restriction of competition or whether, on the contrary, the increased transparency does indeed generate efficiencies to balance the restrictive effects of cooperation.

### 3.1 *Direct exchanges and vertical exchanges*

Direct exchanges between competitors is the most obvious way of exchanging information and data. Absent acceptable justifications, competition agencies have taken the view that direct exchanges of sensitive information can rarely disguise the anticompetitive object of such agreements. However, information sharing can fall within the scope of competition law even if there is no direct exchange between competitors.<sup>39</sup> Pricing rules in vertical agreements could bear contingency clauses or commitment obligations like most favoured nation,<sup>40</sup> meeting competition or price matching clauses,<sup>41</sup> or resale price

<sup>37</sup> See Bennett and Collins, 2010.

<sup>38</sup> See para 65.

<sup>39</sup> See Auricchio, 2010.

<sup>40</sup> Under a most favoured nation (‘MFN’) clause, the buyer is guaranteed the lowest price offered by the seller to other buyers. In general, MFN clauses are viewed as a protection of the weaker contractual party (*i.e.*, the buyer) who will be sheltered from future price shocks and/or from discriminatory treatment vis-à-vis other buyers (see Motta, 2004; Capobianco, 2007). However, the chilling effect of these type of clauses on price competition is apparent: if these clauses are widely used in an industry, no supplier will have any incentive to adopt aggressive price cuts (e.g. to attract new customers), because the price cut will affect all its customers, with great loss of profits. Therefore deviations from a collusive outcome will be more unlikely.

maintenance clauses,<sup>42</sup> which allow the supplier to know immediately if rivals have undercut its price. These clauses therefore increase the chances of detecting deviations. Similar concerns are raised by the so-called ‘English clause’, whereby customers have an obligation to disclose to the dominant company the existence of competing offers and have to inform the dominant company of the terms and conditions of such offers. The dominant company has then a right to match the competing offer; thus, it is able to use the information from its own customers (which it would not have otherwise) to adapt its market strategy *vis-à-vis* its customers and competitors.<sup>43</sup> In practice, English clauses create an artificial market transparency providing the dominant firm with information about the market and the actions of its competitors, which may have a great value for carrying out its market strategy.

Competition agencies have investigated cases of vertical information flows (so-called “hub-and-spoke” arrangements), where the exchange of commercially sensitive information takes place through a third party, for example from one retailer to another via their common supplier. Vertical exchanges of information between manufacturers and retailers are normally not objectionable if the information transferred concerns only the retail sales of the manufacturer in question. Vertical exchanges, however, may amount to a competition infringement if they allow for the identification of sales of other competitors, and if such information allows interference with the retail activity of the dealers or of the parallel importers. In these cases, while the flow of information is vertical in nature, as it involves firms on different levels of trade, the effect of the exchange is horizontal as it affects competition between retailers or between suppliers.

#### **Box 4. Examples of "hub and spoke" cases from the United Kingdom**

In the United Kingdom, the Office of Fair Trading (the ‘OFT’) has investigated a number of vertical information exchange cases.

In *Double Glazing*,<sup>44</sup> the OFT found that the UK’s leading supplier of a chemical used in double glazing had conspired with four of its double glazing distributors to fix and/or maintain minimum resale prices for UOP’s chemical. According to the OFT investigation, the conspiracy originated by the decision of UOP to resolve a dispute among its distributors who had complained about a too-aggressive pricing policy by their competitors. The OFT showed that each distributor could have reasonably expected that other distributors would have ceased the price war following the manufacturer’s intervention. The distributors were aware of each others’ involvement and knew their

<sup>41</sup> Under a meeting competition clause, the buyer is guaranteed the lowest price offered by the seller’s rivals (also known as an ‘alignment clause’). These clauses, by increasing the transparency of the market (*i.e.*, because the buyer will have to inform the supplier of the competing price) may facilitate horizontal collusion. In practice, meeting competition clauses work as an information exchange mechanism and therefore allow firms to immediately detect price deviations, since customers will immediately report them to benefit from the lower price.

<sup>42</sup> In vertical agreements where the buyer is obliged or induced not to resell below a certain price (so-called minimum resale price maintenance), at a certain price (so-called recommended resale price maintenance) or not above a certain price (so-called maximum resale price maintenance), competition may be affected if these pricing clauses increase firms’ awareness of competitors’ prices. Increased price transparency makes horizontal collusion among suppliers or among distributors easier, at least in concentrated markets.

<sup>43</sup> In the *Hoffmann-La Roche* judgment (in [1979] ECR 461), the GJEU concluded that “[t]he fact that an undertaking in a dominant position requires its customers or obtains their agreement under contract to notify it of its competitor’s offers, whilst the said customers may have an obvious commercial interest in not disclosing them, is of such a kind as to aggravate the exploitation of the dominant position in an abusive way” (para 106).

<sup>44</sup> OFT decision of 8 November 2004 (CA 98/08/2004).



conduct was part of an overall strategy.

In the *Replica Football Kit* case,<sup>45</sup> the initiative to organise the conspiracy came from the retailers, rather than the manufacturers. The investigation unearthed evidence of several agreements or concerted practices to set a minimum price for certain football replica kits, including top-selling shirts. The agreements were policed through informal meetings and monitoring retail customers. Indirect contacts between competing retailers had occurred via a mutual supplier and the OFT held both the manufacturer and the retailers liable for a concerted practice aimed at co-ordinated prices. The challenged conduct originated from pressures exercised over the manufacturer (Umbro) by a retailer (JJB). JJB threatened to cancel orders because of a competing retailer's aggressive discounting practices. Umbro intervened to compel a price raise, to encourage price-fixing agreements between retailers and to facilitate price collusion between retailers by exchanging retail pricing information.

A similar trilateral arrangement was investigated by the OFT in the *Toys and Games* case.<sup>46</sup> Here the OFT found that two retailers and the manufacturer Hasbro had entered into unlawful price-fixing agreements regarding the sale of toys and games. The Competition Appeal Tribunal when assessing the OFT's decision found that Hasbro had entered into separate bilateral agreements with each of the retailers, whereby each of them had agreed to sell certain of Hasbro's toys and games at Hasbro's recommended retail prices. Furthermore, as Hasbro had disclosed the pricing intentions of one retailer to the other, there was a trilateral agreement between Hasbro and the two retailers.

According to the case law of English courts<sup>47</sup> which reviewed the OFT decisions, proving the knowledge of the parties and the context of the exchange is crucial. It must be demonstrated that where a retailer discloses to their supplier their future pricing intentions, the circumstances of this disclosure are such that the retailer may be taken to have intended that the supplier will/would make use of that information to influence market conditions, or did in fact foresee this, by passing that information on to other retailers.<sup>48</sup> The OFT must show that the information has actually been passed on and that it is used by the recipient to determining its own future pricing strategy.<sup>49</sup>

### 3.2 Exchanges through trade/industry associations

In many cases, trade and industry associations provide the ideal context for firms to exchange information. The fact that there is no direct contact between competitors but that communications are managed by a trade association does not necessarily change the assessment of the practice under competition rules. Because the institutional (and legitimate) role of trade associations is that of collecting and disseminating information on the relevant industry sector among the members, it is particularly important to distinguish those cases where the dissemination underlies a conspiracy between the members, from those cases where the activity of the trade association renders the market more efficient, making both competitors and consumers better off.<sup>50</sup> In order to avoid the risk of violating competition law trade associations should put in place extra safeguards against anticompetitive spill-overs from their institutional

<sup>45</sup> OFT decision of 1 August 2003 (CA98/06/2003).

<sup>46</sup> OFT decision of 21 November 2003 (CA98/8/2003).

<sup>47</sup> See *Argos Ltd/Littlewoods v Office of Fair Trading*, [2006] EWCA CIV 1318, Case Nos 2005/1071 and 1074; and *Umbro Holdings Ltd v Office of Fair Trading* (Judgment on penalty) and *JJB Sports v Office of Fair Trading*, [2006] EWCA Civ 1318, Case No 2005/1623.

<sup>48</sup> See Bennett and Collins, 2010.

<sup>49</sup> In the *UK Agricultural Tractor Exchange* decision (in [1992] OJ L 68/19), the European Commission also questioned the validity of a vertical exchange of information between manufacturers and retailers. In particular, the Commission established that such an exchange is not objectionable if the information transferred concerns only the retail sales of the manufacturer in question, but may amount to an infringement of Article 101 TFEU if (i) it allows for the identification of sales of competitors and (ii) such information allows interference with the retail activity of the dealers or of the parallel importers.

<sup>50</sup> See OECD, 2007; Capobianco 2004, Bissocoli, 2000.

tasks. For instance, associations should - if possible - make the collected information available to non-members; ensure participation in the statistical programs is voluntary and open to non-members; verify that the trade association does not become the forum for further discussions between members about the data disseminated and its bearing on commercial strategies; and ensure management of the trade association is independent from the members of the association.

### 3.3 *Dissemination of market data by independent third parties*

In many instances, information on the structure of the market is disseminated by an independent consultant (*e.g.*, Nielsen, Dataquest, IDC, etc.) whose activity is to monitor markets and collect, compile and sell industry data and market studies to the market players. These market studies, often commissioned by individual firms, are largely based on publicly available information and/or on the proprietary intelligence of the consultant companies and/or on data gathering at retail level. Despite the fact that the market studies are a means to disseminate sometimes very sensitive information, competition agencies are more reluctant to challenge such activities. There are several reasons why.

- *First*, in these cases there is no real exchange of information between competitors, since information is independently collected by the consulting company from the market and not directly from the suppliers. Thus, one of the conditions for the application of cartel rules (*i.e.*, the existence of an agreement between competitors) is not met.<sup>51</sup>
- *Second*, the information used for these market studies is usually publicly available; if the market is in itself transparent, the exchange of information does not add any risk of collusion to that market.
- *Third*, using specialized consultants for gathering market intelligence allows cost savings which increase the company's business efficiency.

If, on the other hand, the market study prepared by the independent consultant is jointly commissioned by the market players (*i.e.*, there is an agreement between competitors to give a joint mandate to the consultant) and the information is provided by the companies to the consultant, the consultant could play a similar role to that of a trade association, and exposure to antitrust enforcement could be higher.

### 3.4 *Public information exchanges and private information exchanges*

A distinction can be drawn between *public market transparency* and *private market transparency*. Public exchanges of information lead to market transparency for the benefit of all market players, including consumers; private exchanges only increase transparency on the supply side. It has been argued that public transparency intensifies competition, while private transparency is likely to restrict it.<sup>52</sup> An information exchange is genuinely public if it makes the exchanged data equally accessible to suppliers and customers. The fact that information is exchanged in public may decrease the likelihood of a collusive outcome on the market to the extent that competitors unaffiliated to the information exchange, potential entrants, and buyers may be able to constrain any potential restrictive effect on competition.

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<sup>51</sup> See Commission Decision, *Wirtschaftsvereinigung Stahl*, [1998] OJ L 1/10, para. 58.

<sup>52</sup> See Kühn and Vives, 1995.

Empirical evidence shows that the positive effects for consumers of public announcements outweigh the possible collusive effects from the transparency they generate.<sup>53</sup> Because of this, it can be very difficult in practice to distinguish whether public information exchanges have a pro-competitive effect or simply facilitate collusion. One important factor that the literature points out is that communications between firms may have little value in facilitating coordination unless the information is verifiable. Information which is not verifiable can be dismissed as “cheap talk” and therefore disregarded.<sup>54</sup> However, some have suggested that “cheap talk” can assist in a meeting of minds and allow firms to reach an understanding on acceptable collusive strategies.<sup>55</sup> Even “cheap talk” which is not immediately verifiable may be of concern as announced plans can often be verified later or revoked, and wrong announcements can be punished, which in long-term commercial relationships, may be enough to create credibility.<sup>56</sup> This is the position that was taken by the US Department of Justice in the ATP case,<sup>57</sup> which involved “cheap talk” such as announcing a future price increase but leaving open the option to rescind or revise it before it took effect. The Department argued that if the terms of agreement are complex but there is a common desire to reach agreement, cheap talk can help firms reach a collusive equilibrium.<sup>58</sup>

### 3.5 *Information exchanges and unilateral announcements*

Although direct exchange of data between competing companies is clearly the most straightforward example of information sharing, more subtle forms of exchange may also be anti-competitive. Courts have always been reluctant to condemn unilateral public announcements of future prices as anticompetitive because of the potential benefits to consumers in comparing prices and adjusting their purchasing strategies. This is consistent with the economic theory that public disclosures of sensitive information make demand more elastic and therefore reduce the likelihood of coordination on the supply side.<sup>59</sup>

The CJEU, for example, in *Wood Pulp*<sup>60</sup> stated that if prices are announced to the public, “[t]hey constitute in themselves market behavior which does not lessen each undertaking’s uncertainty as to the future attitude of its competitors. At the time when each undertaking engages in such behavior, it cannot be sure of the future conduct of the others”<sup>61</sup>. The Court concluded that the system of price announcements represented a rational response to the fact that both buyers and sellers needed the information in advance in order to limit their commercial risk in a long-term market.

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<sup>53</sup> See Motta, 2004. Public announcements have a smaller risk of under-enforcement (see Bennett and Collins, 2010). For this reason, their effects on competition should be analysed on a case-by-case basis. As for private exchanges, while they should not be viewed as presumptively anti-competitive in all circumstances, most agencies are very cautious and looked at very closely to assess if there is any benefit/efficiency that can justify them under the competition rules.

<sup>54</sup> See Baliga and Morris, 2002.

<sup>55</sup> See Overgaard and Møllgaard, 2007.

<sup>56</sup> See Nitshe and von Hinten-Reed, 2004; Bigoniy, Fridolfsson, Le Coq and Spagnolo, 2010.

<sup>57</sup> See discussion below.

<sup>58</sup> See US submissions in OECD, 2007. See also Farrell and Rabin, 1996.

<sup>59</sup> According to Kühn, public pricing announcements enclose forms of commitment relative to customers which trigger potential efficiency effects significant enough not to consider the public announcement as a violation of competition rules (see Kühn, 2001).

<sup>60</sup> See CJEU, *Ahlström and others v. Commission*, in [1993] ECR I-1307.

<sup>61</sup> See para. 64.

However, information which is made available through public price announcements may act as indirect exchanges of information, or as a ‘signal’ to competitors of a company’s future intentions. This behaviour may offer competitors opportunities to align prices. For this reason, competition agencies have considered the potential application of competition rules also in relation to information exchange by means of publishing data, *e.g.*, on a common website accessible to a group of competitors, or by reacting publicly to announcements of other competitors regarding strategic issues. Agencies have attempted to develop rules to distinguish between price announcements with positive effects and those with collusive potential.

In the *Airline Tariff Publishing (ATP)* case, the US Department of Justice was determined to pursue a case of price posting on a jointly-owned fare exchange system, in a way that facilitated collusion. ATP was a joint venture created by eight major US airlines which collected fare information from the airlines and disseminated it on a daily basis to all airlines and the major computer reservation systems used by travel agents. The US Department of Justice alleged that the ATP system allowed air carriers to respond quickly to each others’ prices and made the deterrence more imminent which in itself facilitated collusion.<sup>62</sup> In addition, ATP could serve to coordinate future actions to eliminate strategic uncertainty. It allowed air carriers to engage in “cheap talk”, *i.e.*, to engage in communication that did not commit the carriers to a particular course of action but rather allowed them to “negotiate” without the need to meet in order to coordinate on the collusive outcome. The ATP case was settled through consent decrees in 1994.<sup>63</sup>

#### **4. Information exchanges in the practice of selected jurisdictions**

##### **4.1 European Union**

Article 101 TFEU, which prohibits agreements and concerted practices between competitors whose object or effect is to restrict competition within the common market, does not refer to the exchange of information among the non-exhaustive list of anti-competitive practices included in its first paragraph. The current law on information exchange therefore originates from the European Commission’s enforcement practice and from the case law of the European courts.

The first policy statement of the European Commission on exchanges of information between competitors can be traced back to the 1968 Notice concerning Agreements, Decisions and Concerted Practices in the field of Co-operation between Enterprises (the ‘Notice’).<sup>64</sup> The Notice established for the first time that exchanges of information may fall within the scope of application of what was then Article 85 EC (now 101 TFEU), but recognized that the assessment of such practice may vary according to the structure and characteristics of the industry and the specific facts of the case. The Notice already pointed out some of the factors that may influence such assessment including: (i) only the exchange of information which may have a bearing on competition is relevant under the Treaty rules on competition; and (ii) a restraint of competition may occur in particular on an oligopolistic market for homogeneous products.

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<sup>62</sup> More specifically, ATP designed and operated the system in a way that unnecessarily facilitated coordinated interaction among the airlines so that they could (1) communicate more effectively with one another about future fare increases, restrictions, and elimination of discounted fares, (2) establish links between proposed fare changes in one or more city-pair markets and proposed changes in other city-pair markets, (3) monitor each other’s changes, including changes in fares not available for sale, and (4) reduce uncertainty about each other’s pricing intentions.

<sup>63</sup> See US submissions in OECD, 2001 and in OECD, 2007.

<sup>64</sup> In [1968] OJ C075, p. 3. The 1968 Notice was replaced in 2001 by the Commission’s Guidelines on the applicability of Article 81 to horizontal co-operation agreements (see OJ C 3 of 06.01.2001, p. 2), which expressly do not cover agreements between competitors on the exchange of information (see paragraph 10). However, it is widely understood that the policy statements in the Notice are still correct today.

The European Commission further detailed its policy on information exchanges in 1977,<sup>65</sup> after a series of decisions on individual cases<sup>66</sup> and along the lines of the judgment of the European courts in the *Sugar* case.<sup>67</sup> In particular, the European Commission reaffirmed its policy statement that there is no *per se* approach to information exchanges, but that a case-by-case approach is fundamental for the assessment of whether an information sharing system is restrictive of competition. In addition, in its 1977 policy statement, the European Commission listed three key criteria it follows when reviewing such arrangements. First, the structure of the market is likely to affect the probability that these sorts of contacts might generate incentives to coordinate commercial behaviour between competitors.<sup>68</sup> Second, the nature and the scope of the information exchanged both have an important bearing on the likelihood that the information can indeed be used by the recipient to coordinate market strategies rather than to compete more fiercely.<sup>69</sup> Third, the European Commission also takes into account whether the exchange of information is of a private nature - this form of cooperation between firms normally improves only the seller's knowledge of the market - or has a wider public impact on the customers as well, who will therefore be in a position to compare the various offers and increase the level of competition.

Although the European Commission's first policy statement on this issue dates back to 1968, it was only in the early '90s with the *UK Agricultural Tractor Exchange* case<sup>70</sup> that the European Commission had a case in which it carried out a comprehensive assessment of the potential restrictive effects of a stand-alone information exchange system. The European Commission's decision was reviewed in appeal by both the General Court (the 'GC', then Court of First Instance)<sup>71</sup> and by the CJEU (then European Court of Justice).<sup>72</sup> Both courts rejected the appeals and fully endorsed the European Commission's approach.

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<sup>65</sup> See 7th Report on Competition Policy, at para. 5 et seq.

<sup>66</sup> See in particular *VVVF*, in [1969] OJ L 168; *IFTRA-Flat Glass Containers* [1974] OJ L 160; *IFTRA-Aluminium*, in [1975] OJ L 228; *Cobelpa/VNP*, in [1977] OJ L 242/10 and *Vegetable Parchment*, in [1978] OJ L 70/54.

<sup>67</sup> See CJEU, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Suiker Unie and others vs. Commission*, [1975] ECR 1663.

<sup>68</sup> The increased transparency generated by the exchange of information strengthens the interdependence between firms and reduces the intensity of competition in oligopolistic markets, insofar as the increased knowledge of the market (*i.e.*, transparency) allows participants to monitor competitors' strategies and to swiftly (and efficiently) react to one another's action.

<sup>69</sup> While the European Commission will closely scrutinize the exchange of sensitive information and of trade secrets (*i.e.*, quantities produced and sold, prices, terms for discounts, general terms of sale, delivery and payment, etc.), it will not object to the exchange of statistical data which sets out production and sales figures without identifying individual businesses and without breaking down the data by product, country or period of time beyond what is required for the statistical purposes.

<sup>70</sup> See Commission Decision, *UK Agricultural Tractor Exchange*, in [1992] OJ L 68/19.

<sup>71</sup> See GC, *J. Deere vs. Commission*, [1994] ECR II-957; GC, *Fiatagri and New Holland Ford vs. Commission*, [1994] ECR II-905.

<sup>72</sup> See CJEU, *J. Deere vs. Commission*, [1998] ECR I-3111; see CJEU, *New Holland Ford vs. Commission*, [1998] ECR I-3175.

### Box 5. The UK Agricultural Tractor Registration Exchange case

In Europe, the leading case on the exchange of information between competitors remains the *UK Agricultural Tractor Registration Exchange* case. The 1992 decision of the European Commission, which largely reflected its earlier policy statements, found that a complex system for the exchange of information between tractor manufacturers in the UK infringed the European competition rules.<sup>73</sup> The decision was then subject to separate appeals, first to the GC and later to the CJEU. Both courts upheld the Commission's decision, confirming the analysis and the conclusions.

The European Commission based its infringement decision on four main findings:

- The highly concentrated nature of the market, which also had significant barriers to entry and was protected from competition by imports from outside the Community.
- The confidential nature of the information exchanged.
- The extremely detailed level of the information exchanged, in terms of product and geographic breakdowns, and time periods taken into account, which created an even higher degree of transparency in an already highly concentrated market.
- The fact that the participants to the exchange system met regularly within an industry association giving them a forum for contacts.

The Commission concluded that a detailed exchange of sensitive information in a market which is highly concentrated and not exposed to external competitive pressure increases the likelihood of collusive outcomes on the market. Two anticompetitive effects were identified by the decision. First, the increased level of transparency in a already highly concentrated market would prevent the residual hidden competition (or the 'surprise effect') between the participants to the exchange of information, who would be less exposed to the aggressive reaction of the other market players (*i.e.*, restriction of *internal* competition between members of the exchange system). In concentrated markets, secrecy and uncertainty are the key factors to residual competition. Second, the exchange of information raises barriers to entry for non-members of the exchange system (*i.e.*, restriction of *external* competition), regardless of whether they join the exchange system or not. If a new supplier chooses not to become a member of the exchange, he would be disadvantaged by the fact that he did not have access to the detailed and accurate market information about other suppliers which is available to members of the exchange. If, on the contrary, it chooses to become a member of the exchange, it would be forced to reveal to its competitors its own confidential data on a very detailed level, thus permitting the incumbent suppliers to use such information to prevent aggressive market strategies by the new member.

Following the *UK Agricultural Tractor Exchange* case, the European Commission applied on various occasions the principles established in the decision, further clarifying their scope. In particular, the *UK Agricultural Tractor Exchange* decision triggered a number of notifications of information exchange systems seeking individual exemption under Article 101(3) TFEU. Some of examples are discussed below.

In the 1994 *Cartonboard* decision,<sup>74</sup> the European Commission ordered the parties to cease the exchange of commercial information on deliveries, prices, plant standstills, order backlogs and machine utilization rates in support of other restrictions of Article 101 TFEU, even if exchanged in the form of aggregated statistics. The GC annulled the part of the European Commission's decision relating to the

<sup>73</sup> The Commission rejected the parties' request for an individual exemption of the agreements setting up the exchange, since it concluded that the exchange system did not meet the conditions for such an exemption set forth in Article 81(3) EC, now article 101(3) TFEU.

<sup>74</sup> See Commission Decision, *Cartonboard*, in [1994] OJ L 243/1.

exchange of statistical data which, according to the court, could not be used for anti-competitive purposes since such statistical information could not be used to deduce information about individual companies.<sup>75</sup> In *CEPI-Cartonboard*,<sup>76</sup> the Commission reviewed the application for negative clearance of a new exchange system between cartonboard producers which was meant to replace the information exchange system censored by the Commission in 1994. The modified system would allow the association to continue collating and disseminating important statistical information to its members, in conformity with EU competition rules. Despite the fact that the notified agreement only provided for an exchange of statistical information (*i.e.*, no disclosure of individual data) without side discussions of these statistics and disclosure of sensitive information (*i.e.*, prices, production forecasts or forecasts of capacity utilization rate), the European Commission insisted on modifying the notified systems because it allowed in particular cases the parties to identify individual participants from the analysis of the aggregated data.<sup>77</sup>

In the *Wirtschaftsvereinigung Stahl* decision,<sup>78</sup> the European Commission found that an exchange of confidential information at firm level (*i.e.*, individual market shares and data on individual deliveries, broken down by quality and consumer industries) on a monthly basis infringed EU competition law.<sup>79</sup> The outcome of the decision heavily relied on the concentrated nature of the steel industry in Germany, and on the existence of structural links between the participants. The Commission also concluded that exchanging information on deliveries allowed competitors to identify those undertakings which tried to increase their market share and to undertake retaliatory measures against them, therefore eliminating incentives to effective competition.

In 1998, the European Commission exempted by comfort letter an agreement between the members of *EUDIM*, an association of wholesalers in installation materials, whose purpose was - *inter alia* - to exchange confidential information on a number of products sold to the members of the association. In its notification,<sup>80</sup> *EUDIM* argued that the information exchange system was not restrictive of competition because, by exchanging information related to individual purchase prices and conditions, its members were seeking to strengthen their bargaining power *vis-à-vis* their suppliers, by trying to obtain the best (lowest) purchase prices. According to *EUDIM*, the purpose of the exchange of purchase prices was to reduce costs, which would have allowed its members to compete more effectively with other wholesalers who had lower costs, such as do-it-yourself stores. The European Commission shared *EUDIM*'s views and considered that the information exchanged, whether of a general nature or of an individual character (such as specific purchase prices and supplier rebates), did not restrict competition on the relevant wholesale market.

<sup>75</sup> See GC, *Sarrió SA vs. Commission*, [1998] ECR II-01439, at para. 281. The GC added that “*the mere fact that a system for the exchange of statistical information might be used for anti-competitive purposes does not make it contrary to Article 85(1) [now 101(1)] of the Treaty, since in such circumstances it is necessary to establish its actual anti-competitive effect*”

<sup>76</sup> See Commission's Notice pursuant to Article 19.3 of the Regulation 17 (case no. IV/34.936/E1 - *CEPI-Cartonboard*), in [1996] OJ C 310/3.

<sup>77</sup> This was, for instance, the case of countries where only two competitors were part of the exchange of information. In particular, the Commission requested that, when only two or very few manufacturers were present on a certain geographic or product market, the data be aggregated with those of other countries and/or with other products in the same country.

<sup>78</sup> See Commission Decision, *Wirtschaftsvereinigung Stahl*, [1998] OJ L 1/10.

<sup>79</sup> The case fell under the scope of application of Article 65 ECSC, since the participants to the agreement operated in the steel industry.

<sup>80</sup> A description of the notified agreements can be found in the Commission's Notice pursuant to Article 19.3 of the Regulation 17 (case no. IV/33.815, 35.842 - *EUDIM*), in [1996] OJ C 111/8.

More recently, the European courts have looked at information exchange in two instances. In the *Asnef/Equifax* case,<sup>81</sup> the CJEU looked at an exchange of information set up by Asnef, the Spanish association of financial institutions. In particular, Asnef had set up an online register containing sensitive information on existing and potential borrowers (e.g., past credit history, failures to pay, outstanding credit balances etc.) to better inform lenders as to risks connected with granting loans leading to greater and more efficient availability of credit. As the credit register was designed to limit risk of credit institutions in granting loans,<sup>82</sup> the Court found that such exchange did not, in principle, have as its object to restrict competition. To reach such conclusion, the CJEU looked at the context of the agreement, the relevant markets and at the specific characteristics of the system concerned (such as its purpose, conditions of access to it, the type of information exchanged, the periodicity of such information and its importance for the fixing of prices, volumes or conditions of services) and concluded that the exchange of information did not have by its very nature the object of restricting or distorting competition.

In *T-Mobile Netherlands*,<sup>83</sup> its most recent judgement in this area, the CJEU took a strict view on information exchanges. The case involved a single meeting of the five operators of mobile telecommunication services in the Netherlands where the parties discussed, among other things, reducing standard dealer remunerations for post-paid subscriptions. The Court held that “[...] *an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object, [...]*.” The Court also confirmed that even a limited exchange of information between competitors, concerning matters other than prices to customers and in the context of a single meeting, can infringe the competition rules.

In response to the recent court pronouncements and in order to provide guidance in this area of law, in May 2010 the European Commission published for consultation a revised version of the Guidelines on the application of Article 101 TFEU to horizontal cooperation agreements between competitors.<sup>84</sup> The Draft Guidelines, reflecting both EU case law and the European Commission’s practice in this area for the first time offers general guidance on when exchanges of information between competing companies might breach the EU competition rules.<sup>85</sup> In the Draft Guidelines, it is said that information exchanges can have restrictive effects on competition if they lead to co-ordination of competitive behaviour, or to market foreclosure. In most cases, the assessment of information sharing will depend on the characteristics of the market (concentration, transparency, stability and complexity), on the market coverage and on the type of information exchanged (commercial sensitivity, public availability). As for exchanges of future conduct on prices or quantities the Draft Guidelines states that they often infringe Article 101 TFEU “by object”. The Commission will also look information exchanges under Article 101(3) and justify them if they lead to intensification of competition or significant efficiency gains.

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<sup>81</sup> See case C-238/05, *Asnef-Equifax/Ausbanc*, judgement of 23/11/2006.

<sup>82</sup> The Court concluded that the risk of lending is reduced by reducing the disparity between the information available to credit institutions and that held by potential borrowers.

<sup>83</sup> See case C-8/08, *T-Mobile Netherlands and others*, judgement of 4 June 2009.

<sup>84</sup> See SEC(2010) 528/2, available on the website of the Directorate General for Competition of the European Commission.

<sup>85</sup> Further guidance on the European Commission’s approach to information exchanges in specific industry sectors can be found in the Communication on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decision and concerted practices in the insurance sector (in [2010] OJ C 82/20) and in the Guidelines on the Application of Article 81 of the EC Treaty to maritime transport services (in [2008] OJ C 245/2).



## 4.2 United States

In the United States, Section I of the Sherman Act of 1890,<sup>86</sup> states that “[e]very contract, combination [...] or conspiracy, in restraint of trade or commerce [...] is declared to be illegal.”. As in the European Union, US antitrust statutes do not prohibit, or even disfavour, information exchanges. Courts and the enforcement agencies have recognised the potential pro-competitive benefits of certain information exchange programmes. Nevertheless, agencies and courts have identified instances where exchanges of information can be a facilitating factor for collusion and therefore should be prohibited. A number of early decisions from US courts have established the line between permissible and impermissible exchanges of price information.

In its earlier judgements, which primarily dealt with exchange of information between members of trade associations, the Supreme Court was mostly concerned with the exchange of price and output information; particularly, when the exchange included “*suggestions as to both future prices and production*”.<sup>87</sup> The Court held that the exchange of this type of information intended to reduce production and raise prices.<sup>88</sup> The Court also focused its attention on the private nature of the information sharing schemes, noting that if the information is kept within the association membership, it prevents the members’ customers using it to negotiate on a more favourable basis with association members.<sup>89</sup> Public exchanges of information, on the contrary, can be beneficial for competition if the information is disseminated in the widest possible way (*i.e.*, the information is available not only to the association’s members, but also to their customers) and in aggregated form, even if the exchange calls for detailed information on individual sales, prices and monthly information on production and new orders.<sup>90</sup>

In more recent cases, the Court focussed its analysis on the actual effects of the information exchange on competition and recognised the importance for this analysis of factors such as the degree of market concentration, the nature of the product and the characteristics of demand. The Court also concluded that reciprocal exchanges of price information could amount to a concerted action sufficient to establish an anti-competitive conspiracy under Section 1 of the Sherman Act.<sup>91</sup> It also ruled out a *per se* approach to the

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<sup>86</sup> 15 U.S.C. 1-7.

<sup>87</sup> See *American Column and Lumber Co v. US*, 257 US 377 (1921, at 398-99).

<sup>88</sup> The judgement was criticised for not having taken into account the pro-competitive effects of the exchange of information. Justice Brandeis and Justice Holmes dissented and saw no evidence of any serious attempt to limit production, and found that there was simply a reporting of “market facts”. The dissenting judges concluded that not allowing the exchange of information could lead to the elimination of competition in the wood industry.

<sup>89</sup> See *US v. American Linseed Oil Co*, 262 US 371 (1923), where the Court struck down another associational information exchange programme concerning price lists, price variations and the names and addresses of buyers who received special prices.

<sup>90</sup> See *Maple Flooring Manufacturers Association v. US*, 268 US 563 (1925).

<sup>91</sup> In *US v. Container Corporation of America et al.* (393 US 333 (1969)), for example, the Court found that an agreement between container manufacturers to exchange information with no evidence of intent to adhere to a price fixing scheme was anti-competitive. Individual orders of cardboard boxes were customised according to the customer's needs, and prices were quoted individually to prospective buyers. The product was fungible, demand was inelastic, and competition was based on price. Each participant, upon request by a competitor, would offer information as to the most recent price charged or quoted to individual customers, with the expectation of reciprocity and with the understanding that it represented the price currently being bid. The defendants accounted for about 90% of the relevant market and the exchange of price information was infrequent and irregular. However, the exchange of price information stabilized prices at a downward level.

assessment of information exchanges in favour of a rule of reason approach. The Court argued that the pro or anti-competitive effects of these practices depend on a variety of factors and that they have to be assessed necessarily on a case-by-case basis.<sup>92</sup>

In April 2000, the U.S. Federal Trade Commission and the U.S. Department of Justice (the ‘DOJ’) issued the Antitrust Guidelines for Collaborations among Competitors.<sup>93</sup> Drawing from the extensive guidance from the courts, the Guidelines recognize that the sharing of information among competitors may be pro-competitive and is often reasonably necessary to achieve the pro-competitive benefits of certain collaborations;<sup>94</sup> for example, sharing certain technology, know-how, or other intellectual property may be essential to achieve the pro-competitive benefits of an R&D collaboration. Nevertheless, the US agencies identify instances where the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. All things being equal:

- The sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables.
- The sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information.
- The sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data.

In general, the Guidelines also exclude that the two agencies under normal circumstances would challenge a competitors collaboration when the market shares for the collaboration and its participants collectively account for no more than 20% of each relevant market.

The Guidelines complement the 1996 guidance jointly issued by the two agencies on information exchange programs in the context of the health care industry.<sup>95</sup> To help protect against the risk of collusion, the joint statement identifies antitrust “safety zones” where the agencies will not challenge information sharing arrangements on prices, discounts or methods of payment. The safe harbours apply provided that:

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<sup>92</sup> In *US v. United States Gypsum Co. et al.*, 438 US 422 (1978), the Court reviewed the exchange of information between several manufacturers of gypsum board concerning the current prices charged to specific customers. The defendants alleged that the purpose of the practice was to ensure that any price cut offered was necessary to meet a competitive price. The Court held that “*the exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a per se violation of the Sherman Act. [...] A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication. [...] Exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not per se unlawful have consistently been held to violate the Sherman Act. [...]*” (at 441, n. 16).

<sup>93</sup> Available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>94</sup> See section 3.31(b).

<sup>95</sup> See Statements of Antitrust Enforcement Policy in Health Care (Health Care Statements) (1996).

- the survey of prices or salaries is managed by a third party (e.g. a purchaser, government agency, health care consultant, academic institution, or trade association);
- the information provided by survey participants is based on data more than three months old; and
- there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 % on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

### 4.3 Canada

In December 2009, the Canadian Bureau of Competition released a set of guidelines on competitors collaboration.<sup>96</sup> Part of the Guidelines is dedicated to information sharing among competitors, both through direct exchanges and through trade associations.<sup>97</sup> The Guidelines recognise that, for the most part, such exchanges do not raise concerns under the Act because competitors generally avoid sharing information that is competitively sensitive in order to preserve their competitive advantage. In certain cases, an agreement that involves a unilateral disclosure or exchange of information between competitors can impair competition by reducing uncertainties regarding competitors' strategies and diminishing each firm's commercial independence.

In assessing information sharing agreements between competitors, the Bureau will consider a number of factors:

- *The nature of the information exchanged, i.e., whether the information is competitively sensitive.*<sup>98</sup> An agreement to disclose or exchange information that is important to competitive rivalry between the parties can result in a substantial lessening or prevention of competition. This is the case, for example, of price information, information on costs, trading terms, strategic plans, marketing strategies or other significant competitive variables. Where competitors agree to share competitively sensitive information, it can become easier for these firms to act in concert, thereby reducing or even eliminating competitive rivalry. In general, the Bureau does not consider publicly available information to be competitively sensitive, but may be concerned with an agreement between competitors to disclose future pricing information if such an agreement has anticompetitive effects and there is an efficiency justification for it.
- *The timing of the information exchange (e.g., whether the information relates to historical, current or future activities).*<sup>99</sup> The exchange of information relating to current or future activities is more likely to affect competition adversely and, as such, raises greater concerns than the exchange of information relating to historical activities. However, an agreement to disclose historical information could still raise concerns if the information provides a meaningful indication of future intended pricing or other competitively significant factors.
- *Whether the parties participating in the information exchange have market power or will likely have market power.*<sup>100</sup> The Bureau will not challenge agreements to share information unless the

<sup>96</sup> Available on the website of the Canadian Competition Bureau.

<sup>97</sup> See Section 3.7.

<sup>98</sup> See Section 3.7.1.

<sup>99</sup> See Section 3.7.2.

<sup>100</sup> See Section 3.7.3.

parties have or are likely to have market power, or the relevant market is concentrated such that firms are able to engage in a coordinated exercise of market power.

- *The manner in which the information is collected and disseminated* (e.g., whether the information is shared directly between competitors or aggregated by a third party).<sup>101</sup> Information exchanged directly between competitors is more likely to raise concerns than information that is supplied to an independent third party.<sup>102</sup> In addition, information that is aggregated so as not to disclose information specific to any given firm is less likely to raise concerns than information that is shared in a disaggregated form.
- Whether any anti-competitive effects are offset and outweighed by the efficiencies generated through the information sharing agreement.<sup>103</sup> The Canadian Guidelines also deal with whether any efficiencies generated through the sharing of information between competitors outweigh the anti-competitive effects thereof. The guidelines specifically state that there are various types of efficiency which may come to fruition from such information exchanges, such as the reductions in fixed and variable costs owing to rationalization of distribution, sales and advertising functions; improved utilization of distribution and warehousing; increased specialization in distribution, sales and marketing functions; more intensive use of a network infrastructure; and improvements to product quality.

#### 4.4 Japan

The Japanese Fair Trade Commission (the 'JFTC') published Guidelines concerning the activities of trade associations under the Antimonopoly Act (the 'AMA') in October 1995. Although the Guidelines expressly review the possible effects on competition of trade associations' activities, the detailed discussion of the JFTC assessment of information sharing schemes within a trade association can apply even outside the context of a trade association.

According to Section 9 of the Guidelines, some exchanges are likely to constitute an infringement of the AMA. In particular, the JFTC finds that tacit collusion can be facilitated by the exchange of information specifically related to important competitive factors, concerning the present or future business activities of the firms involved, such as specific plans or prospects regarding the prices or quantities of goods or services supplied or received; specific details of the transactions with customers; and the limits of anticipated plant investment.

In contrast, the exchange of other types of information is unlikely to constitute a violation of the AMA. This includes information on the proper use of products for the benefits of consumers, general information on technological trends, management expertise, market environment, legislative or administrative trends, historical information on firms' business activities, statistical information, information on materials or technology indicators that enable fair and objective benchmarking, general information on the overall demand trends, and information concerning the credit standings of customers for the purpose of ensuring safe transactions.

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<sup>101</sup> See Section 3.7.3.

<sup>102</sup> In evaluating an agreement to exchange information, the Bureau will also consider the safeguards established through the organization and governance of the collaboration that are directed at preventing or minimizing the disclosure of competitively sensitive information. For example, participants in the collaboration can limit disclosure of information to personnel who are not engaged in sales or marketing activities, or can prevent sales and marketing personnel from participating in a research and development joint venture.

<sup>103</sup> See Section 3.7.3.

#### 4.5 Italy

In Italy, the Italian Competition Authority (the ‘AGCM’) has been confronted with a number of information exchange cases. In *RAS-Generali/IAMA Consulting*,<sup>104</sup> for example, the AGCM investigated a concerted practice by insurance companies whereby all companies acquired access to the same database which included detailed information on life assurance and pension insurance products.<sup>105</sup> The AGCM found that the acquisition of the database by the insurance companies amounted to a concerted practice to exchange horizontal sensitive information between them. The decision is interesting because the market structure was not very concentrated<sup>106</sup> and because the information that was included in the database was public. The AGCM argued that even in non-oligopolistic markets an exchange of information may be restrictive of competition if it concerns prices and if consumers do not benefit from the greater transparency. As for the public nature of the information, the AGCM argued that (i) the information contained in the database was supplied by the insurance companies themselves, and was not independently collected from the market by the consultant; and that (ii) the information contained in the database had an added value in comparison with the information that individual insurance companies could collect directly from the market and from public sources.

The AGCM has also looked into vertical information exchange schemes. In the *Baby Milk* case,<sup>107</sup> it held that indirect contacts between competitors were sufficient to presume collusion. The case saw milk production companies forwarding a list of suggested retail prices to pharmacies, which were then integrated in a database accessible to all pharmacists and to all milk producers as well. The authority was concerned that all producers offered similar rebates to pharmacies and wholesalers. In *Philip Morris/Cigarette Retailers*,<sup>108</sup> the AGCM was also confronted with a situation where there was no direct exchange of information between competitors (*i.e.*, no direct horizontal effects) as the exchange took place between companies at different levels of trade.<sup>109</sup> Nevertheless, the AGCM concluded that the vertical

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<sup>104</sup> See Bollettino 40/2004.

<sup>105</sup> The database offered the buyer access to sensitive information on all insurance and pension products available on the Italian market. The information was disaggregated (*i.e.*, available for each product separately) and was released to the buyer on a quarterly basis.

<sup>106</sup> CR4: 56%; HHI: 1.000.

<sup>107</sup> In Bollettino 40/2005.

<sup>108</sup> In Bollettino 24/2004.

<sup>109</sup> In February 2003, Philip Morris (PM) notified the AGCM of a standard agreement that PM intended to enter with a significant number of tobacco retailers. According to the agreement, retailers had to transmit to PM, on an exclusive basis, information on the sales volumes of their outlets, and notably information on (i) PM’s daily sales volumes by brand, (ii) the retailer’s daily aggregated sale volumes, and (iii) the daily sales of each cigarette brand sold by the retailer. PM was to receive such information monthly. The AGCM decided to open an investigation on the ground that PM would gain a competitive advantage *vis-à-vis* its competitors by foreclosing access to the same or a comparable set of detailed and sensitive information on the sale of cigarettes in Italy. It considered that PM’s initiative, which would give it detailed exclusive information on its competitors’ sales on a daily basis, might go beyond what was necessary for PM to monitor its own business trends. Indeed, the investigation showed that the retailers selected by PM represented the best statistical group for such an exercise because of their number, size, location and type of business. The exclusivity clause clearly prevented competitors from replicating a similarly representative set of retailers. In the course of the investigation, PM removed the exclusivity, thus eliminating the main vertical concern raised by the AGCM. At the same time, PM argued that the agreement had pro-competitive effects, in particular that it would generate distribution efficiencies, such as avoidance of the stock disruption which is the main factor driving demand towards competing brands.

information exchange could indirectly affect horizontal competition between cigarette suppliers since it concerned sensitive information relating to the market for the sale of cigarettes.<sup>110</sup>

#### 4.6 South Africa

In South Africa, the Competition Commission has reviewed information exchange schemes in a number of industry sectors. In March 2006, for example, the Commission filed a complaint against the major processors of dairy products alleging that they had directly and indirectly fixed purchasing milk prices from producers through the exchange of price information.<sup>111</sup> The information exchanges between the processors were followed by discussions on forthcoming price reductions and on their magnitudes, on strategic decisions of individual processors including communications on changes to pricing structures, on prices paid by different processors in different regions and on future price movements. The information exchanged included private, individualised, disaggregated and future price information between competitors. The Commission concluded that removal of the uncertainty about the rivals' actions which is the essence of competition can itself limit competitive rivalry, especially in highly concentrated markets where the increased transparency enables firms to better predict or anticipate their rivals' conduct. Other information exchange schemes have been investigated by the Competition Commission in other markets, including milling, fertilizers, steel and cement.<sup>112</sup>

### 5. Factors considered when assessing information sharing arrangements

The review of the main literature on communication between competitors and of the agencies' practice on exchanges of information shows that agencies rely on a number of factors when deciding whether communications between competitors may constitute a restriction of competition. In particular, they look at: (i) the structure of the market on which the participants to the exchange are active; (ii) the type of product to which the information refers; and (iii) the type and quality of information exchanged. Although the agencies' practice focuses its attention on these factors, there are other aspects which should be taken into consideration when determining if an exchange of information is likely to facilitate collusion on the market or not. For instance, there are markets whose intrinsic degree of transparency is already very high (*e.g.*, markets where certain information has to be made publicly available by mandatory rules). In these cases, the exchange of information would normally not add any extra transparency and may therefore be neutral as to a collusive outcome.<sup>113</sup>

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<sup>110</sup> The agreement was amended by Philip Morris and the AGCM closed the investigation with a non-infringement decision.

<sup>111</sup> See Tribunal Consent Order in the matter between the Commission and Lancewood Cheese. Tribunal Case No 103/CR/Dec06.

<sup>112</sup> See cases discussed in das Nair and Mncube, 2009; Morphet and van Dijk, 2009. One of the reasons for the numerous cartels and exchange of information in South Africa is the high degree of regulation which in some cases explicitly allows such practices.

<sup>113</sup> The European Commission's Draft Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements states: "*The lower the pre-existing level of transparency in the market, the more value an information exchange may have in attaining a collusive outcome. However, an information exchange that contributes little to the transparency in a market is less likely to have appreciable negative effects than an information exchange that significantly increases transparency. Therefore it is the combination of both the pre-existing level of transparency and how the information exchange changes this level that will determine how likely the information will have negative appreciable effects.*" (see para 74)

Indeed, there are markets where, regardless of the degree of transparency, collusion is difficult to sustain. This could be the case where companies have no incentive to collude because:<sup>114</sup>

- the cost structures of the involved companies, their market shares, their capacity levels, and/or their degree of vertical integration are asymmetric, all factors which reduce the overall incentives of firms to reach a degree of coordination;
- innovation is a very important competing factor in the market and may allow one firm to gain major advantages over others;
- supply and demand conditions are too volatile and unstable to make coordination likely;
- there are companies which are not part of the exchange of information that could jeopardize the outcome of any expected coordination;
- entry barriers are low, and potential entry has a disciplinary effect on the alleged coordination;
- customers have sufficient countervailing buyer power to make coordination unstable;
- retaliation is not likely to be successful, making incentives to deviate from any collusive arrangement very high.

All these factors should also be taken into consideration, as they may affect the assessment of an information exchange scheme.

### **5.1 *The structure of the market and the nature of the product in question***

The fewer the firms on the market, the easier it is to collude.<sup>115</sup> If a market is highly concentrated or there are only a few large firms on the supply side, the costs of organizing a sustainable collusion will be low; it will be easier to find terms of coordination and to monitor that those terms are actually respected by each participant; punishment mechanisms will be more effective since cheating firms will be exposed to much higher losses. In contrast, in fragmented markets, firms will have greater incentives to deviate from any collusive understanding in order to try and gain market shares over their competitors and monitoring such deviations will be much more difficult. Such incentives to deviate will jeopardize the stability of a cartel.

For this reason, competition agencies and courts have been particularly careful in reviewing exchanges of information in oligopolistic markets. In the *UK Agricultural Tractor Registration Exchange* case, for example, the European Commission prohibited the exchange of information in a market where four firms had combined market shares of almost 80% and with high barriers to entry. On the contrary, in the *EUDIM* case,<sup>116</sup> the European Commission considered that the exchange of individual and confidential

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<sup>114</sup> For a discussion of these factors and their significance for collusion, see Ivaldi, Jullien, Rey, Seabright and Tirole, 2003.

<sup>115</sup> Although pointing at a precise number may not always be the best way to proceed, there is empirical evidence that in markets with more than five competitors it is more advantageous to stay out of a cartel, while when there are less than five competitors they will *all* find it profitable to collude (see Selten, 1973).

<sup>116</sup> See Commission's Notice pursuant to Article 19.3 of Regulation 17 (case no. IV/33.815, 35.842 - *EUDIM*), in [1996] OJ C 111/8.

information between the competitors would not have an appreciable effect on the competitive structure of the market, which was too fragmented (with more than 3,000 companies) to be considered oligopolistic.

#### **Box 6. Information exchange in non-oligopolistic markets**

The evidentiary value of the market structure, however, is imperfect. There are examples of highly concentrated industries which are very competitive and where one experiences fierce rivalry. Conversely, cartels are known to have existed and prospered for many years in industries with numerous competitors and differentiated products.<sup>117</sup>

The agencies' practice does not provide clear answers to the question of whether an exchange of information may be deemed anticompetitive in a competitive market situation. In the *UK Agricultural Tractor Registration Exchange* decision, for example, the European Commission did not eliminate the possibility that there may be instances where communications between competitors may lead to collusive outcomes even in fragmented/non-oligopolistic markets. On this specific issue, it is interesting to consider a decision of the Italian Competition Authority which found a restriction of competition in an exchange of information between competing insurance companies in a market which was not considered to be oligopolistic. In the *RC Auto* decision,<sup>118</sup> the AGCM argued that even in non-oligopolistic markets an exchange of information may be restrictive of competition if it concerns prices and consumers do not benefit from the increased transparency. The AGCM argued that, despite the fact that the market was not concentrated, constant price increases and parallel commercial strategies were evidence of scarce competition on the market. The AGCM also argued that the need to exchange information as a system to ensure stability of a collusive agreement is higher in non-concentrated markets where the cost of collecting information on competitors is significantly higher in markets where only a few players are active.<sup>119</sup> In these cases, the burden of proof on the competition agencies is certainly high. If the market is fragmented, the agencies have to provide persuasive and credible evidence that despite the non-concentrated nature of the market there are other factors that are likely to give rise to tacit collusion.

In theory, price collusion is more easy to reach, monitor and sustain over time if the collusive agreement concerns products which are homogeneous. If products characteristics differ in attributes such as quality and durability, it becomes difficult for firms to detect whether variations in sales are due to changing buyer preferences or cheating strategies by firms in the form of secret price cuts. Economists, however, also note that under certain circumstances the differentiated nature of the products may also facilitate collusion. In case of differentiated products, deviations are in fact less profitable because the cheating firm cannot expect to gain large market shares from such strategy, unless it is prepared to cut prices significantly. In such circumstances, therefore, product differentiation makes collusion more likely.

Exchange of information in homogeneous product markets are more likely to facilitate collusion. For example, since its earliest policy statements, the European Commission has drawn a distinction between exchanges of information in homogeneous product markets and exchanges of information in differentiated product markets. It is easier for companies to coordinate on price for a single, homogeneous product than for many differentiated products. In differentiated product markets, access to detailed sensitive information about competitors may not be useful to predict future behaviour of competitors and therefore may not lead to an increase of coordination between them. The difficulties in comparing differentiated products make the information difficult to interpret and to individualize. For this reason, the European Commission did not raise concerns in the *EUDIM* case,<sup>120</sup> where the information exchanged covered a range of over one

<sup>117</sup> See OECD, 2006, para 15.

<sup>118</sup> See Bollettino 30/2000.

<sup>119</sup> For a commentary on the AGCM decision, see Porrini, 2004; Grillo, 2002.

<sup>120</sup> See Commission's Notice pursuant to Article 19.3 of the Regulation 17 (case no. IV/33.815, 35.842 - *EUDIM*), in [1996] OJ C 111/8.



million products. The European Commission therefore concluded that in this case even the exchange of individual and confidential information would not lead to any restriction of competition.

## 5.2 *The characteristics of the information exchanged*

A second set of relevant considerations for the assessment of information exchange systems relates to the characteristics of the information exchanged. Agencies usually make distinctions between the type of information that is exchanged and distinguish the information according to the degree of detail in which it is communicated and the frequency of the communications. The *rationale* for such distinctions lies in the fact that not all information allows competitors to identify each other's future strategies.

### 5.2.1 *The subject matter*

As for the subject matter of the information exchanged, not all information has the same relevance. Confidential information (*i.e.*, information on the very nature of the business, such as prices, quantities, commercial strategies, and the like) generally cannot be disclosed to competitors. Competition law enforcers are often very suspicious when information is exchanged between competitors regarding these sensitive competitive variables. Such information exchanges are considered to assist in the establishment, administration and enforcement of a collusive understanding between competitors. In particular, such information is considered critical for competitors to monitor any digression from a collusive arrangement.

The exchange of information on market demand, costs or publically available data are usually considered to be less problematic,<sup>121</sup> as it does not necessarily reduce uncertainty about rivals' conduct, although market estimates (or aggregate demand) may allow firms to see whether decreases in individual demand are due to negative shocks in the market or cheating.<sup>122</sup> Agencies, however, have considered as an infringement of competition rules the exchange of information such as product deliveries, deliveries to customers, capacity utilization, output and sales figures and market shares. The relevance for collusion of some of these data is not clear-cut; the analysis therefore may not be done in abstract, but must refer closely to the economic context and to the alleged collusive risk (*i.e.*, data on deliveries to customers may be very relevant if the risk of collusion relates to customer allocation, but may be irrelevant if the collusive arrangement is on the level of discounts).<sup>123</sup>

### 5.2.2 *The level of detail of the information exchanged*

The level of detail of the information exchanged is also likely to influence the ability of the firms to coordinate their market strategies. The higher the level of detail, the higher the possibility for competitors to predict each others' future conduct and to adjust accordingly. In general, agencies do not object to the dissemination of aggregated data, which does not allow for identification of the information related to individual companies. Exchanges of genuinely aggregated data, *i.e.*, where the recognition of individualised company level information is sufficiently difficult, are less likely to lead to restrictive

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<sup>121</sup> See Vives, 2007.

<sup>122</sup> See Motta, 2004.

<sup>123</sup> Kühn and Caffarra distinguish between sharing of sales information and delivery information. Delivery information may not necessarily assist firms in monitoring a collusive agreement in markets where delivery figures do not correspond to sales figures. They further explain that aggregated delivery information shared in certain markets may have substantial efficiency benefits and little collusive potential (see Kühn and Caffarra, 2006). Similarly, Vives shows that in certain circumstances exchanging cost information may have large efficiency benefits and therefore these efficiencies would have to be taken into account appropriately (see Vives, 2007).

effects on competition than exchanges of company level data.<sup>124</sup> However, there may be instances where even the exchange of aggregated data should be prohibited. According to Peeperkorn, “[...] *below a critical market price level, the oligopolists will automatically assume that someone has cheated and trigger off a price war. This means that aggregate price information could be of use to oligopolists when trying to collude. Aggregate output information will even be of more use to them as this would reveal immediately whether someone is defecting.*”<sup>125</sup> There are no general criteria for determining the minimum level of aggregation required to prevent an antitrust investigation; when confronted with aggregated information, agencies verify that it is sufficient to prevent any identification on a case-by-case basis.

### 5.2.3 *The age and the reference period of the information exchanged*

Agencies are usually concerned with exchanges of data regarding *future* strategies, including prices, sales, and capacities trends. This information is particularly sensitive and should remain within the corporate knowledge of each company. The sharing of future pricing intentions directly between competitors is probably the most useful information in enabling them to reach a focal point, and hence is viewed as the most harmful. Sharing information about current or past behaviour may not be as useful as information about future behaviour in identifying focal points.<sup>126</sup> *Historical* information (even if regarding individual firms) has generally lost its value as a competitive asset to be able to affect future conduct of the companies involved; therefore, their exchange is generally not considered harmful.<sup>127</sup> Information older than 12 months are generally considered historical,<sup>128</sup> but this assessment should be made on a case-by-case basis, based on the specific characteristics of the market in question.<sup>129</sup> The exchange of *current* information is more likely to be considered an infringement of competition law if the information can be used to determine the conduct of participants in the market at the time of the exchange. Because of the incentive of each individual colluding party to undercut and free-ride on the high price charged by the others, one of the most difficult problems for the colluding parties is to detect secret price cuts or secret sales in addition to the collusive quantities or quotas. Information about prices and quantities charged by the colluding firms is essential for monitoring deviations.

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<sup>124</sup> See para 85 of the European Commission’s Draft Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements.

<sup>125</sup> See Peeperkorn, 1996.

<sup>126</sup> However, information about past behaviour may still be used to achieve a collusive understanding. This can happen in two cases. First, through public announcements of price information a price leader may create a focal point around which similar price increases may be tacitly implemented by other firms. Secondly, sharing information about past costs or demand may make it easier for firms to come to a tacit understanding on a focal point for coordination. For example, sharing detailed current price information provides firms with a clearer idea of each other’s position in the market. This reduces the number of possible focal points on which price coordination may take place and therefore makes it easier to pick a single point.

<sup>127</sup> See para 86 of the European Commission’s Draft Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements: “*The exchange of historic data is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors’ future conduct or provide a common understanding on the market.*”

<sup>128</sup> See Commission Decision, *UK Agricultural Tractor Exchange*, in [1992] OJ L 68/19.

<sup>129</sup> See para 86 of the European Commission’s Draft Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements.

#### 5.2.4 *The frequency of the exchange*

Another factor that may affect the assessment of an exchange of information relates to the frequency of the exchange. Frequent data exchanges allow companies to better (and more timely) adapt their commercial policy to their competitors' strategy. In addition, for collusion to be sustainable it is necessary that punishment of deviations is credible and effective. It is therefore necessary that the cheating is detected sufficiently fast, in order to limit the gains from it. Again, the frequency of the exchange should be considered in relation to the characteristics of the market and to the specific facts of the case.<sup>130</sup> For example, in markets with long term contracts (which are indicative of infrequent price re-negotiations) a less frequent exchange of information could therefore normally be sufficient for reaching a collusive outcome than in markets with short term contracts and frequent price re-negotiations.

#### 5.2.5 *The public availability of the information*

Generally, the exchange of public information is not considered as an infringement of competition rules. In its judgment on the *TACA* case,<sup>131</sup> for example, the GC was asked to review the European Commission's conclusion that an exchange of public information was an infringement under Article 101 TFEU. The GC noted that if the information is in the public domain as a result of mandatory disclosure requirements (in that case compulsory publication under US law) or if it can be easily deduced from publicly available information, the exchange of this information between competitors cannot be considered an infringement of the EU Treaty competition rules.<sup>132</sup> Most agencies, however, interpret the notion of "publicly available information" narrowly: in order not to give rise to competition concerns the information exchanged has to be *genuinely* public, *i.e.*, the information must be readily observable and available to everyone (*i.e.*, to both competitors and customers) and at no cost. Search and collection costs play an important role.<sup>133</sup> If the information is available to the public but its research and its retrieval and difficult and costly, the information is not genuinely available to the public.<sup>134</sup>

## 6. Regulation of competitors communications: some policy questions

### 6.1 *Should information exchanges be prohibited per se?*

Very few *per se* rules are justified in competition law and limited to those cases where the anti-competitive effects of the practice can never be outweighed by pro-competitive effects or by efficiency justifications. Form-based approaches to antitrust illegality have been progressively eliminated in many jurisdictions or at least undermined in favour of an effects-based approach. As seen above, there are no reliable form-based rules that determine if an information exchange has pro or anti-competitive effects.

<sup>130</sup> See para 87 of the European Commission's Draft Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements.

<sup>131</sup> See joined cases T-191/98, T-212/98 and T-214/98, *Atlantic Container Line (TACA)*, in [2003] ECR II-3275, paragraph 1154.

<sup>132</sup> Past case-law of the European courts is cited in support (see, *inter alia*, General Court, *John Deere vs. Commission*, in [1994] ECR II-957, para. 81, upheld on appeal by the CJEU in *John Deere vs. Commission*, in [1998] ECR I-3111, para 89 and 90).

<sup>133</sup> See Italian Competition Authority, *RAS-Generali/IAMA Consulting*, in *Bollettino* 3/2004.

<sup>134</sup> For this reason, in the *RAS-Generali/IAMA Consulting* case, the Italian Competition Authority considered that the fact that the information was obtained by the third-party consulting company in charge of creating the information database directly from the different competitors indicated that the information itself was not in the public domain. If the information was readily available, there would be no reason to set up a costly exchange system.

This seems to advocate against a *per se* approach to assessing information exchanges. Also from an economic perspective,<sup>135</sup> the notion of a *per se* rule against information exchanges has no support. Information exchanges cover a very broad spectrum of practices whose pro- or anti-competitive effects are very dependent on the economic context, and that leads to the conclusion that in this area of enforcement, a structured effects-based approach should be favoured. Courts have also supported a rule of reason approach to information exchanges. For example, the US Supreme Court in the Container case discussed under Section 1 of the Sherman Act a stand-alone information exchange— as opposed to merely using the information exchange as evidence upon which to infer a pricing agreement. It concluded that “[t]his exchange of information is not illegal *per se*, but can be found unlawful under a rule of reason analysis.”<sup>136</sup>

A structured approach under the rule of reason should start by assessing if the market structure and the product characteristics are such that there is a risk of collusion should transparency increase; if the answer to this first question is positive the analysis should move to the analysis of the types and the nature of the information exchanged (such confidential nature, public availability, etc.) and to the characteristics of the exchange (such as frequency, aggregation, etc.) to assess the effects of the exchange on competition and the likelihood of collusion. For example, a concern that exchange of price information could facilitate price collusion might be rejected if the market is very fragmented or it is too dynamic to sustain price-based collusion. Such concerns may also be rejected if the information exchanges are not sufficiently precise, detailed and/or frequent to allow firms to reach an understanding on a common line of conduct which is likely to weaken competition.<sup>137</sup>

## 6.2 *Should some information exchanges be anti-competitive “by object”?*

Agreements that are anti-competitive “by object” automatically breach competition rules, and there is no need for the competition agency to establish that they have anticompetitive effect. These agreements, as opposed to agreements which are anti-competitive *per se*, can always be justified by efficiency reasons. If a conduct restricts competition “by object”, this suggests that the role for economic analysis in assessing the legality of such agreements is limited. The competition agency does not have to show that the agreement has anti-competitive effects as that conclusion is so self-evident that it does not need to be established. The parties to the exchange, though, can show that the exchange generates sufficient efficiency gains (*e.g.*, it helps firms to better forecasts sales) and that those benefits cannot be realised through the less harmful means.

Part of the literature<sup>138</sup> and the enforcement practice of some competition agencies have identified one type of information exchange that ought to be considered a restriction “by object”: private exchanges of firms’ individual plans for future conduct, such as future prices and volumes. The exchange of such kind of information is viewed as very close to the establishment of a price fixing arrangement between the parties that share the information. The rationale for this approach is that it may make economic sense to attribute a presumption of illegality to exchanges of information which are very likely to have an anti-competitive effect and unlikely to have an objective or pro-competitive justification.<sup>139</sup> This view was recently endorsed by the CJEU in its recent ruling in T-Mobile, in which the CJEU held that “*an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent*

<sup>135</sup> See Evans and Mellsop, 2003.

<sup>136</sup> See *U.S. v. Container Corp.*, 393 U.S. 333 (1969).

<sup>137</sup> See RBB, 2009.

<sup>138</sup> See, for example, Kühn, 2001; Bennett and Collins, 2010; Swedish Competition Authority, 2006.

<sup>139</sup> See Kühn, 2001.

*and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object.*"<sup>140</sup> Others have argued that a restriction by object is not justified even in these circumstances. It has been argued the categorisation of information exchanges as conduct that is anti-competitive "by object" seems to provide an exception to the increasing influence of economic analysis and that there is no justification for placing such conduct in the same automatic presumption of anticompetitive "object" category as full-scale horizontal price-fixing.<sup>141</sup>

All other types of information exchanges are generally reviewed under competition rules based on their effects on competition. Some exchanges will more likely have an impact on competition, such as exchanges of individualised current sensitive information, than others, such as the exchange of aggregated historic information which are in the public domain. In these cases, the assessment will depend on the market structure, on the product characteristics and on the type of information which is exchanged.

### **6.3 Can an information exchange be justified on the basis of efficiencies?**

Even where an exchange of information between competing companies might have adverse effects on competition in the market, it may be possible to justify it, and thus benefit from an exemption from the prohibition on anti-competitive agreements. Indeed, most agencies recognise in their policy statements that information exchange may lead to significant efficiency gains.<sup>142</sup> Many of the possible efficiencies have been discussed above and they include a more efficient allocation of production, benchmarking, signalling quality to consumers or helping consumers to make a more informed choice about products. It is up to the companies to provide good evidence to support the claimed efficiencies. In addition a number of other conditions must be satisfied. Most countries require the parties to show that the efficiencies generated by the enhanced transparency outweigh any restrictive effects on competition, that a fair share of the efficiency gains must be passed on to consumers and that the information exchange must not go beyond what is necessary to achieve the relevant efficiency gains.

### **6.4 Are there permitted exchanges? Is there room for safe harbours?**

It has been argued by some scholars<sup>143</sup> and by some courts<sup>144</sup> that the exchange of truly aggregated data (*i.e.*, data that cannot be disaggregated to reveal individual firms' information) should be considered *per se* permitted, as it never allows for the targeted sanctioning of deviations from a collusive arrangement. This thesis, however, has not found support in the economic literature, which concludes that targeted sanctioning is not the only possible credible and effective punishment which makes collusion sustainable. Even the dissemination of aggregate information can reveal to the cartel member that a cheat has occurred can trigger reactions that stabilise collusion.<sup>145</sup> The recent Draft Guidelines of the European Commission on the applicability of Article 101 to horizontal co-operation agreements supports this conclusion when it says

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<sup>140</sup> See case C-8/08, *T-Mobile Netherlands and others*, judgement of 4 June 2009.

<sup>141</sup> See RBB, 2009.

<sup>142</sup> See for example the Canadian Guidelines on Competitors Collaboration, section 3.7.1; Draft Guidelines of the European Commission on the applicability of Article 101 TFEU to horizontal co-operation agreements, section 2.3.1; US Antitrust Guidelines for Collaborations amongst Competitors, section 3.31.(b).

<sup>143</sup> See Tugendreich, 2004, p. 175 and 221; see also Kühn and Caffarra, 2006 according to which some types of information exchanges, such as the exchange of aggregated information and cost data should always be allowed.

<sup>144</sup> See Oberlandesgericht Düsseldorf, decision in case Kart. 37/01, Transportbeton Sachsen, 26 July 2002, WuW/E DE-R 949.

<sup>145</sup> See Kühn and Vives, 1995.

that: “[...] the exchange of aggregated data may also lead to a collusive outcome. For example, members of a tight and stable oligopoly exchanging aggregated data could automatically assume that someone defected from the collusive outcome when noticing a market price below a certain level.”<sup>146</sup>

However, the question of whether there are information exchanges which are highly unlikely to affect competition and should therefore enjoy of a safe harbour remains valid. Some agencies have introduced structural safe harbours for all co-operation agreements. In the US, for example, under the Antitrust Guidelines for Collaborations amongst Competitors the US agencies under normal circumstances do not challenge a competitors collaboration when the market shares of the participants collectively account for no more than 20% of the relevant market. It has been recently argued that “[...] one possibility may be to base the safe harbour on some threshold of the market covered by the information sharing. It must be acknowledged that deriving a specific threshold for such a safe harbour is always somewhat arbitrary. However, given the level of other safe harbours within the guidelines, 20% may be a sensible starting point to consider. Any such safe harbour would also have to be subject to a cumulative coverage test similar to the cumulative test within the vertical guidelines. This would prevent networks of information sharing that would allow firms to have access to information covering the entire market. In this context, 30% may be a sensible starting point to consider for such a cumulative test.”<sup>147</sup>

Agencies should consider if, in addition to a structural safe harbour, other types of information should fall in the safe harbour, such as truly historical information, publicly available information and aggregated information. The introduction of safe harbours in this area would offer businesses, and particularly small businesses, the required legal certainty to engage in pro-competitive information sharing. All information exchanges falling outside the safe harbour should not be considered as anti-competitive, as this might discourage firms from engaging in beneficial exchanges, such as industry-wide collation of aggregated historic information on sales and price trends.

## 7. Conclusions

Exchange of information between competitors is a complex area of competition law enforcement. The economic and legal debate on the pro and anti-competitive effects of transparency on competition and firms’ incentives to collusion is likely to continue to affect the antitrust enforcement activities in this field.

This is an area of law which is deeply affected by the economic theories on tacit collusion, and where compliance with competition rules is therefore complex. For this reason, companies are looking for legal certainties as to what kind of communications are allowed under competition law and as to which factors they should consider when entering into exchange of information systems with competitors. The distinction between exchanges of information within a traditional cartel context, exchanges of information as stand-alone infringements of competition rules, and pro-competitive exchanges of information will certainly benefit from clear guidance from antitrust enforcers.

It is difficult to elaborate general and theoretical rules to distinguish a restrictive exchange of information from an exchange of information which is at least neutral, if not pro-competitive and efficiency enhancing, from a competition policy perspective. The approach must be on a case-by-case basis and cannot ignore the economic context in which the participants to the information exchange are active. The economic literature has identified cases where artificially increased transparency is a factor leading to collusion and others where increased transparency is pro-competitive and therefore to be enhanced.

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<sup>146</sup> See para 85.

<sup>147</sup> See Bennett and Collins, 2010.

In general, where there is suspicion of coordination, transparency can be seen as further facilitating the participant's ability to monitor one another's behaviour and to identify "cheating" on unlawful coordination agreements. The exchange of core competitive information (*e.g.*, information on price, quantity and future strategies) is viewed as particularly problematic because it increases supply-side market transparency. The artificially increased transparency eliminates the uncertainty on the future conduct of competitors that provides such a motivating force in competitive markets.<sup>148</sup> This is the reason why many agencies distinguish between an exchange of information concerning historical *versus* future pricing, quantity or general market strategies. Information sharing becomes even more of a concern where the participants to the exchange of information operate in a concentrated market and/or where they represent a substantial part of the market.

There are questions which are still debated, such as to what extent an exchange of information may restrict competition in a non-oligopolistic market, the legitimate use of independent third-parties consultants for collecting and disseminating market information or the potential restrictive effect of public statements of future commercial strategies. Other questions relate to whether information exchanges should be viewed as a *per se* infringement of competition rules or should be assessed under a structured rule of reason. Finally, agencies should address the question of how to provide more clarity and legal certainty to companies who might engage in these type of practices. The use of restriction by object, on the one hand, or of safe harbours, on the other hand, could meet this need.

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<sup>148</sup> See Kühn and Vives, 1995; Capobianco, 2004.

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## NOTE DE RÉFÉRENCE

*Par le Secrétariat<sup>1</sup>*

### 1. Introduction

Les ententes « manifestes », explicites, sont presque universellement condamnées comme étant illicites. À l'inverse, les comportements résultant purement d'une interdépendance oligopolistique (collusion tacite) ne passent pas pour une infraction au droit de la concurrence. Entre les deux, les entreprises peuvent se livrer à toutes sortes de pratiques visant à réduire l'incertitude stratégique et à coordonner plus efficacement leur action. Peuvent en faire partie la communication unilatérale au marché des stratégies futures, les échanges d'informations tels que le « *cheap talk* » sur un projet d'augmentation des prix, les capacités ou toute autre action future ainsi que les systèmes plus formalisés d'échange d'informations à l'échelon du secteur dans son ensemble.

Les échanges d'informations entre les entreprises renforcent la transparence du marché au bénéfice des consommateurs, en réduisant par exemple les coûts de recherche et en les aidant à faire un choix plus efficace entre les différents produits. Cela étant, la transparence peut avoir l'effet inverse. Dans certaines situations, par exemple sur les marchés suffisamment concentrés, la transparence peut être préjudiciable aux consommateurs si elle permet aux entreprises de s'entendre tacitement pour augmenter les prix, se partager ou s'attribuer des marchés ou, dans le cadre d'une entente, de connaître plus facilement celles qui s'écartent de la ligne d'action commune, et donc de les sanctionner. Cet impact négatif est probable sur les marchés qui sont déjà prédisposés, du fait de leurs caractéristiques structurelles, à une coordination anticoncurrentielle.

Les autorités chargées d'appliquer le droit de la concurrence peuvent avoir du mal à faire une distinction entre un comportement purement unilatéral, d'une part, comme les communications unilatérales, qui n'entre pas dans le champ d'application des lois visant à lutter contre les accords restrictifs et, d'autre part, les comportements coordonnés qui peuvent, en principe, en relever. Dans le passé, bon nombre d'autorités de la concurrence ont apprécié les échanges d'informations en se demandant s'ils entraînaient la formation d'ententes anticoncurrentielles ou, au contraire, une transparence du marché favorisant la concurrence, en tenant compte de plusieurs facteurs essentiels, et notamment du type et de la nature des informations échangées, ainsi que de la structure du marché concerné.

À quelques exceptions près<sup>2</sup>, en matière d'accords horizontaux, les législations sur la concurrence n'incluent pas explicitement les échanges d'informations dans la liste des pratiques anticoncurrentielles. En l'espèce, la loi trouve donc principalement son origine dans la pratique décisionnelle des autorités de la concurrence et dans la jurisprudence des tribunaux. Les échanges d'informations peuvent être examinés

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<sup>1</sup> La présente note a été préparée par Antonio Capobianco du Secrétariat de l'OCDE.

<sup>2</sup> Au Mexique, par exemple, l'article 9 de la Loi sur la concurrence fait directement référence à l'« échange d'informations » qui est explicitement proscrit lorsqu'il a pour objet ou pour effet de fixer, d'augmenter ou de manipuler les prix.

dans un certain nombre de contextes<sup>3</sup>, mais de manière générale, les autorités de la concurrence les ont appréciés dans trois cas de figure précis<sup>4</sup> : (i) lorsque l'échange d'informations s'inscrit dans le cadre d'une affaire d'entente plus générale, (ii) lorsque l'échange d'informations s'inscrit dans le cadre d'un accord de coopération plus général comme un accord de formation d'une coentreprise, de normalisation ou de recherche-développement, (iii) lorsqu'il s'agit d'une pratique autonome, c'est-à-dire ne s'inscrivant pas dans le cadre d'une entente ou d'un accord plus général.

L'analyse des deux premières catégories d'échange d'informations est relativement simple. Les autorités de la concurrence apprécient les éventuels effets restrictifs de ces pratiques dans le contexte plus général de l'entente ou de l'accord, dont elles sont un élément subsidiaire. La présente note s'intéresse principalement à la troisième catégorie d'échanges, c'est-à-dire aux systèmes autonomes d'échange d'informations<sup>5</sup>. Appréhender cette catégorie est plus compliqué, car interdire ce type d'échanges implique qu'ils sont anticoncurrentiels en soi, même en l'absence d'autres preuves de collusion (comme une entente en matière de fixation des prix ou toute autre restriction injustifiable). Un bon nombre d'autorités de la concurrence s'accordent à conclure qu'un accord passé entre concurrents en vue d'échanger des informations confidentielles, ayant pour objet ou pour effet de fausser la concurrence, doit normalement être jugé incompatible avec les règles prohibant les accords et pratiques anticoncurrentiels. Généralement, toutefois, aucun *accord* d'échange d'informations à des fins anticoncurrentielles n'est conclu. Le problème est donc de déterminer dans quels cas l'échange d'informations est effectivement contraire à ces règles. On utilise souvent la notion de *pratique concertée* pour couvrir ces situations<sup>6</sup>.

La présente note s'articule autour des axes suivants :

<sup>3</sup> Kühn et Vives (1994) laissent entendre qu'en droit européen, l'échange d'informations peut être potentiellement couvert comme suit : (i) dans le cadre d'un accord prohibé plus général comme un accord de fixation des prix, (ii) comme un moyen indirect de fixer les prix, (iii) en tant que preuve suffisante de l'existence d'un accord illégal, (iv) en tant que condition nécessaire rendant viable l'accord illégal, elle-même illégale en tant que disposition facilitant cet accord, (v) en tant qu'accord illégal en soi, restreignant ou faussant la concurrence.

<sup>4</sup> Voir Bennett et Collins, 2010.

<sup>5</sup> Elle ne traite pas des systèmes d'échange d'informations dans le contexte des règles de conduite unilatérale s'inscrivant dans le cadre des négociations en vue d'une fusion. En ce qui concerne les contacts entre les parties à la fusion au stade de la planification de l'opération, il suffit de relever qu'ils peuvent aboutir à une coordination anticoncurrentielle en cas d'échec des négociations. Les autorités de la concurrence reconnaissent l'importance de ces contacts préalables à une fusion et ont dispensé de très nombreux conseils au fil des ans sur les activités préalables à une telle opération. Voir par exemple, Blumenthal, 2005 ; Morse, 2002 ; Sipple, 2000.

<sup>6</sup> Paragraphe 56 du projet de Lignes directrices sur l'applicabilité de l'article 101 du traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (« TFUE ») : « Conformément à la jurisprudence de la Cour de Justice de l'Union européenne, la notion de pratique concertée vise une forme de coordination entre entreprises qui, sans avoir été poussée jusqu'à la réalisation d'une convention proprement dite, substitue sciemment une coopération pratique entre elles aux risques de la concurrence<sup>6</sup>. En l'absence d'accord sur des échanges d'informations, il conviendra d'examiner au cas par cas si une pratique concertée peut être constatée ou si, par exemple, la diffusion régulière d'informations par une entreprise constitue un acte réellement unilatéral, qui n'entre pas dans le champ d'application de l'article 101, paragraphe 1. » Toutefois, quand une entreprise seulement divulgue des informations et qu'une ou plusieurs autres les acceptent, il peut également s'agir d'une pratique concertée. Voir par exemple Affaires jointes T-25/95, etc., *Cimenteries CBR et autres contre Commission des Communautés européennes*, Recueil 2000, p. II-491, point 1849 : « [...] la notion de pratique concertée suppose effectivement l'existence de contacts [...] caractérisés par la réciprocité. Cette condition est toutefois satisfaite lorsque la divulgation, par un concurrent à un autre, de ses intentions ou de son comportement futur sur le marché a été sollicitée ou, à tout le moins, acceptée par le second. »

- Premièrement, elle examine les effets pro concurrentiels d'une amélioration de la transparence découlant des échanges d'informations, tant pour les fournisseurs que les consommateurs, ainsi que les risques que cette transparence accrue peut parfois poser pour la concurrence.
- Deuxièmement, elle analyse les diverses formes que peuvent prendre ces échanges d'informations et l'incidence qu'elles peuvent avoir sur l'application des règles de concurrence.
- Troisièmement, cette note s'intéresse à la manière dont, dans un échantillon de juridictions, les règles de concurrence ont été appliquées à l'encontre des pratiques d'échange d'informations.
- Quatrièmement, elle passe en revue les principaux facteurs que les autorités prennent en compte pour déterminer si un échange d'informations a ou non des effets anticoncurrentiels.
- Enfin, la note tire certaines conclusions du point de vue de la politique de la concurrence.

## 2. Avantages et risques du renforcement de la transparence du marché

Les ouvrages économiques placent traditionnellement la transparence et l'accès à l'information au centre du processus concurrentiel et des avantages économiques qui en résultent. La théorie économique sur la transparence du marché et son utilité du point de vue de la lutte contre les pratiques anticoncurrentielles comporte deux volets. En 1776, Adam Smith nous mettait en garde contre les conséquences éventuelles pour la concurrence des communications entre concurrents<sup>7</sup>. Cela étant, pour que la main invisible ait des effets bénéfiques pour la collectivité dans son ensemble, il est nécessaire que des intervenants indépendants puissent prévoir et mener à bien leur activité économique en se fiant à des signaux de prix. La transparence du marché est donc un facteur qui peut, selon les cas, soit favoriser, soit restreindre la concurrence<sup>8</sup>.

L'amélioration de la transparence du marché est apparemment un facteur à encourager ; après tout, le modèle idéal de concurrence parfaite suppose une information parfaite du côté de la demande et du côté de l'offre. Du côté de l'offre, la connaissance du marché et de ses caractéristiques essentielles (comme les caractéristiques de la demande, les capacités de production disponibles, les projets d'investissement, etc.) facilite la mise au point de stratégies commerciales efficaces et efficaces par les intervenants du marché. Les nouveaux entrants ou les intervenants marginaux peuvent mettre à profit ces informations pour s'implanter plus efficacement sur le marché et y livrer une concurrence plus féroce aux intervenants en place. Une meilleure connaissance des conditions du marché peut également être un avantage pour les consommateurs qui peuvent faire un choix entre des produits concurrents en s'appuyant sur une meilleure compréhension des caractéristiques des produits ; ils peuvent en outre comparer les conditions des diverses offres et choisir librement celle qui répond le mieux à leurs besoins. De plus, la grande transparence bénéficie aux consommateurs en réduisant les coûts de recherche<sup>9</sup>.

La grande transparence est en revanche l'un des facteurs facilitateurs indispensables pour qu'il y puisse y avoir collusion tacite. Afin de parvenir à s'entendre sur les modalités de la coordination, d'en contrôler le respect et de sanctionner efficacement les comportements déviants, les entreprises doivent

<sup>7</sup> Dans *La Richesse des Nations* (1776), Adam Smith observait que: « *il est rare que des gens du même métier se trouvent réunis, fût-ce pour quelque partie de plaisir ou pour se distraire, sans que la conversation finisse par quelque conspiration contre le public, ou par quelque machination pour faire hausser les prix.* » [Traduction française de Germain Garnier, 1881] (Tome I, Livre I, Ch. 10 (1776).

<sup>8</sup> Voir Mollgard et Overgaard, 2001 ; Philips, 1988.

<sup>9</sup> Voir OCDE, 2001.



avoir une connaissance précise des stratégies de détermination des prix et/ou de production de leurs concurrents. L'élimination artificielle de l'incertitude entourant les actions des concurrents, incertitude à la base du processus concurrentiel, peut en soi faire disparaître la rivalité normale entre concurrents<sup>10</sup>. Cela est particulièrement vrai sur les marchés fortement concentrés sur lesquels la grande transparence permet aux entreprises de mieux prévoir ou anticiper les actions de leurs concurrents et donc de s'aligner sur elles.

On analysera successivement, dans les paragraphes qui suivent, les éventuels effets pro- et anticoncurrentiels des échanges d'informations.

## 2.1 *Éventuels effets proconcurrentiels des échanges d'informations*

Si les échanges d'informations ne suscitent pas les préoccupations, du point de vue de la concurrence, dont il sera question plus loin, ils sont alors presque toujours positifs en termes de bien-être. De fait, ils peuvent avoir des avantages importants tant pour les fournisseurs que pour les consommateurs.

### 2.1.1 *Avantages éventuels pour les fournisseurs*

Dans de nombreux cas, les échanges d'informations entre concurrents peuvent contribuer à améliorer le fonctionnement des marchés. Ces avantages peuvent à leur tour permettre aux entreprises de se livrer plus efficacement concurrence, ce qui entraîne en définitive une amélioration du bien-être collectif. Cela étant, comme on le verra, l'existence de ces avantages ne doit pas justifier les échanges d'informations en toutes circonstances, mais doit être prise en compte par les autorités de la concurrence lorsqu'elles apprécient les effets pro- ou anticoncurrentiels d'un échange d'informations. Certains des avantages éventuels de la transparence pour les fournisseurs sont analysés ci-dessous.

- Une connaissance approfondie du marché et de ses caractéristiques essentielles favorise la mise au point de stratégies commerciales efficaces et efficaces par les intervenants du marché et permet aux entreprises de prendre des décisions tarifaires en se fondant sur une compréhension plus complète du marché. De même, une grande transparence est bénéfique pour les nouveaux entrants ou les intervenants marginaux et leur permet de s'implanter plus efficacement sur le marché pour y livrer plus féroce concurrence. Meilleure est l'information, plus les entreprises comprennent les évolutions du marché et adaptent leur stratégie en fonction de façon à mieux faire coïncider l'offre et la demande<sup>11</sup>. Les échanges d'informations peuvent en outre améliorer le système de distribution et les stratégies commerciales des entreprises, et ont de ce fait des effets bénéfiques.
- Les échanges d'informations peuvent améliorer le positionnement des produits, en particulier dans les secteurs caractérisés par une différenciation des produits ou dans les secteurs multi-marchés. Selon certaines études empiriques, l'absence d'informations peut en effet inciter les entreprises à positionner leurs produits d'une manière qui ne maximise ni leur bénéfice ni le bien-

<sup>10</sup> Voir Cour de Justice de l'Union européenne (« CJUE »), Affaire C-8/08, *T-Mobile*, du 4 juin 2009, paragraphe 33.

<sup>11</sup> Dans un monde sans informations sur la demande et les activités des concurrents, les entreprises devraient s'adapter en permanence à l'évolution de la situation en procédant par tâtonnements ou par erreurs successives. Comme l'a déclaré un responsable de la US Federal Trade Commission: « *Les informations sur les prix permettent aux entreprises de prendre des décisions éclairées sur les prix auxquels elles commercialisent leurs produits et services, et celles-ci n'ont de ce fait plus besoin de procéder par tâtonnements ou par erreurs successives, ce qui est plus coûteux. Ces informations sont utiles à la fois pour les consommateurs et pour les entreprises qui peuvent dès lors prendre leurs décisions d'achat en connaissance de cause.* » (Azcuena 1994, p. 4).

être des consommateurs<sup>12</sup>. Autoriser l'échange d'informations dans ces conditions peut donc améliorer le surplus du consommateur et son bien-être.

- Sur les marchés caractérisés par des fluctuations importantes de la demande, les entreprises conservent généralement des stocks importants afin de pouvoir répondre à la demande en période de pointe<sup>13</sup>. Si les échanges d'informations renforcent la capacité des entreprises à anticiper les fluctuations de la demande, ils peuvent améliorer leur efficacité économique en leur permettant d'optimiser leurs stocks et d'éviter pénuries ou surproduction<sup>14</sup>.
- Une meilleure circulation de l'information permet aux entreprises de se comparer à leurs concurrents dans certains domaines essentiels<sup>15</sup>. L'analyse comparative (autrement dit la comparaison des performances de telle ou telle entreprise aux performances d'ensemble de son secteur)<sup>16</sup> est un exemple de la manière dont les entreprises peuvent utiliser l'information pour améliorer leur efficacité interne<sup>17</sup>. Que cette analyse comparative puisse donner lieu à un échange illégal d'informations sensibles dépend de la manière dont elle a été organisée. En général, pour préparer une analyse comparative, seule une désagrégation limitée des informations est nécessaire ; de ce fait, la diffusion d'informations sensibles constitue un risque mineur au regard des gains d'efficacité apparents de cette pratique sur les performances de l'entreprise.
- Même si les ouvrages économiques ne contiennent guère d'éléments empiriques sur ce point, les échanges d'informations peuvent en outre améliorer les décisions d'investissement des entreprises<sup>18</sup>. Comme le souligne Hovenkamp : « *les entreprises réagissent face à l'incertitude en se montrant moins dynamiques. Si le fabricant n'a aucune idée de ce que sera la demande pour son produit, il couvrira sa mise. Cela signifie, le cas échéant, qu'il construira une usine plus petite ou qu'il achètera moins d'intrants. À l'inverse, des informations de qualité sur le marché réduisent l'incertitude et les vendeurs sont donc plus sûrs du bien-fondé de leurs investissements et donc davantage incités à investir* » et « *les données généralisées sur les prix, la production et les stocks peuvent contribuer à guider les entreprises qui peuvent dès lors prendre des décisions intelligentes sur le montant à investir dans les sites de production et les équipements, sur le volume de production à prévoir pour l'année suivante et ainsi de suite*<sup>19</sup>. »
- Une certaine transparence est indispensable au bon fonctionnement de certains secteurs. Ainsi, dans ceux de la banque et de l'assurance, les échanges d'informations sur les profils de risque des

<sup>12</sup> Voir Kruse et Schenk, 2000.

<sup>13</sup> Voir Novshek, 1996.

<sup>14</sup> Voir Matutes, 2001 ; voir aussi RBB Economics, 2009.

<sup>15</sup> Voir Bennett et Collins, 2010 ; Capobianco, 2004 ; Vives, 2002.

<sup>16</sup> Tel est le cas lorsqu'une entreprise indépendante recueille des données commerciales auprès des différents intervenants du marché, les traite, puis les restitue séparément à chacun d'entre eux, et notamment leur part de marché de respectives.

<sup>17</sup> Voir Kühn, 2001.

<sup>18</sup> Christiansen et Caves (1997) ont observé l'impact des échanges d'informations sur le développement des capacités du secteur de la pâte à papier et du papier et leur effet sur la concurrence et l'investissement. Ils relèvent que si les marchés ne sont pas trop concentrés, les échanges d'informations dans le cadre desquels les interlocuteurs ne prennent pas d'engagement (« *cheap talk* ») peuvent résoudre l'incertitude stratégique sur les décisions d'investissement des concurrents et donc améliorer l'efficacité économique globale.

<sup>19</sup> Voir, Hovenkamp, 1999, p. 43 et suivantes. Il a en outre été avancé que « *négliger l'importance des échanges d'informations pour les décisions d'investissement implique de négliger des coûts qui peuvent être importants pour les consommateurs, ce qui aboutit à des distorsions sur le plan de la qualité et de la variété des produits, de la localisation et de la capacité future à faire face à l'évolution de la demande* » (voir Nitsche et von Hinten-Reed, 2004).

clients peuvent réduire les problèmes d'anti-sélection (lorsque les entreprises ne peuvent distinguer les bons clients des mauvais) et d'aléa moral (lorsqu'un client qui est protégé des risques est susceptible de se comporter différemment que s'il était pleinement exposé aux risques). Dans ces cas, les mécanismes d'échange d'informations comblent une asymétrie de l'information concernant les clients et permettent donc au secteur de fonctionner avec efficience<sup>20</sup>.

### **Encadré 1. Échanges d'informations dans le secteur de l'assurance**

Il est admis que dans le secteur de l'assurance, un certain degré de coopération entre concurrents est indispensable au bon fonctionnement du secteur lui-même et a en outre pour effet d'accroître la concurrence entre les compagnies d'assurance. Pour cette raison, la Commission européenne a adopté un Règlement d'exemption par catégorie afin d'exempter certaines catégories d'ententes horizontales entre compagnies d'assurance<sup>21</sup>. L'exemption par catégorie de certains flux d'informations au sein du secteur de l'assurance se justifie par le fait que les calculs, tables et études permettent d'améliorer la connaissance des risques et facilitent leur évaluation par les différentes compagnies. Cela peut, en retour, favoriser l'entrée sur le marché et donc, en définitive, être bénéfique aux consommateurs. Cela étant, l'exemption par catégorie ne couvre aucune restriction inutile de la concurrence. Ainsi, l'établissement en commun de tarifs de prime n'est pas exempté, et les calculs, tables et études ne le sont que s'ils (a) n'identifient pas les compagnies d'assurance ou les parties assurées concernées ; (b) comportent une déclaration, lors de leur compilation et de leur diffusion, du fait qu'ils n'ont pas de caractère contraignant et (c) peuvent être consultés, dans des conditions raisonnables et non discriminatoires, par toutes les entreprises d'assurance qui en sollicitent une copie, y compris celles qui ne sont pas actives sur le marché géographique ou de produits auxquels se rapportent les résultats de ces calculs, tables ou études.

<sup>20</sup> Voir Padilla et Pagano, 1999. Les auteurs concluent toutefois que l'échange d'informations plus précises peut réduire l'effet disciplinaire des échanges d'informations et que les emprunteurs sont davantage incités à honorer leurs engagements quand les prêteurs ne les tiennent informés que de leurs défaillances passées que lorsqu'ils leur communiquent toutes les données les concernant.

<sup>21</sup> Voir Règlement (UE) n° 267/2010 de la Commission concernant l'application de l'article 101, paragraphe 3, du TFUE à certaines catégories d'accords, de décisions et de pratiques concertées dans le secteur des assurances, dans [2010] JO L 83/1. Ce Règlement remplace les anciens règlements d'exemption par catégorie concernant le secteur de l'assurance (Règlement n° 358/2003, dans [1986] JO L 378/4 et Règlement n° 3932/92, dans [1992] JO L 398/7). En particulier, l'Article 101 du traité sur le fonctionnement de l'Union européenne ne s'applique pas aux accords ayant pour objet ou pour effet la mise au point et la diffusion en commun de calculs et de tables et la réalisation en commun d'études sur l'incidence probable de circonstances générales étrangères aux entreprises concernées, soit sur la fréquence ou l'ampleur des sinistres futurs pour un risque ou une catégorie de risques donnés, soit sur la rentabilité de différents types d'investissement et la diffusion des résultats de ces études. Le terme « calculs » désigne les calculs du coût de couverture moyen pour un risqué donné dans le passé. Le terme « tables » désigne les tables de mortalité et de fréquence des cas de maladie, accident et invalidité pour les assurances comportant un élément de capitalisation.

### Encadré 2. Échanges d'informations dans le secteur bancaire

Appliqué au secteur bancaire, le même raisonnement a abouti à la constitution, de 1997 à 2007, de fichiers de crédit, publics et privés, dans toute l'Union européenne. L'établissement de ces fichiers peut faciliter l'entrée directe du fait de la réduction des asymétries de l'information qui, à son tour, intensifie la concurrence<sup>22</sup>. Dans l'affaire *Asnef-Equifax*<sup>23</sup>, la Cour de Justice de l'Union européenne (la « CJUE ») a été sollicitée pour apprécier la compatibilité d'un fichier en ligne, constitué par une association espagnole d'établissements financiers, avec les règles de concurrence européennes. Ce fichier contenait des informations sensibles sur des emprunteurs existants ou potentiels, tels que leurs antécédents de crédit, les défauts de paiement, les soldes créditeurs, etc. Il a pour objet de mieux informer les prêteurs sur les risques inhérents à l'octroi de prêts, ce qui entraîne une meilleure disponibilité du crédit. La CJUE a conclu que l'échange d'informations sur la solvabilité des emprunteurs éventuels sert à réduire le risque de crédit en réduisant la disparité entre les informations à la disposition des établissements financiers et celles détenues par les emprunteurs éventuels. De ce fait, ces échanges d'informations ont permis de réduire le nombre d'emprunteurs n'honorant pas leurs remboursements et ont donc amélioré le fonctionnement du dispositif d'offre de crédit dans son ensemble, conduisant à une plus grande efficacité des effets du marché. Le fichier ayant été conçu pour limiter le risque de crédit encouru par les établissements financiers, la Cour a conclu que les échanges d'informations n'avaient pas pour objet de restreindre ou de fausser la concurrence.

- Enfin, les échanges d'informations peuvent s'avérer particulièrement utiles sur les marchés où l'innovation est un facteur important et se caractérisant par des mutations technologiques fréquentes ou par une évolution rapide des goûts et préférences des consommateurs. Dans ces conditions, l'incertitude pèse sur les décisions d'investissement. Plus elle est forte, plus les entreprises hésitent à investir même sur des marchés dont les paramètres fondamentaux sont pourtant positifs<sup>24</sup>. La littérature consacrée à la dynamique de la concurrence sur les marchés d'innovation a montré que les formes de coopération entre concurrents, notamment les échanges d'informations, peuvent être un facteur renforçant le processus d'innovation en soi et le progrès technologique<sup>25</sup>. Des études ont en particulier fait valoir que les autorités de la concurrence ne doivent pas opposer d'objection à l'échange d'informations sensibles sur les entreprises des marchés d'innovation, du fait que la circulation des connaissances dans ce secteur réduit l'incertitude élevée liée aux processus de recherche et développement<sup>26</sup>. La réduction de cette

<sup>22</sup> Voir Gianetti, Jentzsch et Spagnolo, 2010.

<sup>23</sup> Affaire C-238/05 du 23 novembre 2006.

<sup>24</sup> Voir Berti, 1996.

<sup>25</sup> Voir Teece, 1994 ; Jorde et Teece, 1993 ; Jorde et Teece, 1990.

<sup>26</sup> On peut trouver un exemple de cette approche dans les Lignes directrices de la Commission européenne sur l'applicabilité de l'article 81 [désormais article 101 du TFUE] du traité CE aux accords de coopération horizontale (dans [2001] JO C 3/2). Dans le contexte des accords de normalisation, la Commission reconnaît que, pour que les avantages économiques de ce type de coopération soient effectifs, « *les informations nécessaires à l'application de la norme doivent être accessibles à tous ceux qui souhaitent pénétrer sur le marché [...]* » (voir paragraphe 169 ; la même formulation figure dans le Projet de Lignes directrices sur l'applicabilité de l'article 101 du traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale, SEC(2010) 528/2, paragraphe 301). De même, le Règlement d'exemption de catégories d'accords de transfert de technologie (voir Règlement (CE) n° 772/2004 de la Commission du 27 avril 2004 concernant l'application de l'article 81, paragraphe 3, du traité à des catégories d'accords de transfert de technologie (dans [2004] JO L 123/11) permet au donneur de la licence de transférer, avec la licence de savoir-faire, « *un ensemble d'informations pratiques, résultant de l'expérience et testées, qui est : (i) secret, c'est-à-dire qu'il n'est pas généralement connu ou facilement accessible, (ii) substantiel, c'est-à-dire important et utile pour la production des produits contractuels, et (iii) identifié, c'est-à-dire décrit d'une façon suffisamment complète pour permettre de vérifier qu'il remplit*

incertitude, de nature à freiner *in fine* les investissements technologiques, favorise la compétitivité des différentes entreprises et le développement global de ce secteur d'activité. En revanche, la circulation d'informations sur ces marchés très dynamiques a une valeur très limitée en termes de concurrence et ne permet pas aux intervenants de coordonner leur action.

### 2.1.2 Avantages éventuels pour les consommateurs

La grande transparence et une meilleure compréhension des conditions du marché peuvent aussi être avantageuses pour les consommateurs. En 1961, Stigler a mis en évidence l'importance des coûts de recherche pour les consommateurs<sup>27</sup>. Les acheteurs doivent connaître les vendeurs et leurs prix, les consommateurs doivent se documenter sur la qualité des produits. Plus il y a d'informations disponibles sur le marché, autrement dit, sur les produits et services et ceux qui les fournissent, plus les consommateurs seront en mesure de faire un choix entre produits concurrents et plus ils seront informés sur les caractéristiques des produits. Les consommateurs peuvent comparer, en parfaite connaissance de cause, les conditions des différentes offres et choisir librement celle qui répond le mieux à leurs besoins. Dans ces circonstances, l'amélioration de la transparence peut leur être bénéfique, puisqu'elle réduit les coûts de recherche. L'économie comportementale a montré que des consommateurs mieux informés peuvent contribuer à développer une concurrence vigoureuse entre fournisseurs.<sup>28</sup> Les publications économiques ont également montré que les asymétries de l'information et l'absence d'informations peuvent non seulement fausser le comportement des consommateurs, mais aussi avoir un impact défavorable sur la concurrence et la compétitivité<sup>29</sup>. Dès lors, une amélioration artificielle de la transparence peut améliorer le bien-être des consommateurs<sup>30</sup>.

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*les conditions de secret et de substantialité* » (voir article 1(i)) (souligné ajouté). Dans les Lignes directrices accompagnant le Règlement d'exemption de catégories d'accords de transfert de technologie (dans [2004] JO C 101/2.), la Commission précise que « [Dans de tels cas, l'Autorité de surveillance AELE] examinera si des mesures de sécurité ont été mises en place pour garantir que des données sensibles ne soient pas échangées. Un expert indépendant ou l'organisme qui délivre les licences peuvent jouer un rôle important à cet égard, en garantissant que les données relatives à la production et aux ventes, qui peuvent s'avérer nécessaires pour calculer et vérifier les redevances, ne soient pas divulguées à des entreprises qui sont en concurrence sur les marchés affectés » (voir paragraphe 234).

<sup>27</sup> Voir Stigler, 1961.

<sup>28</sup> Pour une analyse plus approfondie de cette question, voir Bennett, Fingleton, Fletcher, Hurley et Ruck, 2010.

<sup>29</sup> Voir Klemperer, 1995, selon lequel l'application de frais de changement de prestataire élevés permet aux entreprises de maintenir des prix plus élevés et de réaliser des bénéfices plus importants.

<sup>30</sup> Bennett et Collins (2010) ont, cependant, souligné qu'il importe que l'accès à l'information s'accompagne de la possibilité pour le consommateur d'évaluer cette information et d'agir en fonction. À cet égard, certains chercheurs ont mis en garde contre les effets que peuvent avoir sur les choix des consommateurs et par conséquent sur leur bien-être les stratégies des entreprises visant à submerger leurs clients d'informations sur leurs produits et services à seule fin de rendre plus complexe l'évaluation des informations et, partant, plus difficile le choix des consommateurs. Voir, par exemple, Ellison et Ellison, 2009 ; Gabaix et Laibson, 2006.

### Encadré 3. Table ronde sur la concurrence et la réglementation dans le secteur de la banque de réseau

La banque de réseau est un exemple de secteur où la concurrence est positivement corrélée à l'information accessible aux consommateurs sur le marché. Selon les conclusions de la Table ronde de l'OCDE sur la concurrence et la réglementation dans le secteur de la banque de réseau qui a eu lieu en 2006<sup>31</sup>, mobilité et choix du consommateur sont essentiels pour y stimuler la concurrence. Dans le secteur bancaire, les clients peuvent être liés à leurs banquiers du fait de l'existence des frais de changement d'établissement. Ce verrouillage donne aux banques un pouvoir de marché considérable<sup>32</sup>. Les banques peuvent se livrer agressivement concurrence *ex ante* pour conquérir des clients afin de bénéficier d'un pouvoir de marché *ex post*. C'est la raison pour laquelle les marchés caractérisés par des frais de changement de prestataire peuvent être dans l'ensemble moins concurrentiels car la présence de ces coûts a généralement pour effet d'atténuer la concurrence. La Table ronde a en outre indiqué qu'en vue d'encourager davantage les clients à quitter un établissement financier pour un autre et de réduire la rente que les banques tirent des frais de changement de prestataire, les pouvoirs publics doivent prendre des mesures constructives, y compris des mesures visant à renforcer la transparence et à favoriser la diffusion d'informations sur les prix des produits financiers, ce qui serait souhaitable pour offrir aux clients davantage de possibilités de comparer les établissements financiers entre eux. Une meilleure éducation des clients et une meilleure connaissance des différentes offres financières à leur disposition les inciteraient à quitter un établissement pour un autre et réduiraient la rente que les banques tirent des frais de changement de prestataire.

## 2.2 Événements éventuels anticoncurrentiels des échanges d'informations

Malgré les nombreux aspects pro concurrentiels des systèmes d'échange d'informations entre concurrents, les publications soulignent également que ces dispositifs peuvent être substantiellement préjudiciables pour les consommateurs, principalement du fait qu'ils facilitent la collusion. L'amélioration artificielle de la transparence qui en découle peut permettre aux entreprises d'entreprendre une action concertée et de la faire durer dans le temps. Cela étant, si la coordination est le principal problème, il existe également d'autres théories du préjudice causé reposant sur des effets non coordonnés.

### 2.2.1 Théories du préjudice causé reposant sur des effets coordonnés

Pour réussir à atteindre et à maintenir dans le temps un équilibre collusoire, trois conditions *cumulatives* doivent être réunies<sup>33</sup>.

- *Premièrement*, les parties à l'entente doivent pouvoir se mettre d'accord sur une « ligne de conduite commune » et contrôler que chacune des autres parties s'y plie effectivement. Il n'est pas suffisant que chaque participant soit conscient qu'une action interdépendante sur le marché est profitable à tous, il faut aussi qu'il ait un moyen de vérifier que les autres adoptent la même stratégie et l'appliquent sur la durée. Pour parvenir à s'entendre sur les modalités de la coordination et pour contrôler que tous les participants les respectent, la transparence du marché est essentielle.
- *Deuxièmement*, la coordination doit être viable – autrement dit, les entreprises doivent être incitées à ne pas s'écarter de la ligne de conduite arrêtée en commun. Cela rend nécessaire, en retour, l'application d'un mécanisme de rétorsion efficace. La collusion n'est donc viable à long terme que s'il existe des mécanismes de dissuasion et de sanction crédibles et adéquats que

<sup>31</sup> Voir OCDE, 2006.

<sup>32</sup> Voir Farrell et Klemperer (2006) pour un tour d'horizon récent des frais de changement de prestataire.

<sup>33</sup> Pour plus d'informations, voir Stigler, 1964 ; Carlton et Perloff, 1990 ; Philips, 1995 ; Ivaldi, Rey et Tirole, 2003 ; Scherer et Ross, 1990 et les nombreuses études citées dans ces textes.

l'entente peut mettre en place afin d'assurer qu'aucun de ses participants ne s'écarte de la ligne de conduite commune.

- *Troisièmement*, les réactions prévisibles des consommateurs comme des concurrents ne doivent pas être de nature à nuire à la ligne de conduite commune. Si l'augmentation de prix réalisée en commun est susceptible d'attirer de nouvelles entreprises sur le marché ou si les consommateurs sont suffisamment puissants ou éclairés pour résister à toute tentative d'augmentation en commun des prix, il est peu probable qu'une collusion puisse être mise en place. De ce fait, les réactions des concurrents actuels ou futurs, ainsi que celles des consommateurs, peuvent compromettre les retombées que les participants attendaient de la ligne de conduite commune.

Plusieurs facteurs peuvent faciliter la formation d'ententes, notamment la structure concentrée du marché, la nature homogène des produits, la symétrie des coûts, des obstacles importants à l'entrée/à la sortie, la stabilité des conditions de l'offre et de la demande, l'interaction répétée entre les entreprises et les contacts multi-marchés. Cela étant, la collusion peut être mise en place et maintenue si les entreprises disposent d'une information complète et parfaite sur les grandes variables de la concurrence que sont la structure du marché, les coûts supportés par les entreprises qui prennent part à la collusion, leur stratégie commerciale, etc. À cet égard, la transparence du marché est donc un élément essentiel qui permet aux entreprises d'aligner plus facilement leur stratégie et de détecter et sanctionner rapidement tout comportement s'écartant des termes de l'entente qui ont été convenus. Il s'ensuit que les échanges d'informations peuvent favoriser la collusion s'ils permettent aux participants (i) de s'entendre plus facilement sur les modalités de la coordination, (ii) de vérifier que ces modalités sont bien respectées et (iii) d'être plus à même de sanctionner tout comportement s'écartant des modalités de la coordination ou de réduire le coût de la sanction.

- (iv) Il n'est pas toujours facile de s'entendre sur les modalités d'une action coordonnée sur les prix ou les volumes, notamment lorsque de nombreux équilibres collusoires sont possibles. Les accords d'échange d'informations renforcent artificiellement la transparence du marché et sont donc l'un des facteurs facilitant la collusion<sup>34</sup>. Les échanges d'informations peuvent faciliter cette pratique en offrant aux entreprises des points de coordination ou de convergence<sup>35</sup>. Ils peuvent ainsi permettre aux entreprises de coordonner leur action même en l'absence d'accord anticoncurrentiel explicite.
- (v) L'amélioration artificielle de la transparence permet aux entreprises de contrôler que les participants respectent l'accord et de mieux savoir quand et comment sanctionner les entreprises déviantes<sup>36</sup>. Pour que la collusion soit viable, il est indispensable que les entreprises puissent détecter les comportements s'écartant de l'équilibre collusoire. L'échange d'informations peut donc étayer la stabilité interne de l'accord collusoire car les entreprises disposent de plus de précisions leur permettant de sanctionner les comportements déviants. Si elles ont accès à des

<sup>34</sup> Albaek et al. 1997, analyse ainsi la décision rendue en 1993 par l'autorité danoise de la concurrence sur le marché du béton sur lequel les entreprises avaient décidé de collecter et de publier les prix de transaction, propres à chaque entreprise, de deux catégories de béton prêt à l'emploi dans trois régions du Danemark. Après la première publication, les prix moyens des catégories signalées ont augmenté dans une fourchette de 15 à 20 % en un an. Les auteurs se demandent si cette augmentation est due à une reprise de l'activité et/ou à des contraintes de capacités. Selon eux, une meilleure explication est cependant que la publication des prix a permis aux entreprises de réduire l'intensité de la concurrence sur les prix au sein de l'oligopole, ce qui a entraîné leur augmentation.

<sup>35</sup> Voir Levenstein et Suslow, 2006.

<sup>36</sup> Voir Genesove et Mullin, 2001.

informations précises et individualisées sur leurs concurrents, les entreprises seront davantage en mesure de savoir quelle entreprise a dévié de la ligne de conduite commune et pour quel produit.

- (vi) L'amélioration artificielle de la transparence permet en outre aux entreprises en place de mieux connaître les possibilités qu'ont les nouveaux entrants de pénétrer sur le marché et de réagir de manière coordonnée, ce qui renforce la stabilité de l'accord collusoire.

Compte tenu de ce qui précède, on peut s'attendre à ce que les échanges d'informations entre entreprises concurrentes favorisent la collusion lorsqu'elles réduisent une asymétrie de l'information existante, rendent plus précise l'observation de l'action des concurrents et renforcent la transparence sur leurs futures intentions stratégiques.

### 2.2.2 Théories du préjudice causé reposant sur des effets non coordonnés

Les échanges d'informations peuvent également donner lieu à des effets de verrouillage. Cela peut se produire si l'échange d'informations entre un nombre limité de concurrents leur procure un avantage concurrentiel important sur leurs autres concurrents.<sup>37</sup> Ainsi, selon le projet de Lignes directrices sur l'applicabilité de l'article 101 du traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale, « [un] échange d'informations exclusif pourrait aboutir au verrouillage anticoncurrentiel du marché sur lequel il se produit. Tel sera le cas si l'échange d'informations commerciales sensibles place des concurrents non liés dans une situation concurrentielle désavantageuse par rapport aux entreprises liées dans le cadre du système d'échange. Ce type de verrouillage n'est possible que si l'information concernée présente un caractère particulièrement stratégique sur le plan de la concurrence et couvre une part substantielle du marché en cause »<sup>38</sup>.

## 3. Différentes formes d'échanges d'informations

Les échanges d'informations entre entreprises concurrentes peuvent prendre différentes formes. Dans les paragraphes qui suivent, nous passerons succinctement en revue certains des moyens les plus courants par lesquels elles mettent en place ces circuits d'information. Comme pour d'autres modes de communication, la forme que peuvent prendre les échanges d'informations est souvent sans rapport avec la question essentielle qui se pose à cet égard, c'est-à-dire le fait de savoir s'il y a restriction de la concurrence ou si, au contraire, l'amélioration de la transparence génère, dans les faits, des gains d'efficience qui équilibrent les effets restrictifs de la coopération.

### 3.1 Échanges directs et échanges verticaux

Les échanges directs entre concurrents sont la manière la plus évidente d'échanger des informations et des données. En l'absence de justifications acceptables, les autorités de la concurrence estiment que les échanges directs d'informations sensibles peuvent rarement dissimuler l'objet anticoncurrentiel de tels accords. Pour autant, les échanges d'informations peuvent entrer dans le champ d'application du droit de la concurrence même s'il n'y a pas d'échange direct entre concurrents<sup>39</sup>. Les règles de fixation des prix des accords verticaux peuvent inclure des clauses de réserve ou des obligations d'engagement telles que les clauses de la nation la plus favorisée<sup>40</sup>, d'alignement sur la concurrence ou d'alignement des prix<sup>41</sup>, ou de

<sup>37</sup> Voir Bennett et Collins, 2010.

<sup>38</sup> Voir paragraphe 65.

<sup>39</sup> Voir Auricchio, 2010.

<sup>40</sup> En vertu d'une clause de la nation la plus favorisée (« NPF »), l'acheteur se voit garantir par le vendeur le prix le plus avantageux appliqué aux autres acheteurs. En général, ces clauses sont considérées comme une protection de la partie contractante la plus faible (l'acheteur) qui est ainsi protégée de futurs chocs de prix



prix de vente imposés,<sup>42</sup> qui permettent au fournisseur de savoir immédiatement si ses concurrents ont cassé leurs prix. Ces clauses augmentent donc les chances de détecter les comportements déviants. La clause dite « clause anglaise », aux termes de laquelle les clients d'une entreprise dominante sont tenus de lui divulguer l'existence d'offres concurrentes et de l'informer des conditions générales attachées à ces offres, soulève des préoccupations analogues. L'entreprise dominante est dès lors en droit de s'aligner sur l'offre concurrente ; elle peut donc utiliser l'information recueillie auprès de ses propres clients (qu'elle n'aurait pu obtenir autrement) pour adapter sa stratégie commerciale à ses clients et concurrents<sup>43</sup>. Dans la pratique, les clauses anglaises créent une transparence artificielle du marché en procurant à l'entreprise dominante des informations sur le marché et sur les actions de ses concurrents, qui peuvent lui être très précieuses pour élaborer sa stratégie commerciale.

Les autorités de la concurrence ont examiné des affaires de flux verticaux d'informations (accords dits « en étoile »), dans lesquelles l'échange d'informations commercialement sensibles s'effectue par le biais d'un tiers, par exemple entre un détaillant et un autre par le biais de leur fournisseur commun. En règle générale, les échanges verticaux d'informations entre fabricants et détaillants ne sont pas contestables si les informations transmises ne concernent que les ventes du fabricant en question. Ils peuvent cependant être assimilables à une entente anticoncurrentielle s'ils permettent de connaître les ventes des autres concurrents ou si ces informations ont pour effet de gêner l'activité de détaillants ou d'importateurs parallèles. Le cas échéant, si le flux d'informations est vertical par nature, puisqu'il implique des entreprises exerçant à différents niveaux du marché, l'effet de l'échange est horizontal car il affecte la concurrence entre détaillants ou entre fournisseurs.

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et/ou de tout traitement discriminatoire par rapport aux autres acheteurs (voir Motta, 2004 ; Capobianco, 2007). Cela étant, l'effet d'inhibition de ce type de clauses sur la concurrence sur les prix est évident : si ces clauses sont largement utilisées au sein d'un secteur d'activité, aucun fournisseur ne sera incité à appliquer des réductions de prix agressives (par exemple pour attirer de nouveaux clients), car la réduction de prix sera répercutée sur tous ses clients et se soldera pour lui par un manque à gagner important. De ce fait, les comportements déviants sont d'autant moins probables.

<sup>41</sup> En vertu d'une clause d'alignement sur la concurrence, l'acheteur se voit garantir le prix le plus avantageux proposé par les concurrents du vendeur. Accroissant la transparence sur le marché (du fait que l'acheteur doit informer le vendeur du prix pratiqué par la concurrence), ces clauses peuvent faciliter la collusion horizontale. Dans la pratique, elles fonctionnent comme un mécanisme d'échange d'informations et permettent donc aux entreprises de détecter immédiatement les déviations de prix, puisque leurs clients les leur signaleront sans délai afin de bénéficier du prix le plus avantageux.

<sup>42</sup> Les accords verticaux obligeant ou incitant l'acheteur à ne pas facturer le produit aux clients en dessous d'un prix plancher (le « prix de vente imposé minimum »), à le revendre à un prix donné (le « prix de vente imposé recommandé ») ou à ne pas le facturer au-dessus d'un prix plafond (le « prix de vente imposé maximum ») peuvent avoir une incidence sur la concurrence si ces clauses donnent aux entreprises une meilleure connaissance des prix pratiqués par leurs concurrents. La grande transparence des prix rend plus facile la collusion horizontale entre fournisseurs ou entre distributeurs, du moins sur les marchés concentrés.

<sup>43</sup> Dans l'arrêt qu'elle a prononcé dans l'affaire *Hoffmann-La Roche* (dans [1979] Recueil 461), la CJUE concluait que « *le fait, pour une entreprise en position dominante, d'exiger ou d'obtenir contractuellement de ses clients qu'ils s'obligent à lui signaler les offres de la concurrence, alors que lesdits clients peuvent avoir un intérêt commercial évident à ne pas les révéler, est de nature à aggraver le caractère abusif de l'exploitation de la position dominante* » (paragraphe 106).

#### Encadré 4. Exemples d'affaires d'accords en étoile au Royaume-Uni

Au Royaume-Uni, l'*Office of Fair Trading* (« OFT ») a enquêté dans un certain nombre d'affaires d'échanges verticaux d'informations.

Dans l'affaire dite du *double vitrage*<sup>44</sup>, l'OFT a conclu que le plus grand fournisseur britannique d'un produit entrant dans la fabrication de double vitrage s'était entendu secrètement avec quatre de ses distributeurs de double vitrage en vue de fixer et/ou de maintenir des prix imposés minimum pour le produit chimique de l'entreprise UOP Ltd. D'après l'enquête de l'OFT, l'entente secrète avait pour origine la décision prise par UOP de régler un différend entre ses distributeurs qui s'étaient plaints de la politique de prix trop agressive de leurs concurrents. L'OFT a démontré que chaque distributeur pouvait raisonnablement s'attendre à ce que les autres distributeurs mettent fin à la guerre des prix à la suite de l'intervention du fabricant. Les distributeurs avaient connaissance de l'implication de chacun d'entre eux et savaient que leur action s'inscrivait dans une stratégie globale.

Dans l'affaire *des copies de tenues de football*<sup>45</sup>, l'initiative de l'entente secrète est venue des détaillants et non des fabricants. L'enquête a révélé l'existence de plusieurs accords ou pratiques concertées visant à fixer un prix minimum pour certaines copies de tenues de football, notamment les maillots les plus vendus. Les ententes étaient gérées au moyen de réunions informelles et d'une surveillance des détaillants. Les contacts indirects entre détaillants concurrents avaient lieu par l'intermédiaire d'un fournisseur commun et l'OFT a tenu à la fois le fabricant et les détaillants pour responsables d'une pratique concertée ayant pour objet une coordination des prix. Le comportement contesté était le résultat de pressions exercées sur le fabricant (Umbro) par un détaillant (JJB). JJB avait menacé Umbro d'annuler ses commandes en raison des rabais agressifs pratiqués par un concurrent. Umbro est intervenu pour imposer une augmentation des prix, encourager un accord de fixation des prix entre les détaillants et faciliter une collusion sur les prix entre les détaillants en échangeant avec eux des informations sur les prix de vente au détail.

L'OFT a mené une enquête sur une entente trilatérale analogue dans l'affaire *des jouets et jeux*<sup>46</sup>. Dans cette affaire, l'OFT a conclu que deux détaillants et le fabricant Hasbro avaient conclu une entente illicite sur les prix portant sur la vente de jouets et de jeux. La cour d'appel, qui a examiné la décision rendue par l'OFT, a confirmé qu'Hasbro avait conclu deux accords bilatéraux distincts avec chacun des deux détaillants en cause, aux termes desquels chacun d'eux convenait de revendre certains jouets et jeux Hasbro au prix de détail recommandé par le fabricant. En outre, Hasbro ayant divulgué les intentions de prix de chacun des deux détaillants à l'autre, il existait bien une entente trilatérale entre Hasbro et les deux détaillants.

Conformément à la jurisprudence des tribunaux britanniques<sup>47</sup> qui ont examiné les décisions de l'OFT, il est essentiel de prouver que les parties ont connaissance de l'accord et d'établir le contexte de l'échange d'informations. Il doit être démontré que lorsqu'un détaillant divulgue à ses fournisseurs ses intentions de prix futures, les circonstances de cette divulgation doivent être telles que l'on puisse considérer que le détaillant avait pour intention que le fournisseur fasse usage de ces informations afin d'influer sur les conditions du marché en communiquant ces informations aux autres détaillants ou qu'il prévoyait qu'il agirait ainsi<sup>48</sup>. L'OFT doit démontrer que les informations ont réellement été communiquées et que le destinataire les utilise pour déterminer sa propre stratégie tarifaire future<sup>49</sup>.

<sup>44</sup> Décision de l'OFT du 8 novembre 2004 (CA 98/08/2004).

<sup>45</sup> Décision de l'OFT du 1<sup>er</sup> août 2003 (CA98/06/2003).

<sup>46</sup> Décision de l'OFT du 21 novembre 2003 (CA98/8/2003).

<sup>47</sup> Voir *Argos Ltd/Littlewoods v Office of Fair Trading*, [2006] EWCA CIV 1318, Affaires n° 2005/1071 et 1074 ; et *Umbro Holdings Ltd v Office of Fair Trading* (jugement sur la sanction imposée) et *JJB Sports v Office of Fair Trading*, [2006] EWCA Civ 1318, Affaire n° 2005/1623.

<sup>48</sup> Voir Bennett et Collins, 2010.

### 3.2 *Échanges par l'intermédiaire d'associations professionnelles/sectorielles*

Dans de nombreux cas, les associations professionnelles et sectorielles offrent aux entreprises un cadre idéal pour échanger des informations. Le fait qu'il n'y ait pas de contact direct entre les concurrents mais que les communications soient gérées par une association professionnelle ne change pas nécessairement l'appréciation de cette pratique à l'aune des règles de concurrence. Le rôle institutionnel (et légitime) de ces associations étant de recueillir et de diffuser auprès de leurs membres les informations relatives au secteur concerné, il importe tout particulièrement de faire une distinction entre les cas où la diffusion des informations sous-tend une entente secrète entre les membres de ceux où l'activité de l'association accroît l'efficacité du marché, dans le meilleur intérêt tant des concurrents et des consommateurs<sup>50</sup>. Pour se prémunir de tout risque de violation du droit de la concurrence, les associations professionnelles doivent mettre en place des mesures de sécurité supplémentaires contre les effets anticoncurrentiels découlant de leurs missions institutionnelles. Elles doivent ainsi – si possible – mettre les informations qu'elles recueillent à la disposition de ceux qui n'en sont pas membres, assurer que la participation à des programmes de compilation de statistiques est facultative et ouverte à ceux qui n'en sont pas membres, vérifier qu'elles ne sont pas le lieu de discussions plus poussées entre leurs membres sur les informations diffusées, contrôler l'incidence de ces informations sur les stratégies commerciales et veiller à leur autonomie de gestion vis-à-vis de leurs membres.

### 3.3 *Diffusions de données sur le marché par des tiers indépendants*

Dans de nombreux cas, les informations sur la structure du marché sont diffusées par un cabinet de conseil indépendant (comme Nielsen, Dataquest, IDC, etc.) dont l'activité consiste à suivre les marchés et à recueillir, compiler et vendre des données sur les secteurs et des études de marchés aux intervenants intéressés. Ces études de marché, souvent commandées par les entreprises elles-mêmes, reposent dans une large mesure sur des informations publiquement accessibles et/ou sur les renseignements détenus en propre par les cabinets de conseil et/ou sur des données collectées au stade de la vente au détail. Bien que les études de marché soient un moyen de diffuser des informations parfois très sensibles, les autorités de la concurrence sont plus hésitantes à contester ces activités. Cela pour plusieurs raisons.

- *Premièrement*, il n'y a pas d'échange réel d'informations entre concurrents, puisque les informations sont recueillies de manière indépendante par les cabinets de conseil sur le marché et non directement auprès des fournisseurs. L'une des conditions d'application des règles relatives aux ententes (à savoir l'existence d'un accord entre concurrents) n'est donc pas remplie<sup>51</sup>.
- *Deuxièmement*, les informations utilisées pour ces études de marché sont généralement accessibles à tous ; si le marché est transparent en soi, l'échange d'informations n'ajoute donc aucun risque de collusion supplémentaire.
- *Troisièmement*, le recours à des consultants spécialisés pour collecter des informations sur le marché permet de réaliser des réductions de coûts qui renforcent l'efficacité des entreprises.

<sup>49</sup> Dans la décision qu'elle a rendue dans l'affaire *UK Agricultural Tractor Exchange* (dans [1992] JO L 68/19), la Commission européenne a également mis en doute la validité d'un système d'échange d'informations vertical entre fabricants et détaillants. La Commission a notamment établi qu'un tel échange n'est pas contestable si les informations transmises ne concernent que les ventes du fabricant en question, mais peut être assimilable à une infraction à l'article 101 du TFUE si ces informations permettent (i) de connaître les ventes des concurrents et (ii) de gêner l'activité de concessionnaires ou d'importateurs parallèles.

<sup>50</sup> Voir OCDE, 2007 ; Capobianco 2004, Bissocoli, 2000.

<sup>51</sup> Voir Décision de la Commission, *Wirtschaftsvereinigung Stahl*, [1998] JO L 1/10, paragraphe 58.

Si, en revanche, l'étude de marché préparée par le cabinet de conseil indépendant est commandée en commun par plusieurs intervenants du marché (autrement dit, s'il y a un accord entre concurrents pour donner conjointement mandat au consultant) et si les entreprises lui fournissent elles-mêmes les informations, le cabinet de conseil est susceptible de jouer un rôle analogue à celui d'une association professionnelle et s'expose de ce fait davantage à l'action répressive des autorités de la concurrence.

### 3.4 *Échanges d'informations publiques/non publiques*

On peut faire une distinction entre *transparence publique du marché* et *transparence non publique du marché*. Les échanges d'informations publiques aboutissent à une transparence du marché au profit de toutes les parties prenantes, y compris les consommateurs ; les échanges d'informations non publiques ne renforcent la transparence que du côté de l'offre. Une étude a démontré que la transparence publique accroît la concurrence, alors que la transparence non publique est susceptible de la restreindre<sup>52</sup>. Un échange d'informations est réellement public s'il rend les données échangées accessibles à tous les fournisseurs et clients dans des conditions identiques. Le fait que des informations soient échangées publiquement peut limiter la probabilité de collusion sur le marché, dans la mesure où les concurrents qui ne prennent pas part à l'échange, les entrants potentiels et les acheteurs peuvent être à même de limiter l'effet restrictif potentiel sur la concurrence.

Les études empiriques montrent que les effets positifs des annonces publiques sur les consommateurs contrebalancent les éventuels effets collusoires de la transparence qu'elles génèrent<sup>53</sup>. De ce fait, il peut être très difficile de déterminer, dans la pratique, si les échanges d'informations publiques ont un effet proconcurrentiel ou facilitent simplement la collusion. Un facteur important, que soulignent les études, est le fait que les communications entre entreprises ne peuvent guère servir à faciliter la coordination, sauf si les informations sont vérifiables. Les informations qui ne sont pas vérifiables peuvent être écartées en tant que « *cheap talk* » et ne sont donc pas prises en compte<sup>54</sup>. Certains auteurs ont pourtant laissé entendre que le « *cheap talk* » peut contribuer à une convergence de vues et permettre aux entreprises de parvenir à un accord sur des stratégies collusoires acceptables<sup>55</sup>. Même le « *cheap talk* », c'est-à-dire l'échange d'informations qui ne sont pas immédiatement vérifiables, peut être un objet de préoccupation dans la mesure où les projets annoncés peuvent généralement être vérifiés ultérieurement ou révoqués et où les annonces erronées peuvent être sanctionnées, ce qui peut suffire, dans le cadre de relations commerciales à long terme, à susciter leur crédibilité<sup>56</sup>. C'est la position qu'a adoptée le ministère américain de la Justice dans l'affaire de l'ATP<sup>57</sup>, fondée sur un « *cheap talk* », à savoir l'annonce d'une augmentation des prix à venir, s'accompagnant toutefois de la possibilité de l'annuler ou de la modifier avant son entrée en vigueur. Le ministère américain de la Justice a soutenu que si les termes de l'accord sont complexes, mais qu'il

<sup>52</sup> Voir Kühn et Vives, 1995.

<sup>53</sup> Voir Motta, 2004. La loi risque moins d'être sous-appliquée en ce qui concerne les annonces publiques (voir Bennett et Collins, 2010). C'est pourquoi il convient d'analyser leurs effets sur la concurrence au cas par cas. À l'instar des échanges d'informations non publiques, si les annonces publiques ne doivent être présumées anticoncurrentielles en tout état de cause, la plupart des autorités de la concurrence sont très prudentes et les examinent de très près pour apprécier les avantages/efficacités éventuels qui peuvent les justifier en application des règles de concurrence.

<sup>54</sup> Voir Baliga et Morris, 2002.

<sup>55</sup> Voir Overgaard et Møllgaard, 2007.

<sup>56</sup> Voir Nitshe et von Hinten-Reed, 2004 ; Bigoniy, Fridolfsson, Le Coq et Spagnolo, 2010.

<sup>57</sup> Voir analyse ci-dessous.

existe néanmoins une volonté commune de parvenir à un accord, le « *cheap talk* » peut aider les entreprises à atteindre un équilibre collusoire<sup>58</sup>.

### 3.5 Échanges d'informations et annonces unilatérales

Même si les échanges directs de données entre entreprises concurrentes constituent à l'évidence l'exemple d'échange le plus simple, des formes d'échanges plus subtiles peuvent également être anticoncurrentielles. Les tribunaux ont toujours hésité à condamner les annonces publiques unilatérales de prix futurs pour leur caractère anticoncurrentiel en raison des avantages que peuvent en tirer les consommateurs en termes de comparaison des prix et d'adaptation de leurs stratégies d'achat. Cette approche s'inscrit dans la droite ligne de la théorie économique voulant que la divulgation publique d'informations sensibles rende la demande plus élastique et réduise de ce fait la probabilité de coordination du côté de l'offre<sup>59</sup>.

Dans l'affaire de la pâte à bois<sup>60</sup>, la CJUE a ainsi précisé que les annonces publiques de prix « constituent une action sur le marché qui n'est pas de nature à réduire les incertitudes de chaque entreprise sur les attitudes qu'adopteront ses concurrents, car, au moment où une entreprise y procède, elle n'a aucune assurance quant au comportement qui sera suivi par les autres »<sup>61</sup>. La Cour a conclu que le système des annonces de prix représente une réaction rationnelle au fait que les acheteurs et les vendeurs ont les uns et les autres besoin d'obtenir les informations à l'avance afin de limiter leur risque commercial sur un marché de long terme.

Cela étant, les informations rendues publiques par le biais des annonces de prix peuvent tenir lieu d'échanges indirects d'informations ou servir à « signaler » aux concurrents les intentions futures d'une entreprise. Cette action peut donner aux concurrents la possibilité d'aligner leurs prix. C'est la raison pour laquelle les autorités de la concurrence ont envisagé d'appliquer aussi, éventuellement, les règles de concurrence aux échanges d'informations effectués sous la forme d'une publication de données, par exemple sur un site Internet commun accessible à un groupe de concurrents, ou d'une réaction publique aux annonces d'autres concurrents relatives à des questions stratégiques. Les autorités de la concurrence se sont efforcées de mettre au point des règles pour faire une distinction entre les annonces de prix ayant des effets positifs et celles qui sont potentiellement collusoires.

Dans l'affaire *Airline Tariff Publishing (ATP)*, le ministère américain de la Justice était déterminé à porter devant les tribunaux une affaire d'affichage des prix, facilitant la collusion, au sein d'une base de données des tarifs aériens conjointement détenue. Le système ATP était une coentreprise créée par huit grandes compagnies aériennes américaines centralisant tous les tarifs aériens recueillis auprès des compagnies et les actualisant une fois par jour pour les communiquer à toutes les compagnies aériennes et aux grandes plateformes électroniques de réservation utilisées par les agents de voyage. Le ministère américain de la Justice a fait valoir que le système ATP permettait aux transporteurs de réagir rapidement aux prix pratiqués de part et d'autre, rendant l'effet de dissuasion plus présent, ce qui en soi favorisait la

<sup>58</sup> Voir contribution des États-Unis dans OCDE, 2007. Voir aussi Farrell et Rabin, 1996.

<sup>59</sup> Selon Kühn, les annonces publiques de prix comportent des formes d'engagement vis-à-vis des consommateurs qui peuvent avoir des effets suffisamment importants en termes d'efficacité pour ne pas être réputées constituer une infraction aux règles de concurrence (voir Kühn, 2001).

<sup>60</sup> Voir CJEU, *Ahlström et autres contre Commission des Communautés européennes*, dans [1993] Recueil p. I-1307.

<sup>61</sup> Voir paragraphe 64.

collusion<sup>62</sup>. En outre, le système ATP pouvait servir à coordonner de futures actions destinées à éliminer l'incertitude stratégique. Il permettait aux compagnies aériennes de se livrer à un « *cheap talk* », c'est-à-dire de discuter entre elles sans prendre d'engagement sur une ligne de conduite précise tout en « négociant », sans avoir besoin de se rencontrer pour se coordonner afin de mettre en place une collusion. L'affaire ATP a été réglée par jugement convenu en 1994<sup>63</sup>.

#### 4. Échanges d'informations dans la pratique d'un échantillon de juridictions

##### 4.1 Union européenne

L'article 101 du TFUE, qui interdit les accords et les pratiques concertées entre concurrents ayant pour objet ou pour effet de restreindre le jeu de la concurrence au sein du marché commun, ne fait pas figurer les échanges d'informations dans la liste non exhaustive des pratiques anticoncurrentielles énumérées au premier paragraphe. La législation actuelle relative aux échanges d'informations trouve donc son origine dans la pratique décisionnelle de la Commission européenne et la jurisprudence des tribunaux européens.

On peut faire remonter la première déclaration de principe de la Commission européenne sur les échanges d'informations entre concurrents à la Communication de 1968 relative aux accords, décisions et pratiques concertées concernant la coopération entre entreprises (la « Communication »)<sup>64</sup>. Cette Communication établit pour la première fois que les échanges d'informations peuvent entrer dans le champ d'application de ce qui était alors l'article 85 du traité CE (désormais article 101 du TFUE), mais admettait que l'appréciation de cette pratique pouvait varier en fonction de la structure et des caractéristiques du secteur concerné et des circonstances propres à chaque affaire. Elle soulignait déjà certains des facteurs susceptibles d'avoir une influence sur cette appréciation, et notamment le fait (i) que seuls les échanges d'informations susceptibles d'avoir une incidence sur la concurrence sont à prendre en compte aux termes des règles de concurrence énoncées dans le Traité et (ii) qu'une restriction de la concurrence peut, notamment, se réaliser dans un marché oligopolistique de produits homogènes.

La Commission européenne a précisé plus avant sa politique en matière d'échanges d'informations en 1977<sup>65</sup>, après une série de décisions rendues dans différentes affaires<sup>66</sup> et conformément aux décisions des

<sup>62</sup> Plus précisément, ATP a conçu et fait fonctionner le système d'une manière facilitant inutilement les interactions coordonnées entre les compagnies aériennes de sorte qu'elles pouvaient (1) se communiquer plus efficacement entre elles les futures augmentations de prix, les restrictions et la suppression des rabais, (2) établir des liens entre les modifications de tarifs proposées pour une ou plusieurs liaisons interurbaines et les modifications de tarifs proposées pour d'autres liaisons interurbaines, (3) contrôler les changements apportés par les autres compagnies, y compris les modifications de tarifs non disponibles à la vente et (4) réduire l'incertitude quant aux intentions de prix des autres compagnies.

<sup>63</sup> Voir contribution des États-Unis dans OCDE, 2001 et OCDE, 2007.

<sup>64</sup> Dans [1968] JO C075, p. 3. La Communication de 1968 a été remplacée en 2001 par les Lignes directrices de la Commission sur l'applicabilité de l'article 81 aux accords de coopération horizontale (voir JO C 3 du 06.01.2001, p. 2) qui, explicitement, ne traitent pas les accords d'échange d'informations entre concurrents (voir paragraphe 10). Cela étant, il est largement entendu que les déclarations de principe figurant dans la Communication sont encore valides aujourd'hui.

<sup>65</sup> Voir Septième rapport sur la politique de la concurrence, paragraphe 5 et suivants.

<sup>66</sup> Voir en particulier *VVVF*, dans [1969] JO L 168 ; *IFTRA-Fabricants de verre d'emballage* [1974] JO L 160 ; *IFTRA-Producteurs d'aluminium*, dans [1975] JO L 228 ; *Cobelpa/VNP*, dans [1977] JO L 242/10 et *Parchemin végétal*, dans [1978] JO L 70/54.

tribunaux européens rendues dans l'affaire *de l'entente sur le sucre*<sup>67</sup>. Elle a notamment réaffirmé sa déclaration de principe selon laquelle il n'existe pas une seule manière en soi d'appréhender les échanges d'informations, mais qu'une approche au cas par cas est essentielle pour apprécier si un système d'échange d'informations a un effet restrictif sur la concurrence. En outre, dans sa déclaration de principe de 1977, la Commission européenne énumérait les trois grands critères qu'elle applique pour apprécier ces accords. Premièrement, la structure du marché est susceptible d'avoir une incidence sur la probabilité que ces types de contacts puissent inciter des concurrents à coordonner leur action commerciale<sup>68</sup>. Deuxièmement, la nature et l'ampleur des échanges d'informations ont toutes deux une incidence importante sur la probabilité que le destinataire des informations puisse les utiliser dans les faits pour coordonner ses stratégies commerciales et non pour intensifier la concurrence qu'il exerce<sup>69</sup>. Troisièmement, la Commission européenne se demande également si l'échange d'informations est de nature privée – sachant que cette forme de coopération entre entreprises n'améliore normalement que la connaissance du marché du côté du vendeur – ou a aussi un impact public plus large sur les consommateurs, qui seront de ce fait à même de comparer les différentes offres et de renforcer la concurrence.

Même si la première déclaration de principe de la Commission européenne sur cette question remonte à 1968, ce n'est qu'au début des années 90, avec l'affaire *UK Agricultural Tractor Exchange*<sup>70</sup> qu'elle a eu à se prononcer sur une affaire pour laquelle elle a procédé à un examen complet des effets restrictifs potentiels d'un système autonome d'échange d'informations. La décision de la Commission européenne a été examinée en appel à la fois par le Tribunal de première instance des Communautés européennes<sup>71</sup> et par la CJUE (anciennement Cour de Justice européenne)<sup>72</sup>. Ces deux tribunaux ont rejeté les appels et ont pleinement avalisé l'approche de la Commission.

<sup>67</sup> Voir CJUE, Affaires jointes 40/73 à 48/73, 50/73, 54/73 à 56/73, 111/73, 113/73 et 114/73, *Coöperatieve Vereniging "Suiker Unie" UA et autres contre Commission des Communautés européennes*, Recueil 1975 p. 01663.

<sup>68</sup> La grande transparence engendrée par les échanges d'informations accroît l'interdépendance entre les entreprises et réduit l'intensité de la concurrence sur les marchés oligopolistiques, dans la mesure où la meilleure connaissance du marché (autrement dit la transparence) permet aux participants de surveiller les stratégies des participants au système et de réagir rapidement (et efficacement) aux mesures prises par chacun d'entre eux.

<sup>69</sup> La Commission européenne surveille de près les échanges d'informations sensibles et de secrets commerciaux (autrement dit les quantités produites et vendues, les prix, les conditions de rabais, les conditions générales de vente, de livraison et de paiement, etc.), mais ne s'oppose pas à l'échange de données statistiques présentant les chiffres de production et de vente qui n'identifient pas individuellement les différentes entreprises et ne ventilent pas les données par produit, pays ou période plus que cela n'est nécessaire à des fins statistiques.

<sup>70</sup> Voir Décision de la Commission, *UK Agricultural Tractor Exchange*, dans [1992] JO L 68/19.

<sup>71</sup> Voir Tribunal de première instance des Communautés européennes, *John Deere Ltd contre Commission des Communautés européennes*, Recueil 1994 p. II-957 ; Tribunal de première instance des Communautés européennes, *Fiatagri et New Holland Ford contre Commission des Communautés européennes*, Recueil 1994 p. II-905.

<sup>72</sup> Voir CJUE, *J. Deere contre Commission des Communautés européennes*, [1998] Recueil p. I-3111 ; voir CJUE, *New Holland Ford contre Commission des Communautés européennes*, [1998] Recueil p. I-3175.

### **Encadré 5. L'affaire *UK Agricultural Tractor Registration Exchange***

En Europe, la plus grande affaire d'échange d'informations entre concurrents reste l'affaire *UK Agricultural Tractor Registration Exchange*. La décision rendue en 1992 par la Commission européenne, qui reflétait largement ses déclarations de principe antérieures, concluait qu'un système complexe d'échange d'informations entre fabricants de tracteurs britanniques était contraire aux règles de concurrence communautaires<sup>73</sup>. Cette décision a ensuite fait l'objet de deux appels distincts, le premier porté devant le Tribunal de grande instance des Communautés européennes et le second devant la CJUE. Ces deux tribunaux ont soutenu la décision de la Commission, confirmant son analyse et ses conclusions.

La Commission européenne a fondé sa décision concernant l'infraction sur quatre principales observations :

- La nature très concentrée du marché, également caractérisé par d'importants obstacles à l'entrée et qui était protégé de la concurrence représentée par les importations en provenance de pays situés en dehors de la Communauté.
- La nature confidentielle des informations échangées.
- Le caractère extrêmement détaillé des informations échangées (ventilation détaillée par produits, par zones géographiques et par périodes), engendrant une transparence encore plus grande sur un marché déjà très concentré.
- Le fait que les participants au système d'échange se soient régulièrement rencontrés au sein d'une association sectorielle leur offrant une enceinte pour entretenir des contacts.

La Commission a conclu qu'un échange d'informations précises et sensibles sur un marché fortement concentré et non exposé à des pressions concurrentielles extérieures accroît la probabilité de collusion sur le marché. La décision a relevé deux effets anticoncurrentiels. Premièrement, la grande transparence sur un marché déjà très concentré rend impossible toute concurrence cachée résiduelle (ou « effet de surprise ») entre les participants au système d'échange d'informations, qui sont de ce fait moins exposés à la réaction agressive des autres intervenants du marché (restriction de la concurrence *interne* entre les participants au système d'échange). Sur un marché très concentré, la « concurrence résiduelle » tient en effet essentiellement à la part d'incertitude et de secret qui entoure l'état du marché. Deuxièmement, l'échange d'informations dresse des obstacles à l'entrée pour ceux qui ne participent pas au système d'échange (restriction de la concurrence *externe*), qu'ils deviennent ou non membres du système. Si un nouveau fournisseur choisit de ne pas devenir membre du système, il est désavantagé par le fait qu'il n'a pas accès aux informations de marché détaillées et précises sur les autres fournisseurs qui sont accessibles à ceux qui en sont membres. S'il choisit, au contraire, de devenir membre du système, il est contraint de révéler à ses concurrents ses propres informations confidentielles de manière très détaillée, ce qui permettra aux fournisseurs en place d'utiliser ces informations pour empêcher le nouveau membre d'appliquer des stratégies de marché agressives.

Après l'affaire *UK Agricultural Tractor Exchange*, la Commission européenne a appliqué en diverses occasions les principes définis dans cette décision, en précisant plus avant leur champ d'application. La décision rendue dans l'affaire *UK Agricultural Tractor Exchange* a notamment entraîné un certain nombre de notifications de la part de systèmes d'échange d'informations sollicitant une exemption en vertu de l'article 101(3) du TFUE. Certains exemples sont analysés ci-dessous.

<sup>73</sup>

La Commission européenne a rejeté la demande d'exemption individuelle des accords constituant l'échange car elle a conclu que le système d'échange ne réunissait pas les conditions d'exemption définies à l'article 81(3) du traité CE, désormais article 101(3) du TFUE.



Dans la décision *sur l'entente du carton* rendue en 1994<sup>74</sup>, la Commission européenne a ordonné aux parties de mettre fin à l'échange d'informations commerciales sur les livraisons, les prix, les arrêts de production, les commandes en carnet, les taux d'utilisation des machines pour soutenir l'application des restrictions de l'article 101 du TFUE, même si ces informations étaient communiquées sous une forme agrégée. Le tribunal de grande instance des Communautés européennes a annulé la partie de la décision de la Commission se rapportant à l'échange de données statistiques qui ne peuvent, selon le tribunal, être utilisées à des fins anticoncurrentielles puisqu'elles ne peuvent être utilisées pour en induire des informations individualisées sur les différentes entreprises<sup>75</sup>. Dans l'affaire *CEPI-Cartonboard*<sup>76</sup>, la Commission a examiné la demande d'attestation négative d'un nouveau système d'échange entre producteurs de carton, destiné à remplacer le système d'échange d'informations censuré par la Commission en 1994. Le système modifié permettait à l'association de continuer à collecter et à diffuser auprès de ses membres d'importantes informations statistiques, en conformité avec les règles de concurrence de l'UE. Même si l'accord notifié ne prévoyait qu'un échange d'informations statistiques (et non la divulgation de données individualisées) sans discussions parallèles sur ces statistiques ni communication d'informations sensibles (prix, prévisions de production ou de taux d'utilisation des capacités), la Commission a demandé instamment la modification du système ayant fait l'objet de la notification car il permettait dans certains cas aux parties d'identifier les différents participants à partir de l'analyse des données agrégées<sup>77</sup>.

Dans la décision *Wirtschaftsvereinigung Stahl*<sup>78</sup>, la Commission européenne a conclu qu'un échange mensuel d'informations confidentielles à l'échelon des entreprises (parts de marché individualisées et données sur les livraisons par produit selon les qualités et par secteur consommateur) était contraire au droit de la concurrence de l'UE<sup>79</sup>. La décision se fondait en grande partie sur le caractère concentré du secteur de l'acier en Allemagne et sur l'existence de liens structurels entre les participants. La Commission a en outre conclu que l'échange d'informations sur les livraisons permettait aux concurrents de connaître les entreprises qui tentaient d'augmenter leur part de marché et de prendre des mesures de rétorsion à leur rencontre, éliminant de ce fait les incitations à se concurrencer efficacement.

En 1998, la Commission européenne a exempté par lettre de confort un accord entre les membres de l'EUDIM, une association de distributeurs en gros de matériaux de construction ayant pour objet – entre

<sup>74</sup> Voir Décision de la Commission européenne dans l'affaire d'entente sur le *carton*, dans [1994] JO L 243/1.

<sup>75</sup> Voir Tribunal de grande instance des Communautés européennes, *Sarrió SA contre Commission des Communautés européennes*, [1998] Recueil p. II-01439, paragraphe 281. Le Tribunal a ajouté que « *le seul fait qu'un système d'échange d'informations statistiques puisse être utilisé à des fins anticoncurrentielles ne le rend pas contraire à l'article 85, paragraphe 1, [désormais article 101, paragraphe 1] du traité, puisqu'il convient, dans de telles circonstances, d'en constater in concreto les effets anticoncurrentiels* ».

<sup>76</sup> Voir Communication de la Commission européenne faite conformément à l'article 19 paragraphe 3 du règlement n° 17 du Conseil concernant une demande d'attestation négative ou d'exemption au titre de l'article 85, paragraphe 3 du traité CE (Affaire n° IV/34.936/E1 - CEPI-Cartonboard) - Journal officiel C 310 du 19/10/1996 p. 0003 - 0006.

<sup>77</sup> Tel a été, par exemple, le cas dans les pays où deux concurrents seulement participaient au système d'échange d'informations. La Commission a notamment exigé que, lorsque deux constructeurs ou un petit nombre seulement de constructeurs sont présents sur un marché géographique ou de produits en cause, les données soient agrégées avec celles d'autres pays et/ou avec celles relatives à d'autres produits du même pays.

<sup>78</sup> Voir Décision de la Commission, *Wirtschaftsvereinigung Stahl*, [1998] JO L 1/10.

<sup>79</sup> Cette affaire relevait du champ d'application de l'article 65 du traité établissant la Communauté européenne du charbon et de l'acier, puisque les participants à l'accord exerçaient leur activité dans le secteur de l'acier.

autres – d'échanger des informations confidentielles sur un certain nombre de produits vendus aux membres de l'association. Dans cette notification<sup>80</sup>, l'EUDIM faisait valoir que le système d'échange d'informations n'avait pas d'effet restrictif sur la concurrence car, en échangeant des informations sur les prix et les conditions d'achat individuels, ses membres cherchaient à renforcer leur pouvoir de négociation vis-à-vis de leurs fournisseurs, en tentant d'obtenir les meilleurs prix (les plus avantageux). D'après l'EUDIM, l'échange d'informations sur les prix d'achat visait à réduire les coûts, ce qui permettait à ses membres de faire plus efficacement concurrence aux autres grossistes dont les coûts étaient moins élevés, comme les magasins de matériel de bricolage. La Commission européenne a partagé l'avis de l'EUDIM, considérant que les informations échangées, à caractère général ou individuel (comme les prix d'achat propres à chaque membre ou les rabais consentis par le fournisseur), n'avaient pas pour effet de restreindre la concurrence sur le marché de la distribution de gros concerné.

Plus récemment, les tribunaux européens se sont intéressés aux échanges d'informations dans deux affaires. Dans l'affaire *Asnef/Equifax*<sup>81</sup>, la CJUE s'est penchée sur un système d'échange d'informations mis en place par l'Asnef, l'association espagnole des établissements financiers. L'Asnef avait mis sur pied un fichier en ligne contenant des informations sensibles sur les emprunteurs existants et potentiels (comme les antécédents de crédit, les défauts de paiement, les soldes créditeurs, etc.) afin de mieux informer les prêteurs des risques liés à l'octroi de crédit, fichier de nature à entraîner une disponibilité plus grande et plus efficiente du crédit. Ce fichier ayant été conçu pour limiter le risque de crédit encouru par les établissements financiers<sup>82</sup>, la Cour a conclu que ce système d'échange n'avait pas, en principe, pour objet de restreindre la concurrence. Pour aboutir à cette conclusion, la CJUE a examiné le contexte de l'accord, les marchés en cause et les caractéristiques propres au système concerné, telles que sa finalité, les conditions d'accès et de participation à l'échange, ainsi que la nature des informations échangées, leur périodicité et leur importance pour la fixation des prix, des volumes ou des conditions de la prestation, concluant que l'échange d'informations n'avait pas, par sa nature même, pour objet de restreindre ou de fausser le jeu de la concurrence.

Dans l'affaire *T-Mobile Netherlands*<sup>83</sup>, sa plus récente décision dans ce domaine, la CJUE a adopté un point de vue strict vis-à-vis des échanges d'informations. L'affaire concernait une unique réunion entre cinq opérateurs offrant des services de télécommunication mobile sur le marché néerlandais qui portait notamment sur la réduction des rémunérations standard des revendeurs pour les abonnements. La Cour a estimé que « [...] il y a lieu de considérer comme ayant un objet anticoncurrentiel un échange d'informations susceptible d'éliminer des incertitudes dans l'esprit des intéressés quant à la date, à l'ampleur et aux modalités de l'adaptation que l'entreprise concernée doit mettre en œuvre [...] ». Elle a en outre confirmé qu'un échange d'informations, même limité, entre concurrents concernant des affaires n'ayant pas de lien direct avec les prix à la consommation et ayant lieu dans le cadre d'une unique réunion, peut être contraire aux règles de concurrence.

En réaction à de récentes décisions rendues par les tribunaux et en vue de donner des orientations dans ce domaine du droit, la Commission européenne a publié en mai 2010, aux fins de consultation, une version révisée des Lignes directrices sur l'applicabilité de l'article 101 du traité sur le fonctionnement de

<sup>80</sup> Une description des accords notifiés figure dans la Communication de la Commission conformément à l'article 19, paragraphe 3, du règlement n° 17 du Conseil (Affaire n° IV/33.815, 35.842 - EUDIM) - *Journal officiel C 111 du 17/04/1996 p. 0008 - 0010*.

<sup>81</sup> Voir Affaire C-238/05, *Asnef-Equifax/Ausbanc*, arrêt du 23/11/2006.

<sup>82</sup> La Cour a conclu que le risque lié à l'octroi de prêts est atténué par la réduction de la disparité existant entre les informations dont disposent les établissements financiers et celles détenues par les emprunteurs.

<sup>83</sup> Voir Affaire C-8/08, *T-Mobile Netherlands BV e.a. contre Raad van bestuur van de Nederlandse Mededingingsautoriteit*, arrêt du 4 juin 2009.

l'Union européenne aux accords de coopération horizontale<sup>84</sup>. Le projet de Lignes directrices, s'inspirant à la fois de la jurisprudence de l'UE et de la pratique décisionnelle de la Commission européenne offre pour la première fois des orientations générales permettant de savoir quand les échanges d'informations entre entreprises concurrentes sont susceptibles d'être contraires aux règles de concurrence communautaires<sup>85</sup>. Dans ce projet de Lignes directrices, il est précisé que les échanges d'informations peuvent avoir des effets restrictifs sur la concurrence s'ils entraînent une coordination de l'action concurrentielle ou un verrouillage du marché. Dans la plupart des cas, l'appréciation des systèmes d'échange d'informations dépendra des caractéristiques du marché (telles que la concentration, la transparence, la stabilité, la complexité, etc.), de la couverture du marché et de la nature des informations échangées (leur sensibilité commerciale, leur disponibilité publique). En ce qui concerne les échanges d'informations concernant une action future sur les prix ou les quantités, le projet de Lignes directrices précise qu'ils sont généralement contraires, « par objet », à l'article 101 du TFUE. La Commission appréciera en outre les échanges d'informations à l'aune de l'article 101, paragraphe 3, et les justifiera s'il en découle une intensification de la concurrence ou d'importants gains d'efficience.

## 4.2 États-Unis

Aux États-Unis, l'article 1 du Sherman Act [loi antitrust] de 1890<sup>86</sup> stipule que « tout contrat, toute association [...] ou toute entente délictueuse visant à entraver les échanges ou le commerce [...] est déclaré illicite ». Comme dans l'Union européenne, le droit américain de la concurrence n'interdit pas, ni même ne décourage, les échanges d'informations. Les tribunaux et les autorités répressives ont reconnu les avantages que peuvent avoir certains programmes d'échange d'informations pour la concurrence. Les autorités de la concurrence et les tribunaux ont cependant identifié des cas où ces échanges peuvent constituer un facteur facilitant la collusion et doivent par conséquent être interdits. Un certain nombre de décisions rendues dans le passé par les tribunaux américains ont établi une frontière entre les échanges d'informations autorisés sur les prix et ceux qui sont interdits.

Dans ses premiers jugements, portant principalement sur les échanges d'informations entre membres d'associations professionnelles, la Cour suprême s'inquiétait surtout des échanges d'informations sur les prix et la production, notamment lorsque ces échanges comportaient « *des suggestions à la fois sur les prix et la production futurs* »<sup>87</sup>. La Cour estimait que l'échange de ce type d'informations avait pour but de réduire la production et d'augmenter les prix<sup>88</sup>. La Cour concentrait aussi son attention sur le caractère privé du mécanisme de partage d'informations, soulignant que si la diffusion des informations se limitait aux membres d'associations, elle empêchait leurs clients de s'en servir pour négocier des tarifs plus

<sup>84</sup> Voir Affaire SEC(2010) 528/2, consultable sur le site Internet de la Direction générale de la concurrence de la Commission européenne.

<sup>85</sup> La Communication de la Commission concernant l'application de l'article 101, paragraphe 3, du traité sur le fonctionnement de l'Union européenne à certaines catégories d'accords, de décisions et de pratiques concertées dans le secteur des assurances (dans [2010] JO C 82/20) et les Lignes directrices relatives à l'application de l'article 81 du traité CE aux services de transport maritime (dans [2008] JO C 245/2) contiennent des orientations supplémentaires sur la manière dont la Commission européenne appréhende les échanges d'informations dans certains secteurs.

<sup>86</sup> 15 U.S.C. 1-7.

<sup>87</sup> Voir l'affaire *American Column and Lumber Co v. US*, 257 US 377 (1921), points 398-99.

<sup>88</sup> Ce jugement a été critiqué pour ne pas avoir pris en compte l'impact favorable sur la concurrence des échanges d'informations. Les juges Brandeis et Holmes ont contesté la décision, n'ayant pas constaté de preuves d'une quelconque tentative sérieuse de limiter la production et ayant estimé qu'il ne s'agissait que d'une simple communication de « *market facts* » [informations sur le marché]. Les juges ayant contesté la décision ont conclu que l'interdiction de l'échange d'informations pouvait se solder par une élimination de la concurrence dans l'industrie du bois.

favorables auprès desdits membres<sup>89</sup>. Les échanges d'informations publiques, en revanche, peuvent être favorables à la concurrence si les informations sont diffusées le plus largement possible (autrement dit, si les informations sont accessibles non seulement aux membres de l'association, mais aussi à leurs clients) et sous une forme agrégée, même si les échanges nécessitent des informations détaillées sur chaque vente, prix, information mensuelle sur la production et nouvelle commande<sup>90</sup>.

Dans des affaires plus récentes, la Cour a centré son appréciation sur l'impact effectif des échanges d'informations sur la concurrence et a reconnu l'importance de l'examen de facteurs comme la concentration du marché, la nature du produit et les caractéristiques de la demande. La Cour a également conclu que les échanges réciproques d'informations sur les prix peuvent correspondre à une action concertée suffisante pour établir l'existence d'une entente délictueuse anticoncurrentielle aux termes de l'article 1 du Sherman Act<sup>91</sup>. Elle a en outre exclu une approche d'interdiction systématique des échanges d'informations en tant que tels (*per se*) pour apprécier les échanges d'informations au moyen d'une approche fondée sur la règle de raison. La Cour a fait valoir que l'impact favorable ou défavorable de ces pratiques sur la concurrence dépend de divers facteurs et qu'elles doivent être nécessairement évaluées au cas par cas<sup>92</sup>.

En avril 2000, la *U.S. Federal Trade Commission* et le ministère américain de la Justice ont publié les *Antitrust Guidelines for Collaborations among Competitors*<sup>93</sup> [Lignes directrices sur la collaboration entre concurrents]. S'inspirant des arrêts des tribunaux, ces Lignes directrices reconnaissent que les échanges d'informations entre concurrents peuvent être favorables à la concurrence et sont souvent suffisamment

<sup>89</sup> Voir l'affaire *US v. American Linseed Oil Co*, 262 US 371 (1923), où la Cour s'est prononcée contre un autre programme d'échange d'informations dans le cadre d'une association, qui concernait des listes de prix, des fluctuations de prix et les noms et adresses des acheteurs bénéficiant de tarifs spéciaux.

<sup>90</sup> Voir Affaire *Maple Flooring Manufacturers Association v. US*, 268 US 563 (1925).

<sup>91</sup> Dans le cadre de l'affaire *US v. Container Corporation of America et al.* (393 US 333 (1969)), par exemple, la Cour a conclu qu'un accord d'échange d'informations entre des fabricants d'emballage, sans preuve de leur intention de participer à un système d'entente sur les prix, était anticoncurrentiel. Les commandes individuelles de boîtes en carton étaient personnalisées en fonction des besoins du client et les prix étaient mentionnés individuellement aux acheteurs potentiels. Le produit était fongible, la demande inélastique et la concurrence se fondait sur les prix. À la demande d'un concurrent, chaque participant fournissait des informations sur le dernier prix facturé ou mentionné à chaque client. Cette pratique devait être réciproque et le prix devait correspondre à celui proposé sur le moment. Les défendeurs représentaient environ 90 % du marché en question et l'échange d'informations sur les prix était rare et irrégulier. Pourtant, l'échange d'informations sur les prix stabilisait les prix en les tirant vers le bas.

<sup>92</sup> Dans l'affaire *US v. United States Gypsum Co. et al.*, 438 US 422 (1978), la Cour a examiné l'échange d'informations entre plusieurs fabricants de plaques de plâtres à propos des prix courants facturés aux différents clients. Les défendeurs ont fait valoir que le but d'une telle pratique était de s'assurer que toute réduction de prix proposée était nécessaire pour parvenir à un prix compétitif. La Cour a affirmé que « l'échange d'informations sur les prix ou autres entre concurrents n'a pas systématiquement un effet anticoncurrentiel ; d'ailleurs, de telles pratiques peuvent, dans certaines circonstances, renforcer l'efficacité économique et accroître, plutôt que restreindre, la concurrence sur les marchés. Aussi estimons-nous que ces échanges d'informations ne constituent pas per se une violation du Sherman Act. [...] Un certain nombre de facteurs, dont essentiellement la structure du secteur concerné et la nature des informations échangées, passent généralement pour des indicateurs de l'impact favorable ou défavorable sur la concurrence de ce type de communication entre vendeurs. [...] Les échanges d'informations sur les prix courants sont, bien entendu, les plus susceptibles de générer des effets anticoncurrentiels et, bien qu'ils ne soient pas illégaux per se, ils passent régulièrement pour être contraires au Sherman Act. [...] » (point 441, n. 16).

<sup>93</sup> Disponible sur <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

indispensables pour donner lieu aux avantages proconcurrentiels de certaines collaborations<sup>94</sup> ; il peut, par exemple, être indispensable de partager une technologie, un savoir-faire ou un élément de propriété intellectuelle pour qu'une collaboration dans le domaine de la recherche-développement puisse présenter des avantages en termes de concurrence. Il n'empêche que les autorités américaines relèvent des cas où l'échange d'informations, sur un marché où il y a une collaboration ou encore sur un marché où les intervenants sont des concurrents effectifs ou potentiels, peut augmenter la probabilité d'une collusion sur des aspects comme les prix, la production ou d'autres variables sensibles à la concurrence. Les préoccupations, du point de vue de la concurrence, dépendent de la nature des informations partagées. Toutes choses égales par ailleurs :

- Les échanges d'informations sur les prix, la production, les coûts ou la planification stratégique sont davantage susceptibles de susciter des inquiétudes que les échanges d'informations relatives à des variables moins sensibles sur le plan concurrentiel.
- Les échanges d'informations sur l'exploitation actuelle et future de l'entreprise sont davantage susceptibles de susciter des inquiétudes que les échanges d'informations rétrospectives.
- Les échanges de données individualisées sur les entreprises sont davantage susceptibles de susciter des inquiétudes que les échanges de données agrégées qui ne permettent pas aux destinataires d'identifier les données spécifiques à une entreprise donnée.

En général, dans des circonstances normales, les Lignes directrices excluent également que le ministère de la Justice et l'autorité de la concurrence remettent en cause la collaboration entre concurrents quand les parts de marché couvertes par la collaboration et ceux qui y participent ne représentent collectivement pas plus de 20 % du marché en question.

Les Lignes directrices complètent les instructions de 1996 publiées conjointement par le ministère de la Justice et l'autorité de la concurrence sur les programmes d'échange d'informations dans le secteur de la santé<sup>95</sup>. Pour contribuer à la protection contre le risque de collusion, la déclaration conjointe définit des « zones de sécurité » en termes de concurrence au sein desquelles les autorités ne remettront pas en cause les accords d'échange d'informations sur les prix, les rabais ou les méthodes de paiement. Des zones de sécurité peuvent être établies sous réserve que :

- les enquêtes sur les prix ou les rémunérations sont gérées par un tiers (par exemple, un acheteur, un organisme public, un cabinet de conseil spécialisé dans la santé, un établissement universitaire ou une association professionnelle),
- les informations fournies par les participants à l'enquête se fondent sur des données ayant plus de trois mois,
- et au moins cinq prestataires communiquent les données sur lesquelles se fonde chaque statistique diffusée, aucune donnée de chaque prestataire ne représentant plus de 25 % de cette statistique en termes de pondération, et toute information diffusée étant suffisamment agrégée pour ne pas permettre aux destinataires de connaître les prix facturés ou la rémunération versée par un prestataire donné.

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<sup>94</sup> Voir section 3.31(b).

<sup>95</sup> Voir Statements of Antitrust Enforcement Policy in Health Care (Health Care Statements) (1996).

### 4.3 Canada

En décembre 2009, le Bureau canadien de la concurrence a publié un ensemble de lignes directrices sur la collaboration entre concurrents<sup>96</sup>. Une partie de ces Lignes directrices porte spécifiquement sur l'échange d'informations entre concurrents, tant directement que par l'intermédiaire d'associations professionnelles<sup>97</sup>. Les Lignes directrices reconnaissent que, pour la plupart, ces échanges ne soulèvent pas de préoccupations au regard de la législation, car les concurrents évitent généralement d'échanger des informations sensibles sur le plan de la concurrence afin de conserver leur avantage concurrentiel. Dans certains cas, un accord portant sur une divulgation ou un échange unilatéral d'informations entre concurrents peut nuire à la concurrence en réduisant les incertitudes quant aux stratégies des concurrents et en limitant l'indépendance commerciale de chaque entreprise.

Pour évaluer les accords d'échange d'informations, le Bureau tient compte de divers facteurs :

- *La nature de l'information échangée* (autrement dit si elle est sensible sur le plan de la concurrence)<sup>98</sup>. Un accord conclu entre des parties pour divulguer ou échanger des informations importantes pour le jeu de la concurrence peut sensiblement réduire ou empêcher la concurrence. C'est le cas, par exemple, des informations sur les prix, les coûts, les conditions de négociation, les plans stratégiques, les stratégies de marketing ou autres variables significatives pour la concurrence. Lorsque des entreprises concurrentes s'entendent pour échanger des informations sensibles sur le plan concurrentiel, il peut être plus facile pour elles d'agir de concert, limitant ou éliminant ainsi la concurrence. En général, le Bureau ne considère pas que les informations accessibles au public sont sensibles sur le plan concurrentiel, mais il peut s'inquiéter d'un accord entre concurrents visant à divulguer des informations sur les prix futurs si un tel accord a des effets anticoncurrentiels et si l'efficacité est la raison invoquée pour le justifier.
- *L'actualité de l'information échangée* (à savoir si l'information concerne des activités passées, actuelles ou futures)<sup>99</sup>. Les échanges d'informations sur les activités actuelles ou futures sont davantage susceptibles d'avoir un impact négatif sur la concurrence et suscitent de ce fait plus d'inquiétudes que ceux qui concernent des activités passées. Cela étant, un accord conclu pour divulguer des informations rétrospectives peut tout de même soulever des inquiétudes si les informations donnent une indication significative sur les prix futurs ou sur d'autres facteurs importants sur le plan concurrentiel.
- *La mesure dans laquelle les parties participant à l'échange d'informations possèdent ou posséderont vraisemblablement un pouvoir de marché*<sup>100</sup>. Le Bureau ne remet pas en cause les accords d'échange d'informations sauf si les parties possèdent ou posséderont vraisemblablement un pouvoir de marché ou si le marché concerné est concentré de sorte que les entreprises peuvent chercher à y exercer de façon coordonnée un pouvoir de marché.
- *La façon dont l'information est recueillie et diffusée* (par exemple, si l'information est partagée directement entre concurrents ou agrégée par un tiers)<sup>101</sup>. Les informations échangées

<sup>96</sup> Disponible sur le site Internet du Bureau canadien de la concurrence.

<sup>97</sup> Voir section 3.7.

<sup>98</sup> Voir section 3.7.1.

<sup>99</sup> Voir section 3.7.2.

<sup>100</sup> Voir section 3.7.3.

<sup>101</sup> Voir section 3.7.3.

directement entre concurrents sont davantage susceptibles de susciter des préoccupations que celles fournies à un tiers indépendant<sup>102</sup>. En outre, les informations agrégées de manière à ne pas divulguer de données propres à une entreprise en particulier sont moins susceptibles de soulever des inquiétudes que les informations échangées sous forme désagrégée.

- La mesure dans laquelle les éventuels effets anticoncurrentiels sont neutralisés par les gains en efficacité engendrés par l'accord d'échange d'informations et si ces derniers ont plus de poids<sup>103</sup>. Les Lignes directrices canadiennes abordent aussi la question de savoir si des gains d'efficacité générés par les échanges d'informations entre concurrents l'emportent sur les effets anticoncurrentiels qui en découlent. Les Lignes directrices précisent qu'il existe différents types de gains d'efficacité qui peuvent être obtenus grâce à cet échange d'informations : réductions des coûts fixes et variables par suite de la rationalisation des fonctions distribution, ventes et publicité ; meilleur usage de la distribution et de l'entreposage ; spécialisation accrue dans les fonctions distribution, ventes et commercialisation ; utilisation plus soutenue d'une infrastructure de réseau ; et améliorations apportées à la qualité des produits.

#### 4.4 Japon

La *Japan Fair Trade Commission* (Commission japonaise de la concurrence) ou « JFTC » a publié des Lignes directrices concernant les activités des associations professionnelles dans le cadre de la loi anti-monopole en octobre 1995. Bien que les Lignes directrices examinent explicitement les effets possibles sur la concurrence des activités des associations professionnelles, cette analyse détaillée de l'évaluation des mécanismes d'échange d'informations au sein des associations professionnelles menée par la JFTC peut s'appliquer même en dehors de ce contexte.

Selon la section 9 des Lignes directrices, certains échanges peuvent être contraires à la loi anti-monopole. La JFTC estime notamment qu'une collusion tacite peut être facilitée par un échange d'informations portant spécifiquement sur des facteurs importants sur le plan concurrentiel, concernant les activités actuelles ou futures des entreprises concernées, comme des projets spécifiques ou des prévisions de prix ou de quantités de biens ou de services fournis ou reçus, des précisions sur les transactions réalisées avec les clients et les plafonds des projets d'investissements dans les sites de production.

En revanche, les échanges d'autres types d'informations ne sont guère susceptibles d'être contraires à la loi anti-monopole. En font partie les informations sur l'utilisation des produits destinées aux consommateurs, les informations générales sur les évolutions technologiques, les compétences en matière de gestion, les conditions sur le marché, les évolutions législatives ou administratives, les informations rétrospectives sur les activités commerciales des entreprises, les informations statistiques, les informations sur les matériaux ou les indicateurs technologiques qui permettent une analyse comparative équitable et objective, les informations générales sur l'évolution globale de la demande et les informations relatives à la solvabilité des clients destinées à garantir la sûreté des transactions.

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<sup>102</sup> Pour évaluer un accord d'échange d'informations, le Bureau examine également les mesures de sécurité prévues dans le cadre de l'organisation et de la gestion de la collaboration pour empêcher ou minimiser la diffusion d'informations sensibles sur le plan concurrentiel. Par exemple, les participants à la collaboration peuvent limiter la diffusion d'informations au personnel qui n'intervient pas dans les activités de ventes ou de marketing, ou peuvent empêcher le personnel des ventes ou du marketing de participer à une co-entreprise de recherche-développement.

<sup>103</sup> Voir Section 3.7.3.

## 4.5 Italie

En Italie, l'Autorité italienne de la concurrence (l'« AGCM ») a été confrontée à un certain nombre d'affaires d'échange d'informations. Dans l'affaire *RAS-Generali/IAMA Consulting*<sup>104</sup>, par exemple, l'AGCM a enquêté sur une pratique concertée entre compagnies d'assurance dans le cadre de laquelle toutes les entreprises obtenaient un accès à la même base de données qui comportait des informations détaillées sur des produits d'assurance-vie et de retraite<sup>105</sup>. L'AGCM a conclu que l'acquisition de cette base de données par les sociétés d'assurance équivalait à une pratique concertée d'échanges mutuels horizontaux d'informations sensibles. La décision est intéressante dans la mesure où la structure du marché n'était pas très concentrée<sup>106</sup> et où les informations saisies dans la base de données étaient publiques. L'AGCM a fait valoir que, même sur des marchés non oligopolistiques, un échange d'informations peut restreindre la concurrence s'il porte sur les prix et si les consommateurs ne bénéficient pas de cette transparence accrue. Quant à la nature publique de ces informations, l'AGCM a avancé que (i) les informations contenues dans la base de données étaient fournies par les sociétés d'assurance elles-mêmes et n'étaient pas recueillies indépendamment sur le marché par le cabinet de conseil ; et que (ii) les informations contenues dans la base de données avaient une valeur ajoutée par rapport à celles que les différentes sociétés d'assurance pouvaient collecter directement sur le marché et auprès de sources publiques.

L'AGCM a aussi examiné les mécanismes d'échange d'informations dans le cadre d'ententes verticales. Dans l'affaire *Baby Milk*<sup>107</sup>, elle a considéré que les contacts indirects entre concurrents étaient suffisants pour présumer l'existence d'une collusion. Dans cette affaire, les sociétés de production de lait remettaient aux pharmacies une liste leur suggérant des prix au détail, qui étaient ensuite intégrés dans une base de données accessibles à tous les pharmaciens et à tous les producteurs de lait. L'autorité craignait que tous les producteurs ne proposent des rabais comparables aux pharmacies et aux grossistes. En outre, dans l'affaire *Philip Morris/Cigarette Retailers*<sup>108</sup>, l'AGCM s'est trouvée confrontée à une situation où il n'y avait pas eu d'échange direct d'informations entre concurrents (autrement dit, pas d'effets horizontaux directs), l'échange s'étant déroulé entre entreprises exerçant leur activité à différents niveaux du marché<sup>109</sup>.

<sup>104</sup> Voir Bollettino 40/2004.

<sup>105</sup> La base de données fournissait à l'acheteur un accès à des informations sensibles sur tous les produits d'assurance et de retraite disponibles sur le marché italien. Les informations étaient désagrégées (c'est-à-dire disponibles pour chaque produit séparément) et communiquées à l'acheteur chaque trimestre.

<sup>106</sup> CR4 : 56 % ; HHI : 1.000.

<sup>107</sup> Dans Bollettino 40/2005.

<sup>108</sup> Dans Bollettino 24/2004.

<sup>109</sup> En février 2003, Philip Morris (PM) a informé l'AGCM que PM avait l'intention de conclure un accord avec un grand nombre de débits de tabac. Selon l'accord, les débitants de tabac devaient transmettre à PM, à titre exclusif, des informations sur le volume de ventes de leur débit, et notamment (i) le volume des ventes journalières de PM selon les marques, (ii) le volume des ventes journalières agrégées du débitant, et (iii) les ventes journalières pour chaque marque de cigarettes vendue par le débitant. PM devait recevoir ces informations chaque mois. L'AGCM a décidé d'ouvrir une enquête au motif que PM gagnerait un avantage concurrentiel sur ses concurrents en leur empêchant l'accès à un ensemble identique ou comparable d'informations détaillées et sensibles sur la vente de cigarettes en Italie. Elle a considéré que l'initiative de PM, susceptible de lui procurer des informations détaillées exclusives et journalières sur les ventes de ses concurrents, pouvait aller au-delà de ce qui était nécessaire à PM pour contrôler l'évolution de ses propres activités. L'enquête a d'ailleurs révélé que les débitants choisis par PM représentaient le meilleur groupe statistique pour un tel exercice du fait de leur nombre, leur taille, leur emplacement et leur type d'activités. La clause d'exclusivité empêchait à l'évidence les concurrents de reproduire un échantillon aussi représentatif de débitants. Au cours de l'enquête, PM a supprimé l'exclusivité, éliminant ainsi la principale inquiétude en termes d'entente verticale soulevée par l'AGCM. Parallèlement, PM a



L'AGCM a néanmoins conclu que l'échange d'informations dans le cadre d'une entente verticale pouvait indirectement affecter la concurrence horizontale entre fournisseurs de cigarettes car il portait sur des informations sensibles concernant la vente de cigarettes<sup>110</sup>.

#### 4.6 Afrique du Sud

En Afrique du Sud, la *Competition Commission* (Commission de la concurrence) a examiné les mécanismes d'échange d'informations dans un certain nombre de secteurs d'activité. En mars 2006, par exemple, la Commission a reçu une plainte contre les principaux fabricants de produits laitiers alléguant qu'ils fixaient directement et indirectement les prix d'achat du lait auprès des producteurs au moyen d'un mécanisme d'échange d'informations sur les prix<sup>111</sup>. Les échanges d'informations entre les fabricants étaient suivis de discussions sur les prochaines baisses de prix et leur ampleur, sur les décisions stratégiques des différents fabricants, y compris de communications sur les modifications des structures de prix, sur les prix payés par différents fabricants dans différentes régions et sur les futures évolutions tarifaires. Les informations échangées entre concurrents comportaient des informations non publiques, individualisées, ventilées et futures sur les prix. La Commission a conclu que la suppression des incertitudes concernant les initiatives des concurrents, qui sont l'essence même de la concurrence, peut en soi limiter la concurrence, surtout sur des marchés extrêmement concentrés où l'amélioration de la transparence permet aux entreprises de mieux prédire ou anticiper les actions de leurs concurrents. D'autres mécanismes d'échange d'informations ont été examinés par la *Competition Commission* sur d'autres marchés, y compris ceux des minoteries, des fertilisants, de l'acier et du ciment<sup>112</sup>.

### 5. Facteurs examinés lors de l'appréciation des accords de partage d'informations

Il ressort de l'examen des principales études sur la communication entre concurrents et de la pratique décisionnelle des autorités de la concurrence en matière d'échanges d'informations que les autorités de la concurrence tiennent compte d'un certain nombre de facteurs pour décider si les communications entre concurrents constituent ou non une restriction de la concurrence. Elles examinent notamment : (i) la structure du marché sur lequel les participants aux échanges interviennent ; (ii) le type de produits auquel les informations se réfèrent ; et (iii) la nature et la qualité des informations échangées. Bien que, dans la pratique, les autorités de la concurrence se concentrent sur ces facteurs, d'autres aspects doivent être pris en compte pour déterminer si les échanges d'informations risquent de faciliter ou non une collusion sur le marché. Par exemple, certains marchés offrent déjà intrinsèquement une très grande transparence (notamment ceux où des informations doivent être obligatoirement mises à la disposition du public en vertu de certaines règles). Dans ces cas, il est rare que les échanges d'informations renforcent la

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avancé que l'accord avait des effets favorables sur le plan concurrentiel et, en particulier, qu'il générerait des gains d'efficacité pour la distribution, en évitant notamment les ruptures de stocks, principal facteur orientant la demande vers les marques concurrentes.

<sup>110</sup> L'accord a été modifié par Philip Morris et l'AGCM a clos l'enquête en concluant à une absence d'infraction.

<sup>111</sup> Voir le *Tribunal Consent Order* dans l'affaire entre la Commission et Lancewood Cheese. Tribunal Case n° 103/CR/Dec06.

<sup>112</sup> Voir les affaires examinées dans Nair et Mncube, 2009 et Morphet et van Dijk, 2009. L'une des raisons qui expliquent le grand nombre d'ententes et de mécanismes d'échanges d'informations en Afrique du Sud est le degré élevé de réglementation qui, dans certains cas, autorise explicitement de telles pratiques.

transparence et, par conséquent, ces échanges peuvent être neutres vis-à-vis de la constitution d'une collusion<sup>113</sup>.

D'ailleurs, sur certains marchés, indépendamment du degré de transparence, il est difficile de mettre durablement en place une collusion. Cela peut être le cas lorsque les entreprises ne sont pas incitées à former une entente<sup>114</sup> car :

- les structures de coûts des entreprises concernées, leurs parts de marché, leurs capacités et/ou leur degré d'intégration verticale sont asymétriques, tous ces facteurs limitant les incitations générales des entreprises à atteindre un certain degré de coordination,
- l'innovation est un facteur de concurrence très important sur le marché et peut permettre à une entreprise d'acquérir des avantages considérables par rapport aux autres,
- les conditions de l'offre et de la demande sont trop imprévisibles et instables pour rendre probable une quelconque coordination,
- certaines entreprises ne participent pas à l'échange d'informations et pourraient remettre en cause l'issue de toute coordination attendue,
- les obstacles à l'entrée sont peu élevés et l'arrivée éventuelle de nouveaux entrants a un effet disciplinaire sur la coordination présumée,
- les clients ont, vis-à-vis de leurs fournisseurs, un pouvoir compensateur suffisant pour rendre la coordination instable,
- les mesures de rétorsion n'ont guère de chance d'être efficaces, ce qui incite fortement les participants à s'écarter de l'entente.

Tous ces facteurs doivent aussi être pris en compte, car ils peuvent influencer sur l'appréciation des mécanismes d'échange d'informations.

### **5.1 La structure du marché et la nature du produit concerné**

Moins les entreprises sont nombreuses sur le marché, plus une entente peut s'établir facilement<sup>115</sup>. Si un marché est fortement concentré ou s'il n'y a que quelques grandes entreprises du côté de l'offre, les

<sup>113</sup> Selon le Projet de Lignes directrices de la Commission européenne sur l'applicabilité de l'article 101 du Traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (le « TFUE ») : « *Moins le degré de transparence préalable du marché est élevé, plus l'échange d'informations présentera d'intérêt aux fins d'une collusion. Toutefois, un échange d'informations qui contribue de façon limitée à la transparence sur un marché est moins susceptible d'avoir des effets négatifs substantiels qu'un échange d'informations améliorant sensiblement la transparence. C'est donc la combinaison du niveau de transparence préalable et de la façon dont l'échange d'informations affecte celui-ci qui déterminera le degré de probabilité d'une incidence fortement négative des informations.* » (voir paragraphe 74)

<sup>114</sup> Pour un examen de ces facteurs et de leur importance pour le mécanisme de collusion, voir Ivaldi, Jullien, Rey, Seabright et Tirole, 2003.

<sup>115</sup> Même si l'indication d'un chiffre précis n'est pas forcément la meilleure approche, des preuves empiriques montrent que, sur les marchés où il existe plus de cinq concurrents, il est avantageux de rester à l'écart d'une entente, tandis que lorsqu'il y a moins de cinq concurrents, ceux-ci trouveront tous rentables de s'entendre (voir Selten, 1973).

coûts que présente l'organisation d'une collusion durable seront faibles ; il est plus facile de décider des conditions d'une coordination et de s'assurer que ces conditions sont bel et bien respectées par chaque participant ; les mécanismes de sanction sont plus efficaces car les entreprises qui trichent seront exposées à des pertes nettement supérieures. En revanche, sur des marchés fragmentés, les entreprises sont davantage incitées à s'écarter d'une entente pour tenter de gagner des parts de marché sur leurs concurrents et le contrôle de ces comportements déviants est bien plus difficile. Ces incitations à dévier de l'accord remettent en cause la stabilité d'une entente.

Aussi les autorités de la concurrence et les tribunaux sont-ils particulièrement prudents lorsqu'ils examinent les échanges d'informations sur les marchés oligopolistiques. Dans l'affaire *UK Agricultural Tractor Registration Exchange*, par exemple, la Commission européenne a interdit l'échange d'informations sur un marché où quatre entreprises détenaient ensemble près de 80 % du marché et où il existait d'importants obstacles à l'entrée. En revanche, dans l'affaire de l'*EUDIM*<sup>116</sup>, la Commission européenne a considéré que l'échange d'informations individualisées et confidentielles entre les concurrents n'avait pas d'effet appréciable sur la structure concurrentielle du marché, qui était trop fragmentée (avec plus de 3 000 entreprises) pour être considérée comme oligopolistique.

#### **Encadré 6. Échange d'informations sur les marchés non oligopolistiques**

La valeur de preuve qu'a la structure de marché est cependant imparfaite. Il existe des exemples de secteurs très concentrés qui sont extrêmement concurrentiels et qui se caractérisent par une concurrence féroce. Inversement, on sait que des ententes ont existé et prospéré pendant de nombreuses années dans des secteurs où étaient présents de nombreux concurrents et où les produits étaient différenciés<sup>117</sup>.

La pratique des autorités de la concurrence n'apporte pas de réponses claires à la question de savoir si un échange d'informations peut être jugé anticoncurrentiel dans le cas d'un marché concurrentiel. Dans la décision qu'elle a rendue dans l'affaire *UK Agricultural Tractor Registration Exchange*, la Commission européenne n'a ainsi pas écarté la possibilité que, dans certains cas, les communications entre concurrents puissent favoriser une collusion même sur des marchés fragmentés/non oligopolistiques. Sur cette question précise, on notera une décision de l'Autorité italienne de la concurrence, qui a conclu à une restriction de la concurrence pour un échange d'informations entre sociétés d'assurance concurrentes sur un marché qui ne passait pas pour oligopolistique. Dans la décision concernant l'affaire *RC Auto*<sup>118</sup>, l'AGCM a en effet soutenu que même sur des marchés non oligopolistiques, un échange d'informations peut restreindre la concurrence s'il porte sur les prix et si les consommateurs n'ont pas bénéficié de l'amélioration de la transparence. L'AGCM a argué que, malgré l'absence de concentration du marché, les augmentations constantes des prix et les stratégies commerciales parallèles témoignaient d'un manque de concurrence sur le marché. L'AGCM a aussi fait valoir que pour s'assurer de la stabilité d'une entente, il est davantage nécessaire d'instituer un système d'échange d'informations, sur des marchés non concentrés, où le coût de la collecte d'informations sur des concurrents est nettement plus élevé, que sur les marchés sur lesquels quelques intervenants seulement exercent leur activité<sup>119</sup>. En pareils cas, la charge de la preuve est assurément plus lourde pour les autorités de la concurrence. Si le marché est fragmenté, les autorités de la concurrence doivent fournir des preuves convaincantes et crédibles confirmant que, malgré l'absence de concentration du marché, d'autres facteurs sont susceptibles de donner lieu à une collusion tacite.

<sup>116</sup> Voir Communication faite conformément à l'article 19 paragraphe 3 du règlement n°17 du Conseil (affaire n°IV/33.815, 35.842 - *EUDIM*), dans [1996] Journal officiel C 111 du 17/04/1996 p. 0008 - 0010.

<sup>117</sup> Voir OCDE, 2006, paragraphe 15.

<sup>118</sup> Voir Bollettino 30/2000.

<sup>119</sup> Pour un commentaire sur la décision de l'AGCM, voir Porrini, 2004 ; Grillo, 2002.

En théorie, une collusion sur les prix est plus facile à conclure, contrôler et maintenir au fil du temps si l'entente concerne des produits homogènes. Si les caractéristiques des produits diffèrent en termes de qualité et de durée de vie, par exemple, il peut être difficile pour des entreprises de détecter si les fluctuations des ventes sont dues à un changement de préférences de la part des acheteurs ou à des stratégies dans le cadre desquelles des entreprises trichent en réduisant secrètement leurs prix. Cela étant, les économistes font aussi remarquer que, dans certaines circonstances, la nature différenciée des produits peut aussi faciliter une collusion. Dans le cas de produits différenciés, les comportements déviants sont en fait moins rentables car l'entreprise qui triche ne peut espérer acquérir d'importantes parts de marché au moyen de cette stratégie, sauf si elle est prête à réduire considérablement ses prix. Dans de telles circonstances, la différenciation des produits rend donc une collusion plus probable.

Les échanges d'informations sur les marchés de produits homogènes sont davantage susceptibles de faciliter la collusion. Par exemple, depuis ses premières déclarations de principe, la Commission européenne a établi une distinction entre les échanges d'informations sur les marchés de produits homogènes et les échanges d'informations sur les marchés de produits différenciés. Il est plus facile pour les entreprises de se coordonner sur le prix d'un seul produit homogène que sur ceux de nombreux produits différenciés. Sur les marchés de produits différenciés, l'accès à des informations sensibles détaillées sur les concurrents peut ne pas être utile pour prévoir le comportement futur des concurrents et donc ne pas entraîner un renforcement de leur coordination. La difficulté qu'ont les concurrents à comparer des produits différenciés rend les informations difficiles à interpréter et à individualiser. Aussi la Commission européenne n'a-t-elle pas exprimé d'inquiétudes dans l'affaire de l'*EUDIM*<sup>120</sup>, où les informations échangées couvraient un éventail de plus d'un million de produits. La Commission européenne a donc conclu que, dans ce cas, même l'échange d'informations individualisées et confidentielles n'avait pas d'effet restrictif sur la concurrence.

## 5.2 *Les caractéristiques des informations échangées*

Un deuxième ensemble de considérations à prendre en compte aux fins de l'appréciation des systèmes d'échange d'informations concerne les caractéristiques des informations échangées. Les autorités de la concurrence établissent généralement des distinctions en fonction de la nature, de la précision et de la fréquence des informations échangées. Ces distinctions se justifient du fait que les informations ne permettent pas toutes aux concurrents de connaître les futures stratégies de chacun des participants à l'échange.

### 5.2.1 *Le sujet*

En ce qui concerne le sujet sur lequel portent les informations échangées, les informations n'ont pas toutes la même pertinence. Les informations confidentielles (autrement dit, les informations sur la nature même de l'activité, comme les prix, les quantités, les stratégies commerciales et autres informations du même type) ne doivent généralement pas être divulguées aux concurrents. Les autorités de la concurrence sont souvent très suspicieuses quand les concurrents s'échangent des informations sur ces variables extrêmement sensibles sur le plan concurrentiel. Les échanges d'informations passent pour contribuer à établir, administrer et mettre en œuvre une entente entre concurrents. Or ces informations en particulier sont considérées comme essentielles pour permettre aux concurrents de contrôler tout comportement déviant.

<sup>120</sup> Voir Communication faite conformément à l'article 19 paragraphe 3 du règlement n°17 du Conseil (affaire n°IV/33.815, 35.842 - *EUDIM*), dans [1996] Journal officiel n°C 111 du 17/04/1996 p. 0008 - 0010.

Les échanges d'informations sur la demande du marché, les coûts ou les données à la disposition du public sont généralement jugées moins problématiques<sup>121</sup>, car ils ne réduisent pas nécessairement les incertitudes concernant l'action des concurrents, même si les estimations du marché (ou la demande agrégée) peuvent permettre aux entreprises de vérifier si les épisodes de contraction de la demande individuelle sont dus à des chocs négatifs sur le marché ou au fait que des entreprises trichent<sup>122</sup>. Les autorités de la concurrence ont cependant jugé contraires aux règles de concurrence les échanges d'informations portant notamment sur les livraisons de produits, les livraisons aux clients, l'utilisation des capacités, les chiffres de la production et des ventes et les parts de marché. La pertinence, pour une collusion, de certaines de ces données n'est pas évidente ; l'analyse ne peut donc être réalisée dans l'abstrait, mais doit se référer étroitement au contexte économique et au risque de collusion présumé (autrement dit, les données sur les livraisons aux clients peuvent être très pertinentes si le risque de collusion a trait à une répartition de la clientèle, mais peuvent ne pas l'être si l'entente concerne les rabais à appliquer)<sup>123</sup>.

### 5.2.2 La précision des informations échangées

Il est aussi probable que la précision des informations échangées influe sur la capacité des entreprises à coordonner leurs stratégies de marché. Plus la précision est grande, plus les concurrents sont en mesure de prévoir les actions futures de chacun d'entre eux et de s'adapter en conséquence. En général, les autorités de la concurrence ne voient pas d'objection à la diffusion des données agrégées, qui ne permettent pas d'induire des informations concernant une entreprise donnée. Les échanges de données réellement agrégées, c'est-à-dire de données dans lesquelles il est suffisamment malaisé de distinguer les informations se rapportant à une entreprise donnée, sont moins susceptibles d'avoir des effets restrictifs sur la concurrence que les échanges de données concernant des entreprises<sup>124</sup>. Cependant, dans certains cas, même l'échange de données agrégées doit être prohibé. Selon Peeperkorn, « [...] en dessous d'un seuil critique de prix du marché, les oligopoles partiront automatiquement du principe que quelqu'un a triché et déclencheront une guerre des prix. Cela signifie que les informations agrégées sur les prix pourraient servir aux oligopoles qui tentent de former une entente. Les informations agrégées sur la production leur seront encore plus utiles dans la mesure où elles révéleront immédiatement si quelqu'un a fait défection »<sup>125</sup>. Il n'existe pas de critère général pour déterminer le seuil minimum d'agrégation requis pour ne pas avoir à ouvrir d'enquête afin de s'assurer du respect des règles de concurrence ; face à des informations agrégées, les autorités de la concurrence vérifient au cas par cas si l'agrégation suffit à empêcher une quelconque identification.

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<sup>121</sup> Voir Vives, 2007.

<sup>122</sup> Voir Motta, 2004.

<sup>123</sup> Kühn et Caffarra établissent une distinction entre l'échange d'informations sur les ventes et l'échange d'informations sur les livraisons. Les informations sur les livraisons n'aident pas forcément les entreprises à contrôler une entente sur les marchés où les chiffres des livraisons ne correspondent pas aux chiffres des ventes. Ils expliquent en outre que l'échange d'informations agrégées concernant les livraisons sur certains marchés peut présenter des avantages considérables en termes d'efficacité sans pour autant permettre la formation d'une entente (voir Kühn et Caffarra, 2006). De même, Vives montre que, dans certaines circonstances, l'échange d'informations sur les coûts peut avoir d'importants avantages en termes d'efficacité et qu'il conviendrait, par conséquent, de prendre en compte ces gains d'efficacité comme il se doit (voir Vives, 2007).

<sup>124</sup> Voir paragraphe 85 du Projet de Lignes directrices de la Commission européenne sur l'applicabilité de l'article 101 du Traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (TFUE).

<sup>125</sup> Voir Peeperkorn, 1996.

### 5.2.3 La date et la période de référence des informations échangées

Les autorités de la concurrence s'inquiètent généralement des échanges de données concernant les stratégies  *futures* , notamment sur l'évolution des prix, des ventes et des capacités. Ces informations sont particulièrement sensibles et doivent rester dans le champ des connaissances de chaque entreprise. Les échanges directs des intentions de prix entre concurrents sont sans doute les informations les plus utiles pour parvenir à un point de convergence et cette pratique est donc considérée comme la plus préjudiciable. Pour identifier des points de convergence, les échanges d'informations sur les actions actuelles ou passées peuvent ne pas être aussi utiles que ceux qui concernent les actions futures<sup>126</sup>. Les informations  *rétrospectives*  (même si elles concernent des entreprises spécifiques) ont généralement perdu de leur valeur en tant qu'actif précieux sur le plan concurrentiel permettant d'influer sur l'action future des entreprises concernées ; par conséquent, leur échange n'est généralement pas considéré comme préjudiciable<sup>127</sup>. Les informations qui ont plus de 12 mois sont généralement considérées comme rétrospectives<sup>128</sup>, mais cette évaluation devrait être effectuée au cas par cas en fonction des caractéristiques spécifiques du marché en cause<sup>129</sup>. Les échanges d'informations  *actuelles*  sont davantage susceptibles d'être considérés comme contraires au droit de la concurrence si ces informations peuvent servir à déterminer les actions des participants sur le marché au moment de l'échange. Comme chaque participant à la collusion est incité à casser les prix et à bénéficier sans contrepartie du prix élevé facturé par les autres, l'un des principaux problèmes qui se posent pour les parties ayant conclu une entente est de détecter les réductions de prix secrètes ou les ventes secrètes réalisées en plus des quantités ou des quotas fixés dans le cadre de l'entente. Les informations sur les prix et les quantités facturés par les entreprises participant à l'entente sont essentielles pour contrôler les comportements déviants.

### 5.2.4 La fréquence des échanges

La fréquence des échanges peut aussi avoir une incidence sur l'appréciation d'un échange d'informations. Les échanges fréquents de données permettent aux entreprises de mieux adapter (et en temps plus opportun) leur politique commerciale à la stratégie de leurs concurrents. De plus, pour qu'une collusion puisse perdurer, la sanction en cas de comportement déviant doit être crédible et efficace. Il est donc nécessaire que la tricherie soit détectée assez rapidement pour limiter les avantages pouvant en découler. Là encore, la fréquence des échanges doit être examinée en relation avec les caractéristiques du

<sup>126</sup> Toutefois, les informations sur l'action passée des concurrents peuvent tout de même servir à conclure une entente. Cela peut se produire dans deux cas. Premièrement, par le biais d'annonces publiques de prix, une entreprise déterminant les prix peut créer un point de convergence autour duquel des augmentations de prix comparables peuvent être tacitement appliquées par d'autres entreprises. Deuxièmement, le partage d'informations sur la demande ou sur les coûts passés peut favoriser une entente tacite entre les entreprises sur un point de convergence autour duquel se coordonner. Par exemple, le partage d'informations détaillées sur les prix actuels donne aux entreprises une idée plus claire de leur position respective sur le marché. Cela réduit le nombre de points de convergence possibles autour desquels une coordination sur les prix peut avoir lieu et facilite par conséquent le choix d'un seul point de convergence.

<sup>127</sup> Voir le paragraphe 86 du Projet de Lignes directrices de la Commission européenne sur l'applicabilité de l'article 101 du Traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (TFUE) : « *L'échange de données historiques est peu susceptible d'aboutir à une collusion, étant donné qu'il est peu probable qu'il indique les actions à venir des concurrents ou permette une compréhension commune sur le marché.* »

<sup>128</sup> Voir Décision de la commission, *UK Agricultural Tractor Exchange*, dans [1992] JO L 68/19.

<sup>129</sup> Voir paragraphe 86 du Projet de Lignes directrices de la Commission européenne sur l'applicabilité de l'article 101 du Traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (TFUE).

marché et les faits propres à l'affaire considérée<sup>130</sup>. Par exemple, sur les marchés caractérisés par des contrats à long terme (lesquels indiquent des renégociations de prix peu fréquentes), le fait que des informations soient moins souvent échangées pourrait donc, en principe, davantage suffire pour conduire à une collusion que sur des marchés caractérisés par des contrats à court terme et des renégociations fréquentes.

### 5.2.5 *L'accès public aux informations*

Généralement, les échanges d'informations publiques ne sont pas considérés comme contraires aux règles de concurrence. Ainsi, lorsque le Tribunal de première instance des Communautés européennes a statué sur l'affaire *TACA*<sup>131</sup>, il lui a été demandé d'examiner la conclusion de la Commission européenne selon laquelle l'échange d'informations publiques était contraire à l'article 101 du TFEU. Le Tribunal de première instance a fait remarquer que si les informations sont dans le domaine public du fait des règles de divulgation d'informations obligatoires (en l'occurrence, une publication obligatoire imposée par le droit des États-Unis) ou si elles peuvent être facilement déduites d'informations accessibles au public, l'échange de ces informations entre concurrents ne peut être réputé contraire aux règles de concurrence du traité sur le fonctionnement de l'Union européenne<sup>132</sup>. La plupart des autorités de la concurrence, cependant, interprètent la notion d'« informations accessibles au public » au sens strict : pour ne pas susciter d'inquiétudes en matière de concurrence, les informations échangées doivent être véritablement publiques, autrement dit les informations doivent être facilement observables et accessibles à tous (c'est-à-dire aux concurrents et aux consommateurs) sans frais. Les frais de recherche et de collecte jouent un rôle important<sup>133</sup>. Si les informations sont accessibles au public, mais qu'il est difficile et coûteux de les rechercher et de les récupérer, elles ne sont pas véritablement accessibles au public<sup>134</sup>.

## 6. **Réglementation des communications entre concurrents : quelques questions sur la politique à appliquer**

### 6.1 *Les échanges d'informations doivent-ils être interdits en tant que tels (per se) ?*

Très peu de règles *per se* se justifient en droit de la concurrence et elles se limitent aux cas où les effets favorables à la concurrence ou les justifications d'efficience ne l'emportent jamais sur les effets anticoncurrentiels de la pratique concernée. Les approches fondées sur la forme des communications pour établir leur caractère illicite du point de vue du droit de la concurrence ont été progressivement écartées

<sup>130</sup> Voir paragraphe 87 du Projet de Lignes directrices de la Commission européenne sur l'applicabilité de l'article 101 du Traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (TFUE).

<sup>131</sup> Voir les affaires jointes T-191/98, T-212/98 et T-214/98, *Atlantic Container Line (TACA)*, Recueil 2003, p. II-3275, paragraphe 1154.

<sup>132</sup> Des cas de jurisprudence des tribunaux européens sont cités en appui (voir, entre autres, l'arrêt du Tribunal de première instance des Communautés européennes, *John Deere contre Commission des Communautés européennes*, dans [1994] Recueil p. II-957, paragraphe 81, pourvoi en appel par la CJUE dans *John Deere contre Commission des Communautés européennes*, dans [1998] Recueil p. I-3111, paragraphes 89 et 90).

<sup>133</sup> Voir Autorité italienne de la concurrence, *RAS-Generali/IAMA Consulting*, dans Bollettino 3/2004.

<sup>134</sup> C'est la raison pour laquelle, dans l'affaire *RAS-Generali/IAMA Consulting*, l'Autorité italienne de la concurrence a considéré que le fait que les informations soient obtenues par le cabinet de conseil tiers chargé de créer la base de données à partir d'informations directement recueillies auprès des différents concurrents montrait que les informations en elles-mêmes n'étaient pas dans le domaine public. En effet, si les informations avaient été aisément accessibles, il n'y aurait eu aucune raison de mettre en place un système d'échange coûteux.

dans de nombreuses juridictions ou, à tout le moins, remises en cause au profit d'une approche fondée sur leurs effets. Comme on l'a vu, il n'existe pas de règles fiables fondées sur la forme qui permettent de déterminer si un échange d'informations a des effets pro- ou anticoncurrentiels. Apparemment, cela ne plaide pas en faveur d'une approche *per se* de l'appréciation des échanges d'informations. En outre, dans une perspective économique<sup>135</sup>, la notion d'une règle d'interdiction *per se* des échanges d'informations n'a pas de fondement. Les échanges d'informations couvrent un très large éventail de pratiques dont les effets pro- ou anticoncurrentiels dépendent fortement du contexte économique, ce qui amène à la conclusion que, dans ce domaine de l'application du droit, une approche structurée fondée sur les effets est à privilégier. Les tribunaux se sont aussi exprimés en faveur d'une approche de l'appréciation des échanges d'informations selon la règle de raison. Dans l'affaire de l'entente dans le secteur de l'emballage, la Cour suprême des États-Unis a ainsi apprécié un échange d'informations autonome au regard de l'article 1 du Sherman Act – au lieu de n'utiliser que l'échange d'informations en tant que tel comme preuve permettant d'établir l'existence d'une entente sur les prix. Elle a conclu que « *cet échange d'informations n'est pas illicite per se, mais [qu'] il peut être jugé comme tel selon une analyse fondée sur la règle de raison* »<sup>136</sup>.

Une approche structurée fondée sur la règle de raison doit commencer par apprécier si la structure du marché et les caractéristiques des produits sont telles qu'un risque de collusion existerait si la transparence venait à augmenter ; si la réponse à cette première question est positive, l'appréciation doit plutôt chercher à déterminer le type et la nature des informations échangées (comme leur nature confidentielle, leur caractère public, etc.) et les caractéristiques de l'échange (comme la fréquence, l'agrégation des informations, etc.) pour évaluer les effets de l'échange sur la concurrence et la probabilité de la collusion. Par exemple, la crainte qu'un échange d'informations sur les prix puisse faciliter une entente sur les prix peut être écartée si le marché est très fragmenté ou s'il est trop dynamique pour qu'une collusion fondée sur les prix perdure. Ces craintes peuvent aussi être dissipées si les échanges d'informations ne sont pas suffisamment précis, détaillés et/ou fréquents pour permettre aux entreprises de s'entendre sur une ligne de conduite commune risquant, selon toute probabilité, d'affaiblir la concurrence<sup>137</sup>.

## 6.2 Certains échanges d'informations doivent-ils être jugés anticoncurrentiels « par objet » ?

Les accords qui sont anticoncurrentiels « par objet » sont automatiquement contraires aux règles de concurrence et les autorités de la concurrence n'ont donc pas besoin d'établir qu'ils ont des effets anticoncurrentiels. Ces accords, par opposition à ceux qui sont anticoncurrentiels *per se*, peuvent toujours être justifiés en invoquant l'efficacité. Si une action restreint la concurrence « par objet », on peut supposer que le rôle de l'analyse économique pour évaluer le caractère légal de ces accords est limité. Les autorités de la concurrence n'ont alors pas à démontrer que l'accord a des effets anticoncurrentiels car une telle conclusion est tellement évidente qu'elle n'a pas besoin d'être établie. Les participants à l'échange, toutefois, peuvent démontrer qu'il génère des gains d'efficacité suffisants (autrement dit qu'il aide les entreprises à mieux prévoir les ventes) et que ces avantages ne peuvent être obtenus par des moyens moins préjudiciables.

Une partie des publications<sup>138</sup> et des pratiques répressives de certaines autorités de la concurrence ont identifié un certain type d'échanges d'informations qui doit être considéré comme une restriction « par objet » : les échanges privés de projets spécifiques d'entreprises concernant leur action future, notamment en matière de prix et de volumes. L'échange de ce type d'informations est jugé très proche de la mise en place d'une entente sur les prix entre ceux qui y participent. La justification de cette approche est qu'il est

<sup>135</sup> Voir Evans et Mellsop, 2003.

<sup>136</sup> Voir *U.S. v. Container Corp.*, 393 U.S. 333 (1969).

<sup>137</sup> Voir RBB, 2009.

<sup>138</sup> Voir, par exemple, Kühn, 2001 ; Bennett et Collins, 2010 ; Autorité suédoise de la concurrence, 2006.



raisonnable, sur le plan économique, d'attribuer une présomption d'illégalité aux échanges d'informations qui risquent fortement d'avoir un effet anticoncurrentiel et dont il est très peu probable qu'ils aient une justification objective ou une motivation favorable à la concurrence<sup>139</sup>. C'est la position récemment adoptée par la CJUE dans une récente décision sur T-Mobile, dans laquelle elle faisait valoir qu'« *il y a lieu de considérer comme ayant un objet anticoncurrentiel un échange d'informations susceptible d'éliminer des incertitudes dans l'esprit des intéressés quant à la date, à l'ampleur et aux modalités de l'adaptation que l'entreprise concernée doit mettre en œuvre*<sup>140</sup> ». D'autres études ont fait valoir qu'une restriction par objet ne se justifie pas, même dans ces circonstances. L'argument a été avancé que la catégorisation des échanges d'informations en tant que conduite anticoncurrentielle « par objet » semble faire exception à l'influence croissante de l'analyse économique et que soumettre cette conduite à la même présomption automatique de catégorie anticoncurrentielle « par objet » qu'une entente horizontale sur les prix à part entière<sup>141</sup> ne se justifie pas.

Tous les autres types d'échanges d'informations sont généralement appréciés au regard des règles de concurrence en fonction de leurs effets sur la concurrence. Certains échanges sont davantage susceptibles d'avoir un impact sur la concurrence, comme les échanges d'informations sensibles actuelles et individualisées, que d'autres, comme les échanges d'informations rétrospectives agrégées qui sont dans le domaine public. En pareils cas, l'évaluation dépendra de la structure du marché, des caractéristiques des produits et du type d'informations échangées.

### 6.3 *Un échange d'informations peut-il se justifier par les gains d'efficience ?*

Même lorsqu'un échange d'informations entre entreprises concurrentes peut être défavorable à la concurrence sur le marché, il est possible de le justifier, et donc de bénéficier d'une exemption à l'interdiction des accords anticoncurrentiels. En effet, la plupart des autorités de la concurrence reconnaissent dans leurs déclarations de principe que les échanges d'informations peuvent générer d'importants gains d'efficience<sup>142</sup>. Nombre de ces gains d'efficience éventuels ont été traités plus haut. En font notamment partie la répartition plus efficiente de la production, l'analyse comparative, la communication aux consommateurs d'informations relatives à la qualité ou leur permettant d'effectuer des choix plus éclairés concernant les produits. Il incombe aux entreprises de fournir des éléments convaincants pour prouver l'existence de ces gains d'efficience. En outre, un certain nombre d'autres conditions doivent être satisfaites. La plupart des pays exigent que les entreprises démontrent que les gains d'efficience générés par une plus grande transparence compensent tout effet restrictif sur la concurrence, qu'une bonne partie d'entre eux sont répercutés sur les consommateurs et que les échanges d'informations ne dépassent pas ce qui est nécessaire pour parvenir aux gains d'efficience en question.

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<sup>139</sup> Voir Kühn, 2001.

<sup>140</sup> Voir l'affaire C-8/08, *T-Mobile Netherlands et autres*, jugement du 4 juin 2009.

<sup>141</sup> Voir RBB, 2009.

<sup>142</sup> Voir par exemple les Lignes directrices sur la collaboration entre concurrents, Bureau de la concurrence, Canada, section 3.7.1 ; le Projet de Lignes directrices de la Commission européenne sur l'applicabilité de l'article 101 du Traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (TFUE), section 2.3.1 ; les US Antitrust Guidelines for Collaborations amongst Competitors, section 3.31.(b).

#### 6.4 Certains échanges sont-ils autorisés ? Des zones de sécurité peuvent-elles être envisagées ?

Certains chercheurs<sup>143</sup> et certains tribunaux<sup>144</sup> ont avancé que l'échange de données vraiment agrégées (autrement dit des données qui ne peuvent pas être désagrégées pour révéler des informations sur des entreprises spécifiques) doit être considéré *per se* comme autorisé, car il ne permet jamais de sanctionner de façon ciblée des comportements déviants. Cette thèse n'a cependant pas trouvé d'appui dans les études économiques, qui concluent que la sanction ciblée n'est pas la seule sanction possible crédible et efficace qui rend une collusion viable. Même la diffusion d'informations agrégées peut révéler aux membres d'une entente que les termes de celle-ci n'ont pas été respectés, ce qui peut déclencher des réactions pour stabiliser la collusion<sup>145</sup>. Le récent Projet de Lignes directrices de la Commission européenne sur l'applicabilité de l'article 101 du Traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale étaye cette conclusion en affirmant que : « [...] *l'échange de données agrégées peut également aboutir à une collusion. Par exemple, les membres d'un oligopole étroit et stable qui échangent des données agrégées pourraient d'office présumer qu'une entreprise s'est écartée de la collusion s'ils constatent sur le marché un prix inférieur à un niveau donné*<sup>146</sup> ».

Cela étant, la question de savoir si certains types d'échanges d'informations ne sont guère susceptibles d'avoir un impact sur la concurrence et doivent par conséquent bénéficier d'une zone de sécurité reste valable. Certaines autorités de la concurrence ont introduit des zones de sécurité structurelles pour tous les accords de coopération. Aux États-Unis, par exemple, aux termes des Lignes directrices sur la collaboration entre concurrents, les autorités américaines de la concurrence ne remettent pas en cause, dans des circonstances normales, une collaboration entre concurrents quand les parts de marché des participants ne représentent ensemble pas plus de 20 % du marché correspondant. Il a été récemment avancé que « [...] *il serait possible, notamment, de définir la zone de sécurité en fonction d'un seuil du marché couvert par l'échange d'informations. Il faut reconnaître que déduire un seuil spécifique pour une telle zone de sécurité est toujours quelque peu arbitraire. Cependant, compte tenu du niveau fixé pour d'autres zones de sécurité dans le cadre des lignes directrices, un seuil de 20 % peut constituer un point de départ raisonnable à envisager. Une telle zone de sécurité devrait aussi faire l'objet d'un test de couverture global comparable à celui défini dans les lignes directrices concernant les ententes verticales. Cela éviterait l'existence de réseaux d'échange d'informations permettant aux entreprises d'avoir accès à des informations couvrant l'ensemble du marché. Dans un tel contexte, un seuil de 30 % pourrait être un point de départ raisonnable à envisager pour un test global* »<sup>147</sup>.

Les autorités de la concurrence devraient examiner si, en plus de la zone de sécurité structurelle, d'autres types d'informations doivent aussi entrer dans le cadre d'une zone de sécurité, comme les informations véritablement rétrospectives, les informations accessibles au public et les informations agrégées. L'introduction de seuils de sécurité dans ce domaine offrirait aux entreprises, en particulier aux petites entreprises, les certitudes juridiques requises pour s'engager dans un échange d'informations favorable à la concurrence. Tous les échanges d'informations n'entrant pas dans le cadre d'une zone de sécurité ne devraient pas être jugés anticoncurrentiels, car cela pourrait dissuader les entreprises de

<sup>143</sup> Voir Tugendreich, 2004, pp. 175 et 221 ; voir également Kühn et Caffarra, 2006 selon lesquels certains types d'échange d'informations, comme l'échange d'informations agrégées et de données sur les coûts, doivent toujours être autorisés.

<sup>144</sup> Voir Oberlandersgericht Dusseldorf, décision dans l'affaire Kart. 37/01, Transportbeton Sachsen, 26 juillet 2002, WuW/E DE-R 949.

<sup>145</sup> Voir Kühn et Vives, 1995.

<sup>146</sup> Voir paragraphe 85.

<sup>147</sup> Voir Bennett et Collins, 2010.

s'engager dans des échanges bénéfiques, comme le regroupement à l'échelle d'un secteur d'informations rétrospectives agrégées sur les évolutions des ventes et des prix.

## 7. Conclusions

Les échanges d'informations entre concurrents sont un domaine complexe de la mise en œuvre du droit de la concurrence. Le débat économique et juridique sur les effets favorables ou défavorables de la transparence sur la concurrence et sur les incitations des entreprises à s'entendre entre elles va sans doute se poursuivre et avoir une incidence sur les activités des autorités de la concurrence.

Les théories économiques sur la collusion tacite ont une grande influence sur ce domaine du droit et le respect des règles de concurrence y est de ce fait complexe. Aussi les entreprises recherchent-elles des certitudes juridiques pour savoir quel type de communications leur est autorisé en vertu du droit de la concurrence et quels facteurs elles doivent prendre en compte quand elles décident de participer à des systèmes d'échange d'informations avec leurs concurrents. Des indications claires de la part des autorités de la concurrence leur seront donc assurément utiles pour établir une distinction entre les échanges d'informations qui s'inscrivent dans le cadre d'une entente classique, ceux qui constituent une infraction autonome aux règles de concurrence et ceux qui favorisent la concurrence.

Du point de vue de la politique de la concurrence, il est difficile d'élaborer des règles générales et théoriques pour établir une distinction entre un échange d'informations restrictif et un échange d'informations qui est à tout le moins neutre sur le plan concurrentiel, à défaut de favoriser la concurrence et les gains d'efficacité. Cette approche doit être appliquée au cas par cas et ne peut ignorer le contexte économique dans lequel les participants à l'échange d'informations exercent leur activité. Les études économiques ont relevé des cas où une amélioration artificielle de la transparence est un facteur de collusion et d'autres où une grande transparence est favorable à la concurrence et doit donc être renforcée.

En général, lorsqu'un soupçon de coordination existe, la transparence peut être considérée comme favorisant la capacité des participants à contrôler mutuellement leur comportement et à identifier une « tricherie » par rapport à des accords de coordination illicites. Les échanges d'informations essentielles sur le plan de la concurrence (informations sur les prix, la quantité et les futures stratégies) sont considérés comme étant particulièrement problématiques car ils augmentent la transparence du marché du côté de l'offre. L'amélioration artificielle de la transparence élimine les incertitudes sur l'action future des concurrents qui sont précisément un facteur de motivation important sur les marchés concurrentiels<sup>148</sup>. C'est la raison pour laquelle bon nombre d'autorités de la concurrence établissent une distinction selon qu'un échange d'informations porte sur des stratégies passées en matière de prix, de quantité ou de marché en général ou sur des stratégies futures. Les échanges d'informations sont une préoccupation d'autant plus grande que ceux qui y participent exercent leur activité sur un marché concentré et/ou qu'ils représentent ensemble une part de marché importante.

Certains aspects font encore l'objet de débats, notamment l'effet restrictif ou non sur la concurrence des échanges d'informations sur un marché non oligopolistique, le caractère licite ou non du recours à des cabinets de conseil, qui sont des tiers indépendants, pour recueillir et diffuser des informations sur le marché, ou l'effet restrictif éventuel des annonces publiques de futures stratégies commerciales. D'autres questions se posent encore. On peut notamment se demander si les échanges d'informations doivent être considérés comme une infraction *per se* aux règles de concurrence ou être appréciés à l'aune d'une règle de raison structurée. Enfin, les autorités de la concurrence devraient se demander de quelle manière elles peuvent apporter des éclaircissements et des certitudes légales aux entreprises susceptibles de se livrer à ce

<sup>148</sup> Voir Kühn et Vives, 1995 ; Capobianco, 2004.

type de pratiques. L'utilisation de la restriction par objet, d'une part, ou des zones de sécurité, d'autre part, pourrait répondre à ce besoin.

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## AUSTRALIA

### 1. Information exchanges and facilitating practices

#### 1.1 *What are facilitating practices?*

Facilitating practices refers to conduct by firms which helps competitors to reduce or eliminate strategic uncertainty and coordinate their conduct more effectively, but does not constitute an explicit cartel agreement.

Information exchanges are a common form of facilitating practice. The exchange of pricing information between competitors increases transparency between those businesses and changes the incentive for those businesses to compete and may facilitate coordination on price.

In response to concerns expressed by the Australian Competition and Consumer Commission (ACCC) for a number of years about the adequacy of Australian competition law in addressing facilitating practices, and its proposal to address the issue through changes to the meaning of ‘understanding’, the Australian Government released a discussion paper in January 2009 seeking submission from the public on this important issue.

#### 1.2 *What constitutes an information exchange?*

As recognised by the OECD in 2007, facilitating practices commonly involve arrangements among competitors to exchange information, for example historic or future price information or information about future strategic conduct.<sup>1</sup> The exchange of this type of information can have pro-competitive or anticompetitive effects, depending on the circumstances in which it occurs.<sup>2</sup>

Australian businesses are subject to a range of regulatory obligations to disclose information, including but not limited to continuous disclosure obligations for publicly listed corporations under Australian corporate law. In some specific cases, regulatory obligations can extend to current price information – in Western Australia, petrol retailers are required by law to specify (on a public website), and adhere to, retail petrol prices for the next day.

Ordinarily, information exchange plays a vital role in any economy and should be encouraged. Suppliers communicate to their customers and potential customers for a variety of reasons including to inform customers, to advertise their market positioning and to improve brand awareness in competitive markets. This communication in turn provides signals to rivals which ultimately encourages competitive activity. As a general rule, such communications are perfectly legitimate, pro-competitive and efficiency enhancing. Conversely, in some cases the provision and receipt of information between competitors clearly has the potential to diminish competition. For example, by knowing what price a competitor is going to move to, the ‘receiving party’ does not need to offer their best price to attract customers. They can comfortably price at or around that disclosed by the ‘provider’. Where businesses do not need to ‘fight’ to

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<sup>1</sup> OECD, Policy Roundtables, *Facilitating Practices in Oligopolies*, 2007, p.9.

<sup>2</sup> Ibid, p.10.

secure their profit margin, the incentive to innovate or offer new and better products and services diminishes. There is also no incentive for a party to lower its price as this would be instantly communicated and copied by a competitor.

The extent to which information exchanges impact on the effectiveness of competition in the market can depend on the structure of the market, the nature of the information and the way the information is exchanged.

### **1.3 Economic theory about information exchanges and their effects on competition**

In oligopolistic markets (i.e. markets characterised by a small number of large firms), the structure and conditions of these markets mean the firms within them recognise their mutual interdependence, anticipate that their actions will have an effect on market outcomes and will cause reactions from their rivals and take account of their expectations about those effects in their own price and output decisions. The repeated interactions between firms in such markets and their mutual awareness of each other's commercial strategies over time, can often lead to coordination in relation to *inter alia*, prices without any additional information exchange, communication or agreement.

While the effects of this interaction can result in prices being higher than they otherwise would be in a workably competitive market (and similar to the consequences of explicit cartel conduct), the pricing is a consequence of rational profit maximising firm behaviour in an oligopolistic market structure. As such it would be inappropriate for policy makers to impose competition law regulation on firms for rational oligopolistic conduct without something more since there is no relevant behavioural remedy.

Merger regulation, which is aimed at preventing the creation of concentrated markets, or other forms of structural intervention aimed at reducing entry barriers are means of avoiding or eroding over time market structures in which oligopolistic coordination may flourish. A recent example in Australia concerned the proposed acquisition of one petrol company's retail assets by another petrol company<sup>3</sup> which the ACCC opposed on the grounds that it had concerns that it was likely the proposed acquisition would increase the effectiveness of the current coordinated market practices which act to limit competition in petrol retailing. The ACCC considered that the coordination was facilitated through the frequent exchange of pricing information between competitors via a subscription-only electronic network service and that the enhancement of coordinated conduct resulting from any acquisition was likely to substantially lessen competition in contravention of the TPA.<sup>4</sup>

In contrast to pure oligopolistic conduct, supra-competitive prices can also be supported by facilitating practices; for instance where competitors actively exchange market sensitive information. This conduct can reduce uncertainty and the incentive to compete and facilitate coordination on price. This type of conduct can and should be susceptible to competition law. However, in Australia, the TPA does not currently prohibit facilitating practices unless that practice occurs as a result of a contract, arrangement or understanding between competitors (as described more fully below).

Facilitating practices such as information exchanges are typically only likely to be of concern in highly concentrated markets. The concern arises because such exchanges assist competitors to better coordinate their actions and can overcome impediments to collusive conduct in an oligopolistic market where over time that conduct may be difficult to maintain or where deviations may not be able to be detected or punished in a timely manner. This type of facilitating practice helps to solve the problem of

<sup>3</sup> ACCC, *Public Competition Assessment – Caltex Australia Ltd – proposed acquisition of the retail assets of Mobil Oil Australia Pty Ltd*, 9 February 2010.

<sup>4</sup> Section 50.

collusion by increasing the probability that parties will reach an agreement, and that cheating on that agreement will be detected and punished. They do this by improving transparency and/or by changing incentives to compete.

Increased transparency reduces uncertainty about competitors' actions and supports more effective coordination. Such behaviour removes the competitive tension and facilitates patterns of behaviour to the detriment of consumers. Further, timely exchanges of pricing information can impact on the incentive to compete within a market as this allows one market participant to signal its price restorations and to monitor whether other participants follow. It decreases the incentive to cut prices below those of other participants, because the lower price will be rapidly communicated to rivals and matched, with limited impact on volumes.

#### **1.4 *Types of information exchanges***

Information exchanges can have both pro-competitive and anticompetitive effects on an economy, depending on the circumstances in which they are made. Pro-competitive results are produced where information exchanges provide consumers and potential entrants with better information on which to base their decisions and drive competitive market outcomes. In these instances, the communication of information through markets is a critical underpinning of the economy.

For example, companies that make public announcements concerning imminent price increases enable consumers to readily act on that information and ultimately make well-informed purchasing decisions by allowing them to compare prices within the particular market and make purchases before the planned increase. The provision of information in this circumstance permits the consumer to drive the market mechanism for competition and allows for the more efficient allocation of resources.

Another example where information exchanges can produce a pro-competitive outcome is the use by petrol stations of pricing billboards in its forecourt. In this situation, customers and competitors alike can see a station's pricing at a given point in time. This benefits the consumer by facilitating comparison between retailers before they drive up to the pump.

However, information exchanges can also be used by firms to help them eliminate strategic uncertainty and coordinate their conduct more effectively. International and Australian experience suggests that disclosures and exchanges of information between competitors are the most prevalent and harmful form of facilitating practices, as well as being the most readily distinguished from benign or pro-competitive forms of conduct. For example, a private discussion of future pricing intentions between competitors is likely to have little to no redeeming qualities, whereas there may be legitimate business reasons for the communication of information publicly.

The competitive concerns arising from the exchange of information also depends on the nature of the information shared. Other things being equal, the sharing of information in relation to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information about less competitively sensitive variables. Similarly, other things being equal, the sharing of information on current operating and future business plans are more likely to raise concern than the sharing of historical information.

In terms of a facilitating practice, little distinction should be made between the exchange of current (where not otherwise in the public domain)<sup>5</sup> and future price information. Collusion generally requires knowledge of a competitor's current or future prices. Disclosing current prices can be just as harmful to

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<sup>5</sup> For instance, price lists may be confidential to particular consumers.

competition, by facilitating reaching agreement and the detection and punishment of cheating, as circumstances where a business proposes to adopt new prices but chooses not to announce those prices until it has disclosed the prices to its competitor.

However, the private disclosure of price information may be commercially justifiable between related companies, joint venture participants, and entities that comprise a dual listed company or where the exchange information occurs for the purpose of merger discussions. Any regulation must permit information exchange in these circumstances.

## 2. Information exchanges and Australian competition law

Australia has put in place a strong competition policy framework, which is underpinned by the TPA. The objective of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.<sup>6</sup>

Effective competition can be reduced by firms behaving, either independently or with other firms, in ways that reduce rivalry in the market, or prevent or deter the entry of new firms. The provisions in Part IV of the TPA promote competition by prohibiting certain types of anti-competitive conduct.

Under Part IV of the TPA, collusive behaviour in which competitors make or give effect to a 'contract, arrangement or understanding' which contains an exclusionary provision<sup>7</sup> or has the purpose, effect or likely effect of substantially lessening competition is prohibited by section 45 of the TPA. In addition, under sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the TPA it is an offence and a per se contravention to make or give effect to a contract, arrangement or understanding for explicit cartel conduct such as price fixing, bid rigging, reducing outputs and allocating territories.

These provisions clearly capture anticompetitive conduct which involves one competitor attempting to induce another into collusive conduct. However, it is clear from numerous judicial decisions that the competition provisions of the TPA do not effectively address facilitating practices, such as information exchanges, where these occur outside of a contract, arrangement or understanding. As the words 'arrangement' and 'understanding' are not defined in the TPA, it has been left to the Australian courts to interpret their meaning.

The Australian courts have held that proving a contract, arrangement or understanding will generally require direct evidence of a communication; a 'meeting of the minds' between parties; and an actual commitment by at least one party to act in a certain way. Specifically, the interpretation of the word 'arrangement' and of the word 'understanding' appears to require the clear assumption by colluding parties of a 'commitment' or 'obligation' as to their conduct in the market.

The cases indicate that at least one party must 'assume an obligation' or give an 'assurance' or 'undertaking' that it will act in a certain way before the collusive conduct will be held to be a breach of the TPA. A mere expectation that as a matter of fact a party will act in a certain way is not enough, even if it has been engendered by that party.<sup>8</sup> In addition, if a party is motivated to act in a particular way for fear of repercussions if it does not do so, the courts have held that this does not mean that an arrangement or understanding exists.<sup>9</sup> Combined with the court's reluctance to infer an arrangement or understanding

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<sup>6</sup> Section 2.

<sup>7</sup> Section 4D.

<sup>8</sup> *ACCC v CC (NSW) Pty Ltd (No 8)* [1999] FCA 954 at [141].

<sup>9</sup> *ACCC v Rural Press Ltd* [2001] FCA 116.

from circumstantial evidence, this has given rise to a view that over time there has been a narrowing of the interpretation of the word ‘understanding’.

The Part IV provisions of the TPA have generally been effective in dealing with cases of explicit collusion and cartel behaviour because the criteria were clearly met via the direct evidence provided. However, they have not been effective in capturing collusive behaviour cases involving the exchange of information where anticompetitive outcomes have been reached by competitor coordination; that is information exchanges between competitors which, when combined with a rational response based on their underlying incentives, leads to circumstances in which supra-competitive prices can be created and maintained.

Consequently, in Australia a business can lawfully receive pricing and other strategic information from a competitor and take advantage of that information without breaching the TPA if they do not commit to conduct themselves in a certain way following the receipt of the information. Information provision to a competitor on a ‘for information and no obligation basis’ does not create the sense of obligation required to establish a contract, arrangement or understanding within the meaning of the TPA.

## **2.1 Relevant Australian case examples**

### **2.1.1 *TPC v Email Ltd & Ors [1980] FCA 86; ATPR 40-172***

The two parties involved in this case, Email and Warburton Franki, were at the time the only manufacturer and suppliers of electricity meters in Australia. The parties issued identical price lists, submitted identical tenders, adopted the same price variation clause, sent to each other their respective price lists which showed the prices as identical, forwarded to each other new price lists immediately they changed prices or introduced any new meter or component, and tendered in accordance with their respective price lists.

The Trade Practices Commission (now known as the Australian Competition and Consumer Commission) contended that the respondent’s actions constituted an arrangement or understanding under section 45 of the TPA and that the requisite meeting of minds was to be construed from the circumstances. The Commission also alleged that the communications about price gave rise to mutual expectations that each party (or at least one) would accept restrictions as to its conduct.

However, the Court found that there was no evidence of commitment, either to exchange the price lists or to charge particular prices, and hence no contract, arrangement or understanding, and considered the conduct to be parallel, explained by “rational commercial considerations”. The Court held that the Warburton Franki could readily have found out prices from sources other than Email and therefore it was not the exchange of price information which resulted in parallel prices but ‘market forces, competition and the necessity for Warburton Franki to follow Email’.<sup>10</sup>

### **2.1.2 *Apco Service Stations Pty Ltd v ACCC [2005] FCAFC 161***

In this case, the Court found evidence that some petrol station owners (in the Ballarat region of Victoria, Australia) had entered into arrangements or understandings regarding the retail price of petrol in the area.

However, in relation to Apco, the Court did not find that it had entered a contract, arrangement or understanding with the other parties to the agreement, despite receiving information regarding its

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<sup>10</sup> *TPC v Email & Ors* (1980) ATPR 40-172 at 42,380

competitors pricing. The Court accepted Apco's contentions that it was not a party to any price-fixing understanding because it did not commit to changing its price based on the information it received.

The Court affirmed that a mere hope or expectation that a party will act in a particular way is insufficient to support an arrangement or understanding in contravention of section 45 of the TPA. In this instance, the Court held there was no expectation that Apco would match the price increases of its competitors, which unavoidably led to the conclusion that Apco was not a party to any understanding to fix prices. As the Court pointed out, "(u)nilaterally taking advantage of a commercial opportunity presented is not to arrive at or give effect to an understanding in breach of the Act"<sup>11</sup> and therefore Apco's actions did not result in a contravention of section 45 of the TPA.

### 2.1.3 *ACCC v Leahy Petroleum [2007] FCA 794*

In this case, it was admitted that a petrol retailer had telephoned a competitor to advise of its intention to increase prices and the timing of those increases. However, the Federal Court found this conduct was not sufficient to constitute a contract, arrangement or understanding and therefore was not a breach of the TPA because the initiator was not obliged to provide the information and the recipient was not obliged to act upon the information. In the court's view there was no commitment, moral obligation or obligation binding a party in honour to act in a particular way.<sup>12</sup>

However, his Honour did note that private communication of intended price increases, without communication of the intention to potential purchasers, lent itself readily to price-fixing, but without more did not in itself constitute price-fixing.<sup>13</sup>

This case considers the words contract, arrangement and understanding to be distinct legal concepts and finds these concepts, although 'plainly intended to represent a spectrum of consensual dealings'<sup>14</sup>, all require one essential element to satisfy their meaning in section 45: that is, the element of obligation or commitment.<sup>15</sup> Gray J stated:

*The absence of any element of commitment or obligation, from any of the alleged arrangements or understandings must lead to the conclusion that none of those arrangements or understandings is capable of amounting to an arrangement or understanding within the meaning of s.45(2)(a) of the Trade Practices Act. None of them is capable of containing a provision for the fixing of prices.*<sup>16</sup>

Subsequent to these rulings, there has been considerable debate around the issue of commitment. It is important to note that the "success" of facilitating practices such as information exchanges in sustaining supra-competitive prices does not depend on whether the conduct requires any sort of obligation or "commitment" by the parties – moral or otherwise. Rather it depends on the ability and incentive for participants to maintain prices above competitive levels and thereby harm consumers. The issue becomes whether the existence of the practice in question enhances the ability and/or incentive of participants to coordinate their conduct and thereby raise or sustain prices above competitive levels and harm consumers.

<sup>11</sup> *Apco Service Stations v Australian Competition and Consumer Commission* [2005] FCAFC 161 at paragraph 31

<sup>12</sup> *ACCC v Leahy Petroleum Pty Ltd (No 2)* [2005] FCA 254.

<sup>13</sup> *ACCC v Leahy Petroleum Pty Ltd* [2007] FCA 794 at [924]-[925].

<sup>14</sup> *Ibid*, at [24].

<sup>15</sup> *Ibid* at [26], [37], [948].

<sup>16</sup> *Ibid* at [949].

## 2.2 *Facilitating practices: Developments in Australia*

The ACCC has for a number of years been concerned that the TPA does not adequately cover facilitating practices such as information exchanges. In particular, it has been concerned that corporations, who are more than ever aware of their liability for penalties for engaging in cartel conduct, are effectively able to achieve cartel like outcomes with impunity because facilitating practices are not adequately regulated under the Australian law.

On 18 December 2007, the ACCC released the Petrol Report<sup>17</sup>, the result of its public inquiry into the price of unleaded petrol in Australia. The ACCC referred to what it considers to be a gap in the law that developed as a result of the Courts decisions in a number of petrol cases.<sup>18</sup> The gap arises where although the ACCC may be able to demonstrate and prove the existence of a meeting or communication between parties and an agreement to communicate prices, if the ACCC cannot demonstrate a commitment to adjust prices accordingly, the Courts have held that there is no requisite contract, arrangement or understanding.

In particular, the ACCC expressed concerns that court decisions have, over time, narrowed the conduct that is caught by the term ‘understanding.’ Such a narrowing of the term affects the way businesses in Australia may choose to conduct themselves. The ACCC is conscious that cartel like outcomes can be achieved by competitors agreeing to share pricing intentions but denying the existence of a commitment to adjust prices accordingly. In these circumstances it is possible that in running a cartel, to avoid sanction, parties may deviate from any understanding made, on several occasions just to demonstrate that there was no commitment.

The ACCC has also raised concerns as to the readiness of the Court to draw inferences from the evidence in determining whether parties have reached an understanding. To address these concerns, the ACCC recommended that amendments to the TPA be made in order to broaden and clarify the meaning of the term ‘understanding’.

In January 2009, responding to the concerns raised by the ACCC, the Australian Government issued a discussion paper on the meaning of ‘understanding’.

While the majority of stakeholders did not support the ACCC proposed option for clarifying and expanding the definition of the term ‘understanding’, concerns were raised that some harmful forms of information exchange are not currently caught by the TPA. However, submitters considered that if it were to be addressed, it should be through specific amendments to the TPA, focussed on the effect on competition of particular information exchanges, not through broadening the definition of understanding.

In practice, such an approach would act to shift the focus in this area away from whether particular conduct will fit into the legal definition of ‘agreement’ (with its requirement for commitment) and towards its harm to competition and consumers. The ACCC has also expressed support for this approach to addressing the issue of facilitating practices in the TPA. The Australian Government is still considering the issues raised in response to the discussion paper and is yet to respond publicly.

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<sup>17</sup> ACCC (2007), *Petrol Prices and Australian Consumers*, Report of the ACCC inquiry into the price of unleaded petrol, December.

<sup>18</sup> See *ACCC v Leahy Petroleum Pty Ltd* [2004] FCA 1768; *ACCC v Leahy Petroleum Pty Ltd (No 2)* [2005] FCA 254; *ACCC v Leahy Petroleum Pty Ltd* [2007] FCA 794.





## BELGIUM

### 1. General Effects of Enhanced Price Transparency

*Please describe one or more actual situations in which transparency played a role in the degree of competition in the market. Are there cases in your jurisdiction where changes in the degree of transparency clearly resulted in changes in the existing degree of competition?*

It seems fair to say that increased transparency has stimulated competition in Belgium on:

- the (mobile) telephony market,
- the internet access market,
- the energy (gas and electricity) retail markets,
- the food distribution retail market for pre-packed food.

*What factors and market characteristics do you take into consideration when assessing if transparency is a competition enhancing factor or not? Please illustrate your remarks with actual situations.*

It should be said first that the enhanced transparency referred to in response to question 1.1 did not result from agreements between competitors (or from an intervention of the Competition Authority) but from consumer protection law and a number of initiatives taken by sector regulators and consumer organisations.

The markets referred sub 1.(i) to (iii) were highly intransparent because a limited number of suppliers offered each a wide range of complicated formulas that made any direct comparison virtually impossible, while consumers were, initially in respect of each of these markets and probably still for energy, very reluctant to switch suppliers.

The market referred to sub 1.(iv) was not transparent as long as retailers were only required to indicate the net-price and not the weight or volume related prices.

## 2. Information Exchanges between Competitors

*Transparency can be an inherent characteristic of a market, but it can also be artificially enhanced by practices put in place by companies. Among these "transparency enhancing" practices there are direct and indirect exchanges of information among sellers and/or buyers including through trade, professional or consumer associations or electronic marketplaces; advertising prices; formulation and circulation of suggested or average prices by professional, industrial or consumer associations, etc. Based on your experience please address the following issues (Please illustrate your answer with actual examples):*

*When are information exchanges amongst competitors permissible in your country? In what circumstances an exchange of information between competitors can be pro-competitive?*

The Belgian competition authority has condemned in a formal decision a scheme run by the association of Flemish bakeries that provided a website based cost calculation model with defined parameters ([Decision n° 2008-I/O-04, 25 January 2008](#)).

The Belgian competition authority did, in an informal intervention in 2008, not object to a website based cost calculation model for French fries retailers because it did not quantify the impact of parameters.

The Belgian competition authority did, in an informal intervention in 2010, not object to the publication of a price index for scrapped metals subject to the commitment to use longer reference periods.

We may add that the Belgian competition authority condemned price exchange schemes between competitors that were seen as part of a price cartel (see e.g. [Decision n° 2008-I/O-13, 4 April 2008, Bayer e.a.](#)).

*If information exchanges restrict competition, will they restrict competition by „effect? Or will they restrict competition by „object or constitute a per se infringement?*

Pure information exchange schemes will be seen as infringements ‘by effect’. However, when seen as part of a price fixing cartel or assimilated with a price fixing or coordination scheme, they will be assessed as (part of) an infringement ‘by object’.

*In order to establish an infringement, is it necessary to prove that firms agreed to share information? Or can the mere fact that they exchanged information be sufficient to establish a competition law violation? Does your competition law apply to a mere concerted practice of exchanging information among competitors?*

We have no case law on this specific point. However, in case competitors share information without agreement to exchange information between each other, they probably each decided, perhaps as a concerted practice to, make information publicly available. Given that our Competition Act applies to concerted practices in line with article 101 TFEU, we can not rule out that such practice might constitute an infringement of article 2 of the Belgian Competition Act (equivalent of article 101 TFEU), but it will usually not be the case.

*What factors can be used to distinguish in these cases between unilateral actions by firms and coordinated actions that could potentially be subject to a prohibition against unlawful agreements? Is reciprocity required to find that information exchanges are unlawful? Conversely, could it be unlawful if one firm unilaterally makes information available to competitors or the market place, for example information about intended price increases or other future competitive conduct?*

Conceptually, it is possible that there might be an illicit ‘exchange’ of information or ‘inducement to a concerted pricing policy’ without reciprocity. But as already indicated it will be difficult to prove that informing the market (and not secretly each other) constitutes an illicit information exchange scheme, and it will be even more difficult in case of a unilateral initiative.

And, given the way our authority (as other authorities) defines its priorities, taking into account *inter alia* the chances of ‘success’ of a procedure, it is unlikely that a non-reciprocal ‘exchange’ of information case will be opened in the absence of very strong evidence, *i.e.* of a significantly more convincing nature than what most leniency applicants can provide.

*In your practice, have you developed “safe harbours” that can help the industry to structure information exchanges in a way which does not infringe competition law? Have you published guidelines in this area?*

We did not develop real ‘safe harbours’ and did not publish guidelines. However, the abovementioned decisions and indications about our informal competition policy (reported in our annual reports) should give some guidance.

*Under what circumstances, if at all, would your competition authority prohibit information exchanges? If information sharing is not prohibited per se, what factors should be used to decide whether an information sharing practice was unlawful? Would it always be necessary to show that information sharing had anticompetitive effects?*

In practice we try to assess primarily to what extent the information risks to result in a concerted pricing policy, the impact of the issue on the Belgian market and the likelihood that we will obtain the evidence necessary to build a case.

*More specifically, what role would the following factors (please feel free to extend the list) play in decisions to prohibit such practices?*

a) *evidence of pro- or anti-competitive intent and/or effects;*

Evidence of anti-competitive intent will be taken into account but will not be sufficient in case the information exchange needs to be assessed as an infringement by effect.

b) *general market structure and conditions affecting the probability of successful co-ordination (e.g. degree of concentration; height of barriers to entry/expansion/exit; degree of product differentiation; lumpiness in order volumes; etc.);*

Yes.

c) *degree to which such practices are widespread in the market;*

Yes, but if the market is generally transparent, publishing information that is usually available is unlikely to constitute an infringement.

d) *evidence that information exchanges were adopted by agreement with competitors, versus being unilaterally deployed;*

Yes, *cfr. supra*.

e) *evidence that one or more transparency enhancers are being used to support an anticompetitive agreement; and*

Yes, and in that case, depending on the nature of the anticompetitive agreement, the infringement may be qualified as an infringement by object.

f) *characteristics of the information exchanged, such as its subject matter, level of detail, age and frequency;*

Yes, in line with the European Commission's case law in respect of information exchange schemes.

g) *the public or private nature of the information exchanged.*

Yes, and the exchange of public information will normally not restrict competition.

*Do you distinguish between the following types of information exchanges? If you do, how do you assess of these different types of information exchanges?*

a) *“Direct” exchanges between competitors and “indirect” exchanges, i.e. exchanges which take place with the intermediation of a third party (e.g. a consultant or a trade association)?*

This difference should have no impact on the assessment.

b) *“Horizontal” information exchanges (i.e. between companies on the same level of trade) and “vertical” information exchanges (i.e. between companies on different levels of trade)?*

We assume that a ‘vertical’ exchange of information needs, in case it restricts competition, to be assessed as a vertical arrangement to in the light of the relevant EU block exemption. This implies that it is very important to assess to what extent the exchange qualifies as (part of) a vertical price maintenance scheme or similar hardcore restriction (excluding the benefit of the exemption).

c) *Information exchanges which are set up by companies and information exchanges which are favoured or required by the government or by other public entities?*

To the extent that government regulations impose an information exchange, its anti-competitive effects can not constitute an infringement of the rules of competition by the participating undertakings. However, in case the scheme is only favoured by government, the participating undertakings still need to assess whether the scheme is compatible with the rules of competition.

d) *“Private” information exchanges (i.e. among suppliers only) and “public” information exchanges (i.e. among suppliers and buyers)?*

Please see in respect of information exchanges between suppliers the responses to question 2.7, and in respect to information exchanges among suppliers and customers the response to question 2.8 (b). Information exchanges between suppliers and customers can be ‘private’ as well as ‘public’ See also response to question 2.7(g).

*In your jurisdiction, to what degree and under what particular circumstances information exchanges taken as circumstantial evidence of an anti-competitive agreement?*

The finding of an information exchange scheme between competitors prompts the question whether it is part of a price fixing arrangement. In case we establish that there is a suspicious parallelism in the development of pricing policies of competitors, the information exchange scheme will be part of the evidence taken into account.

*How do you assess possible countervailing efficiencies? For example, the parties may argue that information exchanges can bring about productive efficiencies and increase welfare. If the conduct has plausible efficiencies, would that be sufficient to undermine an infringement case or would it be necessary to engage in a broader balancing exercise of restrictive effects and efficiencies?*

If the conduct has plausible efficiencies, and it is not part of a price fixing cartel, such efficiencies will be taken into account but only as part of broader balancing exercise.

### **3. Cases**

*Please describe any recent case in which you have assessed the effect on competition of an information exchange scheme, whether the information exchange was part of a broader antitrust infringement (i.e. price fixing) or a stand-alone infringement of your competition rules.*

Please see response to question 2.1.



## CANADA

### 1. Introduction

The Canadian Competition Bureau (the “Bureau”) recognizes that information exchanges between competitors can have positive and negative effects on competition in Canada. For example, information exchanges can be pro-competitive, in that they may intensify competition through the elimination of information asymmetries and create the opportunity for significant efficiency gains through, among other things: (a) benchmarking and the development and implementation of best practices; (b) the development of more efficient means of production; and (c) the introduction of new products and services that could not be produced unilaterally. Information exchanges may also lead to enhanced transparency in the marketplace, which can, among other things, facilitate competition by allowing firms that offer lower prices or higher quality services to distinguish themselves from competitors.<sup>1</sup> At the same time, information exchanges can be anti-competitive, as they may make it easier for competitors to collude or to tacitly coordinate their conduct, thereby reducing or even eliminating competitive rivalry.

As a general rule, information exchanges may raise issues under the *Competition Act* (the “Act”)<sup>2</sup> only if they involve the exchange of competitively sensitive information, such as firm-specific information regarding costs, pricing, trading terms, strategic plans, marketing strategies, market shares, levels of output or other significant competitive variables.<sup>3</sup> The exchange of such information could make it easier for competitors to act in concert, particularly in markets characterized by high levels of concentration, barriers to entry and relative stability. Such exchanges could also assist competitors in monitoring one another’s prices or conduct as part of an anti-competitive agreement. The risk of issues arising under the Act is further heightened when the information exchanged relates to products that are relatively homogeneous and where firms compete across a limited number of competitive variables.

#### *1.1 Provisions of the Act relevant to information exchanges*

Prior to March 12, 2010, information exchanges between competitors were subject to section 45 of the Act, which prohibited agreements that prevented or lessened competition unduly. This provision was repealed on March 12, 2010 and replaced with: (a) a new *per se* criminal offence prohibiting agreements between competitors to fix prices, allocate markets or restrict output (section 45); and (b) a new civil provision for all other agreements between competitors that prevent or lessen competition substantially (section 90.1).<sup>4</sup> Information exchanges that constitute or facilitate the development and implementation of an agreement between two or more competitors are now subject to these new provisions.

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<sup>1</sup> See, for example, the discussion in Competition Bureau, *Self-Regulated Professions - Balancing Competition and Regulation* (Ottawa: Industry Canada, 2007), available online at [www.cb-bc.gc.ca](http://www.cb-bc.gc.ca).

<sup>2</sup> R.S.C. 1985, c. C-34, as amended, available online at [www.laws.justice.gc.ca](http://www.laws.justice.gc.ca).

<sup>3</sup> While the Bureau does not typically consider publicly available information to be competitively sensitive, it may be concerned with an agreement between competitors to publicly disclose competitively sensitive information.

<sup>4</sup> These provisions are set out in Schedule “A” to this paper.



A person found guilty of an offence under section 45 may be imprisoned for up to 14 years and/or fined up to CAD\$25 million. Where there is a finding of guilt, the court may also issue an order under subsection 34(1) of the Act prohibiting any behaviour that constitutes or is directed toward the commission of the offence. Orders issued under subsection 34(1) can last up to 10 years and may include prescriptive terms requiring positive steps or acts to ensure compliance with the law. Under subsection 34(2) of the Act, a court may issue a prohibition order without a finding of guilt where the court finds that a person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence. As with orders issued under subsection 34(1) of the Act, such orders can last up to 10 years and may include prescriptive terms requiring positive steps or acts to ensure compliance with the law.

In circumstances in which the Bureau applies for an order under section 90.1 of the Act and the Competition Tribunal (the “Tribunal”) finds that an agreement substantially prevents or lessens competition, the Tribunal may prohibit any person from doing anything under the agreement, or require any person, with the consent of that person and the Commissioner, to take any other action. Subject to certain exceptions, the Tribunal cannot make an order under section 90.1 where it finds that the agreement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition.

## **1.2 Guidelines relevant to information exchanges**

The Competitor Collaboration Guidelines (the “Guidelines”) describe the Bureau’s general approach to applying sections 45 and 90.1 of the Act to collaborations between competitors, including information sharing agreements.<sup>5</sup> Among other things, the Guidelines provide as follows:

*[T]he amended criminal prohibition is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute “naked restraints” on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture). Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under the civil agreements provision in section 90.1 that prohibits agreements only where they are likely to substantially lessen or prevent competition.<sup>6</sup>*

The Guidelines recognize that collaborations can involve a considerable degree of information exchange between competitors. In this regard, the Guidelines provide as follows:

*For the most part, [information exchanges between competitors] do not raise concerns under the Act because competitors generally avoid sharing information that is competitively sensitive in order to preserve their competitive advantage. However, information exchanges can, in certain cases, impair competition by reducing uncertainties regarding competitors’ strategies and diminishing each firm’s commercial independence. In such cases, information exchanges can raise issues under sections 45 or 90.1 of the Act.<sup>7</sup>*

## **2. Agreement between competitors**

Sections 45 and 90.1 of the Act apply to agreements between competitors. The meaning and scope of the terms “agreement” and “competitors” are discussed below. Other issues concerning the applicability of

<sup>5</sup> Competition Bureau, *Competitor Collaboration Guidelines* (Ottawa: Industry Canada, 2009), available online at [www.cb-bc.gc.ca](http://www.cb-bc.gc.ca).

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.* at 27.

sections 45 and 90.1 to information exchanges between competitors are discussed in Parts 3 and 4 of this paper.

## 2.1 Agreement

In determining whether an agreement exists, the Bureau will consider whether the parties reached a “meeting of the minds”, either explicitly or tacitly. An agreement may be established through direct evidence that the parties entered into an agreement, or it may be inferred from a course of conduct or other circumstantial evidence. In this regard, subsection 45(3) of the Act specifically provides that, in a prosecution under subsection 45(1), “[a] court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it”.<sup>8</sup>

The Bureau does not consider that the mere act of independently adopting a common course of conduct with awareness of the likely response of competitors, or in response to the conduct of competitors, commonly referred to as “conscious parallelism”, is sufficient to establish an agreement. For example, in retail gasoline markets, the visibility of posted prices and the predominant consumer perception that gasoline sold by different companies is essentially the same product could logically produce similar or identical prices without an agreement. However, parallel conduct coupled with facilitating practices, such as sharing competitively sensitive information, may be sufficient to prove that an agreement was concluded between the parties.<sup>9</sup>

For example, in *R. v. Armco Canada Ltd.*<sup>10</sup> the accused manufacturers adopted an open price policy in order to achieve pricing stability in their industry. The policy advocated that the accused would publish their price lists and circulate them to the other members of their industry association. The advantages of the policy were highlighted in documents circulated throughout the industry and in speeches given to members of the association. The written materials emphasized that the policy was voluntary and, with one exception, no documents suggested that the association members agreed to follow the policy. However, within weeks of the publication and circulation of a price list by one of the accused, several manufacturers “were suddenly all quoting the same price per lineal foot ... in advance of the effective date of any particular company’s price list”.<sup>11</sup> After determining that it would be difficult to find a direct agreement among the accused, the trial judge stated that “[t]he cumulative effect of all the evidence with the uniformity of prices ... has convinced me that there was a tacit agreement to maintain identical prices”.<sup>12</sup>

Similarly, in *R. v. Canadian General Electric Company Ltd.*<sup>13</sup> the accused manufacturers of electric large lamps introduced similar sales plans and price lists. The sales plans and price lists were provided to distributors several months before they took effect, with the expectation that they would thereafter be

<sup>8</sup> *Supra* note 2 at s. 45(3). The Act does not include a similar provision for applications commenced before the Tribunal under section 90.1. However, the Bureau is of the view that the Tribunal may also infer the existence of an agreement from circumstantial evidence.

<sup>9</sup> Facilitating practices enhance the ability of competitors to coordinate their behaviour. Such practices assist competitors in monitoring one another to ensure that no one “cheats” on an agreement and responding to any deviations from the agreement. The concept of facilitating practices was discussed in detail during the OECD’s roundtable on Facilitating Practices in Oligopolies in October 2007 and in the country submissions, available online at [www.oecd.org](http://www.oecd.org). Accordingly, this concept is not discussed in detail in this paper.

<sup>10</sup> (1974), 6 O.R. (2d) 521 (H.C.).

<sup>11</sup> *Id.* at 551.

<sup>12</sup> *Id.* at 575.

<sup>13</sup> (1976), 15 O.R. (2d) 360 (H.C.).

provided to the other manufacturers. Each manufacturer subsequently became aware of the others' plans and adopted similar pricing policies. The trial judge found that "[t]he published price list became the signal ... for what the bidder ... deemed to be a fair price.... [A] price change by one of the accused resulted in an almost simultaneous price change by the others. This substantially simultaneous pricing behaviour was a product of a deliberate strategy to publish price information far in advance to allow the followers to respond without a time lag."<sup>14</sup>

In the Bureau's view, it is not necessary to prove that the parties agreed to exchange information for the purpose of facilitating an agreement contrary to the Act. Accordingly, a situation in which one party unilaterally makes information available to other competitors, such as information about intended price increases or other future competitive conduct, may be sufficient to infer the existence of an agreement contrary to the Act. For the purpose of determining whether an agreement exists, it does not matter whether information is made available only to competitors or to the marketplace generally, although the Bureau will typically view private exchanges with greater suspicion.

## 2.2 Competitors

Sections 45 and 90.1 apply to agreements between parties who compete or who are potential competitors with respect to the products that are the subject of the agreement.<sup>15</sup> The Bureau does not consider companies operating at different levels of trade to be competitors for the purposes of these provisions. Accordingly, information exchanges made in the context of entirely vertical buying and selling relationships are not within the scope of sections 45 and 90.1 of the Act, even where such exchanges constitute or facilitate the development and implementation of an agreement.<sup>16</sup>

Where an agreement involves competing and non-competing parties, the fact that some parties are not competitors does not insulate the competing parties from prosecution under section 45. Parties that are not competitors may also be prosecuted under section 45 through the aiding and abetting provisions in section 21 or the counselling provisions in section 22 of the *Criminal Code*<sup>17</sup> in circumstances where the conditions of those sections are met.

Information sharing including a non-competitor most often occurs in the context of trade association activities. Agreements between members of a trade association may constitute agreements between competitors for the purpose of sections 45 and 90.1 of the Act. As discussed in the Guidelines, rules, policies, by-laws or other initiatives (including information exchanges) enacted and enforced by an association with the approval of members who are competitors are considered by the Bureau to be

<sup>14</sup> *Id.* at 395.

<sup>15</sup> For the purposes of sections 45 and 90.1 of the Act, the term "competitor" includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement. *Supra* note 1 at ss. 45(8) and 90.1(11). In determining whether parties to an agreement are competitors for the purpose of section 45, the Bureau is of the view that it is not required to engage in a detailed definition of the relevant market, in the sense of having to plead and prove the full nature and extent of the market and the participants within it. However, the Bureau may nonetheless seek to gather information relating to the market to more fully understand, among other things, the context of the agreement. As long as the parties are offering, or, in the absence of the agreement, would likely offer, the same or otherwise competing products in the same or otherwise competing regions, the Bureau will generally conclude that the parties are in competition with one another for the supply of such products.

<sup>16</sup> However, vertical restraints on minimum pricing, which typically appear in arrangements between upstream and downstream entities, may raise concerns under the civil price maintenance provision contained in section 76 of the Act.

<sup>17</sup> R.S.C. 1985, c. C-46, as amended, available online at [www.laws.justice.gc.ca](http://www.laws.justice.gc.ca).

agreements between competitors for the purpose of sections 45 and 90.1.<sup>18</sup> In the event that such an agreement contravenes section 45 of the Act, the trade association may be considered as a principal party to the offence or may be subject to prosecution through the aiding and abetting provisions in the *Criminal Code*.

### 3. Treatment of information exchanges under Section 45 of the Act

Information exchanges in and of themselves are not *per se* illegal under section 45 of the Act. However, proof that competitors have exchanged information can sometimes serve as evidence of an agreement to fix prices, allocate markets or restrict output. For example, the exchange of pricing information followed by parallel price increases could be sufficient to infer an agreement to fix prices, particularly if accompanied by other “plus factors”, such as evidence that representatives of the competitors were present at the same function or communicated prior to the price increases coming into effect.<sup>19</sup> Similarly, the exchange of production capacity information followed by the closure of one or more production facilities could be sufficient to infer an agreement to lessen the supply of a product. The fact that an information exchange may bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition is not relevant for the purposes of section 45 of the Act.

Where an agreement falls within one of the categories prohibited by section 45 of the Act, liability can be avoided only where one or more of the defences set out in section 45 applies. Of particular importance in the context of information exchanges is the ancillary restraints defence (the “ARD”) in subsection 45(4) of the Act. The ARD is available when: (a) a restraint is ancillary to a broader or separate agreement that includes the same parties; (b) the restraint is directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement; and (c) the broader or separate agreement, when considered in the absence of the restraint, does not contravene subsection 45(1) of the Act. Depending on the circumstances, the ARD might apply to exchanges of pricing, production or other competitively sensitive information made in connection with a broader and legitimate joint venture or strategic alliance between the parties.<sup>20</sup>

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<sup>18</sup> *Supra* note 5 at 8 and 20.

<sup>19</sup> Other “plus factors” include: a relatively small number of firms; a relatively homogenous product; inelastic demand; evidence that prices were well above costs or moved in a way that seemed inconsistent with competition; actions that can only be explained by the existence of an agreement, such as secret meetings and enforcement activities; and the simultaneous adoption of facilitating practices that make coordination possible without the need for any direct communications, such as pre-announcing price increases, the advance circulation of price lists, open pricing policies, net pricing schemes, similar consignment sales programs, similar delivered pricing systems, most-favoured-nation clauses, meet-or-release clauses, common product standards and public statements about the need to achieve pricing stability.

<sup>20</sup> The ARD is discussed in section 2.5 of the Guidelines, *supra* note 5. The other defences in section 45 of the Act relate to regulated conduct, agreements between affiliates, agreements between federal financial institutions, export agreements and specialization agreements. For a discussion of these defences, see section 2.6 of the Guidelines, *id.*

#### **4. Treatment of information exchanges under Section 90.1 of the Act<sup>21</sup>**

In assessing information sharing agreements between competitors under section 90.1 of the Act, the Guidelines indicate that the Bureau will consider the following factors, among others: (a) the nature of the information exchanged; (b) the timing of the information exchange; (c) the manner in which the information is collected and disseminated; (d) whether the parties participating in the information exchange have market power or will likely have market power; and (e) whether any anti-competitive effects are offset and outweighed by the efficiencies generated through the information sharing agreement.<sup>22</sup> Each of these factors is discussed below.

##### **4.1 *Competitively sensitive information***

As stated in the Guidelines, an agreement to disclose or exchange information that is important to competitive rivalry between the parties can result in a substantial lessening or prevention of competition. As discussed in more detail above, where competitors agree to share competitively sensitive information, it can become easier for these firms to act in concert, thereby reducing or even eliminating competitive rivalry.

##### **4.2 *Timing of information***

The exchange of information relating to current or future activities is more likely to affect competition adversely and, as such, raises greater concerns than the exchange of information relating to historical activities. For example, disclosure of information relating to future pricing, future marketing activities or the disclosure of other competitively sensitive information is more likely to raise concerns than disclosure of information regarding activities that took place in the past, such as historical costs or sales. However, it should be noted that an agreement to disclose historical information could raise concerns where such information provides a meaningful indication of future intended pricing or other competitively significant factors.

In addition to the nature and currency of the information being exchanged, issues are more likely to arise under section 90.1 of the Act where the information is being exchanged bilaterally between competitors, where the exchange occurs on a frequent and ongoing basis and/or where the exchange takes place immediately before prices or other competitively sensitive matters are determined.

##### **4.3 *Manner of collection and dissemination***

Information exchanged directly between competitors is more likely to raise concerns than information that is supplied to an independent third party. In addition, information that is aggregated so as not to disclose information specific to any given firm is less likely to raise concerns than information that is shared in a disaggregated form. For example, firms wishing to determine costs relative to industry averages or industry trends may agree to supply current sales information to a third party for disclosure in an aggregated form only that does not reveal the sales information of any specific firm, as distinct from sharing that information directly.

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<sup>21</sup> While information exchange agreements may be examined under Section 90.1, the collective abuse of market power could also raise concerns under the abuse of dominance provision contained in section 79 of the Act, even in the absence of any form of coordinated conduct. For example, the Commissioner recently found that Waste Services (CA) Inc. and Waste Management of Canada Corporation were jointly dominant in the provision of commercial non-hazardous waste haulage services in certain areas of British Columbia, with a combined market share exceeding 80%. The Commissioner's concerns regarding the anti-competitive contracting practices were resolved by way of a consent agreement registered with the Tribunal. The consent agreement is available online at [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca).

<sup>22</sup> *Supra* note 5 at 27.

In evaluating an agreement to exchange information, the Bureau will also consider the safeguards established through the organization and governance of the collaboration that are directed at preventing or minimizing the disclosure of competitively sensitive information. For example, participants in a collaboration can limit disclosure of information to personnel who are not engaged in sales or marketing activities, or can prevent sales and marketing personnel from participating in a research and development joint venture.

#### **4.4 Market power**

Section 90.1 is a new provision in the Act. There have not yet been any cases before the Tribunal and there is no jurisprudence on this new section. Nevertheless, like most of the other civil provisions in the Act, there is a requirement in section 90.1 to establish a substantial prevention or lessening of competition. In previous decisions on other civil provisions of the Act, the Tribunal has largely equated a substantial prevention or lessening of competition with the creation, preservation or enhancement of market power.<sup>23</sup> This jurisprudence will, in all likelihood, be brought to bear in determining matters under section 90.1 of the Act.

As with the other civil provisions, the Bureau uses various economic indicators, such as market share thresholds and entry conditions, to guide its initial substantial prevention or lessening of competition assessment. As a general rule, the Bureau will not challenge an information sharing agreement under section 90.1 of the Act on the basis of (a) a concern related to the exercise of market power by the parties to the agreement where the market share held by the parties represents less than 35% of the relevant market or (b) a concern related to a coordinated exercise of market power by firms in the relevant market where the share of the four largest firms in the relevant market is less than 65%, or the share of the parties to the agreement is less than 10% of the relevant market. The fact that the parties collectively hold a large share of the relevant market or that the market is concentrated are highly relevant considerations, but are not alone sufficient to warrant a remedy under section 90.1 of the Act.<sup>24</sup> The timely entry and expansion by potential competitors in the relevant market could, for example, constrain the ability of the parties to the agreement to exercise market power in the relevant market.<sup>25</sup>

#### **4.5 Efficiency exception**

As discussed in the Guidelines, section 90.1 of the Act creates a framework where efficiency gains likely to be brought about by an agreement to exchange information are considered against the anti-competitive effects that are likely to result from the agreement. Under this framework, the burden is on the parties to the agreement to demonstrate, through credible, substantiated claims of efficiency gains, that the cost savings and other benefits brought about by such efficiency gains are greater than and offset any anti-competitive effects that are likely to result from the agreement to exchange information.

<sup>23</sup> See, for example, *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.), *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) and *Canada (Director of Investigation and Research) v. The D & B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.). Market power is typically defined as the ability to profitably maintain prices above competitive levels for a significant period of time. The Bureau's analysis is not confined to pricing, but also includes other measures, such as impact on quality, product choice and service, to the degree that competition is substantially lessened or prevented.

<sup>24</sup> Subsection 90.1(3) of the Act, *supra* note 2, provides that evidence as to the market shares held by the parties to the agreement or the level of concentration in the relevant market cannot constitute the sole basis upon which an agreement may be subject to a remedy by the Tribunal.

<sup>25</sup> The Bureau's approach to determining whether an information sharing agreement is likely to substantially lessen or prevent competition is broadly consistent with the assessment conducted in respect of mergers as set out in the Merger Enforcement Guidelines.

## **5. Structuring information exchanges to avoid issues under the act**

The Guidelines make it clear that the exchange of non-competitively sensitive information typically will not give rise to issues under the Act. Where competitively sensitive information is exchanged, the Guidelines state that competitors can minimize the risk of issues arising under the Act by adhering to the following general principles:

- If the exchange is occurring as part of a joint venture or strategic alliance, limit the exchange to information that is relevant to the joint venture or strategic alliance. Typically, such information should not be disclosed to personnel who are involved in sales or marketing activities for the parties to the joint venture or strategic alliance.
- Limit the exchange to historical information. The exchange of historical information is less likely to raise concerns under the Act than the exchange of current and future information.
- Limit the exchange to aggregated information. The exchange of aggregated information is less likely to raise concerns under the Act than the exchange of disaggregated information, the latter of which allows for identification of firm-specific information.
- Use an independent third party to collect and disseminate the information. Direct exchanges between competitors are riskier than those made through an independent third party that holds the information in confidence, although care still needs to be taken when involving third parties.

In addition to adhering to the general principles set out above, trade associations can further minimize the risk of issues arising under the Act by adhering to the following principles when collecting competitively sensitive information:

- Collect information in a way that preserves the anonymity of association members.
- Do not allow employees of an association member to collect information. Rather, use an independent third party, such as a consultant or accounting firm, to collect the information.
- Do not coerce association members to provide information. Association members should not be required to supply information or comply with any proposals regarding the sharing of information.

## **6. Conclusion**

Depending on their nature and timing, information exchanges that facilitate or give rise to the development and implementation of an agreement between competitors could raise issues under sections 45 and 90.1 of the Act. The Bureau's general approach in applying these new provisions, including their application to information exchanges, is set out in the Guidelines. The Guidelines are intended to assist firms in assessing the likelihood that a competitor collaboration, including an information exchange agreement, will raise concerns under the Act.

As a general rule, information exchanges may raise issues under sections 45 and 90.1 of the Act only if they involve the exchange of competitively sensitive information. While any particular matter depends on the specific facts, competitors can minimize the risk of issues arising under these provisions by, for example, limiting exchanges to historical and aggregated information and using an independent third party to collect and disseminate information.

**SCHEDULE “A”**

**PROVISIONS RELEVANT TO INFORMATION  
EXCHANGES BETWEEN COMPETITORS**

**SECTION 45:**

45(1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product;  
or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding \$25 million, or to both.

(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

- (a) that person establishes, on a balance of probabilities, that
  - (i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
  - (ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and
- (b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

- (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
- (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or



(c) is in respect only of the supply of services that facilitate the export of products from Canada.

(6) Subsection (1) does not apply if the conspiracy, agreement or arrangement

(a) is entered into only by companies each of which is, in respect of every one of the others, an affiliate; or

(b) is between federal financial institutions and is described in subsection 49(1).

(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

(8) The following definitions apply in this section.

“competitor” includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c).

“price” includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.

#### **SECTION 90.1:**

90.1(1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement - whether existing or proposed - between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

(a) prohibiting any person - whether or not a party to the agreement or arrangement - from doing anything under the agreement or arrangement; or

(b) requiring any person - whether or not a party to the agreement or arrangement - with the consent of that person and the Commissioner, to take any other action.

(2) In deciding whether to make the finding referred to in subsection (1), the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;

(b) the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;

(c) any barriers to entry into the market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry;

- (d) any effect of the agreement or arrangement on the barriers referred to in paragraph (c);
- (e) the extent to which effective competition remains or would remain in the market;
- (f) any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or arrangement will or would result in the removal of such a competitor;
- (g) the nature and extent of change and innovation in any relevant market; and
- (h) any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.

(3) For the purpose of subsections (1) and (2), the Tribunal shall not make the finding solely on the basis of evidence of concentration or market share.

(4) The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made.

(5) For the purposes of subsection (4), the Tribunal shall not find that the agreement or arrangement has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

(6) In deciding whether the agreement or arrangement is likely to bring about the gains in efficiency described in subsection (4), the Tribunal shall consider whether such gains will result in

- (a) a significant increase in the real value of exports; or
- (b) a significant substitution of domestic products for imported products.

(7) Subsection (1) does not apply if the agreement or arrangement is entered into, or would be entered into, only by companies each of which is, in respect of every one of the others, an affiliate.

(8) Subsection (1) does not apply if the agreement or arrangement relates only to the export of products from Canada, unless the agreement or arrangement

- (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
- (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
- (c) has prevented or lessened or is likely to prevent or lessen competition substantially in the supply of services that facilitate the export of products from Canada.

(9) The Tribunal shall not make an order under subsection (1) in respect of

- (a) an agreement or arrangement between federal financial institutions, as defined in subsection 49(3), in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

(ii) the Minister of Finance's request for or approval of the agreement or arrangement for the purposes of financial policy;

(b) an agreement or arrangement that constitutes a merger or proposed merger under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

(ii) the Minister of Finance's opinion that the merger is in the public interest, or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts; or

(c) an agreement or arrangement that constitutes a merger or proposed merger approved under subsection 53.2(7) of the Canada Transportation Act in respect of which the Minister of Transport has certified to the Commissioner the names of the parties to the agreement or arrangement.

...

(11) In subsection (1), "competitor" includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement.

## CHILE<sup>1</sup>

### 1. Background

The concept of competitive markets requires strong assumptions, not easily observable in real life. Among others, transparency (understood as common knowledge about prices and costs, and symmetric information among market players), no entry barriers and low switching costs (or better still, no switching costs at all). Asymmetry of information is the key issue of information economics. Entry barriers and switching costs are dealt with by antitrust policy, but price transparency is not as clear as those other issues.

Market and price transparency are a common goal for consumer protection agencies and sector regulators (such as in the bank or financial industry) all over the world, grounded in the fact that easy access to information on prices and product characteristics is a *conditio sine qua non* for consumers to be able to compare and choose (comparison shopping), reducing search costs, and reaching effective decisions given their preferences. Of course, consumers also need to be able to deal with the complexity of such information, but there is no doubt that well informed, confident and effective consumers can play a key role in activating competition between undertakings. In addition, due to the fact that in a market economy prices are the right signal for allocating resources, price transparency could also benefit potential entrants in markets.

However, antitrust agencies must confront and assess price and market transparency with caution, because of the risks of anticompetitive practices they can give rise to. For instance, price and market transparency solves the "veil of ignorance" concerning the actions of rival undertakings, making conscious parallelism, concerted practices and collusion easier than otherwise. Such "negative impact is especially likely in markets already prone to anti-competitive coordination" and increasing "price transparency is unlikely to significantly increase the risk of anti-competitive co-ordination unless the affected markets are already particularly susceptible to such co-ordination" (OECD, 2001). Thus, balancing the pros and cons of price transparency is not an easy task. Antitrust agencies should carefully assess the characteristics of affected markets, how the suppliers acquire, use and react to price information and which are the benefits for buyers, in order to measure the impact of enhancing price transparency for the society as a whole.

The exchange of information among competitors is a different and more complex issue faced by antitrust authorities. Actually, there are multiples ways in which these information exchanges can take place: public announcements, information and data shared by trade associations, or sharing past transactions and future intentions or market positions directly among competitors. Even though information exchange could sometimes be pro-competitive -implying efficiency gains for society-, there are some situations where these information exchanges make firms aware of their competitors' market strategies lessening rivalry among them, with possible restrictive effects on market competition. In fact, information exchanges have a strong potential for collusion, facilitating the implementation of a cartel by enabling undertakings to monitor the compliance of an agreement. According to the experience of

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<sup>1</sup> Note submitted by the FNE, Chile. The FNE is an independent government competition agency in charge of detecting, investigating and prosecuting competition law infringements, issuing technical reports and performing competition advocacy. Its enforcement actions are brought before the Competition Tribunal (Tribunal de Defensa de la Libre Competencia-TDLC) which has adjudicative powers on competition matters. The FNE's website is available at [www.fne.gob.cl](http://www.fne.gob.cl).

competition authorities in Chile, the outcome of information exchange in the affected market depends on the nature of the information exchanged and on the characteristics of the industry in which it took place.

## **2. The Chilean Competition System and the Competition Act**

The Chilean Competition Act was established by Decree Law No. 211 (DL No. 211) in 1973 and its subsequent amendments. Its first article establishes that the purpose of the law is “to promote and defend free competition in markets”. It then spells out the institutional framework, the authority of the National Economic Prosecutor and the National Economic Prosecutor’s Office (FNE) who represent the general interest, and the Competition Tribunal (Tribunal de Defensa de la Libre Competencia-TDLC). These institutions are in charge of investigating (FNE) and sanctioning (TDLC) anticompetitive conducts. In subsequent articles, DL No. 211 states that the anticompetitive illicit is “...any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects...” in a broad sense (Article 3). The following sections of the Act illustrate anticompetitive behaviours, like collusive agreements between competitors and abuses of a dominant position.

The Chilean statute does not distinguish between anticompetitive conducts submitted to a per se illegal rule, and those analysed under a rule of reason. The Competition Act does not consider general procedures for defining markets, market share presumptions as indicators of dominance, thresholds for evaluating market concentration, references to entry barriers nor indicators of the scope of an efficiency defence. In this sense, the analyses by the TDLC has traditionally been performed on a case by case basis, which includes, among others, the definition of the relevant market and the identification of market power used or obtained in a wrongful way, or –in merger analysis- the assessment of the risks of abuses or coordination in the future market scenario. In this sense, and unless a previous order or injunction has been issued by the TDLC regarding a specific sector or industry, under the provisions of the Competition Act, it is hard to conceive the exchange of information among competitors as a per se restriction of competition. Hence, a conduct of this kind would be analyzed under its own merits and in the context of an investigation, with particular attention to the potential or actual effects that such exchange of information would have in the markets.

Regarding how the FNE approaches price and market transparency, its Guide for the Analysis of Horizontal Concentration Operations -which is an internal working tool, non binding for the TDLC- expressly refers to this issue as a criteria for describing and analysing the markets involved, particularly about the risks of coordination in markets affected by M&As. Among other criteria, the Guide states that the FNE will analyse the decline in the number of competitors and the risk of coordination among those which remain in the market, considering among others, the flow of information from existing competitors in the market, that would enhance mutual monitoring, which can be facilitated, for instance by the existence of trade associations or legal entities to which the competitors belong (especially those who own and/or manage inputs or essential infrastructure).

On the other hand, for investigating concerted practices or collusion, the FNE does not have an internal guideline or protocol but its analysis follow international guidelines and best practices recommended by the International Competition Network. Accordingly, price and market transparency as well as the exchange of information among competitors are considered, at the least, as facilitating practices for anticompetitive conducts, being carefully scrutinized by the case handlers in order to assess their implications.

### 3. Experience of Chilean competition authorities regarding enhancing price transparency

Although underlying the Chilean competition authorities' experience there is no unique approach towards cases where price or market transparency has been a key issue, there are cases where the balance has shifted toward the pro-competitive effects of enhancing transparency.

#### 3.1 Cases where enhanced price transparency has been ordered

**Cow raw milk producers.** Markets with value chains characterized by many intermediate stages between the primary producer and the final consumer can have competition concerns, particularly where there is an imbalance between buyer power and seller power in some stages of the chain. As in some other jurisdictions, in Chile the relation between cow raw milk producers and dairy processors has been a matter of investigation and decision by the competition authorities.

In 1997, the FNE began an investigation against six dairy processors (including a number of subsidiaries of multinational companies) and brought a case before the '*Comisión Resolutiva*<sup>2</sup>'. The processors were accused, either together or individually, of various infringements to the Competition Act, including abuse of their dominant position against suppliers (discriminatory pricing and refusal to deal -or purchase refusal) and colluding to determine market share, among others. In 2004, the TDLC issued a ruling<sup>3</sup> rejecting most of the grounds of the FNE's claim, due to lack of sufficient evidence of collusion (market share agreement) and of proof of a refusal to deal. However, the TDLC did find evidence to issue a holding on discriminatory pricing, imposing a fine to one of the accused processors. In addition, the TDLC detected an imbalance of power in the relationship between dairies and milk producers due to the lack of transparency in the market for the acquisition of raw milk, to the detriment of the producers. Accordingly, the TDLC's provision established general instructions for purchases -for instance, that trade conditions must be clear, transparent, objective, non discriminatory and precise, or that the trade terms cannot be changed ex post, or unilaterally, and should be in writing and known by both parties- but also defined precise mechanisms to ensure enhanced price transparency: "There shall be price lists detailing the parameters that compose it, in order to avoid arbitrary differences that affected the cow raw milk producers" or "Prices could not be grounded on historical quotient between winter and summer deliveries".

**Pharmaceutical industry.** In early 2000, the *Comision Preventiva Central* (CPC) opened a case concerned about the performance of the pharmaceutical market with respect to final customers, mainly due to the increasing development of big retail pharmacy chains (or 'pharma-retail'). The scale differences between 'pharma-retail' and the independent retail pharmacies (or traditional channel), and the subsequent asymmetric bargaining power between them with respect to their pharmaceutical suppliers, exposed the latter to severe risks, either being directly abused by laboratories' seller power—for instance, by means of a discriminatory pricing scheme-, or excluded by the 'pharma-retail' –for instance, through predatory pricing. To avoid these risks, the CPC issued general instructions<sup>4</sup> ordering pharmaceutical industry suppliers that sell products (drugs or other items) as wholesalers to retail pharmacies<sup>5</sup>, to disclose permanent information about their products and selling conditions (price lists and credit conditions). All of

<sup>2</sup> The '*Comisión Resolutiva*' and the central and regional Consultative Commissions (the *Comisiones Preventivas*, central (CPC) and regional) were the former institutions in charge of deciding about competition issues according to the Chilean Competition Act, before the current Competition Tribunal (TDLC) was established in 2003.

<sup>3</sup> Ruling No. 7/2004. Spanish text available at: [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_07\\_2004.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_07_2004.pdf)

<sup>4</sup> Resolution No. 634/2001, Resolution No. 638/2002 and Resolution No. 729 / 2004.

<sup>5</sup> The rules are directed to pharmaceutical production laboratories, pharmacies, warehouses, distribution centers and importers of pharmaceutical products.

these providers must keep that information updated and publicly disclosed in their premises and on a website. The FNE was in charge of ensuring the compliance of this provision.

In 2005, the FNE examined the compliance of these rules over a random sample of 17 pharmaceuticals. Based on its findings, the FNE brought a case before the TDLC, which after a due process sanctioned pharmaceutical companies with several fines for the violation of the general instructions<sup>6</sup>, a decision affirmed by the Supreme Court<sup>7</sup>.

After these events, in a non-adversarial procedure, pharmaceuticals requested before the TDLC the abrogation of the general instruction on transparency. The TDLC dismissed this petition while stating, among other considerations, that the goal of this general instruction was to enhance competition of pharmaceuticals sales to final consumers, and that was the reason why the publicity of prices and other commercial terms was required. Thus, more transparency was achieved and so was the possibility for small retail pharmacies to compete fairly with strong retail pharmacy chains was enhanced<sup>8</sup> (Decision No. 12, Ground 3). Thus, the transparency provisions are still enforceable, even though it is not fully economic efficiency-oriented but also fairness-oriented, protecting the traditional channel (mostly small and medium sized enterprises), as was previously identified in the 2004 OECD/IDB peer review.

Banking credit card-management: **FNE v/s Transbank**. Transbank is a facility owned by the Chilean banks since 1986, which operates a multi-sided platform where, on the one side, manages a network of more than 60 thousand affiliated merchants; and on the other side, administrates all banking credit cards issued in the country (Visa, Mastercard, Magna, American Express and Diners Club) as well as debit cards (same cards used to accessing the banking ATM network), with national and international coverage (Electron and Maestro). In addition, Transbank also manages ‘Webpay’, the Internet payment service, and supplies the acquiring and operating services for cards issued by some large retailers.

In this scenario, as a platform administrator for credit cards, during 2001 and 2002 Transbank was the sole supplier to the commercial stores accepting payment cards of computer facilities and operating terminals for its business. It was accused of an abuse of a dominant position by imposing a discriminatory pricing structure to card issuers and predatory and discriminatory prices to stores that accepted bank-issued cards. Although the case began in 2003 before the former ‘Comisión Preventiva Central’ (CPC) which issued the preliminary decision, it was not completely decided until 2005, when the TDLC issued its decision<sup>9</sup>. In its final ruling, the TDLC imposed Transbank a fine for its discriminatory conduct, also approving a partial settlement between the FNE and Transbank, which established a self-regulation scheme (‘Plan de Autorregulación’, PAR) to be periodically overseen by the FNE. The PAR scheme ensures that the charges made by Transbank to both the merchant side and affiliated card issuers are based on an objective pricing mechanism -linked to economic criteria such as volume of transactions, average ticket value and risk associated to each type of merchant- and has been applied onwards by the firm. The scheme for tariffs and charges is publicly available for customers on Transbank’s website<sup>10</sup>.

<sup>6</sup> TDLC Ruling No. 33/2005. Spanish text available at: [www.tdlc.cl/DocumentosMultiples/Sentencia\\_33\\_2005.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_33_2005.pdf)

<sup>7</sup> Supreme Court, 18.05.2006, file 6359-2005.

<sup>8</sup> TDLC Decision N° 12/2006. Spanish text available at: <http://www.tdlc.cl/DocumentosMultiples/Resolucion-12-2006.pdf>

<sup>9</sup> TDLC, Ruling No 29 /2005. Spanish text available at: [www.tdlc.cl/DocumentosMultiples/Sentencia\\_29\\_2005.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_29_2005.pdf)

<sup>10</sup> For instance, [https://www.transbank.cl/tbk\\_t\\_2.asp](https://www.transbank.cl/tbk_t_2.asp)

The agreement reached by the FNE and approved by the TDLC, enhanced price transparency and was an instrument aimed at preventing abusive tariffs charged by Transbank to both the merchant side and affiliated card issuer.

### 3.2 *Cases where excessive transparency has been identified as a potential risk for competition*

There have also been cases where the TDLC has expressly recognized the risks of excessive transparency.

For instance, it stated that “...it is feasible to appreciate ... a number of factors that may be consistent with a collusive agreement: (a) the existence of a small number of competitors, (b) the frequent interaction between the undertakings, (c) a remarkable transparency of information about the competitors, and (d) the presence of entry barriers to market.” (TDLC, Ruling No 57/2007, Gr. No. 69) in re FNE vs. Private Health Insurance Companies case<sup>11</sup>.

In this case, the FNE submitted charges against the major private health insurance companies (or ISAPRES), accusing them to collude for reducing the percentage of coverage of the benefits of their marketed health plans<sup>12</sup> harming their affiliated. Although the FNE’s case did not succeed -because of insufficient evidence for satisfying the standard of proof of the existence of an agreement-, the TDLC endorsed the FNE’s position that information flows regarding the companies’ sales teams and periodical reports about the insurers and their insurance plans disclosed by the sector regulator, were an expeditious information channel leading to parallel conducts<sup>13</sup>.

### 3.3 *Information exchanges between competitors*

As was stated in the first chapter, information exchanges among competitors could adopt several forms. In the following case review, we would like to highlight those differences revealed from recent cases prosecuted by the FNE.

**The AM Patagonia case.** In 2006, the FNE brought a case before the TDLC against AM Patagonia, which was a privately held corporation of specialists physicians formed in Punta Arenas, a southern region of Chile. This entity grouped 84 physicians who work in that region (from a total of 204). For some medical specialities, the physicians who were part of the corporation had a dominant position (or even a monopoly) in the relevant market. The case focused on a price agreement -unifying their tariffs by speciality and other conditions of medical benefits-, which was agreed upon as individual professionals during the corporation’s shareholders meetings. In fact, since its constitution, the entity clearly stated that one of its goals would be to get enough countervailing power for bargaining about their tariffs with the private health insurance companies, negotiating as a block, with common prices based upon the “...excellent geographical position in which we are”. All the evidence came from their meetings, acts and videos they recorded. The decision on this case was issued by the TDLC in 2008<sup>14</sup>, fining the physicians for price agreement. However, in the judicial review, the Supreme Court reduced the fine adding proportionally to the effects of the conduct in the market, and the short period during which the conduct was performed.

<sup>11</sup> TDLC, Ruling No 57/2007. Spanish text available at: [www.tdlc.cl/DocumentosMultiples/Sentencia\\_57\\_2007.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_57_2007.pdf)

<sup>12</sup> It is mandatory for formal workers to contract a health insurance plan, given the Chilean social security scheme.

<sup>13</sup> TDLC Ruling 57/2007, Gr. 75.

<sup>14</sup> TDLC, Ruling No 74/2005. Spanish text available at: [www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=1726&GUID=](http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=1726&GUID=)



**The AGMital case.** In 2006, the FNE brought a case before the TDLC against AGMital, a local transport trade association. The alleged anticompetitive behaviour was a price agreement among the associates intended to exclude a non-associated entrant by charging a predatory tariff in the same route, besides threatening him. Members made shifts to put pressure on the entrant, so that they could share the predatory losses. The information exchange among competitors -the associated ones- was, therefore, the mechanism for designing and implementing the agreement. The TDLC ruled the case in 2010<sup>15</sup>, fining the trade association.

#### **4. Final remarks**

The cases described above show that exchange of information among competitors is also an important issue for competition authorities in Chile, having been subject to important enforcement actions and decisions. In particular, as many other jurisdictions have previously done, the FNE is currently facing the challenge of instilling competition principles in the business community in general and, in particular, within trade associations. As an important step in these efforts, the FNE is currently in the process of drafting a guideline on competition principles for trade associations with the aim that their individual members understand their obligations under the Competition Act. This guideline will include practical steps that the trade associations can take in order to reduce the risks of breaching the DL No 211. Its official release is scheduled for November 2010.

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<sup>15</sup> TDLC, Ruling No 102/2010. Spanish text available at: [www.tdlc.cl/DocumentosMultiples/Sentencia\\_102\\_2010.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_102_2010.pdf)

## CZECH REPUBLIC

This paper summarizes the position of the Czech Office for the Protection of Competition (hereinafter referred to as “the Office”) on, and the experience with, agreements on exchange of information as competition infringement. This contribution contains also general view on transparency, respectively enhanced transparency.

The current statutes of law do not provide specific guidance for assessment of information exchange in the Czech Republic and apart from one pending case there is no pertinent case-law either. Hence the Office has developed quite comprehensive position on information exchange when investigating the latest case of this nature; this pending case is described below.

The Czech competition law consistently reflects the European competition law; the principles and tendencies of the European competition legislation as well as the case-law are recognised by the Office also in national matters. It should therefore be noted that the so called “*Guidelines on horizontal co-operation agreements*” will be published by the European Commission this year, which will examine the applicability of Article 101 of the Treaty on the Functioning of the European Union (hereinafter referred to as “TFEU”) *inter alia* to the agreements on exchange of information; however, the Guidelines will not be reflected in this paper. The aim of this paper is to discuss solely the approach of the Office to the information exchange agreements, and its (however limited) case law in this area.

This paper distinguishes between two general types of information exchange. First, the information exchange may occur in the context of another agreement, i.e. the exchange is ancillary to another collusive agreement; in other words, the exchange of information may facilitate explicit or tacit collusion. Second, the information exchange may constitute an independent infringement of competition law in itself. This paper exclusively deals with the latter.

There are several reasons for enhanced debate on principles for the assessment of information exchange. According to the Office, a more coherent approach should be promoted and it should be set out more clearly that some types of information exchange are prohibited with respect to their object if they meet particular cumulative conditions.

### **1. Transparency and general considerations**

Information exchange between undertakings is essentially connected with transparency. We may consider transparency to be market characteristics (market transparency), or a degree of change of market transparency as a result of information exchange (enhanced transparency). Regarding the first, market transparency as a part of a market structure is described below together with other relevant factors for assessment of anticompetitive effects. Regarding the later, it is often reiterated that enhanced transparency may be pro-competitive as well as anti-competitive.

Information exchange may lead to efficiency gains or create more intensive competition among competitors. Transparency between merchants is likely to lead to intensification of competition if there is a truly competitive market. Efficiency gains may be achieved through cost savings (reduction of unnecessary stock inventories), better logistics (quicker delivery of goods, especially in case of perishable products),

more efficient investment decisions or product positioning; it may lower search costs or facilitate entry in the industry, etc.

In some specific markets, e.g. in the financial or insurance sector, exchange of consumer data may generally be regarded as pro-competitive. These markets often introduce a need for awareness on about consumers' solvency, consumers' risk-behaviour, etc. Sharing this sort of information among undertakings is necessary to diminish asymmetry of information about customers. Companies may thus offer more fair interest rates in consumers' credits or better benefits in automobile insurance if aware of this information. Moreover, keeping track of e.g. frequency of car drivers' accidents brings incentives for them to limit their risk behaviour. Less risking drivers may then enjoy benefits at other insurance companies, which results in stronger competition. On the other hand, free-riding of more risking drivers is then more difficult.

Information exchange is also desirable if it favours innovation or technical development. Exchange of information on innovation and technology markets should not be forbidden since the information exchanged is of very little competitive value.

Information exchange may be pro-competitive if it helps customers in their decision-making and saves their search costs. However, it must be carefully assessed, whether pro-competitive outcome outweighs collusive outcomes caused by the information exchange (see chapter 3 below).

The Office rejected an argument of pro-competitive transparency in a case concerning enhanced price transparency (Decision ref.: R 126/2008/01-3227/2009/310/ADr of March 18<sup>th</sup> 2009). In this case the association of competitors called "Funeral associations in the Czech Republic" (hereinafter referred to as the "FACR") issued recommendations in the form of guidelines with detailed descriptions of how to dig graves, including advice on the way of setting prices for this service and the draft price list; and guidelines for setting prices for the tomb sites and associated services, etc. The FACR argued that application of the guidelines would facilitate price comparison for consumers. However, the Office dismissed the argument of enhancing pro-competitive market transparency in this case. According to the Office the guidelines showed the attempt of the FACR to coordinate price setting by its members and, moreover, the attempt to influence the price charged by its members. This system of cost estimation and recommended prices would allow the members to predict the price policy of its competitors. Therefore the system is forbidden for restricting competition by object. It is likely that the members of the FACR would collude and price would become fixed on the recommended price level. The fact that a consumer may easily compare the prices because of unified price schemes is not sufficient and it is not considered likely to lead to any efficiencies. On the basis of these arguments the Office forbade the practice and fined the FACR.

It has also been demonstrated that exchange of information between competitors can have negative effects (collusive outcome), such as elimination of competition, limitation of production, market sharing, etc. Collusive outcome of information exchange may arise through a common understanding of the terms of coordination.<sup>1</sup> The exchange of commercially sensitive information may be aimed at influencing the conduct of competitors in the market. Thus it is important for agreements on information exchange to be considered in their economic and legal context.<sup>2</sup>

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<sup>1</sup> Transparency may serve also as a monitoring measure for a cartel, in such a case it would be however assessed as a part of the cartel.

<sup>2</sup> Judgment of the Court of 15 December 1994. *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvarereselskab AmbA*. Case C-250/92, paragraph 31. Judgment of the Court of 12 December 1995. *H. G. Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA*. Case C-399/93, paragraph 10.

The Office follows the European case-law and considers agreements on information exchange incompatible with the competition law if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted.<sup>3</sup> Undertakings must determine independently the policy which they intend to adopt in the common market and the conditions which they intend to offer to their customers<sup>4</sup>. If undertakings agree to mutually disclose detailed information about the conduct which they are about to carry out, the mere exchange of information may lead to elimination of competition and may hence create competition conditions which do not correspond to the normal conditions in the market in question.<sup>5</sup>

The Office analysed the possibility to use economic models for economics-based assessment of information exchange. There are two basic models for the assessment: First, **the Cournot competition** model based on the presumption that the undertaking's strategy is based on a decision on the quantity of produced output, and second, the Bertrand competition model based on the presumption that undertakings decide mainly about the price whereas the quantity is implied from the market demand. When using these models, the nature of competition must be determined first (competition by price / competition by quantity). This distinction may have already brought some doubts. Following that, the circumstances and factors like the nature of information exchanged, the way of how information is exchanged, or homogeneity of the products must be considered (see description of factors in the next chapter). Lastly, the impact on competition may be examined.

Both models imply that high-frequented exchange of data on competition key factors (namely information on future prices in the Bertrand model and information on the planned quantity in the Cournot model) is very likely to hamper competition in non-transparent markets with high homogeneity of products. On the other hand, under different circumstances a detailed *ex post* analysis of effects of such exchange would be needed.

## 2. Circumstances and factors

In general, from the Office's point of view the distinction between lawful and unlawful exchange of information consists especially in the following factors: (i) the structure of the relevant market; (ii) the type and characteristics of information exchanged; (iii) how information was exchanged. Nevertheless, additional factors should not to be omitted when evaluating agreements in question.

### 2.1 Market structure

The effects are to be assessed in the markets to which the agreement relates, which is usually defined with respect to the *Notice on the definition of relevant market for the purpose of community competition law*.<sup>6</sup>

<sup>3</sup> Judgment of the Court of 2 October 2003. *Thyssen Stahl v Commission of the European Communities*. Case C-194/99 P, paragraph 81.

<sup>4</sup> Judgment of the Court of 16 December 1975. *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities*. Joined cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, paragraph 173. Judgment of the Court of 14 July 1981. *Gerhard Züchner v Bayerische Vereinsbank AG*. Case 172/80, paragraph 13. Judgment of the Court of 28 May 1998. *John Deere Ltd v Commission of the European Communities*. Case C-7/95 P, paragraph 86.

<sup>5</sup> Judgment of the Court of 28 May 1998. *John Deere Ltd v Commission of the European Communities*. Case C-7/95 P, paragraph 87.

<sup>6</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law. *OJ C 372, 9.12.1997, p. 5-13*.

Regarding the structure of the market, a more concentrated market means a lower probability of pro-competitive effects of dissemination and exchange of information. On the other hand, agreements on exchange of information in an atomized (fragmented) market will be less likely anticompetitive.<sup>7</sup>

Exchange of information in a highly concentrated market (or even oligopolistic)<sup>8</sup> or among undertakings representing a significant part of the market in question might increase the probability of collusion as it is clear that in an oligopolistic market undertakings tend to unify their conduct more widely.<sup>9</sup>

Barriers to entry and product characteristics are other important factors as far as assessment of the agreement is concerned. Exchange of information can mean a barrier to entry if the undertaking that does not participate in that exchange is disadvantaged in the competition.

## 2.2 *The nature of information exchanged*

As undertakings must independently determine the policy which they intend to adopt, exchanged information should not provide for identification of business conduct of other undertakings. Information considered not to provide for identification of business conduct of another undertaking is usually aggregated, public and is of statistical or historical nature.

In general, exchange of public information does not raise any competition concerns. Moreover, customers may even benefit from public communication provided that such exchange enables them to compare trading conditions among different firms. On the contrary, exchange of information that is individualized and about present conduct has a significant coordinating potential.

Assessment of the legality of aggregated data dissemination has to be done in connection with the market structure. The more concentrated the market, the higher the probability that the information, although being aggregated, may simply be assigned to particular players in the market.

Another important aspect is the age of the information exchanged. The older the information, the smaller the possibility for the agreement to be illegal. Exchange of data regarding future strategies is particularly sensitive and should be exclusively a part of internal matters of each company. Age of the information exchanged should be viewed on a case-by-case basis and can vary for instance according to the industry affected or the nature of information exchanged.

Information sharing relating to price, output, costs, or strategic planning is more likely to raise competition concerns than information sharing relating to less competition sensitive variables.

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<sup>7</sup> Judgment of the Court of 23 November 2006. *Asnef-Equifax, Servicios de Información sobre Solvenci y Crédito, SL, Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*. Case C-238/05, paragraph 58. Judgment of the Court of 2 October 2003. *Thyssen Stahl v Commission of the European Communities*. Case C-194/99 P, paragraphs 84 and 86.

<sup>8</sup> 83/671/EEC: Commission Decision of 12 December 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.525 - International Energy Agency). OJ L 376/30, 31/12/1983.

<sup>9</sup> Judgment of the Court of 23 November 2006. *Asnef-Equifax, Servicios de Información sobre Solvenci y Crédito, SL, Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*. Case C-238/05.

### 2.3 *How information is exchanged*

Agreements on exchange of information take various forms and scope. They may take the form of exchange through an industry association, or the form of direct exchange between undertakings. In certain circumstances, the exchange of information can be carried out through an information register, a market study, an independent third party, etc. The way how information is exchanged has changed with the growing importance of the Internet.

According to the Office, the form of information exchange is not the key question. Any approach to assessment of lawfulness of agreements on exchange of information based on the means by which information is exchanged would be rather formalistic. However, this does not mean that competition authorities should not pay attention to that issue. Conversely, B2B and other online meeting places deserve much more attention than ever before.

Agreements on exchange of information by means of outsourcing might be carried out by specialised companies, research institutes or public bodies not active in the product market affected by the agreement. Such information exchange can have a form of a register or market studies.

Market studies worked out by an independent third party usually consist of publicly accessible information. Despite the fact that information is disseminated through these market studies, such information exchange does not usually raise competition concerns.

On the provision that the register through which information is shared is not created by an undertaking active in the relevant market and that the disseminated information is historical, statistical and does not provide for identification of business strategies of undertakings, exchange of information is assumed not to be unlawful for its object. Nevertheless, effects of the agreement should be scrutinized.

The frequency of the exchange is especially important in relation to the ability of undertakings concerned to adapt their behaviour and should be considered in relation to the characteristics of the market and to the specific facts of the case. An industry association can be seen as an ideal forum for contacts where the participants in the exchange system can meet regularly. However, as the recent case law confirmed, even one meeting can constitute a breach of competition law.<sup>10</sup>

It is very important to examine all factors mentioned above before making a conclusion that a particular agreement on exchange of information is anticompetitive or not.

### 3. **Legal assessment**

In general, agreements on the exchange of information can be assessed pursuant to Section 3 paragraph 1 of the Competition Act ( equivalent to Article 101(1) of the TFEU), providing that the exchange of information through any direct or indirect contact between economic operators makes it possible to influence the conduct of an actual or potential undertaking in the market, or to reveal to such an undertaking the conduct which an operator has decided to follow itself or contemplates to adopt in the market, provided that the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions in the market in question, taking into account the nature of products or services provided, the size and number of the undertakings and also the volume of the market.<sup>11</sup>

<sup>10</sup> Judgment of the Court of 4 June 2009. *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*. Case C-8/08.

<sup>11</sup> Judgement of the Court of 8 July 1991. *Commission of the European Communities v Anic Partecipazioni SpA*. Case C-49/92 P, paragraphs 116 and 117.

To review agreements on the exchange of information it is important to ascertain whether the agreements have, by their very nature, the object of restricting or distorting competition within the common market within the meaning of Section 3 paragraph 1 of the Competition Act (similarly Article 101(1) of the TFEU), and if they do not, to determine whether they can do so.<sup>12</sup>

It can be summarized that agreements on exchange of commercially sensitive information which takes place regularly in a very concentrated market and which provides for identification of business strategies of other undertakings and therefore for adaptation of their own conduct in that regard should be considered illegal for their anti-competitive object. This is typical of exchange of information about future prices. In such a case, there is no need to take into account the actual effects of an agreement.<sup>13</sup>

On the other hand, there are situations where information exchange does not have as its object restriction or distortion of competition. According to the case law the common ground is that the essential object of credit information exchange systems (in the form of a register) is to make available relevant information about existing or potential borrowers to credit providers, in particular concerning the way in which they have previously honoured their debts. The nature of the information available may vary according to the type of the system in use.<sup>14</sup> If such exchange of information does not have, by its very nature, the object of restricting or distorting competition, it is up to the competition authority to determine whether it has the effect of doing so.

Although being prohibited for their object, agreements concerned may still fall outside the prohibition of Section 3 paragraph 1 of the Competition Act (Article 101(1) of the TFEU) if they meet conditions defined in Section 3 paragraph 4 of the Competition Act (Article 101(3) of the TFEU). It is up to the parties to the agreement to carry the burden of proof to demonstrate efficiency if they wish to benefit from the efficiency exception.<sup>15</sup> Thereby, it will be assured that agreements which are actually pro-competitive would never be prohibited and thus prohibition according to the object of an agreement will not lead to discouragement from information exchange that is beneficial.

Pro-competitive nature of the exchange of information arises primarily if it enables a more successful entry to the market or if it brings benefits for consumers in the form of better knowledge of the product, easier comparison of offers or lower searching costs.

On the other hand, information agreements cannot be exempted if they impose restrictions that are not indispensable to the attainment of the above mentioned benefits. The condition of indispensability requires the parties to prove that all features of the exchange (e.g. the type, aggregation, age, confidentiality and frequency of the data) carry the lowest risks indispensable for creating the claimed efficiency gains.

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<sup>12</sup> Judgment of the Court of 23 November 2006. *Asnef-Equifax, Servicios de Información sobre Solvenci y Crédito, SL, Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*. Case C-238/05, paragraph 48.

<sup>13</sup> Judgment of the Court of 13 July 1966. *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*. Joined cases 56 and 58-64.

<sup>14</sup> Judgment of the Court of 23 November 2006. *Asnef-Equifax, Servicios de Información sobre Solvenci y Crédito, SL, Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*. Case C-238/05, paragraph 46.

<sup>15</sup> According to the Section 21d of the Competition Act and/or Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

#### 4. Current decision-making practice

The Office has investigated a case of long-term implementation of an agreement on information exchange between competitors in the market of building savings banks. (Decision ref.: S 67/04-22120/06/620 of December 19<sup>th</sup> 2006). In this investigation three main factors were considered by the Office when examining negative effects of the exchange of information: the market structure, character and topicality of the information in question, and regularity of the interchange.

In its decision, the Office subsequently declared that by agreeing on a system of monthly exchanges of statistical data containing their business results in the sector of building savings, the building savings banks had entered into a prohibited agreement on exchange of information capable of distorting competition in the market for building savings – the saving phase. By such conduct, all the parties to the proceeding violated the prohibition set out in Section 2 paragraph 1 of the Czech Act on the Protection of Competition, (hereinafter referred to as “the Competition Act”), i.e. the prohibition of agreements distorting or capable of distorting competition.

In the course of the proceedings it was proven that information was exchanged regularly on a monthly basis as of a certain date, and the parties to the proceeding shared information on the amounts saved, termination of savings agreements upon the elapse of the five-year period, information on bridge loans, on current and newly drawn loans (both number and amounts), information on the structure of the loans, etc. These information and data were of such nature and quality (in terms of volume, structure and topicality, or rather frequency of exchange) that no individual party to the proceeding would have been able to obtain the same on its own, without cooperating with its competitors.

The Office believed that the above-described information sharing ultimately led to a situation where none of the parties to the proceeding retained the advantage of a correctly chosen and applied business strategy for an extended period of time. As all the other competitors were immediately informed about the effects of particular behaviour with regard to market shares and amount of deposits, they were able to “catch up” with that undertaking quickly. To a significant extent this situation could have led to elimination of competition between the individual players in the market.

The findings of the Office were supported by an external economic assessment in the form of “expert evidence” produced by forensic institute in economics. This document was primarily helpful for detailed description and understanding of the market and its characteristics. Effects of information sharing were analysed in respect to these characteristics. In the conclusion, the document assessed the exchange of information as having “a potential effect” in relation to consumers of the building savings banks. Any “real effect” was not proven.

The Office thus concluded that the system of information exchange over time was harmful as such. Overall, the statistical data and the periodical exchange thereof represented an irreplaceable and indispensable comfort for all the entities in the market, a comfort they could not have obtained in any other way than by mutual and illicitly close cooperation. Costs that would have to be incurred by each entity to obtain a comparable amount of accurate monthly information would be considerable.

The Office noted that the agreement jeopardized competition in the market for building savings – the saving phase. The potential for distortion of competition in the case at hand lied in the fact that any change in the business policy of any building savings bank could be virtually immediately compared to the development of its market share and the volume of deposits, target amounts and loans. Given the proven transparency of the market, the parties to the proceeding could thus immediately detect the success of a particular business strategy and its effect on market share and other indicators in the statistical overview.



The agreement on the exchange of information was able to reduce the degree of uncertainty on the part of the individual parties to the proceeding as to the predictability of behaviour of their competitors.

The second potential negative impact of the agreement on exchange of information was seen in the risk of removing the benefit of a high income yield in the area of building savings from a consumer.

The building savings banks appealed to the Regional Court and the decision of the Office was overruled. In its judgment, the Regional Court stipulated that in order for an agreement to be anticompetitive, the Office must either prove that the agreement had actual negative effects on competition or that its object was to potentially distort competition; according to the Court, the Office had proven neither of these conditions.

Supreme Administrative Court rejected the cassation complaint and confirmed that anticompetitive effects of the agreement were not proven. In the reasoning of the judgement the Supreme Administrative Court stipulated the following: *Agreements on the exchange of information can be divided into two categories, i.e. agreements, which are a part of another anticompetitive practice, and separated agreements on the exchange of information that are not per se prohibited. The criteria for evaluation of the anticompetitive character of agreements on exchange of information are: (i) the market structure, (ii) the character of exchanged information, (iii) the way how information is exchanged, (iv) the ability to influence undertakings' behaviour. The system of information exchange does not have a priori effect on restriction of competition if relevant market is not highly concentrated and does not allow identification of particular subjects, and if access to information exchanged and its use is not discriminating in fact or legally. The sensitive character of exchanged information, as well as the disclosure of market position and competitive strategy of undertakings, is the fundamental factor in the evaluation of anticompetitive agreements.*

In another case in 2009, the Office had a slight suspicion of anticompetitive exchange of information on production and export among members of the Czech Beer and Malt Association (hereinafter referred to as “the CBMA”). Information on the production and export of beer was exchanged, data were aggregated and did not include any details (like production of a certain brand or kind of beer, or information on production broken down by regions). This kind of aggregated data was only informative and did not have any potential to restrict competition in the market as such. The Office finally concluded that this information exchange was not capable of distorting competition prior to initiation of administrative proceedings.

## **5. Conclusions and proposals**

A number of countries, including the members of the EU, has its own specific assessment of information exchange between undertakings. Also the case-law differs significantly among them. The Office has made informal enquiries in respect of information exchange assessment among the Member States of the EU. In some jurisdiction this practise is considered to be a separately punishable anticompetitive infringement (e.g. Italy), whereas in other it cannot be assessed as a breach of competition law at all (e.g. Germany).

The different approach to agreements on exchange of information in various countries and its own experience with the case of building savings banks leads the Office to the conclusion that it would be useful to harmonise the approach across all competition agencies. Noteworthy, the *Guidelines on horizontal co-operation agreements prepared* and soon to be published by the European Commission will be beneficial for such convergence. However, more coherent case-law would be welcomed across the countries.

Finally, the Office would like to intervene in favour of a more coherent approach to information exchange which is prohibited with regard to its object. Long-lasting unclear case-law<sup>16</sup> in this field may bring undesirable effects, such as legal uncertainty.

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<sup>16</sup> Even the latest judgment of the ECJ in the case of information exchange (case T-Mobile, see footnote 9) is often criticized for further confusion, see e.g. Bernd Meyring, T-Mobile: Further confusion on information exchanges between competitors In *Journal of European Competition Law & Practice*, 2010, vol. 1. No.1

## DENMARK

### Introduction

This paper reflects the views of the Danish Competition and Consumer Authority (hereinafter: the DCCA)<sup>1</sup> on the topic “Information Exchanges between competitors under competition law”.

The views in this paper are based on legal provisions and considerations within the DCCA as well as the DCCA’s own experience from cases relating to information exchanges between competitors under competition law.

#### 1. General effects of enhanced price transparency

The effects of enhanced price transparency will most likely vary depending on the market environment in which transparency is enhanced. Therefore, the DCCA has been reluctant to support greater transparency as a general rule in competition policy. This also reflects that the Danish Competition Council has decided a number of cases on information exchange – some of which have been brought before the courts – and that the Danish tradition of trade associations organising a large share of Danish firms throughout the economy entails a risk of anti-competitive information exchanges.

The Danish ready-mixed concrete market gives a clear historical example of how increased transparency in a market can lead to improved coordination of seller behaviour. In the beginning of the 1990s the Danish Competition Authority decided to increase transparency in the market for ready-mixed concrete expecting that better informed customers could increase the competitive pressure in the market. Subsequently average prices increased by 15-20 per cent within a year in the Aarhus region and after a year the initial price dispersion was eliminated.<sup>2</sup> Thus the improved transparency in this case seems to have led to improved coordination of the pricing policies, even though both sides of the market had access to the same information.

In evaluating the effects of price transparency it is relevant to distinguish between whether information flows increases price transparency on only one side of the market or both. In general, pro-competitive effects of price transparency are primarily likely if price transparency affects both sides of the market, and in particular the demand side.

In general, a high degree of transparency *on the demand side* – most notably on business-to-consumer markets – will induce competition between firms as it supports consumers in making well-informed and well-reasoned choices.

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<sup>1</sup> On August 19, 2010 the Danish Competition Authority and the Danish Consumer Agency merged and was named the Danish Competition and Consumer Authority. In the remaining part of this note, the DCCA is – unless otherwise stated – used throughout but refers to the former Competition Authority when citing activities before August 19, 2010.

<sup>2</sup> Overgaard, P. B. & Møllgaard, H. P. (2005) Information Exchange, Market Transparency and Dynamic Oligopoly. Centre for Industrial Economics Discussion Papers 11-2005.

Another dimension that is relevant to take notice of is the amount of *information* available in the market and the complexity of this information. Markets with a high degree of, possibly complex, information may be quite blurred even if the information in it self is transparently available. This is for instance the situation in financial services industries or electricity retail markets. In such markets, consumers' choice may be distorted even if the information is available abundantly.

In order for transparent markets to support consumer choices available information must therefore be accessible and clear; *accessible* so that consumers easily can gather information without incurring high search-costs; and *clear* so that consumers are able to compare firms' offerings and pick the most suitable offer.

A third dimension to consider is that for greater information transparency to be pro-competitive, consumers, or a sufficiently high share of consumers, must act effectively on the greater information set available. Therefore, if consumers do not use the greater availability of information, transparency may in some cases tend to benefit the supplier side leaving a greater risk of anti-competitive effects.

These observations have been the foundation for a number of recommendations from the DCCA. One recent study showed that, overall, gathering of information prior to purchase is widespread among Danish consumers as 76 per cent of consumers across all markets seek out information prior to a purchase and 91 per cent obtain a saving as a result.<sup>3</sup> However, only 25 per cent of the consumers typically negotiate over the price or other conditions<sup>4</sup> even though there seem to be a savings potential as 91 per cent of those negotiating obtain a saving. Furthermore, 64 per cent are willing to switch supplier if they are dissatisfied with price, quality or other terms of delivery. Of those who switch supplier, about 75 per cent achieve either a better price or improved terms of sale as a result according to their self reporting. The study also showed that over 60 per cent of the interviewed Danish firms assessed that customers' mobility was low, compared to around 50 per cent in Germany and 40 per cent in the UK. The report concludes that, overall, there is a scope for Danish consumers to engage more actively in seeking the best purchase among alternatives, taking in mind other alternative costs, such as search cost.

One example is the retail electricity market. This market is characterized in Denmark by having much available information for the consumers. Yet the market is considered quite blurred for most consumers as the information available is considered very technical for most consumers. The consumers must therefore encounter high search costs to use this information in their decision on choosing supplier of electricity.

To improve the competition in the market, the DCCA conducted a study of the retail electricity market in Denmark (2008).<sup>5</sup> The report found that in order to intensify competition in the retail market it is necessary for consumers to be more alert of electricity prices and, to a greater extent, respond to price differences between the electricity suppliers. To obtain this objective, the DCCA recommended initiating moves to increase consumer knowledge of the electricity prices, for instance by installing smart meters with price signal information. The DCCA also advocated that the existing retail price portal – the so called “Elpristavle” – was improved so that information would be more readily available and presented to the consumer in a more comprehensible way.

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<sup>3</sup> See Danish Competition Authority and Danish Consumer Agency, “Competition Culture”, 2010 p. 41. The study is based on interviews with 1.000 Danish firms, 500 English and German firms, and 300 Danish consumers in seven different markets.

<sup>4</sup> This average figure covers a large variation across different consumer markets, which is expected as negotiation over price or other conditions is (much) more warranted in some markets, e.g. electronic compliances, than in others, e.g. groceries.

<sup>5</sup> See Danish Competition Authority, ”Competition Report 2007”, Chapter 5.

Information on returns and costs of pension savings is another example, where information is complex and at present non-transparent to some degree at least. The DCCA has recently advocated for pension funds making information on e.g. administrative costs and return on investment available in a transparent and comparable way. Some steps have been taken by the business, but further transparency – in its broader meaning – is needed for competition to intensify.<sup>6</sup>

On an ongoing basis the DCCA monitors the Danish consumer markets by collecting and analyzing information on market and consumer conditions.<sup>7</sup> One element of this monitoring effort is the annual *Consumer Conditions Index* report, which is an aggregate survey with scores for the consumer conditions in 57 Danish market sectors.<sup>8</sup> The monitoring efforts also include a number of other surveys and analyses, including tests of specific products and services. The five consumer markets with the highest Consumer Condition Index are “TV Packages and Channels”, “Mobile Phone Subscriptions”, “Fixed telephone subscriptions”, “Pension funds” and “Used vehicles”.<sup>9</sup> The five consumer markets with the best score are “Books”, “Cinemas, theaters and music”, “Holidays (package/charter)”, “New vehicles” and “Betting and lotteries”.

If transparency primarily occurs on the supplier side of the market, it may cause a risk that companies are able to sustain collusion or engage in tacit collusion. This may be highly relevant in business-to-business markets, but may also be relevant on business-to-consumer markets.<sup>10</sup> Hence the DCCA are more careful when assessing initiatives – such as mergers – that will increase the level of transparency in business to business markets.

Transparency played – alongside other market characteristics – a key role in the assessment of the horizontal merger between two wholesale dealers Brdr. A&O Johansen and F. Lemvig-Müller Holding (2008).

The merger primarily concerned the wholesale market for (i) plumbing and heating materials and (ii) electricity materials to professional customers where both companies were both active. These markets are – on the *supply side* – generally characterized by having a high level of concentration, close and frequent customer contact, high entry barriers, and a high level of transparency. On the *demand side*, the customers are, to a large part, minor companies with little buyer power that make frequent use of day-to-day delivery of small orders.

The merger would reduce the number of nation-wide players from 4 to 3 (with a combined market share above 80 percent) and 3 to 2 (with a combined market share above 85 percent) on the plumbing/heating materials-market and the electricity materials-market respectively.

The Danish Competition Council found that the increase in the horizontal concentration would increase an already high level of transparency and would increase the risk of coordination among the remaining companies, and consequently decided to ban the merger.

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<sup>6</sup> See Danish Competition Authority, “Competition Report 2007”, Chapter 4.

<sup>7</sup> The surveying of transparency of consumer markets was undertaken by the former Danish Consumer Agency.

<sup>8</sup> The Index consists of consumers’ assessment of market transparency and the confidence they have in the markets together with a survey of the access to complain in the market.

<sup>9</sup> A high score reflects bad consumer conditions.

<sup>10</sup> An alternatively way of stating this is that B-to-B markets may tend to be more concentrated than consumer market and, hence, more prone to tacit collusion. This, though, does not hold in general.

## 2. Information exchanges between competitors

### 2.1 Background

The majority of Danish cases on information exchange have concerned exchange in business-to-business markets, in particular exchange of information between trade associations and their members. The DCCA has during the recent years dealt with over 50 cases pertinent to information exchange between trade associations' information and their members.

In Denmark there is a longstanding and widespread tradition for businesses to form trade associations. There are approximately 500 trade associations in Denmark, which are active in most sectors. Industry associations are estimated to cover approximately 60 per cent of businesses in their respective industries.<sup>11</sup> The trade associations safeguard their member's interests by rendering different services such as professional counselling, education, lobbying etc. The large number of trade associations in Denmark implies that a large amount of information is exchanged between the associations and their members.

The following sections describe a number of Danish cases concerning information exchange and jurisprudence following from these cases.

### 2.2 When can information exchange between competitors be permitted?

Whether exchange of information between companies can give rise to competition concerns will depend on a case-by-case analysis. However, the DCCA operates with the following general principles as concerns exchange of information that will normally be a violation of the Competition Act, information exchange which can normally be allowed, and information exchange which is in a grey area with the risk of implying a violation of the Competition Act.

#### *Normally a violation of the Competition Act*

- Recommendations not to use certain marketing efforts, e.g. quantity discounts or special offers.
- Distribution of standard terms concerning pricing or discounting of products.
- Direct or indirect recommendations concerning price increases e.g. corresponding to the general price tendency or any other index.

#### *Risk of Violation*

- Information exchange on common marketing or branding strategies between members in a trade association.
- Dissemination of information on actual prices on e.g. a website.
- Dissemination of cost prognosis indicating cost developments.

#### *Information Exchange Normally Allowed*

- Information and guidance on legislation. If the legislation leaves room for individual options concerning essential parameters of competition, guidance cannot be of normative character.
- Dissemination of branch statistics, provided they are sufficiently aggregated and of a certain age.
- Recommendations to comply with e.g. ethic or environmental standards.

<sup>11</sup> DCCA Annual Competition Report 2007, Chapter 5 on Trade associations' information exchange, p. 131.

### 2.3 *Restriction of competition - by object or by effect?*

The DCCA has primarily dealt with cases, in which information exchange has been regarded as a violation of the competition law by object. The assessment of whether information exchange between competitors, including information exchange through a trade association, has the object of restricting competition will depend on a case-by-case analysis. Once it has been established that an information exchange is a restriction of competition by object, the DCCA is not required to examine the arrangement's actual effects.

In line with the jurisprudence of the Court of Justice<sup>12</sup> information exchange that is capable of removing uncertainty between competitors is according to Danish case law regarded as restricting competition by object. The DCCA will, as the Commission in the new guidelines on horizontal agreements due to come into force as of 1st January 2011<sup>13</sup>, regard exchange of information on future prices or quantities or information exchanges on current conduct that reveals intentions on future behaviour as an infringement of the competition rules by object.

Exchange of information between competitors concerning essential parameters of competition is according to Danish jurisprudence a serious violation of the competition rules. This includes, e.g., recommendations for members of a trade association to introduce a certain percentage price increase<sup>14</sup>, recommendations for members to use minimum prices<sup>15</sup>, distribution of a standard letter for the announcement of price increases to consumers<sup>16</sup>, dissemination of a pre-filled cost calculation program with actual costs and a cost prognosis to members<sup>17</sup> and a trade association's internal rule prohibiting advertisements with prices below the association's minimum prices<sup>18</sup>.

In the case concerning exchange of information through a cost calculation program, the Competition Council and the Competition Appeals Tribunal found that the trade association for international freight and transport, ITD, infringed Section 6 of the Danish Competition Act and TFEU article 101(1)<sup>19</sup> by facilitating the program with pre-filled numbers. The figures in the model represented information that was normally individual for the members. Moreover, the model had a high level of detail and was subject to regular updates from ITD. The model was directly applicable with ITDs pre-filled information and if the members wanted to use the model without ITD's pre-filled information they had to actively delete the pre-typed information. The Competition Council found that the information exchange restricted competition by object. The decision was appealed to the Competition Appeals Tribunal, which upheld the Council's decision stating that *"The Competition Council has been fully entitled to take the view that the pre-filled values in the cost model has appeared for the users as realistic and useful ..."* The Appeal Tribunal

<sup>12</sup> Case C-8/08 T-Mobile Netherlands OJ [2009] C 180/12.

<sup>13</sup> Public consultation draft of 4<sup>th</sup> May 2010, Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.

<sup>14</sup> Danish Bus Association, District Court Judgment of 1st April 2009, Eastern High Court judgment of 3rd September 2009 and Danish Supreme Court judgment of 30<sup>th</sup> August 2010.

<sup>15</sup> Danish Christmas Tree Growers Association, District Court judgment of 17th February 2009, Eastern High Court judgment of 24th September 2009, Danish Supreme Court judgment of 30th August 2010.

<sup>16</sup> Ibid 9.

<sup>17</sup> International Transport Danmark (ITD), Competition Council decision 25<sup>th</sup> February 2009, Competition Appeal Tribunal 26<sup>th</sup> November 2009 (partially upheld), fine settlement, 25<sup>th</sup> August 2010.

<sup>18</sup> The association of Danish Inns & Hotels, District Court judgment of 4<sup>th</sup> October 2007.

<sup>19</sup> Ibid 12.

therefore found, in line with the Council, that ITD's cost calculation program had the object of restricting competition.

On the other hand the Appeals Tribunal did not find that a general recommendation from ITD to its members to pass an increase in oil prices onto customers had the object of restricting competition as "... a simple, not further specified statement from ITD to the members about "introducing an extra oil charge" cannot be assumed in itself to have the object of restricting competition." The Appeals Tribunal did not consider whether the unspecified statement concerning an oil price increase could possibly be a restriction to competition by effect.

In another case from 2009, the Danish High Court found that a trade association for Christmas tree growers' recommendations to charge a minimum price for Christmas trees had the object of restricting competition.<sup>20</sup> The recommendation was along with different statistics communicated to the members in newsletters. The association announced, for example, that the association was expecting that small Christmas trees could bear a price increase, while the association was expecting that last year's prices could serve as basis for all other trees.

The District Court and the High Court found that the information on price statistics, along with the recommendations to the members, constituted a violation of the competition rules by object and imposed a fine on the association and the association's director. The High Court stated that "*According to the content of the published price statistics, market briefings and calculation models and in conjunction with the contents of the magazines sent out to the members ... the High Court concur that it was not merely journalistic disclosure of historical information, but that the defendants in the entire period... have guided the members on, and recommended the use of minimum prices in a way that had the object and the effect of restricting price competition between the association's members...*" The judgment was upheld by the Supreme Court in 2010, where the fine imposed and by the High Court also was increased. Thereby the Supreme Court stated that this type of conduct, according to Danish jurisprudence, is regarded as a serious violation of the competition rules.

Practice from the Danish Competition Council, the Appeals Tribunal, and Danish Courts show that exchange of information e.g. by sending out statistics, an index, or a calculation program will have the object of restricting competition if it implies a recommendation in regard to future prices. A trade association cannot provide members with information which would have been illegal for the members to exchange amongst them.

As a trade association in most cases speaks on the members' behalf the association is likely to attach certain legitimacy to the distributed information. Therefore the information from the trade association can more easily create a focal point in the market. Moreover the members of the trade association will be aware of the likelihood that their competitors will pay regard to the information.

#### **2.4 The need to prove the existence of an agreement or concerted practice**

According to Section 6 (1), cf. Section 6 (3), of the Danish Competition Act<sup>21</sup>, anti-competitive agreements or concerted practices between undertakings, or anti-competitive decisions made by an association of undertakings are prohibited.

<sup>20</sup> Danish Christmas tree grower association, District Court judgment of 19<sup>th</sup> February 2009, Eastern High Court judgment of 24<sup>th</sup> September 2009 and the Danish High Court judgment of 30<sup>th</sup> August 2010.

<sup>21</sup> The Danish Competition Act, LBK 972 of 13<sup>th</sup> August 2010 (Konkurrenceloven).



The DCCA is, in order to establish an infringement, obliged to prove the existence of an agreement or a concerted practice. There are no requirements to show the existence of a legally binding agreement in order to find that an exchange of information between competitors infringe the Competition Act. All types of organized cooperation between undertakings on exchange of information are covered by the prohibition.<sup>22</sup>

According to the preparatory work of the Competition Act a “decision made by an association of undertakings” includes, e.g., resolutions and recommendations<sup>23</sup> from a trade association to its members. Following recent practice from the Danish Competition Council, the Competition Appeal Tribunal, and the Danish Courts of Law recommendations from trade associations to members have been found to constitute decisions within the meaning of Section 6(3) of the Competition Act.<sup>24</sup> As mentioned above, in the case of the Danish Christmas tree grower association the publication of newsletters was considered to fulfil the notion of a competition law agreement, although the newsletter was issued unilaterally by the association.<sup>25</sup>

## 2.5 “Safe harbours”

As a main rule there is in Danish jurisprudence no “safe harbours” in regard to information exchange. As referred to above there can be situations, where exchange of information is unlikely to restrict competition. According to Danish practice a trade association sending out branch statistics to its members that are sufficiently aggregated, and in which the data forming the base of the statistic are historical, has been regarded as not restricting competition.<sup>26</sup>

In the 2007 Annual Competition Report cited above in Paragraph 2.1 the DCCA provides guidance on undertakings on what types of information exchanges the DCCA as a main rule will regard as restricting competition and on the other hand what types of information exchanges are less likely to be problematic as concerns the prohibition in the Competition Act. Moreover, the DCCA has held information meetings with Danish trade associations in order to establish a dialogue with trade associations and raise awareness of the difficult balancing of information exchange issues.

## 2.6 *More specifically, what role would the following factors (please feel free to extend the list) play in decisions to prohibit such practices?*

The DCCA does not have any case-experience with information exchanges that were considered to be a restriction on competition by effect. Overall, the assessment of whether exchange of information constitutes an infringement should be made on a case-by-case basis and follows, initially, the general considerations set out above.

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<sup>22</sup> DCCA Competition Report 2007, Chapter 5 on Trade associations’ information exchange, p. 132.

<sup>23</sup> The parliamentary Journal 1996/97, Appendix A, column 3656ff.

<sup>24</sup> Ibid 9.

<sup>25</sup> Ibid 10.

<sup>26</sup> DCCA Annual Competition Report 2007, Chapter 5 on Trade associations’ information exchange, p. 13, with a reference to the Competition Authority’s statement in the NEMA-case.

## 2.7 *Are distinctions made between different types of information exchanges?*

### 2.7.1 *“Direct” exchanges between competitors and “indirect” exchanges, i.e. exchanges which take place with the intermediation of a third party (e.g. a consultant or a trade association)*

According to Danish practice no distinction is in principle made between direct or indirect information exchanges. The DCA regards information exchanges between a trade association and its members, or information exchange facilitated by a third party, as harmful for competition as information exchanged directly between competitors.

In the Danish case concerning cooperation between 7 local banks, in which the banks *directly* exchanged information about individual fees, interest rates and interest margins amongst each other<sup>27</sup>, an employee in one of the banks participating in the cooperation made the following inquiry to an employee in the competing local bank: “*We would like you to express your views on this cooperation; are we colleagues who respect each other or competitors, doing what we want? And what are the consequences for our local bank cooperation, if the latter is the case?*”<sup>28</sup> The Competition Appeals Tribunal found that the continuous series information exchange – along with a market sharing agreement – had the object of restricting competition.

The Competition Council has in a number of cases dealt with information exchanges that stems from the trade association representing the companies in the market, i.e., *indirectly*. These cases have shown that trade associations’ exchange of information to the market (e.g. statistics regarding observed prices or costs) may be anti-competitive and hence infringe competition law (even on non-concentrated markets). The DCCA also finds that the distribution of information from trade associations may appear as recommendations and hence provide a price focal point in the market. In the criminal case concerning the association of Christmas tree growers, the Danish Supreme Court likewise found that the association’s recommendation about next season’s sales prices sent out to members in newsletters had the object of restricting competition.<sup>29</sup>

### 2.7.2 *Information exchange through government or by other public entities*

The DCCA has interfered towards public information systems when the information exchanged through such systems has been found restrictive to competition. For instance in a case from 2007 concerning the National IT and Telecom Agency. The Agency had published information in a spreadsheet in which regional telecommunication operators’ market shares were evident. The publication was made as background information to a telecom-statistic. The Danish Competition Council stated that there was an information asymmetry as “*... the big nationwide telecom operators were able to follow the development of the regional operators’ market shares, while regional operators were not able to keep track of how nationwide operators evolved in the regional markets. The publication could therefore distort competition between regional and national operators and hamper new business opportunities to penetrate the market.*” The Competition council did not address explicitly whether the information exchange had the object or effect of restriction competition as the Council halted the proceedings, when the Agency agreed to change its practice.

<sup>27</sup> Local Banks, Competition Council decision of 28<sup>th</sup> March 2007, Competition Appeal Tribunal decision of 2<sup>nd</sup> October 2007. Fine settled 15<sup>th</sup> April 2008.

<sup>28</sup> Ibid 22.

<sup>29</sup> Ibid 10.

2.7.3 *“Private” information exchanges among suppliers only versus “public” information exchanges i.e. among suppliers and buyers.*

Information exchange between a trade association and members is likely to be of interest to the competition authorities, since the group of addressees are competitors. In a Danish case concerning a trade association for small and medium sized businesses, the association issued an index to members based on data from a publicly available statistic. However, in preparing the index the association outweighed the data from the public statistics in a way that made it possible to derive the average percentage cost increase on auto repairs. Being available to the members on the association’s website, the index was primarily meant for the members, i.e. suppliers, rather than consumers.

The Competition Council found that the information exchange restricted competition by object and by effect. As the information exchange was addressed directly to members the Competition Council found that when receiving the index from the trade association *“... the auto repair shops [could] with a reasonable degree of probability assume that the other repair shops intend to increase their rates according to the average cost increase.”* In that way the information - even though based on a public statistic - when worked up by the association and exchanged internally between the trade association and the members, created a focal point for the members’ calculation of their individual costs.

In Section 1 above more examples are given.

2.8 *How do you assess possible countervailing efficiencies? For example, the parties may argue that information exchanges can bring about productive efficiencies and increase welfare. If the conduct has plausible efficiencies, would that be sufficient to undermine an infringement case or would it be necessary to engage in a broader balancing exercise of restrictive effects and efficiencies?*

Economic literature describes a number of benefits from information exchange between companies that could be taken into account when evaluating whether there is an efficiency defense to the information exchange when a certain behavior does not have as its object to restrict competition. As discussed above, the cases in Denmark have concerned infringements of the Competition Act that have as their object to restrict competition and therefore it has not been relevant to evaluate effect in those cases.

Efficiencies may be obtained from sharing information that help companies to understand market trends to better plan and match supply and demand – this could especially be the case in markets that are characterized by significantly fluctuating demand, significant technological changes or markets where consumer taste and preferences are rapidly changing. An example, where this type of efficiencies was to some extent addressed is a case concerning a cost index, published by the Danish Textile Services Association (DTS) for the use of undertakings on the textile services market. In addition, the DTS had established a cost index committee, where the members of the association met and discussed the weighting of the individual types of costs. The Danish Competition Council found that the active involvement of the association and its members in the calculation of the index was likely to uniform prices and restrict competition on the textile services market. However, an independent institute was allowed to continue calculating the index that is used in contracts to adjust remuneration for changes in input prices during the contract period.

This case was closed by a remedy decision according to section 16 a of the Danish Competition Act in which the company and the association suggested remedies that were sufficient to eliminate the Competition Councils concerns, and no formal in-depth analysis of the competition restricting and enhancing effects were made.

### 3. Cases: Overview of a selection of Danish practice from 2006 - 2010 on information exchange

Below an overview of a number of Danish cases is given. Criminal cases are described in Section 3.1, while Section 3.2. gives an overview of cases decided by the Competition Council and the Competition Appeal Tribunal.

#### 3.1 Criminal cases

Neither the DCCA nor the Danish Competition Council has authority to set fines in competition cases. Therefore, cases that the DCCA assess suitable for criminal trials are sent to the Special Prosecutor for Economic Crime – in some cases after a decision by the Competition Council – who decides whether to take the cases to the courts. The following describes cases that was decided by Danish courts.

##### 3.1.1 International Transport Danmark (ITD)

- Trade association issued a cost calculation program and a cost prognosis to members
- By object

The trade association for international freight and transport had via their website made a cost calculation program available to their members which had the following characteristics:

- The numbers in the model was pre-filled by ITD with figures that were normally individual for the members.
- The model had a high level of detail, as ITD's pre-filled data was inserted as concerns 49 cost items, including the profit item.
- The model was subject to regular updates from ITD.
- The model was directly applicable with ITD's pre-filled information, unless the members actively deleted this information.
- The model consisted of current and useful figures (contrary to figures of nonsense).

The Appeals Tribunal upheld the Competition Council Decision, finding the program to be an infringement of the Competition Act by object. The Appeals Tribunal stated:

*"The Competition Council has been fully entitled to take the view that the pre-filled values in the cost model has appeared for the users as realistic and useful ..."*

On the other hand the Appeals Tribunal did not find that a general recommendation to members to pass an increase in oil prices on to customers had the object of restricting competition:

*"... a simple, not further specified statement from ITD to the members about "introducing an extra oil charge" cannot be assumed in itself to have the object of restricting competition."*

Fine settled: DKK 300.000 (EUR 40.300). Fine settlement, 25<sup>th</sup> August 2010.

Competition Council decision 25<sup>th</sup> February 2009 (upheld).

Competition Appeals Tribunal 26<sup>th</sup> November 2009 (partially upheld).

### 3.1.2 Danish Christmas Tree Growers Association

- Trade association's recommendation for member to set minimum prices.
- By object

The association announced through a newsletter sent out to its members that expectations were that small Christmas trees could bear a price increase, while it was expected that last year's prices could serve as basis for all other trees. Thus, the association made a recommendation on the use of minimum prices which corresponded to a horizontal price agreement among the members.

The High Court stated as concerns restriction of competition by object:

*"Defendant ... has provided guidance to its members and recommended the use of minimum prices in a way had the object and was likely to restrict price competition among its members."*

Fine: To the association DKK 500.000 (EUR 67.000) (fine to the association) and from DKK 15.000 to DKK 25.000 (EUR 3.400) (personal fine to the association's CEO). District Court judgment of 17<sup>th</sup> February 2009.

Eastern High Court judgment of 24<sup>th</sup> September 2009 (upheld).

Danish Supreme Court judgment of 30<sup>th</sup> August 2010 (upheld).

### 3.1.3 Danish Bus Association

- Trade association's recommendation for members to calculate a 4 per cent price increase as a consequence of increased oil prices.
- By object

The association recommended their members to calculate an "oil price increase" on 4 per cent. The recommendation was issued through a magazine distributed to the members. Moreover the association had drafted a standard letter for members to use when the price increase was introduced to the members' customers.

The High Court stated as concerns restriction of competition by object:

*"... the recommendation is found to have the object and to be likely to restrict competition in regard to pricing."*

A dissenting judge did not find that the recommendations had the object of restricting competition, having regard to the facts in the case concerning the competitive situation on the market in the relevant period, and the members' reactions to recommendations.

Fine: To the association DKK 500.000 (EUR 67.000) and the association's CEO and vice president DKK 25.000 (EUR 3.400). District Court Judgment of 1<sup>st</sup> April 2009.

Eastern High Court judgment of 3<sup>rd</sup> September 2009 (upheld).

Danish Supreme Court judgment of 30<sup>th</sup> August 2010 (upheld).

### 3.1.4 Cooperation between 7 local banks

- Cooperation on not to establish business activities in any of the rivals' mother cities and not to actively contact any of the rivals' clients.
- Exchange of information of individual fees, interest rates and interest margins.
- By object

The information exchange which took place between the local banks was for example inquiries such as: "Today we do not charge anything to provide a guarantee..., but we are considering doing so. Are you charging such a fee and if you are how much do you charge?"

The Competition Council found, based on an overall assessment, that the cooperation between the banks had the object of restricting competition.

The Competition Appeal Tribunal upheld the Competition Council's decision, and stated on "by object":

*"According to an overall assessment of the nature of the cooperation - an agreement on not to establish business activities in each other's headquarters in connection with an agreement not to actively address each other's customers, combined with an exchange of information relevant to each local bank's appearance on the market - the Appeal Tribunal concurs that the cooperation in question, even though it is no way near a classic cartel or an actual market sharing agreement should be regarded as having the object of restricting competition..."*

Fine settled: DKK 4 million (EUR 54.000). Fine settlement 15<sup>th</sup> April 2008.

Competition Council decision of 28<sup>th</sup> March 2007.

Competition Appeal Tribunal decision of 2<sup>nd</sup> October 2007.

### 3.1.5 The association of Danish Inns & Hotels

- Internal rule of the association prohibited all advertisement, including signs outside, on prices below a minimum price.
- By object

A provision in the association's regulations prohibited the members' advertising below the association's minimum prices. As the prohibition restricted members' ability to set their own prices it was found to restrict competition by object.

The District Court stated as concerns restriction of competition by object:

*"The provisions which prohibit the members' advertising through signs are regarded as a decision that has the object of restricting competition..."*

Fine: To the association DKK 400.000 (EUR 54.000) and personal fine to the association's CEO DKK 10.000 (EUR 1.300). District Court judgment of 4<sup>th</sup> October 2007.

### 3.1.6 *Danish auto recycling*

- Trade association's e-mail to members with a completed form enabling members to calculate costs for environmental treatment of cars.
- By object or by effect

The association sent out a form which was not merely a checklist for members when calculating their costs, but was pre-filled with a random member company's current data as an example.

The District Court took into account that: "The form appears as a detailed guide for the members' when calculating costs for - or when pricing - environmental treatment of cars."

The association had stressed to the members that the form was not to be perceived as a price recommendation. The reason for this was that the Competition Authority had previously made the association aware that the distribution of such a form along with a recommendation to the members to charge a certain price would be a violation of the Competition Act.

The District Court stated as concerns restriction of competition by object:

*"In the court's view, the form is according to its content clearly likely to restrict competition by standardizing the price for environmental treatment of cars among the association's members. The Court therefore assumes that the form is within the scope of the prohibition in section 6(3) of the Competition Act against decisions that directly or indirectly, has the object or effect of restricting competition. "*

When calculating the fine the District court emphasized that "... there is no evidence that the infringement had a concrete impact on the market."

Fine: To the association DKK 50.000 (EUR 6.700). District Court judgment of 28<sup>th</sup> February 2005.

### 3.2 *Cases decided by the Competition Authority, the Competition Council and the Competition Appeals Tribunal*

On behalf of the Danish Competition Council, the DCCA carries out the preliminary investigations in different competition cases, e.g., through dawn raids, interviews and requests for information. On the basis of the investigations, the DCCA can decide either: a) to dismiss the case, b) in minor cases decide the case, c) in major cases to present the case to the Danish Competition Council, or d) to hand over the case to the Public Prosecutor for Serious Economic Crime, who decides if there is enough evidence to bring the case before the courts in order to get a fine.

The Danish Competition Council has the power to: a) note an infringement, b) make an order to bring the infringement to an end, or c) make a commitment decision. The Danish Competition Council has no power to impose fines. The Director General of the DCCA may – after a decision by the Danish Competition Council – decide to hand over the case to the Public Prosecutor for criminal enforcement.

The following cases were decided by the DCCA or the Competition Council, and was not taken to courts.

#### 3.2.1 *The National IT and Telecom Agency's publication of telecommunications statistics*

- Publication of statistics, which included telecommunication operators' market shares

- The DCCA halted the proceedings as the Agency agreed to change its practice.

The IT and Telecom Agency had published a spreadsheet of which regional telecommunication operators' market shares were evident.

The DCCA stated:

*"... the big nationwide telecom operators were able to follow the development of the regional operators' market shares, while regional operators were not able to keep track of how nationwide operators evolved in the regional markets. The publication could therefore distort competition between regional and national operators and hamper new business opportunities to penetrate the market. "*

The DCCA council did not address whether the information exchange had the object or effect of restriction competition, as the DCCA halted the proceedings, when the Agency agreed to change its practice.

### 3.2.2 Danish Federation of Small and Medium-Sized Enterprises

- Trade association's information to members on percentage increase in costs on auto repairs.
- Object and effect.

The association issued an index to its members, indicating the average increase in cost for a typical member. The index was based on data from official statistics; however the association had outweighed the data in a way that made it possible for the members to deduct other members future cost increases. It follows from the Competition Council's decision that: *"The association proceeds the official statistics in a such way that the calculated percentage will appear as an objective calculation of what a typical auto repair shop can reasonably require in their negotiations with insurance companies."*

The Competition Appeal Tribunal stated on "by object":

*"The arrangements are, in the same way as a trade association's announcement of a recommended price increase, without further contact between the auto repair shops, likely to coordinate their behaviour in individual price negotiations... The Competition Authority therefore find that the arrangements has the restriction of competition between the auto repair shops as its object "*

*"... When an auto repair shop receives the average cost increase calculation issued by the association, the auto repair shops can with a reasonable degree of probability assume that the other repair shops intend to increase their rates according to the average cost increase."*

On the other hand the Competition Appeal Tribunal also stated that:

*"... there will be no objection to the association's helping members by issuing official statistics, for example wage statistics in a non-processed form in order for the members themselves to determine their individual cost increases ... "*

Competition Council decision of 29<sup>th</sup> March 2006.



## FINLAND

### 1. Introduction

In European jurisprudence, as well as in the theoretical contributions in economics<sup>1</sup>, convincing arguments have been put forward concerning the collusion-facilitating potential of the exchange of information between competitors. The evidence put forward has been sufficient for antitrust authorities to take a rather strict and restrictive approach both in their reactive and proactive measures.

The main worries are crystallized in that the exchange of detailed information may be used to create platforms for subsequent collusive agreements and at best facilitate the detailed monitoring of rivals' actions, thus compromising the independent decision-making of the firms. Unfettered information flows may also help firms to punish or settle deviations from collusive agreements. Some market participants may, however, be more effective and creative in their use of available information. Hence, we must take into account that a requirement of independent decision-making does (to quote)

*“...not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors.”<sup>2</sup>*

The views on the likely harmful effects of information exchange develop over time by the recognition of many nuances that may be decisive in whether an activity can be considered to harm competition. This development is recognized in the European Commission's horizontal guidelines<sup>3</sup>, for example, which may on its own part motivate a thorough discussion on the role and importance of information exchange between competitors.

This contribution is structured as follows. Section 2 discusses the general effects of transparency towards consumers and between competitors. It draws attention to some prerequisites that may mitigate the harmful effects of the latter, which we label as artificial price transparency. Section 3 briefly discusses the various forms of information exchanges and dwells upon under what circumstances exchange of information may be permissible. The relationship between the exchange of information and assessment of efficiencies is considered in Section 4. Section 5 presents some important cases of the FCA and Section 6 concludes.

### 2. General effects of enhanced price transparency

All exchange of information between competitors cannot, of course, be condemned *per se*, but is rather subject to an analysis of its objects or likely effects. There should be no objections to exchange of information as long as it does not compromise the independent decision-making concerning the firms'

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<sup>1</sup> E.g. Overgaard & Møllgaard (2005), Vives (2006), Ivaldi, M. et al. (2003), Kühn (2001).

<sup>2</sup> Case C-7/95 P *John Deere* paragraph 87 and case C-194/99 P *Thyssen Stahl AG v Commission* paragraph 83. A detailed presentation on exchange of information in cartels is found in Table 1 (p. 67-78) in Levenstein & Suslow (2006).

<sup>3</sup> European Commission (2010) *Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*.

behaviour or does not contain information that reveals future actions or plans that lead to increased artificial transparency in the market in a way that impedes the process of workable competition.

To date, the exchange of information has raised serious competition concerns when it contains information about customers, sales, orders and pricing. When exchanged, information such as market shares, production volumes and capacity utilisation rates or terms of sales have a potential to distort the competitive process.<sup>4</sup> In its decision in the UK Tractors case, the Commission argued that the exchange of very detailed information between oligopolists thwarted the competitive process and stabilized the market positions. The following citation condenses the key effect of information exchange on the competitive process:

*“On the contrary, the high market transparency between suppliers on the United Kingdom tractor market which is created by the Exchange takes the surprise effect out of a competitor's action thus resulting in a shorter space of time for reactions with the effect that temporary advantages are greatly reduced. Because all competitive actions can immediately be noticed by an increase in sales, the consequences are that in the case of a price reduction or any other marketing incentives by one company the other can react immediately, thus eliminating any advantage of the initiator.”*<sup>5</sup>

Concerns of restricting competition related, however, only to relatively recent information. In its annual report in 1999 in the aftermaths of the UK Tractors case, the Commission pinned down principles for exchange of information stating that

- Individual data may not be exchanged earlier than one year after the event to which it pertained.<sup>6</sup>
- Aggregated data which is less than twelve months old may be exchanged “if the data is supplied by at least three dealers belonging to a different industrial or financial group”.<sup>7</sup>

These principles seem to underline that, as well as to the naked type and nature of data, attention has to be paid to what can be *inferred* from the data exchanged.

## **2.1 Artificial transparency and collusion**

Theoretical models<sup>8</sup> have demonstrated the point that constraining the flow of (detailed) information between firms increases the critical discount factor and thus reduces the scope for collusive activity. Hence any creation of "artificial transparency" between the firms in the market is associated with a greater risk of tacit collusion becoming a rational strategy. It has been argued that this collusion-facilitating quality is reduced if the consumers' switching costs are successfully lowered.<sup>9</sup>

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<sup>4</sup> C.f. Caffarra & Kühn (2006), Vives (2006) and Kühn (2001).

<sup>5</sup> Commission decision 92/157/EEC, paragraph 37. *OJ L 68*, 13/03/1992, 0019 – 0033. See also footnote 41 in Bennett & Collins (2010).

<sup>6</sup> European Commission (2000) The XXIX:th Report on Competition Policy 1999, 157; see also Whish (2001) *Competition Law* (4<sup>th</sup> ed.). Butterworths, London, 447.

<sup>7</sup> *Ibid.*

<sup>8</sup> Overgaard & Møllgaard (2005) and Ivaldi et al. (2003).

<sup>9</sup> Björkroth (2010).

If the transparency towards the consumers is improved, we may assume that the consumer search costs and thereby also consumer switching costs are reduced. This in turn has a potential to intensify the competition *in* the market. We may, however, dwell upon what this means for the competition *for* the market. Market entry is likely to be more profitable if the consumers' switching costs are larger, as the profits generated by locked-in consumers cannot instantly be competed away.

However, it is difficult to assess how large a part of the consumers' total switching costs can be allocated to informational costs or search costs, as the contractual and implicit switching costs may be relatively important.

### **3. Information exchange between competitors**

#### **3.1 *Different types of information exchanges***

Instead of direct exchange of information between competitors, the flow of information may run through third party information exchanges. The third party collects, processes and distributes it usually to those firms that have submitted raw data (scanner data, for example). This kind of information exchange is perhaps more easily monitored from an antitrust enforcement point of view as the nature, timeliness and granularity of the data are to a larger extent standardized or fixed, compared with information flows within industry organizations or in vertical relationships between retailer and suppliers.

Information exchange between competitors through a hub may be more challenging to evaluate, as the information flows, their precise content and their rationale are less transparent than in open third party managed information exchanges. The contribution of Whelan (2009) sheds light on this issue, by illustrating how an information exchange between a retailer and a supplier may actually gain a horizontal dimension, as sensitive information flows from this supplier to another retailer. When a retailer is in charge of collecting, processing and disseminating the data, it cannot be ruled out that sensitive information may be traded for more favourable terms of trade. It is clear that antitrust authorities have to assess the precise role of potential hubs, in order to rule out possible anticompetitive effects. The assessment is rather straightforward, when a supplier, for example, is simply a messenger in the information flow. To quote (Whelan, 2009, 834):

*"[w]here the supplier acts simply as a go-between connecting the retailer and the competing retailer – that is, where everyone (retailer, supplier and competitor) is fully aware that the supplier is simply acting as a conduit for the communication between the retailer and the supplier – there should be no additional analytical problem concerning this issue: contact, and therefore any resultant agreement or concerted practice, is quite clearly intended to be between the two competitors, and not simply between the retailer and the supplier or the supplier and the competing retailer. The supplier merely represents the means of communicating between competitors; she is the human equivalent of a telephone. In such a case, the existence of the supplier in the equation does not negative the essential horizontal nature of the arrangement."*

#### **3.2 *When is exchange of information permissible & safe harbours***

Although the Commission's draft horizontal guidelines emphasize that the exchange of future intents is more likely to constitute a "by object" infringement, we cannot disregard the potentially harmful effects of the exchange of current information because of its efficiency for monitoring purposes. In this context, the exchange of information between competitors is in principle permissible- when the information exchanged does not contain privileged information that bears a connection to the firms' business strategies. A main principle to be followed in the aggregation and exchange of recent information draws a natural parallel to the Statistics Act, which states in Section 11 that,

*"Statistics shall be compiled so that those whom they concern are not directly or indirectly identifiable from them, unless the data concerning identification are public by virtue of this Act."<sup>10</sup>*

The exchange of information- which is aggregated to such an extent- that an individual firm's figures on sensitive issues can be derived only with a sufficient error margin could be considered as permissible. In this context, a safe harbour should be designed in a way that if one firm subtracts its own figures from the aggregated data, the share of the largest firm in the remaining block of data should not be too large. This is because the estimates of this largest firm's variables (price, quantity etc. and changes herein) asymptotically approach the true values as its share in the "remaining block" increases. To draw an exact line or to assess how small an error margin is acceptable may have to be done on case by case basis, because market characteristics may be decisive in how well this data can be used for monitoring purposes.

The industry dynamics is also important in assessing the permissibility of the exchanged information. In industries where prices and market shares prevail for very short periods, current data will get older sooner than in industries that are less dynamic or less volatile.

Where the exchange of timely price or market share information raises concerns, one may still allow either aggregate sales volume or sales value to be reported relatively soon together with a firm's own figures. This is motivated by the large number of factors that may or actually do influence the sales volume or sales value. The shifts of the aggregate or firm-specific demand (or supply) curve, or pricing decisions, can hardly be determined on the basis of sales value or volume alone. Information needed to infer average prices may be released when its usability for monitoring purposes is reduced. There clearly is a balancing between not forcing the firms to take their decisions blindfolded and to reduce the risk of coordinated behaviour.

This adds to the discussion that allowing the exchange uncertain information may even enhance competition, but it should also turn the attention to what information firms need in order to operate efficiently.

#### **4. Assessment of countervailing efficiencies**

Market information is essential in the shaping of firm strategies, and the ability to make use of such information may improve the productive efficiency in firms. Information about the development of small customer or product segments may be especially important for the small firms operating in a narrow niche. On the other hand, detailed and current information flows may enable pre-emptive measures targeted at small innovative firms.<sup>11</sup> Hence, one could ask whether the need of information in order for efficiencies to prevail varies with firm size and with the size of the product portfolio.

It is thus far from straightforward for an authority, or perhaps for a firm itself to assess precisely what granularity and timeliness of the information exchanged is sufficient to ensure the efficiencies without compromising the functioning of competition. With some reference to the cases presented below, one could argue that little evidence has been put forward to motivate the need of timely information on competitors' individualised figures in generating efficiencies. The firms' own figures together with appropriately aggregated data leaves some uncertainty but still enables the parties to distinguish important trends. Uncertain information may be, and often is, complemented with information provided by normal

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<sup>10</sup> The Statistics Act (280/2004).

<sup>11</sup> This draws a parallel to paragraph 64 in the Horizontal Guidelines, in that exchange of past information may enhance the external stability of a cartel.

business intelligence. If additional information provides large efficiencies, individual investment in market research should be worthwhile and prevail as a source of competitive advantage.

When an exchange is questioned, the parties involved should be responsible for arguing for the possible efficiencies according to the principles set out in Article 101(3) TFEU. Arguments that draw a parallel between improving efficiency and lessening the uncertainty of one's rivals' actions should not be valid.

## **5. Cases**

The cases presented in this section involve exchange of information as an element in sustaining a cartel agreement, but there are also cases where only the exchange of information has been scrutinized and found to infringe the Competition Act. However, the pure information exchange cases presented here were not assessed by the Market Court, as in all three cases the parties terminated the contested activity.

### **5.1 *Price fixing in round wood markets***

In November 2009, the Market Court stated in its decision that during 1997-2004 the forestry companies Metsäliitto Cooperative, Stora Enso Plc and UPM-Kymmene Plc were found guilty of forbidden national price-fixing and exchange of information in the purchase of timber. Although much of the information exchange concerned the cost structure and factor usage of a number of plants, the connection to price fixing in the input market was clear as the firms disclosed prices at the factory and prices at the factory gate of the various wood types and species to each other.

Information on figures regarding the costs of acquiring and purchasing of timber and pulpwood was exchanged well in advance of the publication of annual reports at a granularity, precision and time frame that would have been impossible to obtain from any public sources. Much of the information exchanged was considered a business secret.

### **5.2 *Exchange of information in grocery retail sector (154/61/2007)***

On 19 June 2008, the FCA issued a precedent relating to horizontal exchange of information and its collusion-facilitating potential in an oligopolistic market. The FCA investigated the competitive impacts in the Finnish daily consumer goods market of the ScanTrack service offered by a third party, i.e. the multinational AC Nielsen. The ScanTrack service provided the large grocery retailers (Ruokakesko Plc, the S Group and Tradeka Plc) with detailed and recent information on prices and sales quotas of the daily consumer goods products at EAN code level. The FCA's investigations mainly concern horizontal information exchange between competing daily consumer goods groups.

Considering the size of the market (more than €12bn), the potential welfare losses to the consumers were considerable which consequently motivated the FCA to scrutinise the nature of the information exchange and the restrictive impacts and potential efficiency benefits thereof.

In the ScanTrack service, the retailer groups received detailed information at national level on their own and their competitors' sales of product categories, product segments, and this information was supplier-specific, brand-specific and product-specific. The information contained sales value, sales volume (count and kg), average retail price, percentage of stores selling a product and information on sales promotions. The weekly information was reported monthly, and consequently the exchanged information was only 1 week to 5 weeks old.

The FCA came to the conclusion that the exchange of retailer-group level data enabled the groups to efficiently monitor each other. Due to the high market concentration, the national level and shop-size level information exchanged enabled the two largest retailer groups to efficiently monitor each other.

The retailer groups argued that the information exchange contributed to increased efficiencies in negotiations with suppliers, in pricing and in category decisions and logistics. The FCA recognized some of these efficiencies, but stated that these could be achieved by alternative means that would not facilitate such a detailed monitoring.

The FCA's intervention in the matter has increased public awareness about the competition rules concerning the exchange of information. Parties representing several different sectors have thence contacted the agency and adjusted their upcoming systems for the exchange of information on the basis of the advice received.

### **5.3 *Roofing felt firms (1011/61/2002)***

In its investigations initiated in 2002, the FCA discovered that the three biggest companies in the roofing felt sector – Icopal Ltd, Katepal Ltd and Lemminkäinen Plc – together with the Confederation of Finnish Construction Industries (CFCI) had been engaged in forbidden exchange of information under the national and EU competition rules primarily during 1996–2001.

The companies supplied the CFCI on a monthly basis with detailed sales information from which the Federation drew up sales statistics for its so-called Roof Bitumen Group. The figures revealed monthly detailed sales and market share information of each competitor. The combined market share of the companies-which participated in the exchange of information- of the retail sales in the hardware stores exceeded 90 per cent during the period of inspection. The corresponding figure in the contracting sector was roughly 70 per cent.

Based on the legislation and jurisprudence, the exchange of confidential information between competitors which is critical to competition is prohibited. The negative impacts of the exchange of information on competition were assessed to be more likely or increased in concentrated markets such as the roofing felt market. The exchange of such information was concluded to enable the coordination of the competitors' activities and the harmonisation of their competitive conduct.

In its decision (dated 16 February 2007) the FCA did not, however, bring the matter before the Market Court, since the applicability of the competition legislation enforced in 1996–2001 to the exchange of sales information was unclear to some extent. From the viewpoint of the community competition legislation, the conduct of the companies was clearly prohibited. However, the FCA had no authority to propose sanctions for conduct violating Article 81 of the EC Treaty prior to the reform of the Act on Competition Restrictions on 1 May 2004. The waving of the infringement fine was also motivated by the fact that the companies had adjusted their conduct on their own initiative prior to the commencing of the investigations.

### **5.4 *AC Nielsen's Shop register (Myymälärekisteri, case no. 253/61/1999)***

In March 1999, Liikealan Ammattiliitto (by 2000 merged into Services Union United) requested that the FCA investigate whether AC Nielsen infringed the competition law by collecting firm-specific information and passing on this information to the large grocery retailer groups, to food industry and to the importers of daily consumer goods.

This information sharing was implemented through a so called "shop register", founded by Marketindex Ltd in 1979. AC Nielsen started to publish this information in 1993.

The shop register contained detailed information (address and contact details, size of the shop and sales floor area, total sales and sales of daily consumer goods, details about the shopkeeper and his history in each banner, for example) concerning individual shops in markets for daily consumer goods. The information was collected once a year, and an updated register was published regularly in April each year. However, the establishment of new shops was observed in quarterly updates of the register. The sales figures were quite accurate, as they were rounded to the closest 10.000 euro.

The administration, contents and implementation of the service was in the hands of a board. This board had representatives from the largest grocery retailer groups (Ruokakesko Oy, Suomen Osuuskauppojen Keskuskunta, Suomen Spar Oyj, Ketjuetu Oy and A.C. Nielsen Finland Oy). The parties administering the register were, besides the food industry, those primarily using and benefiting from the service, a circumstance that has been found aggravating in prior EC case law.

The FCA assessed that the most critical of the information exchanged was site-specific information in the regular annual reports. The nature of the information was considered to be of confidential nature and such that may enable the firms to coordinate their behaviour.<sup>12</sup> Corresponding information was not available from any public sources. Here parallels were drawn to Statistics Finland and National Board of Patents and Registration of Finland, who release information on a much more aggregated level. At his point, the FCA also referred to the UK Tractors case.

The concerns regarding the potential for the exchange of information to restrict competition were accentuated by the high concentration in the retail level of daily consumer goods. The four largest groups active in the board enjoyed a market share of around 88 %. Moreover, the information was not available for parties outside the board.

Consequently, the FCA deemed the exchange of information to be in conflict with Section 6 of the Competition Act. The FCA recognized the efficiencies brought about by the register and did not require a direct termination of the service, but rather pinpointed some critical issues that lead the service to infringe on Section 6 of the Competition Act.

The parties declared to withdraw from the board membership. With the dismemberment of the board, the FCA saw in its decision in February 2004 that the prohibited activity between the members had ceased and did not find it necessary to propose fines.

## 6. Discussion and conclusions

In the field of dynamic game theory, it is theoretically established that the exchange of information can facilitate collusion. One of the main challenges is to draw a demarcation line between the likely harmful and harmless or even beneficial exchange of information. Bennett and Collins (2010) illustrate the continuum of likely effects of information exchange, where each case we face could in principle be located. Moreover they refer to the Commission draft Guidelines in that the disclosure of future intentions may be decisive in whether one can consider the exchange of information to be a "by object" infringement. Due to its efficiency for monitoring purposes, there may be some need for nuances before absolving the exchange of current information from being an infringement "by object".<sup>13</sup>

With regard to the signalling or disclosure of future intentions, periods with supply shocks may deserve more attention. The high volatility of input prices is likely to generate a flood of public statements

<sup>12</sup> The fact that one participant did not consider the information being of confidential nature did not alter the FCA's assessment.

<sup>13</sup> C.f. Bennett & Collins (2010, 333-334). The thing to monitor in this case may, however, be an agreement.

on the cost effects or even on effects on producer or retail prices. Such signals are not uncommon in the food supply chain, for example. The challenge is that these may be interpreted as anything between analytical estimates to clear instructions, and provided that they gain media attention and are further elaborated, this pertains to the turning of the signals to something we could call self-fulfilling prophecies.

During the past years we have observed that the market for information services has reshaped, with retailers playing a more important role in the administration and dissemination of market information. The previous FCA decisions have managed to reduce the horizontal artificial transparency in the market for fast moving consumer goods, which has contributed to intensified competition between the retailers. The present implementation of these services poses some new challenges. An interesting question to address is the dual gatekeeper role of the retailers in their role as bottlenecks for the producers to reach the consumers on the one hand and in receiving the information required for the efficiencies to prevail on the other. Adding to this the danger of unfettered secret information flows; the exchanges of information require continuous attention with both a focus and a wide-angle view.



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## FRANCE

On 28 October 2010, the OECD Competition Committee is organising a roundtable relative to “*Information exchanges between competitors under competition law*”. The *Autorité de la concurrence*<sup>1</sup> hereby presents, through its recent decisional practice, the methodology that is guiding its assessment for such behaviours. The present note is designed to be read in the continuity of the previous contribution submitted by the *Conseil de la concurrence* (that became the *Autorité de la concurrence* on 2 March 2009) for the roundtable held on “Facilitating practices in oligopolies” on 18 October 2007. It takes into account the developments after that date, in order to give a broader and updated view on all recent incentives that has been carried out by the *Autorité de la concurrence* on the competition impact of information exchanges between competitors<sup>2</sup> since then.

### Introduction

Information exchanges between competitors have a particularly sensitive role in the intensity of the competition that competitors are likely to engage among themselves and, more generally, regarding the efficiency of market mechanisms. In some cases, better information can improve economic efficiency, for instance when it informs operators with regard to demand side characteristics, or when it increases their production efficiency. Conversely, in other situations, it can serve to hinder competition while resulting in a risk of collusion. As such, information on the planned commercial strategies of competitors might allow for tacit coordination of behaviours, leading to a collusive equilibrium. Information exchanges concerning past behaviours of operators might also deter them from engaging into aggressive commercial strategies based on their respective merits: if competitors are quickly informed of their future incentives and able to adjust their replies in the short term, the expected gains are significantly reduced and undertakings will therefore favour maintaining the existing equilibria on the market.

As underlined by these few examples, information exchanges - that covers the full range of anticompetitive behaviours likely to be forbidden by European or national competition rules - display very differentiated features, both in terms of their forms and of their effects. Such a diversity and complexity are naturally reflected in how the EU and national competition authorities deal with them. Indeed, an information exchange is never prohibited as such, in a nutshell as a *per se* infringement according to American *antitrust* rules and standards. On the contrary, both the *Autorité de la concurrence* and the European Commission base their assessment on a case by case analysis, depending on the single merits of each information exchange.

Taking into account their substantial characteristics, as well as the legal and economic context in which they occur, information exchanges can either be qualified as restrictions of competition by object, or be assessed in view of their effects, the competition authority having then to highlight their actual or potential anticompetitive scope. Under this second hypothesis, that often occurs in practice, the competition authorities are obviously led by the lessons learned from the economic analysis according to

<sup>1</sup> By convention, the terms “*Autorité*” or “*Autorité de la concurrence*” will designate the successor of the *Conseil de la Concurrence*, that became the *Autorité de la concurrence* on 2 March 2009.

<sup>2</sup> Notably see the thematic study on information exchanges in the 2009 annual report of the *Autorité de la concurrence*; *Autorité de la concurrence*, Annual report, La documentation française, Paris, 2009, pp. 105-147.

which the effects of information exchanges differ depending on the structure of the market in which they occur, the nature of the exchanged information and the way in which information are exchanged.

European and national case law transparently illustrates the implementation of this “graduated” approach with regard to information exchanges presenting a risk of collusion. Indeed, this approach is acknowledged in the new draft guidelines of the European Commission on horizontal cooperation agreements that underwent public consultations until 25 June 2010, and to which the *Autorité de la concurrence* gives its support<sup>3</sup>.

Information exchanges occurring within the framework of an express cartel case is the straighter to assess. Such information exchanges are so closely linked to this wider infringement by object prohibited under article 101 of the Treaty on the Functioning of the European Union (hereinafter the “Treaty”) and under the national corresponding provision, article L. 420-1 of the French Code of commerce, that it is not necessary to dissociate the competition assessment of both practices. Indeed, it is utmost unlikely that such a cartel would occurred without this information exchange between its participants, in order first to coordinate their behaviours with one another and, then, to monitor compliance with the common strategy.

However, when information exchanges allow undertakings to coordinate their commercial strategies without going as far as to delineating a unanimously agreed plan, they are severable anticompetitive practices, that should be assessed as concerted practices. In view of their nature, as well as their surrounding economic and legal context, some of these information exchanges are particularly likely to result in negative effects on competition, and are infringements by object according to article 101 of the Treaty. For instance, the European *Bananas*<sup>4</sup> and *T-Mobile*<sup>5</sup> cases fits this approach, while information exchanges between competitors on future pricing elements allowed competing undertakings to very significantly reduce uncertainty, and therefore making much easier the agreement on a common line of conduct. Such practices were sanctioned without the need to assess their anticompetitive effects. The undertakings involved in the exchange are nevertheless entitled to allege the pro-competitive effects of their conducts, according to article 101(3) of the Treaty. When such efficiency gains are proven, the competition authority in charge of the case must balance both types of effects to determine whether or not the anticompetitive effects are positively compensated by these efficiency gains, according to this latter European provision.

If the concerted practices involving information exchanges are not restrictions by object, it will be necessary, in order to assess their effects on competition (and if relevant, the possible efficiency gains that they can provide), to ground the competition assessment on different elements concerning the relevant market, the exchanged information and the technicalities of the exchange. From this viewpoint, a close scrutiny of European and national case law helps and understand the conditions in which an information exchange can be of a nature to result in negative effects on competition. In this regard, the fundamental reference is the “UK Tractors” case, concerning the exchange of detailed data on past sales figures by tractor manufacturers. In its ruling, the Court of Justice of the European Union (hereinafter the “Court of justice”) listed for the first time the criteria upon which its analysis was based,<sup>6</sup> putting first emphasis on the oligopolistic structure of the market and, second, on the precision as well as on the recent and strategic

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<sup>3</sup> See the opinion of the *Autorité de la concurrence* from 25 June 2010 on the review of the European rules applicable to horizontal cooperation agreements, available on the Internet site of the *Autorité* at the following address: [www.autoritedelaconcurrence.fr](http://www.autoritedelaconcurrence.fr), points 14 to 19.

<sup>4</sup> European Commission decision of 15 October 2008 relative to the implementation of article 81 of the Treaty (COMP/39.188 - Bananas), not yet published.

<sup>5</sup> ECJ, 4 June 2009, *T-Mobile Netherlands et al.*, C-8/08, Rec. p. I-4529.

<sup>6</sup> ECJ, 28 May 1998, *John Deere*, C-7/95 P, Rec p. I-3111.

nature of the exchanged information. In its 2005 decisions on Paris luxury hotels<sup>7</sup> and on the mobile telephony sector,<sup>8</sup> the *Conseil de la concurrence* relied on this evaluation grid in order to sanction detailed and sensitive information exchanges between competitors relative to their past behaviour, while taking extensive care to clearly demonstrate how these information exchange practices were likely to modify the incentives of the market players to engage into competition with one another.

The purpose of this contribution is therefore to outline how information exchange practices are handled by the *Autorité de la concurrence*, both under national and European provisions, that it has jurisdiction to implement. The first part introduces the main anticompetitive effects that can result from information exchanges between competitors. The second part reviews the efficiency gains that they are likely to generate. The third part details the criteria upon which the *Autorité de la concurrence* bases its assessment in order to draw its overall competition assessment of information exchanges. Finally, the last part explains how it proceeds in order to prevent the risk of anticompetitive effects related to information exchanges, or to restore the competition landscape affected by such exchanges.

## 1. The collusive effects of information exchanges between competitors

Information exchanges facilitating an anticompetitive practice (e.g. a wider cartel) are, regardless of the nature of the information exchanged, ancillary to this wider infringement prohibited under article 101(1) of the Treaty.<sup>9</sup> When they are not ancillary to prohibited practices, information exchanges can, on the other hand, be of a specific anticompetitive nature. An artificial increase of transparency between competitors can, indeed, prompt them to align their commercial strategies, thereby allowing them to hinder or to distort competition.<sup>10</sup>

The economic doctrine distinguishes between cooperative and non-cooperative oligopolistic equilibria. In a non-cooperative equilibrium, each undertaking independently defines its strategy, based on the anticipated behaviour of its competitors. A non-cooperative equilibrium is not necessarily of a competitive nature. This is only true within a static framework. Indeed, one can assume that undertakings who manufacture a homogeneous goods, without capacity constraints, are competing on prices in a given timeframe: as long as the price required is superior to the competitive price, it is in the interests of each undertaking to lower its price in order to attract all of the demand to oneself; the equilibrium will be reached when neither of the undertakings can offer lower prices. On the other hand, in the event of repeated interactions between operators, the immediate gains related to a unilateral reduction in one's own price must be mirrored to the future losses that possible retaliations from other competitors could bring about. A sufficiently patient undertaking might ascribe enough importance to its future profits in order to be prevented from triggering a price war, while favouring and not deviating from the common line of conduct.

<sup>7</sup> Decision 05-D-64 of 25 November 2005 relative to practices used in the Paris luxury hotels market.

<sup>8</sup> Decision 05-D-65 of 30 November 2005 relative to practices identified within the mobile telephone sector.

<sup>9</sup> V. ECJ, 7 January 2004, *Aalborg Portland*, related cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Rec. p. I-12 N point 281.

<sup>10</sup> See *Conseil de la concurrence* decision 05-D-65, quoted above in note 6. It should be noted that in this case, and in the same decision, the *Conseil de la concurrence* sanctioned the operators for an express agreement relative to the stabilisation of market shares during the period 2000-2002 and, *moreover*, independently for an exchange of information that had occurred during a different period, which covered the period of the express agreement (1997-2003). The two objections were therefore distinct, even though the *Conseil* had determined that the information exchange was able to facilitate the monitoring of the agreement on the stabilisation of market shares during the period covered by both practices.

The more or less competitive nature of the resulting equilibrium within a dynamic context depends on the market characteristics, and notably its degree of transparency. In a market where transparency is structurally high, it is possible to maintain a supra-competitive equilibrium even in the absence of any dialogue between competitors. When each undertaking can at any moment monitor the behaviour of its competitors, that there are no incentives to deviate from the common line of conduct - for instance, because a likelihood of future retaliations exists - and that this line of conduct cannot be called into question by any actual or potential competitors, or even by consumers (Airtours criteria<sup>11</sup> for a collective dominant position), the market is likely to give rise naturally to “tacit collusion”, i.e. a non-cooperative supra-competitive equilibrium. In this case, there is no concerted practice and the rules on cartels do not apply.

If these conditions are not met, and notably if the market’s transparency is insufficient, a supra-competitive outcome can only be sustained through information exchanges: the outcome therefore becomes collusive. This is notably the case when an exogenous shock prevents undertakings from coordinating their behaviours based on the mere maintenance of their acquired positions, and prompts them to exchange information on the options that they have adopted or are planning to adopt. In more general terms, the economic doctrine indicates that, within the framework of tacit collusion, there are quantities of possible equilibria that are characterized by different levels of prices beyond its competitive level, that is why dialogue between competitors can be crucial in order to successfully reach a determined common outcome.

Information exchanges can also allow to sustaining a collusive outcome within a market that is not structurally favourable to tacit collusion. As well as merger control is targeted to prevent the creation of market structures that are favourable to tacit collusion (collective dominant position), competition authorities can sanction information exchanges that are concerted practices if they entail a collusive object or, actual or potential, collusive effects. Indeed, this point was stressed by the European Commission as far back as 1975, in the Suiker Unie decision,<sup>12</sup> when distinguishing between, on the one hand, the mere adaptation to the identified or expected behaviour of competitors which is a legitimate purpose, and, on the other hand, establishing contacts with those competitors, which is prohibited if its object or, actual or potential, effect is to spring collusion.

Information exchanges can encourage collusion in two different ways: either by facilitating coordination within a given supra-competitive equilibrium, or by allowing monitoring of competitors behaviour and retaliating for their possible deviations from a common line of conduct. Depending on the market’s characteristics, an information exchange can have both of these roles, or only serve one of these two purposes. When tacit coordination along past positions on the market is possible, it will be sufficient to outcast deviations. Conversely, in a market where cheating is unlikely because of a low demand elasticity or because of capacity constraints, or because the high pre-existing degree of transparency allows for immediate detection of deviations, the primary objective of information exchanges could be the coordination of operators along a common strategy.

### **1.1 Behavioural coordination of competing undertakings**

Information exchanges allow undertakings to coordinate their behaviours when they are likely “to reduce or remove (...) any uncertainty about the foreseeable nature of its competitors’ conduct”.<sup>13</sup> This is for instance the case when the exchanged information relates to future intentions. In a recent case

<sup>11</sup> CFI, 6 June 2002, *Airtours*, T-342/99, Rec. II-2585, point 62.

<sup>12</sup> ECJ, 16 December 1975, *Suiker Unie*, related cases C-40 to 48/73, 50/73, 54 to 56/73, 111/73, 113 and 114/73, Rec. p. 1663, point 174.

<sup>13</sup> CFI, 27 October 1994, *John Deere*, T-35/92, Rec. p. II-957, point 51. A

concerning the banana trade in Northern Europe, the European Commission sanctioned the three main banana importers for having exchanged information on a regular basis, namely each week, before announcing their quotation prices (to which the final prices were linked). These bilateral talks related to general pricing elements, price trends and, in certain cases, planned changes to their quotation prices. The European Commission considered that “*discussions and disclosure on either “price trends” or specifically on quotation prices had the object of coordinating the setting of quotation prices by the parties*”.<sup>14</sup>

In the case of the Paris luxury hotels, due to, the directors of the eight Paris luxury hotels exchanged information on their projected occupancy rates, in order to better anticipate their respective reactions to the demand shock constitutive of the declining hotel occupancy in the wake of 11 September 2001. As indicated by the sales director of one of the luxury hotels, in the minutes of one of these meetings, these information exchanges allowed for “*a fine coordination of the Paris luxury hotels during these difficult times. No price dumping*”.<sup>15</sup> One must nevertheless, as indicated by the *Autorité*, conceptually distinguish the economic mechanisms corresponding with the various types of exchanged information in these various cases - coordination for exchanges related to the future and surveillance for past data: “*The logic of increasing transparency in the market in order to encourage a collusive outcome stands still without being centred, in the present case, on the aim to measuring any past performances, but rather to providing indications on the targeted sales*.”<sup>16</sup>

Depending on the market structural characteristics, coordination can be more or less difficult to achieve. Entry barriers have an important role by ensuring that the supra-competitive outcome resulting from the coordination will not be threatened by market entrants that would propose lower prices. Coordination can also be facilitated by other market structural characteristics. This is the case when the undertakings have a high degree of symmetry in terms of costs or capacities, when the products are relatively uniform, when the demand is stable or when the market transparency is already high. In such a market, information exchanges aimed at facilitating coordination can be limited, and an isolated dialogue can then be sufficient. A clear cut illustration of this type of market is the mobile telephony market, which notably prompted the Court of justice, ruling on a preliminary issue in the T-Mobile case, to state that a single meeting, intended to harmonize one single competitive element, was sufficient to consider that an exchange of future information was a restriction by object.<sup>17</sup>

To facilitate coordination between operators, it is not necessary that an operator commits directly regarding the planned conduct: on the contrary, cheap talk allows an undertaking that is considering a change of its behaviour within the market to test the reaction of competitors and, if relevant, to revise its own strategy at no cost.

## **1.2 Monitoring competitors behaviours**

In order to stabilize collusion once a consensus has been established, participants must be discouraged from cheating. Detection and punishment of deviations from the common line of conduct are therefore necessary. This is what is aimed at certain information exchanges related to past behaviours.

In general terms, betrayal will as likely as the short-term revenues that it can generate are high, and as the risks of detection and retaliation are low. In the case of price-based competition, the gains generated by

<sup>14</sup> European Commission decision of 15 October 2008 (COMP/39.188 - Bananas), quoted *above* note 4, point 268.

<sup>15</sup> See *Conseil de la concurrence* decision 05-D-64 of 25 November 2005, quoted *above* in note 7, point 275.

<sup>16</sup> *Ibid*, point 257

<sup>17</sup> See ECJ, 4 June 2009, *T-Mobile Netherlands et al.*, quoted *above* note 5 point 60.

a slight price decrease, in comparison to the collusive price, will be high provided that the demand company is rather elastic (which means that a slight price decrease will result in a strong increase of volumes sold for the deviating undertaking), and that the deviating company has a sufficient surplus capacity in order to be able to absorb the subsequent increased demand. However, such a deviation can also result in strong retaliations from competitors (especially if their production capacities allow them to supply the demand in a competitive equilibrium), and therefore prove to be extremely costly in the long term.

For the tacit collusion to be sustainable, the risk of retaliation must be significant and credible. For example, in the case of undertakings negotiating long-term contracts with their customers, a deviation in the form of a price cut to customers may be immediately noticed by competitors, because they will not obtain as many contracts as had been anticipated; however, any retaliation will be delayed, which limits both their cost and the deterrent effect for the deviating company.

Moreover, the implementation of retaliation mechanisms may prove to be difficult when the deviation is difficult to detect in view of the market characteristics. For instance, when the demand is relatively unknown and when an undertaking does not have access to the prices applied by its competitors, but only to the demand directed at him, it will be very difficult for him to uncover a deviation from the collusive outcome. Under such situation, a decrease of the demand for one undertaking could, of course, be the result of a deviation by one of its competitors (which can be enough to trigger a price war even if the deviating company has not been identified), but it could also be the result of an adverse shock affecting the overall demand on the market. In this case, information exchanges on past actions are extremely useful in order to maintain the sustainability of a supra-competitive collusive outcome. For example, being in a position to know the prices applied by competitors or the quantities that they have sold (in certain cases, it can be enough to know the total quantity sold by all the undertakings) will be sufficient to ensure that all undertakings are converging on the common line of conduct.

In this sense, the “UK Tractors” case<sup>18</sup> is the perfect example of a mechanism of detailed information exchanges relative to highly individualized information (sales and market shares of eight producers and importers of agricultural tractors), which made it possible to verify the eventual implementation of a common line of conduct (regarding customers allocation) through the immediate detection of possible deviations.

Detecting deviations is also what the *Conseil de la concurrence* focused on in its decision regarding the mobile telephony sector. It verified that the exchange of gross sales data gave the participants - in comparison with the net sales figures publicly available - a significant advantage in terms of monitoring the strategies of competitors, which further reduced their incentives to lower prices. “According to the *John Deere* case law, what matters is not the precision, measured in abstract terms, of the exchanged information, but indeed the link between the nature of this information and the possibility for the operators to monitor the impact of their commercial policy, and that of their competitors, on sales.”<sup>19</sup> As in the case of the Paris luxury hotels, direct monitoring of the competitors strategy was difficult on account of the high number of sales elements defining each competitor strategy: commissions paid to distributors, direct subsidies granted for mobile phone terminals purchase, multiple subscription and prepaid cards systems, etc. “In a market in which price transparency is hindered by the large number of subscription and pre-paid cards schemes, the existence of multiple options that serve to differentiate the offers, the high frequency of

<sup>18</sup> See notably European Commission decision 92/157/EEC of 17 February 1992 relative to the implementation of article 85 of the Treaty (case IV/31.370 and 31.446 *UK Agricultural Tractor Registration Exchange*), OJEC n° L 68 of 13 March 1992; See also CFI, 27 October 1994, *John Deere*, quoted above note 14, and CJEC, 28 May 1998, *John Deere*, quoted above note 6.

<sup>19</sup> See *Conseil de la concurrence* decision 05-D-65 of 30 November 2005, quoted above in note 8, point 209



*release of new offers and the existence of several distribution networks likely to further increase the differentiation of the offers, monitoring of changes in the gross sales figures is the only way capable of providing summary information on the “competitive effort” made by competitors.*<sup>20</sup> The *Conseil* insisted the fact that the operators themselves considered the number of new subscribers acquired each month as a relevant summary to assess the efficiency of each operator’s strategy.

To be in a position to fulfil this monitoring role, an information exchange must first target a sufficiently significant share of the market, in order to prevent operators, that are not providing information their data, from having an opportunistic strategy without incurring the risk of being detected. Second, the information exchange must relate to data that will contribute to identifying the strategy of competitors. The degree of aggregation, both in terms of timeframe and space, as well as between the various market players, is an essential element. As stated by the European Commission in the guidelines on maritime transport services, one must verify that “*the information cannot be disaggregated so as to allow undertakings directly or indirectly to identify the competitive strategies of their competitors*”.<sup>21</sup> The number of undertakings to which the aggregation relates is necessarily an essential criterion: if only two operators are active in a market, the fact that each of them knows its own commercial strategy means that aggregated data will allow an immediate identification of the rival’s strategy. The degree of aggregation must also be assessed in view of the information readily available on the market, as well as the information that could be available to certain operators, notably as a result of the equity participations that they hold in other companies. Finally, the various exchanged information could also be recombined such as to provide for a relevant assessment of the competitors strategy. In the case of the Paris luxury hotels,<sup>22</sup> the *Conseil de la concurrence* dedicated long reasoning to prove average earnings and occupancy rates, when cross-assessed, are information able to uncover and construe one’s competitor strategy: a reduction in average earnings cross-referenced with a stable occupancy rate indicates that the hotel is offering rebates in order to maintain strong occupancy of its rooms and, conversely, that stable average earnings cross-referenced with a lower occupancy rate means that the hotel is refusing to grant rebates despite a low occupancy rate for its rooms. In the maritime transport guidelines, the European Commission stresses that “*in general, it is important to assess all individual elements of any information exchange scheme together, in order to take account of potential interactions, for example between exchange of capacity and volume data on the one hand and of a price index on the other*”.<sup>23</sup>

It can finally be noted that, regardless of the risk of facilitating collusive behaviour, which is the core issue of the present roundtable, information exchanges can result in other anticompetitive effects that are not concerted practices, but are rather caught under the prohibition of abuses of dominant positions, such as the risks of competition distortion linked to an exclusive access for certain information, to which the *Autorité de la concurrence* dedicate extreme care..

## **2. The pro-competitive effects of information exchanges**

In its assessment on the merits, the *Autorité de la concurrence* also takes into account the efficiency gains that can result from information exchanges. This is also the case of the European Commission, which indicated that information exchanges can allow competitors to optimise their commercial strategies: “*In order to be able to compete effectively on a given market, companies need information about that market and developments on it. The preparation and distribution of collated output, sales or other statistics within*

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<sup>20</sup> *Ibid*, point 210

<sup>21</sup> See European Commission guidelines of 1 July 2008 relative to the application of article 81 of the EC treaty to maritime transport services, OJEU n° C 245 of 26 September 2008, p. 2, point 52.

<sup>22</sup> See *Conseil de la concurrence* decision 05-D-64 of 25 November 2005, quoted *above* in note 7.

<sup>23</sup> Guidelines on marine transport services, quoted *above* note 25, point 57.

*an industry is a task which may legitimately be undertaken by statistical offices and trade associations. The provision of such statistics can improve the companies' knowledge of the market in which they operate and thereby increase competition. The Commission does not therefore object where national trade associations (...) exchange statistics which set out production and sales figures for the industry in question without identifying individual companies".*<sup>24</sup> Moreover, these exchanges can be beneficial if they increase market transparency in favour of consumers by improving their information, as stressed by the European Commission in its guidelines concerning the maritime transport sector, notably if the exchanges relate to aggregated statistical data.<sup>25</sup>

## **2.1 Better adjust supply to demand**

The economic doctrine on static oligopolies indicates that in the presence of uncertainty, an information exchange can generate efficiency gains relative to supply-side adaptation. Nevertheless, these researches stress the difficulties related to assess these information exchanges: the overall competition assessment depends on the market's highly detailed characteristics, such as how competition takes place (based on prices or quantities) or the variables to which the uncertainty relates (demand or costs).<sup>26</sup> However, it is extremely complex to precisely identify these characteristics, which therefore strongly impairs any legal qualification of the information. One can nevertheless derive certain assumptions regarding the efficiency gains that the exchanges may generate when the undertakings are dealing with market where uncertainty exists.

Exchanges of aggregated information on supply-side or on demand-side may favour an efficient reallocation of production towards markets where demand is stronger in comparison to the supply, or even promote product differentiation to the benefit of consumers. In an opinion relative to the performance of statistical surveys by the *Chambre syndicale des améliorants organiques et supports de culture*,<sup>27</sup> the *Autorité de la concurrence* considered that the exchange of past and aggregated data on the sales volumes of various products entailed no risks of anticompetitive coordination between manufacturers, but could provide them with clearer vision of past market evolution, thereby allowing them to better adapt their production capacities to the demand.

Better knowledge of demand or of the consumers' characteristics may also serve to reduce useless costs. In the case of perishable goods, an information exchange on the size of the demand may help undertakings to adjust their prices in order to ensure effective stock-clearing, rather than accumulating unsold merchandise. In the insurance sector, information exchanges on the characteristics of insured customers can also contribute to reducing the risks of insurers, and therefore their costs. Indeed, while the reimbursement of claims represents the greatest cost, each insurer only has limited information on the individuals risks, which does not allow them for a sufficiently precise assessment of the probability of future claims. This prompts insurers, notably the smallest ones, to include a larger risk premium as an average. The exchange of statistical information between insurers can therefore have pro-competitive effects by allowing for a reduction of the premiums. The European Commission has adopted a block exemption regulation relative to agreements between insurance companies in the sole aim to perform or

<sup>24</sup> European Commission decision of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (*Thyssen Stahl* case), OJ L106, 6.05.1994, paragraph 266.

<sup>25</sup> Guidelines on marine transport services, quoted *above* note 28, point 39.

<sup>26</sup> For a recent review of this literature, see for example RAITH (M.), "A General Model of Information Sharing in Oligopoly", *Journal of Economic Theory*, 71, 1996, pp. 260-268.

<sup>27</sup> *Autorité de la concurrence* opinion 10-D-05 of 23 February 2010 relative to the performance of statistical surveys by the *Chambre syndicale des améliorants organiques et supports de culture*, point 61.

disseminate statistical surveys regarding claims, provided that the exchanged data do not allow the identification of the insurers at stake: “*Collaboration between insurance undertakings or within associations of undertakings in the calculation of the average cost of covering a specified risk in the past (...) makes it possible to improve the knowledge of risks and facilitates the rating of risks for individual companies. This can in turn facilitate market entry and thus benefit consumers.*”<sup>28</sup>

Finally, information exchanges are also likely to increase production efficiency of an overall designated economic sector. Information exchanges on investment or research and development programs may prevent operators from engaging into parallel strategies that will lead to overcapacities or to a duplication of costly and irretrievable research efforts; these efficiency gains must nevertheless be balanced with the negative effects linked to the reduction of “competition for the market” that traditionally stimulates innovation.

## **2.2 Improve efficiency and functioning of undertakings**

In order to assess one’s own performances on the market, it is useful to be able to assessing data concerning other undertakings that are in a similar situation on the market, as peer references, can be a valuable tool. Benchmarking methods are commonly used by undertakings to position themselves in scale of their other competitors. Being able to point out its strengths and weaknesses allows an undertaking to improve its efficiency. In practical terms, this undertaking may build up a series of efficiency indicators to renew its objectives and results to be reached, as well as to provide more effective incentives to its employees. It must nevertheless be stressed that the assessment of one’s own performances in comparison to the market only requires aggregated data on the overall economic sector concerned, or possibly anonymous data regarding best practices, but in no way requires any exchange of information that could serve to identify the individual performances of competitors<sup>29</sup>. Similarly, the exchange of very aggregated information on costs may allow undertakings to single out high performance technologies, and thus to optimise their production choices. Indeed, the aggregation of data belonging to several undertakings allows to smooth down possible individual variations that would be independent of the choice that is made, and thus to obtain a more reliable source of information.

## **2.3 Improve consumers’ information**

If the disseminated information is also disclosed to consumers, and if these information are relevant elements to successfully compare the offerings from various undertakings, information exchanges spring competition between these competitors, since consumers can readily identify the most suitable product for their needs, as well as the most efficient undertaking. By reducing research costs, such information exchanges increase the elasticity of demand, which makes collusion more difficult to sustain, since the operator that deviates by lowering its prices will drain a significant share of the demand in the very short term. Thus, public announcements which are irrevocable commitments towards customers on future prices might be pro-competitive, since they prevent cyclical market fluctuations, as they help share the market risks between buyers and sellers, like the Court of justice acknowledged in the “Wood pulp II” ruling.<sup>30</sup>

<sup>28</sup> European Commission regulation (EC) n° 358/2003 of 27 February 2003 on the application of article 81, paragraph 3, of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJEU n° L 53 of 28 February 2003, p. 8, point 10.

<sup>29</sup> See for example *Conseil de la concurrence* opinion n° 06-A-18 of 5 October 2006 relative to the project for an occupancy indicator for hotels in the Mulhouse region, point 26

<sup>30</sup> See ECJ, 31 March 1993, *Ahlström Osakeyhtiö et al.*, related cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, Rec. p. I-1307, point 126.

However, information exchanges intended for consumers are not necessarily pro-competitive, conversely they can favour collusion under market structures more likely to give rise to collusive outcomes. For instance, by taking advantage of these public disclosures, competitors will be able, in the short term, to detect and punish the deviating undertaking by decreasing their own prices, which will in chain reduce the revenues drawn from such a deviation and therefore encourage undertakings to sustain the common line of conduct.

#### **2.4 *Improve investor information***

Undertakings listed on the stock market are under the legal duty, on a regular basis, to disclose their actual and forecasted earnings, in order for investors to correctly assess their yield prospects. This transparency has several positive effects. It notably provides for more reliable information for buyers when purchasing financial products, on better risk management and on mitigation of shocks, since forecasts can be revised if necessary. Thus, undertakings can be required to publicly disclose their sales figures, profits and market shares, both for recent and future periods. Such data can be of sensitive nature if they are disclosed in a very detailed and individualized fashion, i.e. not on an overall scope, but rather market (product, but also geographical markets) by market. However, to estimate the undertaking's value, investors require only aggregated data on all of the undertaking's activities (possibly broken down by major activity sectors), while such data would normally be insufficient to sustain a collusive outcome within a determined market.

#### **2.5 *Correct market failures***

Information asymmetries between sellers and buyers are present in certain markets. These asymmetries can have negative effects for both sellers and buyers. This is notably the case for the insurance sector, in which customers are withholding specific individual information regarding their own risk. Given their inability of identifying the risk of their new customers, insurers must systematically apply to them a relatively high risk premium. This situation is enhanced since consumers who have already submitted a claim will, in order to avoid paying higher premiums, be likely to terminate the contracts with current insurer and switch to a new one who is unaware of their past behaviours. In France, the Insurance Code<sup>31</sup> provides for a referral of an information statement on the insured party's past claims to a new insurer, when subscribing for a motor vehicle insurance contract. Car insurance companies can directly exchange such information in a file known as the AGIRA. This exchange serves to reduce the information asymmetry between insurers and insured parties (information that the client spontaneously "discloses" as time goes as claims arise or due to the absence of claims), which therefore allows, as a result of the competition between insurers, to limit the premiums and the cost of insurance for insured parties.

The same type of information asymmetry is also present in the bank loan market. This led the Court of justice, in a preliminary ruling, to rule a file containing information on the solvency, default and credit of borrowers, that would serve to mitigate the information asymmetry between creditor and debtor, had neither anticompetitive object nor anticompetitive effects and, moreover, would have eventually been eligible for an individual exemption pursuant to article 101(3) of the treaty as a result of the generated efficiency gains<sup>32</sup>.

### **3. *Assessment information exchanges under competition rules***

Article 101(1) of the Treaty and article L 420-1 of the Code of commerce prohibit concerted practices as a "form of coordination between undertakings that, without going so far as to enter into an agreement

<sup>31</sup> French Insurance Code, Appendix to article A 121-1, articles 12 and 13.

<sup>32</sup> ECJ, 23 November 2006, *Asnef-Equifax*, C-238/05, Rec. p. I-11125.

properly speaking, knowingly replace competition risks with practical cooperation between them”.<sup>33</sup> Indeed, French and European competition rules require that any economic operator sets, on an autonomous basis, the strategy that it intends to implement within the common market. “While it is correct to say that this requirement for autonomy does not prevent economic operators from intelligently adapting to the identified or expected behaviour of their competitors, it nevertheless rigorously opposes any direct or indirect establishment of contacts between such operators, the purpose or effect of which would be to either influence a current or potential competitor’s behaviour on the market, or to disclose, to such a competitor, the behaviour upon which one has decided or is envisioning relative to its own actions on the market”<sup>34</sup>. A behaviour can therefore qualify as a concerted practice even when the undertakings have not explicitly agreed upon a common plan on which will depend their actions in the market, if they have designed mechanisms that facilitate the coordination of their commercial strategies. Information exchanges are among such mechanisms.

### 3.1 *The standard of proof*

When an information exchange is a facilitating practice for an anticompetitive cartel, whether by enabling monitoring of the compliance with the cartel by its members and/or adopting a common and mutually agreed upon strategy which benefits all its members, such information exchange is ancillary to the wider cartel and violates competition rules similarly as the cartel does. When an information exchange is disconnected from any wider anticompetitive scheme, is assessed as a concerted practice, which can have anticompetitive object or effects. One must first consider if the information exchange at stake is a restriction of competition by object. Pursuant to the European case law and decisional praxis, it is more likely to be qualified as such if the exchanged information relates to future data, and *even more so* if the disclosure of information occurs only between competitors, to the exclusion of consumers or customers. Assessing its actual or potential effects is limited to the cases where the information exchange has no anticompetitive object. This analysis is always performed on a case-by-case basis, while considering all the circumstances surrounding the behaviour (market context, nature of the exchanged information and technicalities of the exchange). The decisional praxis of the *Autorité de la concurrence* is guided by a similar three-limb-reasoning.

#### 3.1.1 *Information exchanges and concerted practices*

According to article 101 of the Treaty, the notion of a concerted practice requires, besides the existence of a dialogue between undertakings, both an undertakings’ behaviour in the market and that there exists a causality link between both elements. However, according to settled case law, and subject to proof to the contrary which burden falls on the parties colluding undertakings that remain active in the market are presumed to have taken into account the information exchanged with their competitors in order to determine their strategies on the market.<sup>35</sup> In the “T-Mobile” judgement,<sup>36</sup> the Court of justice rules that this presumption is also applicable to Competition Authorities and national courts when they implement article 101(1) of the Treaty.

The conditions to rely on this presumption are extensive. the actual implementation of the common line of conduct that results from the information exchanges is not relevant to rebut it, as far as the information exchange is a restriction of competition by object: “*the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anticompetitive purpose is not such as to relieve it of*

<sup>33</sup> ECJ, 16 December 1975, *Suiker Unie*, case 40/73, Rec. p. S663, point 26.

<sup>34</sup> *Ibid*, point 174.

<sup>35</sup> ECJ, 8 July 1999, *Anic Partecipazioni SpA*, C-49/92, Rec. p. I-4125, point 41.

<sup>36</sup> ECJ, 4 June 2009, *T-Mobile Netherlands et al.*, quoted above note 5.

full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings”.<sup>37</sup> Indeed, as stated by the European Commission, “even if a participant in cartel conduct may seek to exploit cartel arrangements for its own ends, or even cheat, this does not diminish its responsibility for participation in that conduct. It is settled case law that an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit”.<sup>38</sup> Regarding information exchanges, cheating may encompass the deliberate transmission of inaccurate data. This does not exonerate the undertaking from its participation in an anticompetitive information exchange. If this exchange is intended, for example, to monitor the participants in a concerted practice in order to prevent them from deviating from a common line of conduct, an undertaking may be willing to take the risk of deviating in order to generate short-term profits, then attempt to conceal his deviation by supplying false information. This line of defence was invalidated by the “plasterboard” ruling of the Court of First Instance, since if cheating occurs, this confirms that the information exchange serves as a monitoring device in order to avoid deviations.<sup>39</sup>

The presumption that the exchanged information influences the behaviour of the participants to the collusion may be refuted: the undertaking that has participated must then prove that the exchange of information had absolutely no influence on its own behaviour in the market. The undertaking must at least have stopped its participation in the anticompetitive agreements and have publicly distanced itself from the purpose of the meetings, or evidenced that it had indicated to its competitors that it was participating in these meetings, but with a different state.

### 3.1.2 Anticompetitive object and effect

In general terms “the distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition”.<sup>40</sup> As indicated in the guidelines on the application of article 101, paragraph 3, of the treaty “these are restrictions which (...) have such a high potential of negative effects on competition that it is unnecessary, for the purposes of applying article 81, paragraph 1, to demonstrate any actual effect on the market”.<sup>41</sup> Moreover the Court of Justice, while issuing a preliminary ruling, stated that in order to have an anticompetitive object, it is sufficient for the concerted practice to be likely to produce negative effects on competition. In a nutshell, it must simply be capable, while considering the legal and economic context in which it occurs, of preventing, restricting or distorting competition within the common market.<sup>42</sup>

When assessing the anticompetitive nature of a concerted practice, competition authorities base their assessment on its content and on its desired objective aims regardless the fact that participants have colluded for reasons among which some were legitimate.<sup>43</sup> If the anticompetitive object is established, efficiency gains may only be put forward to be granted an individual exemption under article 101(3) of the

<sup>37</sup> CFI, 14 May 1998, *Sarriso*, T-334/94, Rec. p. BI-1439, point 118.

<sup>38</sup> European Commission decision of 15 October 2008 (COMP/39.188 - Bananas), quoted *above* note 4, point 324.

<sup>39</sup> CFI, 8 July 2008, *Lafarge*, T-54/03, Rec. p. II-120, point 274.

<sup>40</sup> CJEC, 20 November 2007, *Beef Industry Development Society and Barry Brothers*, C-209/07, Rec. p. I-8637, point 17.

<sup>41</sup> European Commission guidelines of 27 April 2004 regarding the application of article 81, paragraph 3 of the Treaty, OJEU n° C 101 of 27 April 2004, p. 97, point 21.

<sup>42</sup> ECJ, 4 June 2009, *T-Mobile Netherlands et al.*, quoted *above* note 5, point 35.

<sup>43</sup> ECJ, 20 November 2007, *Beef Industry Development Society and Barry Brothers*, quoted *above* note 65, §21.

Treaty. In this case, the undertakings must prove the pro-competitive effects of the practice, and establish that customers will benefit from the resulting efficiency gains.

Pursuant the “graduated” approach implemented by the *Autorité de la concurrence*, the assessment of the object of an information exchange must therefore be on a case-by-case basis. Nevertheless, certain essential criteria can be identified. Information exchanges between competitors relating to future intentions, that are particularly likely to bring about coordinated behaviour between undertakings, have on several occasions, within European case law and decisional practice, been qualified as infringements by object. The dividing line between price or quantities fixing and information exchanges relative to such future data may sometimes be difficult to delineate. In the first scenario, the information exchanges are facilitating components for an explicit cartel, the object of which is clearly anticompetitive, and it will be scrutinized as one of the grounding elements of the cartel. However, an information exchange may also have an anticompetitive object even if no agreement occurred.

From the time being, the *Autorité de la concurrence* did not face information exchanges between competitors that were intended to restrict competition, severable from a broader anticompetitive practice. Nevertheless, the European case law provides clarification, notably with the “T-Mobile Netherlands” case that resulted in a preliminary ruling issued by the Court of Justice regarding information exchanges on future cost elements. Dutch mobile telephony operators discussed, during a meeting, reducing the standard revenues given to their retailers on subscriptions. In its ruling, the Court of Justice considered that an exchange of information could be an infringement by object even when the exchanged information did not directly relate to the actual prices paid by consumers, but consisted of strategic elements with regard to setting the final price: “*an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anticompetitive object, and that extends to situations, such as that in the present case, in which the modification relates to the reduction in the standard commission paid to dealers*”.<sup>44</sup> Indeed, while recognising that “*the direct object of the concerted practice cannot be said to be the determination of prices for postpaid subscriptions on the retail market*”,<sup>45</sup> the Court of Justice considered that “*it is not possible on the basis of the wording of Article 81, paragraph 1, EC to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited*”<sup>46</sup> since it provides that concerted practices can have an anticompetitive object if they “*directly or indirectly fix purchase or selling prices or any other trading conditions*”. The Court of Justice underlined the concrete existence of an indirect link between the exchanged information and the sale price for subscriptions: “*as far as concerns postpaid subscriptions, the remuneration paid to dealers is evidently a decisive factor in fixing the price to be paid by the end user*”.<sup>47</sup>

Information exchanges regarding future prices may hardly be justified through efficiency gains, *A fortiori* when these information is not disclosed to consumers or when the undertakings do not commit to pass on these prices on consumers. While one can conceive, in the case of discussions relating to new product entry, capacity extensions or research and development future capabilities, the reality of pro-competitive effects due to a better allocation of resources, in the case of discussions relating to prices without pass on warranties to customers, between participants is the only aim of the information exchange. Some economists therefore recommend prohibiting all secret discussions of future prices.<sup>48</sup> That said, it

<sup>44</sup> ECJ, 4 June 2009, *T-Mobile Netherlands et al.*, quoted above note 5, point 41.

<sup>45</sup> *Ibid*, point 19.

<sup>46</sup> *Ibid*, point 36.

<sup>47</sup> *Ibid*, point 35.

<sup>48</sup> Kühn (K.-U.), “Fighting Collusion: Regulation of communication between firms”, *Economic Policy*, Vol. 32, pp. 167-204.

seems relevant that the criteria for assessing information exchanges on future data, most particularly future prices, for which the anticompetitive object can be evidenced, be different from the criteria that are taken into account relative to an information exchange focused, for example, on past sales.

Conversely, in the case of information exchanges that are not facilitating practices for an explicit cartel and that are not restrictions by object, the *Autorité de la concurrence*, like the *Conseil* before it, takes due care to evidence their actual or potential negative effect on competition. In its decision on the Paris luxury hotels, the *Autorité* strove to explain the usage that could be made of the exchanged data in order to efficiently monitor competing hotels, and in practical terms surveying that some of them were not secretly lowering their prices in order to attract more customers. In the Mobile telephony decision, the *Autorité* justified this approach by stating that “according to the *John Deere* case law, the important thing is not the precision, measured in abstract terms, of the exchanged information, but indeed the link between the nature of information and the possibility for the operators to monitor the impact of their commercial strategy, and that of their competitors, on sales”.<sup>49</sup> The French Supreme Court (*Cour de Cassation*) underlined that, the same standard was applicable to the Paris Court of Appeal, which in its reasoning, had to explain “in concrete terms (...) if the regular exchange, from 1997 to 2003, of retrospective information between the three undertakings active on the market (...) had for object or for actual or potential effect, in view of the market characteristics, of its functioning, of the nature and aggregation level of the exchanged data (...), to allow each of the operators to adapt to the future behaviour of its competitors and thus to appreciably distort or limit competition on the market concerned”.<sup>50</sup> Then, the Paris Court of Appeal<sup>51</sup> relayed numerous arguments included in the decision of the *Conseil*,<sup>52</sup> explaining that the exchanged data had been commented upon during executive committees or board of directors meetings, and that the information were taken into account to assess the consequences of the implemented commercial strategy, to justify the future commercial actions, and to re-orientate, if relevant, their commercial strategies, as well as to anticipate the behaviour of their competitors in reaction to a decrease in their market shares. The *Cour de cassation* had then the opportunity to review for a second time the case. In this second ruling dated 7 April 2010,<sup>53</sup> the approach adopted by the *Autorité* relative to such information exchanges was thoroughly validated on its merits, in a ruling. This ruling therefore definitively confirms the assessment grid regarding information exchanges, by entirely agreeing to the methodology used by the *Conseil de la concurrence* since 2005, which is convergent with the European case law.

The *Cour de Cassation* puts emphasis on the fact that: “if, in a highly concentrated oligopolistic market protected by entry barriers and characterized by quantity-based competition, an information exchange may under certain circumstances have beneficial effects for consumers insofar as, for example, it would allow operators to anticipate increase in demand, and eventually adapt accordingly the capacities of their networks in order to better satisfy customers”, an information exchange violates competition rules, on the other hand, if its competitive assessment unveils that “such a beneficial effect is not based on any hard concrete evidence”, that “the exchanged data themselves are of sufficient strategic interest in view of their recentness and the shortened frequency of their exchange over a long period of time”, and that they “have concretely been used by operators in order to assess the consequences of the implemented commercial strategy, to justify future commercial actions, to re-orientate, if relevant, its commercial strategy and, finally, to anticipate the behaviour of their competitors in reaction to a decrease in its [market] shares”. Indeed, such a finding, far from being “a presumption based solely on the market’s oligopolistic character

<sup>49</sup> *Conseil de la concurrence* decision 05-D-65 of 30 November 2005, quoted *above* note 8, point 209.

<sup>50</sup> Court Cass., 29 June 2007, Mobile Telephony, ruling 1020.

<sup>51</sup> Paris CA 11 March 2009, Mobile Telephony.

<sup>52</sup> *Conseil de la concurrence* decision 05-D-65 of 30 November 2005, quoted *above* note 8, points 220 to 224.

<sup>53</sup> Court Cass., 7 April 2010, *SFR and Orange France*



and on abstract data, that a frequent information exchange is likely to appreciably hinder competition”, proves that “the exchanged information were effectively used by operators in order to adjust their respective strategies”, which allows the Autorité and the competent reviewing court to conclude to the existence of an anticompetitive information exchange.

As an additional illustration, the 2008 European Commission guidelines on maritime transport services, after providing that they do not deal with information exchanges with an anticompetitive object, summarize this approach by proposing general orientations for the assessment of the potential effects of an information exchange. To begin with, they stress that the assessment must be on a case-by-case basis, and then highlight two major lines of evaluation: “*the structure of the market where the exchange takes place and the characteristics of the information exchange, are two key elements that the Commission examines when assessing an information exchange*”.<sup>54</sup> We will thus introduce how the market structure, the sensitive nature of the exchanged data and the characteristics of the exchange ought to be taken into account in order to assess the effects of an information exchange.

### 3.2 *The market structure*

Given that the *Autorité de la concurrence* applies European competition law when trade between Member states is affected, the landmark case law relative to the market structure when assessing exchanges of information is that of the “UK Tractors” ruling.<sup>55</sup> “*On a truly competitive market, transparency between traders is in principle likely to lead to the intensification of competition between suppliers*”, at least when this transparency benefits consumers. Conversely, a concentrated market, *a fortiori* a very concentrated market, is more likely to generate collusive behaviours. Many European cases refer to this same case law, such as the European Commission’s *Wirtschaftsvereinigung Stahl* decision, that gives a detailed description of the mechanism whereby information exchanges in a concentrated market serve to sustain collusion<sup>56</sup>. In the course of its a case-by-case assessment, the *Autorité* devotes particular attention to the market structure, which is, according to economic theory, an essential criterion for assessing whether or not a concerted practice is sufficient to establish truly stable collusion. In the Mobile Telephony decision, the *Autorité* provided the characteristics that it considers relevant for the market structure’s scrutiny. “*The criteria underlying the European judge’s analysis [in the John Deere ruling] are therefore those of a tight oligopoly, due to the existence of significant entry barriers, in which the positions of the undertakings are relatively stabilized. It is on the basis of these criteria and only these criteria that one must assess the market for mobile telephony in which the information exchanges under scrutiny occurred, in order to verify if the latter were restrictive of competition*”.<sup>57</sup> Even if the Conseil was not bound by this case law, it also considered other criteria such as the evolution of demand, the competition intensity and even the likelihood of retaliation, in order to thoroughly characterize the effects of these information exchanges.

Similarly, in the decision regarding the Paris luxury hotels,<sup>58</sup> the *Autorité* used several relevant indicators in order to verify the market’s oligopolistic nature. The file indicated that the six Luxury hotels in question did not consider “four-star” hotels to be direct or close competitors. Indeed, customers interested in luxury stays generally value very differentiated characteristics such as a prestigious location, a

<sup>54</sup> Guidelines on marine transport services, quoted *above* note 25, point 45.

<sup>55</sup> ECJ, 28 May 1998, John Deere, C-7/95 P, Rec. p. E-3111, point 88.

<sup>56</sup> European Commission decision 98/4/ECSC of 26 November 1997 relating to a proceeding pursuant to article 65 of the ECSC treaty (case IV/36.069 *Wirtschaftsvereinigung Stahl*), OJEC n° L 1 of 3 January 1998, point 39.

<sup>57</sup> *Conseil de la concurrence* decision 05-D-65 of 30 November 2005, quoted *above* note 8, point 164 (underline added).

<sup>58</sup> See *Conseil de la concurrence* decision 05-D-64 of 25 November 2005, quoted *above* in note 7

high proportion of suites, a fine dining restaurant and very high level installations. Only the Bristol, the Crillon, the George V, the Meurice, the Plaza Athénée and the Ritz displayed all of these features. The six Luxury hotels had average bills per room higher than those of other luxury hotels (above €500 per night), which is indicative of their ability to sell a large number of overnight stays at very high prices. Read in conjunction with the limited number of players, these elements showed the market's oligopolistic nature. Conversely, when the market is very fragmented, information exchanges are less likely to result in collusive effects between competitors that would restrain competition, notably because the large number of players can complicate any monitoring task. Nevertheless, it is essential that the in concrete assessment of the actual or potential effects of information exchanges should *"always be carried out on a case-by-case basis, since it can occur that information exchanges may have anticompetitive effects even in fragmented markets"*.<sup>59</sup>

Moreover, in order to assess market concentration, it is not sufficient to verify that the number of active undertakings in this market is low. An equally important criterion is the number of them that are taking part in the exchange, and their cumulative market share. In certain cases in which information exchanges were characterized as anticompetitive, the market was not very concentrated, but most of the participants were taking part in the information exchange,<sup>60</sup> which limited the risk of opportunistic behaviour by non-participating undertakings.

Finally, the presence of entry barriers is a very important criterion. When the market is characterized by strong entry barriers, for example resulting from the need for costly initial investments or legal provisions, the collusive outcome will not be threatened by the possibility that newcomers might enter the market with lower prices, thereby capturing a significant share of the demand. In the case of the Paris luxury hotels, the *Conseil* noted the presence of high entry barriers, *"not only because of the cost of purchasing and maintaining a prestige hotel offering luxurious services in the heart of Paris, but also because building a brand image is a slow and demanding process."*

Other market characteristics may be relevant for the assessment of the effects on competition of an information exchange. One can refer to any element linked to the degree of concentration - the existence of structural links between the undertakings, which may facilitate both the alignment with a common outcome, and the monitoring of undertakings with regard to the implementation of the common line of conduct. Moreover, the presence of homogeneous products targeted by the exchange and the symmetry among the players on the market, notably in terms of cost structures and production output<sup>61</sup> will also contribute to both the coordination and the monitoring, as will the stability of the demand and low innovation dynamism.

### 3.3 *The sensitive character of the exchanged data*

In order to determine if the exchanged information are business secrets, several elements must be assessed: data of a similar nature may or may not be sensitive depending on their age, degree of aggregation or precision, and depending on the information available elsewhere within this market.

<sup>59</sup> See *Autorité de la concurrence* opinion n° 10-A-05 of 26 February 2010 relative to the performance of statistical surveys by the *Chambre syndicale des améliorants organiques et supports de culture*, points 5

<sup>60</sup> In the *Wirtschaftsvereinigung Stahl* case (quoted *above* note 94), 16 of the market's 20 undertakings were taking part in the exchange, and the top 4 accounted for one half of the production. In the aforesaid *Thyssen Stahl* case, 12 of the 19 undertakings active in the market had taken part in the information exchanges.

<sup>61</sup> See *Conseil de la concurrence* decision N. 05-D-64 of 25 November 2005, quoted *above* in note 7, points 217 and 220.

### 3.3.1 Content of the exchanged information

In its guidelines on maritime transport services, the European Commission provided that the exchange, between competitors, of commercially sensitive data regarding prices, output production or costs is more likely to have anticompetitive effects than other information exchanges.<sup>62</sup>

With regard to future data, relative to which one should be particularly careful, not only data referring to the strategy that an undertaking intends to adopt on the market, but also “*an undertaking’s view of how the market will develop*”<sup>63</sup> ought to be considered as sensitive, since this very personal point of view provides priceless indications in order to anticipate its future behaviour. Such exchanges might be likened to information exchanges on future prices, as mentioned above. In general terms, the assessment of exchanges of future data are stricter than the ones referring to past or recent data, especially when they occur on concentrated markets.<sup>64</sup>

With regard to past data, there is no need to prohibit the essence of information exchanges regarding past prices, such as price reports (for example “*mercuriales*”) - i.e. statements on currently applied prices - provided that they do not allow undertakings to identify individual positions within the market (in particular, commercial terms used by a particular undertaking, or relative to a particular customer).<sup>65</sup> Data exchanges regarding costs are also potentially acceptable, provided that these costs do not represent the bulk of the cost structure, in order to prevent their full disclosure from allowing the preparation of a cost grid on which undertakings would be encouraged to align. “*In each case at stake, should be assess their potential stimulating effect on competition between operators in order to better adapt to the demand, while considering the risk on competition in the event that the undertakings receiving the information were to use them to set their prices instead of considering their own production and distribution costs*”.<sup>66</sup>

The exchange of *seemingly* less sensitive data, such as sales volume, may also be restrictive of competition if the data are recent and sufficiently individualized. The degree of data aggregation is of particular importance. In principle, the exchange of historical statistical data or sector-specific market studies does not result in a competition hindrance, provided that the data do not allow for identification of individual strategies of competitors, as was the case, for example, in the “UK Tractors” case, in which the exchange of recent and extremely detailed sales data, broken down by county and by manufacturer, was considered to be anticompetitive in an extremely concentrated market. Exchanges of *individualized* information relative to prices or past quantities are hardly justifiable, to such a point that some economists are of the strong opinion to assess them very restrictively.<sup>67</sup>

In addition to the individualized character of the exchanged data, their age and precision will influence the exchange’s potential effect on competition. Indeed, having precise and recent data is crucial in order to implement a monitoring and punishment device, since this improves the probability and speed of detecting any deviations, while also allowing for possible targeted retaliation. In practice, the historical or recent nature of the information must be assessed with a certain flexibility, while considering the rhythm

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<sup>62</sup> Guidelines on marine transport services, quoted *above* note 25, point 50.

<sup>63</sup> *Ibid*, point 54.

<sup>64</sup> *Ibid*, point 53.

<sup>65</sup> *Conseil de la concurrence* decision n° 88-D-13 of 15 March 1988 relative to the aluminium food packaging sector.

<sup>66</sup> *Conseil de la concurrence* opinion 03-A-09 of 6 June 2003 relative to an evolution index of the cost of automotive repairs, point 22.

<sup>67</sup> Kühn (K.-U.), *loc. cit.* note 76, p. S

at which the data become obsolete in the market at stake. As to the required degree of details in order to implement such monitoring, it differs according to the markets. In its Mobile telephony decision, the *Conseil de la concurrence* explained that in a market in which transparency is hurdled by a large diversity of subscriptions formulas and options, “*an observation of the evolution of the gross sales is the only indicator that is capable of providing summary information on the “competitive effort” made by competitors*”.<sup>68</sup> In fact, these statistics summed up in a very simple fashion very complex pricing practices, and served as the basis for the strategic decisions of directors. Similarly, in the Paris luxury hotels, the *Autorité* found that the six Paris luxury hotels were exchanging, on a weekly or monthly basis, information on the occupancy rates, the average rate per rented room (ratio between the accommodations sales figure and the number of rented rooms) and the average earnings per available room (ratio between the accommodations sales figure and the number of available rooms). These data were individualized, i.e. specific to each hotel. These information were strategic, since they were likely to allow the sales managers of six hotels to monitor each other’s performances, and thus to increase the pre-existing degree of market transparency.

### 3.3.2 Public character of the exchanged data

In principle, an exchange of information already made available on the market does not violate article 101(1) of the Treaty.<sup>69</sup> The *Conseil* provided, in its Mobile telephony decision, that “*insofar as the exchanged data would not add anything decisive relative to the information already available on the market, they would not modify the market structure and therefore the competition conditions*”.<sup>70</sup> However, the public nature of the information is to be assessed on a case-by-case basis, because it is dependent on the difficulty and cost for acquiring such information. The case law identifies as anticompetitive an exchange of information, that competitors could obtain by other means, only if it allows an “*artificial increase of the market transparency*”.<sup>71</sup>

European case law proved to have been strict regarding such information exchanges: in a case relative to information exchanges between producers of vegetable parchment, the European Commission considered “*[that] in the absence of such an exchange of information, producers (...) could, perhaps, by acting through a third party, obtain their competitors’ price lists, but this would be more complicated and more time-consuming; that it may therefore be assumed that the spontaneous communication of important information on prices artificially alters the competition conditions and tends to establish a system of solidarity and mutual influence between competitors*”.<sup>72</sup> In the *Tate & Lyle* ruling,<sup>73</sup> the Court of First Instance also relied on the reduced cost for acquiring information thanks to the exchange, while moreover noting that the very existence of the exchanges created a climate of mutual certainty between the participants. More recently, in the banana case,<sup>74</sup> the European Commission indicated that even if the data could be accessible elsewhere, only information exchanges with the competitors could have unveiled their personal viewpoints regarding the topics addressed.

<sup>68</sup> *Conseil de la concurrence* decision n° 05-D-65 of 30 November 2005, quoted *above* note 8, point 210.

<sup>69</sup> CFI, 30 September 2003, *Trans-Atlantic Conference Agreement*, joint cases T-191/98, T-212/98 to T-214/98, Rec. p. II-3275, point 1154.

<sup>70</sup> *Conseil de la concurrence* decision 05-D-65 of 30 November 2005, quoted *above* note 8, point 194.

<sup>71</sup> *Conseil de la concurrence* decision 05-D-64 of 25 November 2005, quoted *above* note 7, point 269.

<sup>72</sup> European Commission decision 78/252/EEC of 13 March 1978 relating to a proceeding under article 85 of the Treaty (case IV/28.824 – Vegetable parchment), point 68.

<sup>73</sup> CFI, 12 July 2001, *Tate & Lyle et al.*, related cases T-202/98, T-204/98 and T-207/98, Rec. p. II-2035, point 60.

<sup>74</sup> European Commission decision of 15 October 2008 (COMP/39.188 - Bananas), quoted *above* note 4, point 268.

The decisional practice of the *Autorité de la concurrence* is in line with this case law. In the Paris luxury hotels decision, the *Conseil* found that the luxury hotels had exchanged strategic information that could artificially increase the market's transparency. While some of the data was indeed confidential and unavailable on the market, other information was potentially more easily accessible. However, during the proceedings before the *Conseil*, the parties specifically required the *Conseil* not to disclose the latter information to third parties since they were business secrets. The parties notably argued the fact that “*such information, though disclosed to the public, is difficult for a third party to gather. It delivers priceless indications regarding the rebate strategies*”. Therefore, the *Autorité* was in a position to use these information protection requests in order to prove that conveying such information to competitors, even if the information could potentially have been procured obtained such information by their own means, clearly served to facilitate coordination between the undertakings. Pursuant to the *Autorité's point of view*, the requests of the parties neatly described “*the effects of an information exchange between competitors, even in the event that such an exchange relates to information that could be procured from the market, but the collection of which would require such a cost in terms of individual competition monitoring that it becomes advantageous to obtain it directly from competitors*”.<sup>75</sup>

In its decision relative to petrol retail on motorways, the *Autorité* sanctioned oil companies for having exchanged by telephone, almost every day, the prices applied in their petrol stations on certain motorways sections. In this market, which gathered all of relevant characteristics to be qualified as a tight oligopoly, the *Autorité* considered that such telephone exchanges substantially reduced the information collection costs, and even though the petrol station managers could theoretically have drove by and noted down the prices posted by their closest competitors, such physical efforts would have been very costly: “*even though the effect of these information exchanges on the speed of the alignment of the prices and on their levels cannot be precisely measured, they necessarily favoured a higher level than what would have prevailed in the absence of this collective practice. Indeed, each oil company was induced to reduce its prices at a petrol station relative to the prices charged by competing petrol stations since, as a result of this exchange of information, it had to inform these other stations of the price cut, thereby giving them the possibility to react more quickly to the initial price cut than would have been the case had the information exchange not existed*”.<sup>76</sup> In a nutshell, these frequent exchanges helped to more easily sustain a supra-competitive outcome, since they constituted a systematic monitoring mechanism that allowed for immediate retaliation. However, this reasoning was not validated by the Paris Court of Appeal, which quashed the decision.<sup>77</sup> First, it considered that the degree of price alignment was not sufficient to indicate that it could only be explained by a concerted practice. Second, it did not consider that direct exchanges between competitors sufficiently reduced information collection costs such as to cause an artificial increase of transparency within the market. It therefore did not rule that the information exchanges at stake facilitated the detection of deviations relative to a high price outcome and reduced the inducements to enter into price-based competition.

Finally, in its Mobile telephony decision, the *Autorité* devoted particular attention to showing that the exchanged data were confidential, and in particular that they were different from the data made public by the French Telecommunications sector regulator. “*Indeed, before April 2000, the observatory naturally issued monthly data, but it only provided the net sales. Operators could therefore not identify what, in this indicator, resulted from gross sales on the one hand, and churns on the other hand. However, a different perspective on these two indicators highlights very different information on the competitive effort of the operators, which is merely visible through gross sales. Moreover, since April 2000, this observatory was*

<sup>75</sup> *Conseil de la concurrence* decision 05-D-64 of 25 November 2005, quoted *above* note 7, point 263.

<sup>76</sup> *Conseil de la concurrence* decision 03-D-17 of 31 March 2003 relative to practices within the market for the distribution of fuels on the motorway, point 125.

<sup>77</sup> Paris CA, 9 December 2003, Fuels on the motorway.

only made public once every three months, and is limited to quarterly data.”<sup>78</sup> From April 2000, the frequency of the information exchanges was three times higher than the regulator’s data publication rhythm.

### 3.4 *The exchange technicalities*

As underlined by the case law,<sup>79</sup> it is irrelevant that the information is transmitted directly between competitors, whether bilaterally, collectively or through third party such as a professional association (for example, like in the “UK Tractors” case). In particular, it is also irrelevant that the exchange had been secretly organised or had been known to all.

While the organisational method for the exchange does not have major incidence on its *in concreto* assessment on the one hand, the frequency of the exchanges is a very relevant element, on the other hand. If in order to adopt a common line of conduct, it is not required to incur repeated exchanges (especially when the exchange relates to an isolated and identifiable competition parameter<sup>80</sup>), it must be singled out that this coordination can, as such and by itself, allow to sustain a collusive outcome under the concrete characteristics of the market at stake. The frequency of these exchanges must therefore be mirrored to the content of these exchanges and the market context. When involving past or recent information, residual information exchanges, that are not systematic and neatly apart in timing, are unlikely to serve as a monitoring mechanisms in order to sustain collusion. Conversely, in the Mobile telephony decision, the *Autorité* sanctioned the operators for their systematic information exchanges, on a monthly basis: “*In a market in which offers and price changes evolve at a fast pace, the assessment of the results of others operators within a very short frequency was such as to significantly reduce the uncertainty regarding the behaviour of competitors*”.<sup>81</sup>

One last characteristic ought to be taken into account may be the possible restrictions on access to the exchanged information. Undertakings that disclose information regarding their own behaviour generally have access, in return, to data provided by the other participants. The question therefore arises as to the access to such data for other non-participating undertakings active in the market or for potential newcomers. In principle, however, information exchanges between competitors that set aside significant operators within the market are unlikely to amount to a collusive strategy: indeed, it is impossible to sustain a supra-competitive outcome if undertakings, that are not participants to the exchange, can lower their prices without being detected. For instance, in the “Wood pulp” case, the Court of Justice considered that the presence of undertakings, that were not taking part in the information exchange and that have a market share close to 40%, discarded the ability to reach a collusive behaviour<sup>82</sup>. However, the fact that third parties are deprived from the access to the exchanged information may result in a competition restraint if such information is sufficiently crucial as to provide a substantial competitive advantage to the undertakings in possession of it; such a restriction can then constitute an entry barrier.

Consumer access to the information is a favourable indicator towards a pro-competitive character for the exchange, provided that such information is actually relevant to consumers and will allow them to compare the offers from sellers, which will therefore encourage more intense competition between the latter. This element is also taken into account in the overall assessment that the *Autorité de la concurrence*

<sup>78</sup> *Conseil de la concurrence* decision n° 05-D-65 of 30 November 2005, quoted *above* note 8, point 197.

<sup>79</sup> See Paris CA, 8 February 2000, *Académie d’architecture*.

<sup>80</sup> ECJ, 6 June 2009, *T-Mobile Netherlands et al.*, quoted *above* note 5.

<sup>81</sup> *Conseil de la concurrence* decision n° 05-D-65 of 30 November 2005, quoted *above* note 8, point 263.

<sup>82</sup> ECJ, 31 March 1993, *Ahlström Osakeyhtiö et al.*, quoted *above* note 48, point 116.

carries out on each information exchange mechanism, as the European Commission did in the “Wood pulp” case, when it found that the information exchange at stake could be pro-competitive, as far as such information are made public through public announcements and that consumers request reliable forward-looking data regarding the cost of their future purchases.

#### **4. Incentives undertaken in order to preserve or restore competition**

While stressing the risks for competition that can result from certain types of information exchanges, the *Autorité de la concurrence* acknowledges the positive effects that exchanges between undertakings can produce. Towards information exchanges an balanced approach ought to be struck, in order to limit these communications to those designed to obtain the targeted efficiency gains, but without hindering competition intensity. This advocacy task would serve to avoid the inception of purely anticompetitive information exchanges. However, when such exchanges have been identified, corrective remedies can be implemented. If the exchanges at stake can have beneficial effects, one has only to modifications of some of their characteristics is only required, such as the frequency of the exchanges or the degree of the data aggregation. On the other hand, when the exchanges are clearly of anticompetitive nature, behavioural or structural remedies must be implemented in order to limit or prevent the transmission of the designated information.

##### **4.1 *Helping companies to identify competitive risks related to information exchanges and to accordingly modify the exchange mechanisms***

As showed by the detailed analysis in the previous sections, an assessment of the anticompetitive effects of an information exchange is complex and cannot be summarized in the mechanical implementation of a few major principles: it is indispensable to simultaneously consider the market context, the nature of the exchanged data and the technicalities of the exchange, while the relevant elements to be taken into account can differ from one case to another. In order to allow undertakings to determine whether or not an information exchange mechanism is likely to violate competition rules, assessment criteria have been laid down in the form various, European or national, reading grids relative to diverse specific sectors or of a general nature, that remind the general methodology to scrutinize information exchanges.

At the European level, the 2008 guidelines relative to the application of article 101 of the Treaty to the maritime transport sector clarify the rules regarding information exchanges and professional associations in that sector. The latter are intended to assist maritime transport undertakings to self-assess their behaviour in order to determine if their information exchanges are infringing fall under article 101(1) of the Treaty, and if they can benefit, on the basis of the resulting efficiency gains, from an exemption pursuant to article 101(3) of the Treaty. They do not apply to information exchanges that have an anticompetitive object, but give indications on the potential effects of the exchanges, while systematically synthesizing the relevant European case law, and notably insisting on the necessity for a case-by-case assessment.

Moreover, the European Commission is currently updating the European rules applicable to horizontal cooperation agreements. Acting upon the modifications introduced in the maritime transport guidelines, the European Commission is planning to include, in the general guidelines applicable to horizontal agreements, a substantial chapter dedicated to the competitive assessment of information exchanges between competitors. The draft legislation underwent public consultation until 25<sup>th</sup> of June 2010. The aim of this draft legislation is to summarize the major competitive assessment principles regarding information exchanges, in light of the complexity of their impacts on competition, while proposing a systematic and educational approach on the basis of detailed examples. Insofar as this text reflects all of the assessment principles put forward in this contribution, these new developments will be an opportunity for undertakings

to help them with their self-assessment, of their information exchange mechanisms under article 101 of the Treaty, in order to identify the potential creation of competition restrictions, as well as of efficiency gains.

The complexity of the issues surrounding information exchanges has also led to an increasing number of contacts between undertakings and Competition Authorities, in particular in order to help undertakings to modify their information exchange mechanisms to comply with competition rules. These contacts can either be formal (like under the former European notification system for agreements or through a referral to the *Autorité* for an opinion to the *Autorité*), or informal.

At the national level, this has in particular led to a recent increase in the number of requests for opinions to the *Autorité de la concurrence* by professional organisations.<sup>83</sup> First, All of these opinions have provided the *Autorité de la concurrence* with an opportunity to clearly introduce, outside from the scope of proceedings which can lead to a fine, the key guidelines that underpin its assessment of information exchanges between competitors and, second, to orientate certain economic operators towards set up information exchange mechanisms compliant with national and European competition rules. This was for instance the case in its opinion of the 26<sup>th</sup> of February 2010 relative to agricultural fertilizers sector, in which the *Autorité de la concurrence* informed a professional organisation that the set-up of a mechanism to exchange past and aggregated information within relatively un-concentrated markets would be most unlikely to restrict competition.<sup>84</sup>

#### 4.2 *Limiting the transmission of information*

When information exchanges are not likely to generate efficiency gains that could offset their potential anticompetitive effects, such exchanges must be prevented or limited.. In particular, in the course of tendering procedures, undertakings should not share the details of the bid that they are planning to submit with other bidders, since in such a context, only the preservation of the uncertainty regarding the prices proposed in the bids by competitors is likely to guarantee that a fair and competitive price is finally reached<sup>85</sup>. In cases in which undertakings have reached a consensus prior to submitting their bids (for example, in the *Autorité*'s cases relative to national and international removal services and relative to the industrial rental-upkeep of fabrics, referred to below), the *Autorité* was able to accept commitments intended to prevent such behaviour from occurring again in the future, and allowed the undertakings to benefit from a reduction of their penalties.

The commitments proposed in order to limit anticompetitive information exchanges are often inspired by compliance programmes that target overall compliance with competition rules. These programmes for instance include training and awareness-raising measures for the personnel, monitoring measures (e.g. identification of the processes involving contacts with competitors, internal or external audits, reports to be submitted to the competition authority), as well as inducement or sanctioning measures (elements for compliance with competition rules within the sales objectives for employees, employment contract that includes dismissal possibilities in case of personal participation in a competition infringement). While awareness-raising programmes for the personnel relative to competition rules are useful, they are not considered, by themselves, to be sufficient in order to “*result in substantial and verifiable improvements to*

<sup>83</sup> For recent examples, see *Conseil de la concurrence* opinion 06-A-18 of 5 October 2006 relative to a project for a hotel occupancy indicator in the Mulhouse region, *Autorité de la concurrence* opinion 10-D-05 of 23 February 2010 relative to the performance of statistical surveys by the *Chambre syndicale of the améliorants organiques* et supports, and *Autorité de la concurrence* opinion 10-A-11 of 7 June 2010 relative to the inter-professional optical council.

<sup>84</sup> See *Autorité de la concurrence* opinion n° 10-D-05 of 23 February 2010 relative to the performance of statistical surveys by the *Chambre syndicale des améliorants organiques et supports de culture*, points 56 et seq.

<sup>85</sup> Paris CA, 3 July 2008, Public works in the Ile-de-France region.



*the competitive operation of the markets affected by such practices*".<sup>86</sup> On the other hand, in the case relative to the behaviours implemented in the industrial rental-upkeep fabrics sector, a commitment not to take part in meetings with competitors except in case of technical necessity, not to discuss prices during these meetings and to draft minutes of meetings with the concerned customers that include the purpose and the participants to the meetings, subject to an internal control procedure, was considered to be substantial, since such meetings could no longer serve as a pretext for anticompetitive talks.<sup>87</sup> The undertakings also decided to set up a whistle blowing mechanism that would allow employees to inform a third party, on an anonymous basis, of any supposed infringement of competition rules. The *Conseil* considered that the behavioural commitments and the training and alarm systems were an overall coherent protection system effectively strengthening compliance with competition rules, because from the date of the decision, meetings between competitors, where no customers are present, could be considered as direct proof of collusion, and that the willingness to continue anticompetitive exchanges of information should be limited by the whistle blowing mechanism.

Finally, corrective remedies can be intended to prevent the transmission of insiders' information regarding consumers to an undertaking, when this information provides the latter with a discriminatory advantage over its direct competitors. In order to obtain clearance for the EDF-Dalkia merger, EDF undertook not to provide Dalkia (undertaking specialising in energy services) with commercially sensitive information regarding the French clientele that it held as a result of its position as the dominant national incumbent operator in the electricity market.<sup>88</sup> In the Solaire Direct case,<sup>89</sup> EDF proposed commitments that would limit the type of information on regulated consumers that could be disclosed to its subsidiary EDF ENR by its information hotline and that anticipated the set-up of independent retail channels for EDF ENR's products and services. The *Conseil de la concurrence* considered these commitments to be insufficient, insofar as the hotline employees would continue to collect and provide EDF ENR with information regarding callers, which would thus provide it with access to data that could not be reproduced by its competitors. Moreover, it considered the timeframe to set up EDF ENR dedicated retail channels to be too long. The *Conseil* therefore issued interim measures requiring EDF to no longer provide EDF ENR with information that EDF possesses as a result of its activities as the supplier of electricity services at regulated rates, and to terminate any disclosure of information gathered by the hotline to EDF ENR.

## 5. Conclusion

Information exchanges between undertakings may generate efficiency gains, for example by allowing them to adapt adequately the supply with the demand, or to benchmark their own performance within the market. However, they may also entail competition hindrances, in particular as they may serve as means to sustain a collusive outcome.

In order to assess the competitive impact of an information exchange, both the *Autorité de la concurrence* and the European Commission have developed a "graduated" approach, that differentiates information exchanges that are anticompetitive by object from those that require an assessment of their

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<sup>86</sup> *Conseil de la concurrence* decision n° 07-D-48 of 18 October 2007 relative to practices implemented in the national and international relocation sector.

<sup>87</sup> *Conseil de la concurrence* decision n° 07-D-21 of 26 June 2007 relative to practices implemented in the fabrics rental-upkeep sector.

<sup>88</sup> Letter from the ministry for the economy, finance and industry dated 12 December 2000, to the boards of the companies Vivendi Environnement and EDF relative to a merger in the services sector related to electricity production, BOCCRF 02 of 23 February 2001.

<sup>89</sup> *Conseil de la concurrence* decision 09-MC-01 of 18 December 2009 relative to a request for interim measures submitted by the company Solaire Direct.

actual or potential effects. The exchange of future data is particularly likely to be considered as restricting competition by object, especially if such data are only available to competitors. Nonetheless, in compliance with the European case law, the concrete contexts in which these behaviours occur is taken into account. This approach is therefore thoroughly different from a “*per se*” conviction, which exists neither in European law nor in national law, and that has accordingly never been implemented by the *Autorité de la concurrence*. When the object of an information exchange is not anticompetitive, the *Autorité de la concurrence* assesses its effects. Its assessment combines a series of criteria, relating to the market context, the nature of the exchanged information and the exchange technicalities.

In order to encourage legitimate information exchanges while precluding the restrictive ones, the *Autorité de la concurrence* may be required to undertake preventive actions, for example within the framework of merger control or through the implementation of remedies aimed at restoring healthy competition, and avoid recidivism of prohibited behaviours. Depending on the merits of each case, it may be required to impose injunctions or to accept commitments intended to modify the characteristics of an information exchange, to prevent the disclosure of information, or to limit it through non-discriminatory mechanism.

Since the entry into force of regulation N.1/2003, undertakings must self-assess whether or not the information exchanges mechanisms that they are planning to implement are compliant with competition rules. The distinction between legitimate information exchanges and the ones likely to restrict competition may be complex, in view of the numerous elements that are to be taken into account. This explains why, both in its decisions and in its opinions, the *Autorité de la concurrence* always strives to clearly present, in a detailed manner, the competitive elements that underpin its assessment and to detail its economic reasoning that justify its findings. Similarly, the present note is intended to contribute to a better understanding of the decisional practice of the *Autorité*.

## GERMANY

### 1. Introduction

Information exchanges between competitors have figured prominently in German competition law ever since the Act against Restraints of Competition (ARC)<sup>1</sup> entered into force in 1958.<sup>2</sup> With market pressure rising and an increasing number of cases being brought to the Bundeskartellamt's attention in the context of its leniency programme, the assessment of information exchange systems (IES) has gained further significance in recent years.

Internal company information as well as market data are key components of the competitive process. The sharing of such information can be carried out with the *purpose* of eliminating competition or can have the *effect* of restricting competition. This submission seeks to provide an overview of the German law and practice relating to IES. It will first focus on the statutory provisions (subsequently 2.), before it turns to recent agency practice (3.) and the relevant evaluative criteria (4.).

### 2. Information exchanges between competitors under German law

In 1998, the German ARC adopted the definition contained in Art. 81 EC (now: Art. 101 TFEU) which prohibits agreements and concerted practices which have as their object or effect the prevention, restriction or distortion of competition (Section 1 ARC). Also, Art. 3 (1) and (2) of Council Regulation No 1/2003 require German competition authorities and courts to apply Art. 81 (1) of the EC Treaty (now Art. 101 TFEU) directly, provided that the relevant case affects trade between Member States.

Recently, the European Commission has issued draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Horizontal Guidelines) which also contain a chapter on information exchange.<sup>3</sup> By adding this chapter, the European Commission is satisfying a widespread interest – shared by many stakeholders in Germany – in receiving guidance in this area.

The Bundeskartellamt fully agrees with the draft Horizontal Guidelines' proposed basic differentiation between (i) the exchange of information on *intended* future conduct and (ii) the exchange of other information that can have restrictive *effects* on competition. As will be demonstrated in more detail below (see sections 3. and 4.), the criteria applied by the Bundeskartellamt are in full conformity with this approach and the respective criteria.

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<sup>1</sup> An English version of the ARC is available at [http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911\\_GWB\\_7\\_Novelle\\_E.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf).

<sup>2</sup> For the early debate, see, e.g., *Markert*, Kartellrechtliche Beurteilung von Preismeldiverträgen, *Der Betrieb* 1963, 1455; *Schmidt*, Markttransparenz als Voraussetzung für Wettbewerbsbeschränkungen, *WuW* 1963, 97.

<sup>3</sup> Draft Horizontal Guidelines available at [http://ec.europa.eu/competition/consultations/2010\\_horizontal/guidelines\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_horizontal/guidelines_en.pdf).

### 3. Recent agency practice of the Bundeskartellamt – the *Castle Round* case

In June 2008, the Bundeskartellamt imposed fines of just under 10 million Euros against manufacturers of high-quality perfumery and cosmetics products.<sup>4</sup> The decision imposing the fines concerned nine companies and 13 previous and current CEOs. In 1995 (possibly even earlier), the companies had begun to meet in the so-called “*Castle Round*” to exchange a large amount of internal company data. Every three months they reported detailed sales data to the moderator of the *Castle Round*, a former employee of L’Oréal, and informed one another on market strategic aspects. Almost all major suppliers of luxury cosmetics products were represented in the *Castle Round*.

In the *Castle Round* case the Bundeskartellamt saw no indication for the existence of an explicit underlying cartel agreement (e.g. on prices or quotas). Neither could its existence be presumed by law. Yet the mere existence of an IES between competitors very often includes an agreement between them as defined by competition rules. In the *Castle Round* case the Bundeskartellamt found that the IES itself constituted an agreement in breach of Section 1 ARC and Art. 81 (1) EC (now Art. 101 TFEU).

### 4. Section 1 ARC and information exchange

Similar to Art. 101 TFEU, Section 1 ARC stipulates that „agreements between undertakings [...] which have as their object or effect the prevention, restriction or distortion of competition, shall be prohibited“. As both the anti-competitive *object* and the anti-competitive *effect* have gained particular relevance in information exchange cases, the following section will focus on these two alternatives (subsequently 4.1 and 4.2), and on the evaluative criteria used to assess both alternatives in their market context (4.3).

In its *T-Mobile Netherlands* case, the European Court of Justice recently repeated and emphasized that each economic operator must determine independently the economic policy which he intends to adopt.<sup>5</sup> This *requirement of independence* precludes any direct or indirect contact between operators by which an undertaking may influence the market conduct of its competitors or disclose to them its decisions or intentions concerning its own market conduct.<sup>6</sup>

The assessment under German law is essentially similar. In the past, German law has focused on the notion of “secret competition” (*Geheimwettbewerb*).<sup>7</sup> Secret competition denotes a situation where all market participants act, without signaling their intentions prior to taking action. In this situation every competitor has the opportunity to change its market behavior before other competitors can take notice and initiate their response measures. Information exchange systems may significantly reduce the effectiveness of such advances and therefore carry the risk of anti-competitive behavior.

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<sup>4</sup> See Bundeskartellamt, press release dated 10 July, 2008 (available at [http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008\\_07\\_10.php](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008_07_10.php)). Full decision not published.

<sup>5</sup> Judgment of the European Court of Justice (Third Chamber) of 4 June 2009 – *T-Mobile Netherlands*, Case C-8/08, para. 33.

<sup>6</sup> Court of Justice (footnote 6), para 33.

<sup>7</sup> Sölter, Informationsdiskriminierung durch das Kartellrecht?, Betriebsberater 1972, 1238. See Bundesgerichtshof (Federal Court of Justice), decision of 18 November 1986, (KVR 1/86, „Baumarkt-Statistik“), WuW/E BGH 2313, 2316.

#### **4.1 *Anti-competitive object***

Restrictions by object have a high potential for negative impact on competition. Exchanging information on intended future conduct regarding competition parameters such as prices or quantities is particularly likely to be restrictive by object. The same applies to information exchanges on current conduct that reveals intentions on future behaviour, and to cases where the combination of different types of data enables the direct deduction of intended future prices or quantities.

#### **4.2 *Anti-competitive effect***

As far as anti-competitive effects are concerned, the European Court of Justice noted in *Asnef Equifax* that the compatibility of an information exchange system with EC law depends on the economic conditions on the relevant markets, on the specific characteristics of the system concerned, such as, in particular, its purpose and the conditions of access to it and participation in it, as well as on the type of information exchanged.<sup>8</sup>

The Bundeskartellamt shares the view that there is no single abstract formula to assess the compatibility of exchange systems with competition rules. It also conducts a case-by-case analysis and has developed a set of criteria for the assessment of potential anti-competitive effects. The *Castle Round* case was somewhat special in that the market information system was so extensive that with even a fraction of its anti-competitive elements it would have fulfilled both alternatives - restriction by object and by effect - under Section 1 ARC and Article 101 TFEU.

#### **4.3 *Additional evaluative criteria***

##### **4.3.1 *Market structure***

In an oligopolistic market structure, the exchange of information can enable undertakings to make assumptions about each other's market position and business strategy which might increase the probability of collusive behavior. As in the collective dominance test in merger control or in abuse cases, transparency and product homogeneity further increase that probability.

In the *Castle Round* case, the companies involved had an aggregated market share of around 80 percent in the relevant market for cosmetics. This market, especially its high-priced cosmetic goods segment, is characterized, *inter alia*, by high investment in marketing and advertisement, the particular importance of developing a brand image and the necessity to have access to distribution channels, all of which constitute barriers to entry.

##### **4.3.2 *Exchange modalities***

In the *Castle Round* case, the information exchange was conducted in a comprehensive, up-to-date, periodical and clandestine manner. The members met four times a year and only a selected group of high-level managers could participate. The data was kept secret from employees and competitors. The organizer of the IES even provided a service where the members could make individual inquiries about other companies' internal data.

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<sup>8</sup> Judgment of the European Court of Justice (Third Chamber) of 23 November 2006 - *Asnef-Equifax*, Case C-238/05, para. 54.

Generally speaking, in a concentrated market the exchange of confidential company data restrains competition if the data is attributable to individual competitors or particular business transactions.<sup>9</sup> Regular meetings combined with up-to-date and individualized data enable the organizers to monitor the participants' behavior closely and to reduce the likelihood of competitive advances. The restriction of access to the circle and the exclusion of smaller competitors can lead to anticompetitive foreclosure and may therefore violate competition rules.

#### 4.3.3 Nature of the information

Another decisive factor for the assessment is the character of the information exchanged. The exchange of publicly available information does, as a rule, not fall under Section 1 ARC and Art. 101 (1) TFEU.<sup>10</sup> On the other hand, the exchange of business secrets will generally be considered as anticompetitive. Exchanging sensitive information such as costs, prices and conduct towards customers usually has the purpose to coordinate market behavior. Whether information can be classified as sensitive depends on the level of detail and its economic and competitive relevance. The general distinction between "current" and "historical" data is rather theoretical. What counts is whether or not the information allows predictions about future behavior.<sup>11</sup> Thus, the exchange of future-oriented information will in most circumstances restrain competition.

The information exchanged in the *Castle Round* case was very detailed. The round systematically exchanged information on turnover, market strategies and other competitively relevant business data of the major brand manufacturers. Information on turnover consisted of advertising expenditure, returned goods, grey market data and information on products sold to specific buyers. Business data on market strategies contained information on distribution channels, scheduled product launches, price lists, expected price increases, sales targets, conduct vis-à-vis the selected perfumeries and other aspects.

#### 4.3.4 Pro-competitive effects and safe harbors

Transparency can facilitate decisions on the demand side which in effect leads to more competition. In its *Tube II* decision<sup>12</sup>, the Berlin Higher Regional Court (*Kammergericht Berlin*) clarified that a market information contract with the single goal of intensifying competition would not fall under Section 1 ARC. Still, it is difficult to offer a positive list of attributes for an IES to qualify as neutral or beneficial to the competitive nature of a given market. In the *Castle Round* case, the parties neither brought forward nor proved any pro-competitive effects of the market information system.

One minimum requirement for formalized market information systems would certainly be the effective anonymization of data. IES therefore need a minimum number of participants, a neutral clearing office, a strict anonymity policy and effective data aggregation. Data that allows the prediction of future market behavior needs to be excluded. All actual and potential competitors should have access to the system.

<sup>9</sup> See *Wagner-von Papp*, *Grenzen der Information im Wettbewerb* (2004), 238.

<sup>10</sup> However, the draft Horizontal Guidelines (footnote 3) emphasize that "even if the data is in what is often referred to as 'the public domain', it is not genuinely public if the costs involved in collecting the data discourage to a sufficient degree other companies and buyers from doing so" (para 82).

<sup>11</sup> See, e.g., *Schroeder*, *Informationsaustausch zwischen Wettbewerbern*, *WuW* 2009, 717, 724.

<sup>12</sup> *Kammergericht Berlin* (Higher Regional Court of Berlin), decision of 24 March 1972 in case Kart B 20/71 – *Tubenhersteller II*, *WuW/E OLG* 1253.

## GREECE

### 1. Introduction

An information exchange which is part of an agreement among parties, a concerted practice or a decision of an association of undertakings, may or may not reduce competition in the relevant product market in which it takes place. It may, indeed, be pro-competitive, when leading to an intensification of competition or to significant efficiency gains that are passed on to the consumer.<sup>1</sup> But it may also promote collusion since it can be used by undertakings a) to reduce strategic asymmetry, b) to coordinate their activities (especially in cartels),<sup>2</sup> c) to influence the terms of collusive agreement,<sup>3</sup> d) to monitor cartel participants<sup>4</sup> and e) to enforce trust among collusive actors.<sup>5</sup>

In terms of antitrust analysis, information exchange may be of a nature that makes it, first, highly unlikely to be found anti-competitive, thus falling outside Articles 101 TFEU and 1 of the Greek Competition Act. Second, it may be highly likely to be found anti-competitive, thus infringing Articles 101(1) TFEU and 1(1) of the Greek Competition Act “by object”.<sup>6</sup> Third, it may depend on a case-by-case analysis whether the agreement or concerted practice provides a net benefit or harm to consumers. If as a result of this analysis it transpires that consumers are worse off, there would be an infringement of Articles 101(1) TFEU and 1(1) of the Greek Competition Act “by effect”. If consumers are better off, there would be no infringement of the competition rules.<sup>7</sup> In all circumstances, it should still be open to the parties to prove efficiency gains through Articles 101(3) TFEU and 1(3) of the Greek Competition Act.<sup>8</sup>

### 2. Information exchange may promote consumer and supplier welfare

The key principles making the information exchange pro-competitive are the following:

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- <sup>1</sup> See Draft Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, SEC(2010) 528/2, para. 58.
- <sup>2</sup> See, on the “cheap talk effect”, Farrell and Gibbons, “Cheap Talk Can Matter in Bargaining”, 48 *Journal of Economic Theory* 221 (1989); Farrell and Rabin, “Cheap Talk”, 10 *Journal of Economic Perspectives* 103 (1996).
- <sup>3</sup> See, on the “signalling effect”, Spence, “Job Market Signaling”, 87 *Quarterly Journal of Economics* 355 (1973).
- <sup>4</sup> See, on the “incomplete information effect”, Friedman, “A Non-cooperative Equilibrium for Supergames”, 38 *Review of Economic Studies* 1 (1971).
- <sup>5</sup> See, on the “trust effect”, Leslie, “Trust, Distrust, and Antitrust”, 82 *Texas Law Review* 515 (2004). For an analytical review of enhanced and distorted effects of information exchange see, *inter alia*, Swedish Competition Authority (Ed.), *The Pros and Cons of Information Sharing* (Stockholm, 2006).
- <sup>6</sup> According to para. 68 of the Commission Draft Horizontal Guidelines, a crucial factor so as to determine an infringement by object or effect is the kind of information which is exchanged and the ability of current data to predict future intentions.
- <sup>7</sup> See Bennett and Collins, “The Law and Economics of Information Sharing”, 6 *European Competition Journal* 311 (2010), pp. 313-314.
- <sup>8</sup> See Draft Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, SEC(2010) 528/2, para. 88 *et seq.*

- The consumer welfare principle:
  - Consumers must have access to information from individual firms so as to make the most suitable choice for their needs.
  - Consumers must be capable to access the information available to them in order to compare different firm offerings and to reduce their search cost.
  - Consumers must exercise their choice.
- The supplier welfare principle:
  - Suppliers may promote innovation, efficiency and hence competition by comparing different business strategies within a sector or across different sectors.
  - Allocation of scarce resources among suppliers (allocative efficiency).
  - Allocation of R&D information among suppliers and improvement of final product quality.
  - Suppliers may understand market conditions better by increasing the level of transparency.
  - Suppliers may minimise the consumers' risk which may stem from adverse selection and moral hazard problems.<sup>9</sup>

The combination of consumer and supplier welfare principles enhances total welfare in the market. However, the presence of such principles may at the same time facilitate the coordination among suppliers by distorting efficient competition and hence eliminating consumer welfare.

### **3. Information exchange may reduce consumer welfare by facilitating coordination among suppliers**

Information exchange may facilitate coordination among suppliers since it constitutes the major mechanism of undertakings to minimise the asymmetric information within the sector or across them.

Information exchange may, first, eliminate the probability of a “price war” among suppliers.<sup>10</sup> This may be achieved by exchanging future, past or current price information. When the undertakings share future price intentions, the probability to reach the correct price equilibrium in the sector is almost one, in economic terms. However, when current or past data are exchanged among them (conduct unlikely to fall under the prohibitions of Articles 101 TFEU and 1 of the Greek Competition Act or infringements of the same Articles “by effect”), the analysis has to take into account the structure of the market. For example, an exchange of current data among suppliers could promote collusion in a Stackelberg market where a price leader publicly announces its price, rather than in different types of oligopolistic markets.<sup>11</sup> In

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<sup>9</sup> In particular, in the banking and insurance sector, historical information exchange about the clients' solvency may be useful to banks and insurance agents so as deal with adverse selection and moral hazard problems. See also Padilla and Pagano, “Endogenous Communication among Lenders and Entrepreneurial Incentives”, 10 *Review of Financial Studies* 205 (1997). Compare Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, [2006] ECR I-11125.

<sup>10</sup> See M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press: Cambridge, 2004), Chapter 4.

<sup>11</sup> The presence of a price leader assumes a highly concentrated sector.



addition, an exchange of both past and current data discloses the power of market participants and enables them to reach a single price equilibrium in the future.

Information exchange may, second, increase stability among collusive suppliers and their capability to punish cheaters and may enable them to recognise fluctuations of demand which arise from its volatility or from price cuts by competitors.<sup>12</sup> It may also reduce potential competition.<sup>13</sup>

Below are some examples from the Hellenic Competition Commission (“HCC”) decisional practice.

The *Association of Greek Supermarkets* (“SESME”) case<sup>14</sup> concerned the exchange of commercially sensitive data, i.e. data regarding future discounts, within a retailers’ association, that was to a certain extent encouraged by the Greek government.

In 2001, the Greek government introduced a law, which prohibited retail sales below cost. In addition, the competent Minister entered into a “gentlemen’s agreement” with the retailers and the suppliers, according to which the retail prices should not be increased following the entry into force of the resale below cost prohibition. With a view to applying the gentlemen’s agreement, SESME’s Managing Board unilaterally decided to draw up a list in order to set the amount of discounts that should be applied by the suppliers. The fixed amount of discount, which was set for each supplier separately, was to be incorporated in the invoices that the suppliers issued for sales to grocery retailers. SESME disseminated the list to its members and the suppliers and asked for its implementation. SESME sought the uniform application of the list, meaning that each supplier was expected to provide the same discount to all retailers. Additionally, SESME asked its members not to accept any invoices from suppliers that do not incorporate the fixed discount.

The HCC established that SESME’s conduct amounted to an unlawful decision by an association of undertakings indirectly fixing minimum prices, which restricted competition by object. In particular, the HCC took the view that SESME’s list leads to the “reward” of supermarkets, which are not willing to compete in the relevant market and to the “punishment” of efficient supermarkets, which would be ready to pass on to the consumers the related savings. Furthermore, the HCC rejected the association’s argument that the list was drawn up in order to conform to the resale below cost prohibition and to the gentlemen’s agreement with the Minister, as the retailers had the discretion to abide by the law without engaging in anti-competitive conduct.<sup>15</sup> It should be stressed that the HCC decision specifically mentioned that the exchange of information on future conduct was unlawful in itself. The decision was upheld by the Athens Administrative Court of Appeal.

In addition, in the *dairy products* case,<sup>16</sup> the HCC examined the exchange of data concerning milk prices, within the Association of Dairy Industries (SEVGAP). The prices of raw milk paid to milk producers by dairy companies are collected by ELOG on a monthly basis. ELOG is the public authority entrusted with the power to communicate to the European Commission the prices of raw milk paid to milk

<sup>12</sup> The higher the demand volatility, the lower the probability of coordination. See Green and Porter, “Noncooperative Collusion under Imperfect Price Information”, 52 *Econometrica* 87 (1984).

<sup>13</sup> See Milgrom and Roberts, “Limit Pricing and Entry under Incomplete Information: An Equilibrium Analysis”, 50 *Econometrica* 443 (1982).

<sup>14</sup> HCC decisions 277 and 284/IV/2005.

<sup>15</sup> See Draft Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, SEC(2010) 528/2, para. 21.

<sup>16</sup> HCC decision 369/V/2007.

producers in accordance with Article 6 of Commission Regulation 562/2005.<sup>17</sup> SEVGAP was represented by one member in ELOG's board of directors. The Statement of Objections issued by the Directorate General of the HCC made reference to the decision reached by SEVGAP to grant its members access to the prices kept by ELOG. The exchange of prices and non-aggregate data was not considered an infringement by the HCC's Board since the practice in question was not systematic. Nevertheless, the HCC ruled that SEVGAP should be represented in ELOG's board of directors by a person who does not work for a dairy company, in order to avoid its access to confidential information such as the price paid by dairy companies to milk producers for raw milk.

The two cases raise important questions as to the role of government and state regulation in encouraging transparency and co-operation among competitors. The HCC succeeded in attributing the conduct in question to the autonomous will of the undertakings concerned and in showing that the government did not lead to or allow for the infringement to take place, but the above question remains. While governments may sometimes have the best intentions when trying to keep prices down,<sup>18</sup> they must be careful not to play either the role of a "hub" in a "hub and spoke" conspiracy or the role of a trust-enhancer ensuring that cartel members will not cheat.<sup>19</sup>

#### 4. The role of transparency and uncertainty

In market transparency conditions, undertakings can reach a common understanding on the terms of coordination of their competitive behaviour, even without an explicit agreement.<sup>20</sup> Transparency can be distinguished between private and public. Private transparency is generally an element of unlawful behaviour (an "object" infringement of Articles 101 TFEU and 1 of the Greek Competition Act).<sup>21</sup> Public transparency, however, may help suppliers improve their knowledge about the competitors and the sector as a whole, while improving consumer welfare as it helps consumers to minimise their search cost.

The link between uncertainty and competition has long been developed in the literature. Following Kühn and Vives,<sup>22</sup> the elimination of uncertainty may distort or enhance competition and hence decrease or increase consumer welfare respectively. Most legal experts believe that uncertainty enhances competition,<sup>23</sup> but for economists the latter is not a clear outcome and depends, *inter alia*, on the nature of competition (Cournot or Bertrand competition).

Transparency and elimination of uncertainty were both present in a 2002 case, where three Greek Travel Agents' Associations filed a complaint against two Greek airlines, OLYMPIC AIRWAYS and AEGEAN/CRONUS, accusing them of a concerted practice and abuse of collective dominance.<sup>24</sup> The

<sup>17</sup> Commission Regulation (EC) No. 562/2005 of 5 April 2005 laying down rules for the implementation of Council Regulation (EC) No 1255/1999 as regards communications between the Member States and the Commission in the milk and milk products sector, OJ [2005] L 95/11.

<sup>18</sup> For example through a gentlemen's agreement with market participants.

<sup>19</sup> See e.g. Leslie, "Trust, Distrust, and Antitrust", 82 *Texas Law Review* 515 (2004), p. 606.

<sup>20</sup> See Draft Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, SEC(2010) 528/2, para. 61.

<sup>21</sup> See Kühn, "Fighting Collusion by Regulating Communication between Firms", 16 *Economic Policy* 167 (2001).

<sup>22</sup> See K.-U. Kühn and X. Vives, *Information Exchanges Among Firms and their Impact on Competition* (Office of the Official Publications of the European Community: Luxembourg, 1995).

<sup>23</sup> See Capobianco, "Information Exchange under EC Competition Law", 41 *Common Market Law Review* 1247 (2004).

<sup>24</sup> HCC decision 249/III/2003.

complainants alleged that the two companies jointly proceeded to a) the reduction of the commission payable to travel agents on issuance of air tickets to all domestic destinations and b) the abolition of all categories of reduced fares. The majority of Greek domestic airline routes were dominated by those two airlines; the latter also had access to the same electronic booking system and were thus able to mutually monitor the fares charged by their competitors. The HCC ascertained that the airlines in question engaged in a concerted practice, which resulted in the increase of air ticket prices to the detriment of consumers. The HCC decision was upheld by the Athens Administrative Court of Appeal.



## ISRAEL

### 1. Preview

This contribution paper discusses the issue of information exchanges between competitors under Israeli Law.

Under certain circumstances, information exchanges between firms may play a pro-competitive role as they may provide better information to consumers. But information exchanges might also have an opposite effect, to the detriment of competition, in other circumstances.

One of the factors facilitating the ability to achieve and sustain a supra-competitive equilibrium in concentrated markets is the dissemination of information regarding the strategic conduct of one's rivals. Interdependence between competitors increases as strategic behavior of each firm is made more transparent to its competitors. Uncertainties regarding the competitive instruments in the market impede competitors' ability to sustain a collusive outcome.

The Israeli Antitrust Authority ("the IAA") has adopted a cautious approach towards certain exchanges of information between competitors, and regards them as having the potential to restrict competition. The IAA finds close scrutiny is required in certain cases involving such exchanges.

In this paper we briefly review the regulation of restrictive arrangements under which information exchanges are examined. We then present some of the factors the IAA takes into account when assessing a specific case involving information exchanges between competitors. Finally, we discuss a current case of information exchanges between the five leading banks in Israel, which well demonstrates the application of the mentioned factors by the IAA.

### 2. The statutory framework

The Israeli Restrictive Trade Practices Law, 5748-1988 ("the Law") sets the statutory framework for competition regulation in Israel. The relevant chapter to the issue of information exchanges between competitors is the one dealing with restrictive arrangements. Information exchange between competitors may be unlawful if it was found to constitute a restrictive arrangement under the Law.

Section 2 of the Law describes the types of agreements that constitute a "restrictive arrangement," and to which it is prohibited to be a party, pursuant to section 4<sup>1</sup>. Section 2(a) provides the general definition of a "restrictive arrangement"<sup>2</sup>. Section 2(b) sets out several legal presumptions according to which any

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<sup>1</sup> Section 4 of the Law is the general provision which prohibits any person from being party to a "restrictive arrangement" unless such an arrangement is cleared either because the parties satisfy the conditions of one of the block exemptions issued by the IAA pursuant to section 15A of the Law or because the parties have obtained one of the various possible forms of clearance from the IAA or the Antitrust Tribunal.

<sup>2</sup> Section 2(a) defines the term "restrictive arrangement" as (1) "an arrangement" (2) by "persons conducting business" (3) in which "at least one of the parties restricts itself" (4) in a manner that "is likely to prevent or reduce competition" (5) "between it and the other parties to the arrangement or any of them, or between it and a person not party to the arrangement."

arrangement involving a restraint that relates to price, profit, market allocation, output or quality, shall be deemed to be a restrictive arrangement.

Section 2(b) creates an *irrefutable presumption* that restraints relating to price, profits, market division, output or quality are restrictive arrangements. This path provides that instead of demonstrating harm to competition as defined under section 2(a), it is sufficient for the prosecution or plaintiff in a section 2 case to merely prove that the underlying "arrangement" relates to one of the typically anticompetitive issues listed under sections 2(b)(1)-(4).

### 3. The factors relevant to the assessment of information exchanges

The IAA considers a number of factors in order to determine whether information exchanges between competitors may have adverse effects on competition.

It should be noted that the factors mentioned hereinafter do not constitute an exhaustive list or a cumulative one. In particular, in different cases, not all the characteristics listed hereinafter need exist in order to prove a specific information exchange practice has the potential of preventing or reducing competition.

#### 3.1 Market structure and characteristics

*Ceteris paribus*, the more concentrated is the market involved, so are the anticompetitive effects of information exchanges more likely to occur. In particular, when a market exhibits the characteristics supporting a supra-competitive equilibrium, there is a higher probability that information exchanges will reduce (or even remove) uncertainties regarding the instruments of competition and hence will facilitate a collusive outcome<sup>3</sup>.

A similar discussion may be found in the General Director's decision to grant an exemption to a restrictive arrangement involving three Israeli Banks ("Banks")<sup>4</sup>. The exemption was granted subject to certain conditions set by the General Director, aimed to deal with the concern that the execution of the arrangement will include information exchanges between the competitors, the three smallest out of the six leading banks in Israel, accounting for 20% of the market.

The Banks applied to exempt an arrangement to setup and maintain two databases regarding the banks' credit consumers. The databases were designed to enable better quantification of credit risks, as part of the implementation of the principles set up by the Basel Committee on Banking Supervision.

In her decision, the General Director concluded that the arrangement raised concerns that competition between the three banks could be reduced, in light of the information exchanges it entailed. The General Director emphasized that such concerns are amplified by the high level of concentration in the Israeli banking sector and by high barriers to entry. Thus, given the structure and characteristics of the banking

<sup>3</sup> See CrimC (Jer) 417/97 *State of Israel v. Israel Phoenix, Insur. Co.* IsrDC (Sentencing Decision), 33(4) Dinim Mehozi 708, 2002 *Antitrust* 3013681. The Israeli District Court stated in that matter that: "Direct information exchanges between competitors regarding prices embodies a great risk to competition between them, especially when the information exchanges take place in a concentrated market...with few significant players (an oligopolistic market)"

<sup>4</sup> *Mizrahi Tefahot Bank Ltd. – Union Bank Ltd. – First International Bank of Israel Ltd - Establishing a share database to estimate credit risks.* (Exemption of Restrictive Arrangement with Conditions), 2006 *Antitrust* 5000434.

sector the exchange of credit information between the Banks may well increase the likelihood of tacit collusion.

However, given the Banks legitimate need for an arrangement such as the one mentioned above, and due to its pro-competitive influence, the General Director granted the exemption yet subjected it to a set of conditions which were intended to assure that no sensitive commercial information is exchanged or transferred between the Banks. Among these conditions were: information needed to construct the databases will be supplied to an outside contractor, by each bank separately; The information included in the databases will not contain data revealing the identity of customers; the information exchanged through the databases shall not include neither analysis nor any interpretation of the underlying credit risk customers may pose.

### **3.2 *Market coverage***

As much as the competitors involved in the information exchange hold a large part of the market, restrictive effects on competition as a result of the exchange are more likely. Nevertheless, the sufficient coverage of market in this context depends on the specific facts of the case including market and information characteristics.

### **3.3 *Type of information exchanged***

Generally speaking, the potential adverse effects on competition depend to a great extent on the type of information exchanged. The exchange of commercially sensitive information is more likely to give rise to anti-competitive effects. Information is commercially sensitive where it serves to reduce or remove uncertainties regarding an element of a firm's conduct in the marketplace.

Some types of information may be competitively neutral like information regarding professional literature, while others may affect competition, like information about quantities offered, capacities, customer lists, business plans and investments. Yet, at the top of the second group stands information regarding prices – exchanges of information on pricing between competitors give rise to severe concerns about the restriction of competition<sup>5</sup>.

### **3.4 *Past, present or future data***

Exchanges of information that pertains both to the present and future enhances transparency among competitors hence carrying the greatest potential to have adverse effects on competition.

Unlike information concerning the present and future, the exchange of information regarding the past does not raise the same concerns. In general, exchange of historic data does not hold the potential of limiting the uncertainties concerning rivals' business behavior as these data usually do not reflect current business reality. However, there are circumstances in which exchange of historic data may well lead to anticompetitive effects. One such example is when competitors' current or future conduct can be derived from historic data exchanged between them. Moreover, historic information may be used for the purposes of monitoring deviations from a cartel or an otherwise collusive outcome.

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<sup>5</sup> It should be mentioned, as explained above, that exchange of information regarding price, profit, market allocation, output or quality may constitute an infringement of section 2(b) of the Law, therefore making the competition effects analysis unnecessary.

An example to these exceptions can be found in the General Director's decision to grant an exemption to a restrictive arrangement involving Israel's three main mobile network operators ("MNOs")<sup>6</sup>, subject to conditions aimed to deal with the concern that the execution of the arrangement might include information exchanges between the competitors.

The MNOs applied to exempt an arrangement between the three of them and a fourth party, LECG Ltd, an international firm specializing in economic consulting. The arrangement was set up for the purpose of LECG producing a report regarding the competition in the Israeli cellular market, as part of the MNOs attempts to persuade the Ministry of Communications to refrain from obligating the MNOs to allow virtual operators to use their networks in order to provide competing cellular services.

In her decision, the General Director concluded that the essence of the arrangement is the transfer of highly sensitive commercial data to LECG by the three MNOs. Such information, if transferred to the competitors themselves, either directly or indirectly may harm competition. However, given the MNOs legitimate need for LECG's report as mentioned above, the General Director granted the exemption yet subjected it to a set of conditions intended to assure that no sensitive commercial information is exchanged or transferred between the MNOs. Among these conditions were: limitation of the information sources for the report, in certain subjects, to public resources only; separation of the information transfer process to LECG so that each competitor transfers its data separately; prohibition on LECG from the transfer of the information given to it from one MNO to another or to third parties; Obligation on the MNOs to appoint an independent advisor whose role is to inspect the information transferred from LECG to the MNOs and prevent competitively sensitive information from being exposed.

The type of information transferred to LECG by the MNO's was mostly of historic nature, hence the MNOs claimed it had no effect on competition. The General Director rejected that claim while stating:

*"As for historic information, its classification depends, inter alia, on the ability to derive future information from it. For example, historic prices charged by a firm do not necessarily indicate the prices that will be charged by that firm in the future. However, if that information is cross-checked with additional data, like the ratio between the historic prices of the firm and its competitors, then the historic information gives at least an indication of firm's future response to pricing decisions made by its competitors."*

### **3.5 Information aggregation level**

Information pertaining to a single firm or aggregate data, from which information about specific firms may be recovered, is more likely to affect competition than information which consists of several firms' data in a way that cannot be separated. This is due to the fact that it may be difficult to monitor and predict competitor's business conduct from an analysis of "pure" aggregate information, whereas more specific information about an individual firm may allow such monitoring and predictions.

### **3.6 Frequency and timing of exchanges**

In general, the more frequent the exchange, the more likely is a collusive outcome. The frequency of the information exchange may indicate the degree of transparency among competitors, and as such, the probability of a collusive outcome increases. Yet, the frequency of exchanges prone to lead to anti-competitive effects depends on the specific market structure and characteristics. In certain conditions, an isolated exchange or transfer of information may harm competition in itself.

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<sup>6</sup> *Cellcom Israel Ltd. – Partner communication Ltd. – Pelephone Communication Ltd. – LECG Ltd (Exemption of Restrictive Arrangement with Conditions), 2007 Antitrust 5000601.*



The timing of the exchange is also important. The likelihood of anti-competitive effects increases whenever the exchange or transfer of information is in conjunction with competitors' decision making.

### **3.7            *The context of the information exchanges***

Whilst information exchanges may constitute a stand-alone practice, it may also take place as an inherent part of a broader legitimate cooperation between competitors. For example, an arrangement for mutual clearing of bus tickets, issued by different transportation companies, may be efficient and beneficial for consumers. A "by product" of such an arrangement may be that pricing information is exchanged between these companies for the purpose of balancing their accounts.

Information exchanges between competitors which are not ancillary to a broader legitimate cooperation constitute a "naked" practice. In the absence of a legitimate cause, they give rise to a presumption of having adverse effect on competition.

### **3.8            *Anti-competitive intent***

Whenever information is transferred or requested with intention to affect decision-making in the market, it naturally gives rise to the presumption that competition will, in fact, be restricted as a result. Anti competitive intent should be regarded a sufficient though not a necessary condition.

### **3.9            *Publicity of the exchange***

Information can be exchanged among competitors only ("private" exchange) or among consumers as well ("public" exchange).

Market transparency (especially price transparency) can promote competition by enabling consumers to compare prices and services offered by sellers. However, since not all information exchanged between competitors is transferred to consumers, not every exchange of information actually enhances transparency in the eyes of consumers. Naturally, information exchanges which are not transparent to consumers are not likely to benefit them as their sole role is to remove or reduce the uncertainties faced by competitors in the market. Clearly, an alleged "public" exchange of information that aims or serves mainly to signal competitors, is not different from a "private" exchange of information in the aspect of restricting competition.

As mentioned before, there is no need to show all of the factors described above in order to determine that an exchange of information between competitors may give rise to severe concerns about the restriction of competition. Yet, the IAA dealt recently with an information exchanges case involving the five leading banks in Israel, showing almost all of the above mentioned factors ("the Banks Case").

## **4.            *The banks case***

In April 2009 the General Director issued a determination<sup>7</sup> regarding information exchanges between the five largest banks in Israel: Bank Hapoalim Ltd., Leumi Bank Ltd., Israel Discount Bank Ltd., Mizrahi Bank Ltd. and the First International Bank of Israel Ltd ("The banks")<sup>8</sup>

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<sup>7</sup> Pursuant to section 43(a)(1) of the Law, the General Director may issue a Determination that a specific arrangement constitutes a restrictive arrangement. Such a determination is significant in that it is *prima facie* evidence of its content in every legal proceeding.

<sup>8</sup> See *Bank Hapoalim Ltd., Leumi Bank Ltd., Israel Discount Bank Ltd., Mizrahi Bank Ltd. and the First International Bank of Israel Ltd* (Determination of Restrictive Arrangement) 2009 Antitrust 5001411.

The General Director found that since the early 1990's and until the IAA's investigation began in November 2004, the banks were engaged in restrictive arrangements for transfers of information. The information regarded the fees charged for bank services for households and small businesses.

The General director found that the exchanges of information between the banks violated both section 2(a) and 2(b)(1) of the Law. As explained above, under section 2(b) of the Law, arrangements concerning price, profits, market allocation, output or quality, are deemed to be restrictive arrangements without the need to establish that anti-competitive effects are probable. Nevertheless, and although not necessary in order to show an infringement of the Law, as elaborated below, the Banks Case raises severe concerns over the restriction of competition, which are reinforced by the application of the factors.

The IAA's analysis concluded that the information exchanges between the banks were likely to prevent or reduce competition in the banking services for households and small businesses, and that it actually restricted the competitive procedure between the banks, in three aspects (in a nutshell):

- **Reducing business uncertainties regarding changes of bank fees, its scope and its collection.** The banks' public tariffs did not fully reflect the actual charged fees, hence the publishing of the tariffs did not remove the uncertainties regarding the fees. The uncertainties were removed or reduced by direct information transfers through phone calls between the banks' officials. This indicates two: the banks' aim to reach a supra-competitive equilibrium and the necessity to achieve that goal through direct communication.
- **Decreasing incentives to inform consumers.** The information exchanges through phone calls enabled the banks to create better transparency among them without allowing equal transparency towards consumers. This way the banks had no incentive to clarify and facilitate the complex and indecipherable tariffs.
- **Decreasing consumer incentives to search.** The information exchanges reduced consumers' incentives to search for an alternative bank. The benefit of a search depends on search costs and the estimated probability of finding a better offer. The information exchanges first raised the search costs by enabling the banks to leave the tariffs indecipherable by consumers, hence obligating them to invest more in order to gain true understanding of how much they pay and what they could be offered. Secondly, the information exchanges served to reduce variance of market prices, hence lowered the expected gain from search.

Moreover, the application of the above mentioned factors to the Banks Case led the IAA to the conclusion that almost all factors indicate to one direction: the information exchanges practice between the banks were likely to have an adverse effect on competition.

- **Concentrated market.** The Israeli banking market is highly concentrated: The five banks involved in information exchanges hold almost 95% of the market, there are high barriers to entry and the level of competition is very poor<sup>9</sup>.
- **Price information.** The information exchanged between the banks was about prices.
- **Current prices and future decisions.** The information regarded both current prices and future intentions regarding prices.

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<sup>9</sup> It should be noted that in 1984 four of the Banks (Bank Hapoalim, Bank Leumi, Israel Discount Bank, and Bank Mizrachi) admitted to illegally colluding to fix interest rates. See CrimC (TA) 7873/84 *State of Israel v. Bank Leumi*, [1986] IsrDC 5746(3) 368.

- **Specific bank information.** The information was individualized - referred to each bank separately.
- **Anti-competitive intent.** The sole purpose of the information exchange between the banks was to affect the receiving bank decision-making regarding price issues.
- **Not ancillary to any business activity.** The information exchanges constituted a stand-alone practice and were not ancillary to any broader legitimate cooperation.
- **"Private" exchange of information.** The information was exchanged among the banks only. The customers did not have equal access to the information.
- **The information was sought prior to a pricing decision.** The frequency of the exchanges varied along the years and between the different banks, yet the timing of the exchange was crucial – the information was sought prior to and for the purpose of a bank own pricing decisions.

In light of the above and more, the General Director determined that the information exchanges between the banks constituted unlawful restrictive arrangements under both sections 2(a) and 2(b)(1) of the Law.

As mentioned above, the banks case is an ongoing one. The five banks appealed to the Competition Tribunal against the General Director's determination. The case has not been decided yet.

## 5. Summary

Information exchanges between competitors potentially have both pro and anti competitive effects. As presented above, the IAA examines exchanges of information between competitors under the restrictive arrangements chapter of the Law.

Whenever an arrangement involves information exchange regarding one or more of the issues covered by section 2(b) of the Law (i.e. price, profits, market allocation, output or quality), it is presumed to be a restrictive arrangement potentially harming competition. Such an arrangement is illegal unless cleared by the IAA or the Antitrust Tribunal in one of the possible forms set by the Law. In information exchange cases which constitute a restrictive arrangement under section 2(a) alone, the IAA performs an analysis of competitive effects. The relevant factors to such an analysis, as described above, serve to assess the ways a specific information exchange would affect competition.

This paper highlights several examples of cases in which the General Director had considered the likely competitive effects of information exchanges between competitors in Israel. In the first two examples, the credit databases case and the MNOs case, the parties to arrangements applied to the General Director to exempt these arrangements. In both cases, the General Director decided to grant the exemption, subjecting it to a set of conditions intended to alleviate the likely anti-competitive effects of the information exchanges. In the Banks Case, following a comprehensive investigation, the IAA found concrete evidence that beginning in the early 1990s and up to November 2004, Bank officials routinely exchanged information regarding current fees and tariffs as well as regarding future conduct concerning fees to be collected from the public. The General Director issued a Determination stating this conduct constituted illegal restrictive arrangements under the Law.



## JAPAN

### 1. Introduction

Information exchanges between competitors can be pro-competitive and anti-competitive.

For example, if competitors exchange information about their own price level or trade associations provide the average price level among their member firms, this might hinder competition in that such actions might induce higher price levels in the market, or, on the contrary, such exchanges of information might promote price competition through making price levels more transparent. In other cases, when competitors exchange information about their R&D activities, there may be benefits if R&D becomes more active due to reduced R&D costs, mutual complementarities of technologies, etc., which could lead to further technological breakthroughs. At the same time, there may be a danger when competition in the market may substantially be restrained if technological information is shared among rival firms.

This contribution paper explains how information exchange activities among competitors are considered in identifying a violating conduct in previous court cases and at the same time, summarizes the JFTC's views on information exchanges among competitors by introducing the "Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act" (published on Oct. 30, 1995, finally revised on Jan. 1, 2010, hereinafter referred to as "Trade Associations Guidelines"). Then actual cases of prior consultations related to information exchange are presented.

### 2. Information exchanges among competitors under the Antimonopoly Act

Information exchanges alone are not considered a violation of the Antimonopoly Act. If the information exchanges between firms lead to agreements that restrict competition in terms of price, volume, clients, distribution channels, facilities, etc., thereby causing a substantial restraint of competition in any particular field of trade, then this falls under "unreasonable restraint of trade," which is prohibited by Article 3 of the AMA and is considered a violation under the Act.

Concerning the nature of information exchanges and agreements that follow, which become elements that constitute "unreasonable restraint of trade," the Tokyo High Court stated in the Toshiba Chemical Corporation case (Sept. 25, 1995) as follows, "The said 'communication of intent' means that an undertaking mutually recognizes or could predict the implementation of the same or similar kind of price increase among different undertakings and accordingly, intends to collaborate with such a price increase. In order to prove 'communication of intent,' it is not sufficient to show the recognition or acceptance of an undertaking's price increase by another undertaking. However, an explicit agreement that binds the related parties is not necessary to prove 'communication of intent.' In other words, 'communication of intent' can be proven by showing the mutual recognition of other undertakings' price increase and the tacit acceptance of such price increase of another." Therefore, the Tokyo High Court interpreted that identifying the conclusion of an agreement only needs the existence of tacit agreement instead of explicit binding agreement. In addition, the Tokyo High Court mentioned, "If an undertaking exchanges information about a price increase with other undertakings and accordingly, takes the same or similar conducts with others, the court cannot but presume that the parties had a relationship where they expected the concerted action from each other; therefore, the said 'communication of intent' exists unless there is evidence that shows the price increase was implemented individually by an undertaking's own decision and the price increase was

made to meet price competition in the relevant market and there is no relationship between that undertaking's price increase and that of other undertakings."

In this ruling, it is necessary to prove the following conditions in order for the above case to be judged a violation of the AMA through tacit agreement: (a) there were communications and negotiations prior to the agreement, (b) negotiations were made regarding a price increase, and (c) each action taken after the negotiations by parties involved conformed to the negotiations. Thus, in order to establish an infringement, it is necessary to show not only the fact that information was actually exchanged between competitors, but also the fact that information exchanges were related to the price increase, and as a consequence the actions of the undertakings conformed to the content of the communications.

### **3. The JFTC's views on information exchanges - The Trade Association Guidelines**

As mentioned above, information exchanges between firms can be pro- or anti- competitive. The impacts on competition may vary depending on how and what information is exchanged.

The JFTC has compiled and published various guidelines to enhance transparency in its law enforcement as well as predictability for firms, some of which highlight how the JFTC views information exchanges between businesses. Since trade associations do perform information gathering and dissemination for member firms as one of their principal functions, some part of the JFTC's "Trade Association Guidelines" is devoted to this subject. "The Trade Association Guidelines," which identify the kind of trade association activities that become problematic under the AMA, summarize points to be considered on information exchanges as below:

#### **3.1 *Conduct suspected to constitute an infringement***

- Collecting or offering information from or to constituent firms, or promoting the exchange of information among the constituent firms, where such information specifically relates to important competition-related factors, concerning the present or future business activities of the constituent firms, such as the following: specific plans or prospects regarding the prices or quantities of goods or services supplied or received by the constituent firms, the specific contents of the constituent firms' transactions with or inquiries from customers, and the limits of anticipated plant investment.

#### **3.2 *Conduct in principle not constituting a violation***

- Offering, for purposes of improving their convenience, information concerning such matters as the proper use of products or services supplied in the business field to the consumer.
- Collecting and offering general information that concerns such matters as technological trends, management expertise, market environment, legislative or administrative trends, and socioeconomic conditions in the field concerned, and that is provided by government agencies, private research organizations, and so forth.
- In order to obtain and disseminate information on general business performance in the field concerned, collecting, at the discretion of the constituent firms, general information regarding the previous business performance of those firms, including collecting data relating to such matters as the quantities or monetary value of previous production, sales, and plant investment; statistically and otherwise objectively processing such information; and publicly disseminating that information in a summarized form, without disclosing the actual quantities or monetary amounts relating to individual constituent firms.

However, in cases where the constituent firm in question has already publicly announced its specific quantities or monetary amounts, the association may disclose relevant information.

- For the purpose of providing users and the constituent firms information concerning previous prices, collecting, at the discretion of the constituent firms, general information about those firms' previous prices; statistically and otherwise objectively processing such information; deriving an accurate indication of price distributions and trends; and offering such general information to the constituent firms and users without disclosing the prices of individual constituent firms.
- Offering the constituent firms and users informational materials, or technical indicators, that enable fair and objective comparisons of price-related matters such as expense items, degree of difficulty of operation, and quality of goods or services whose prices are difficult to be compared in the market.
- Collecting and offering general information concerning overall demand trends in the field of business concerned; or formulating and disseminating rough estimates of demand, based on objective facts.
- Collecting and offering to the constituent firms objective information concerning the credit standings of customers, for the purpose of ensuring the safety of transactions by the constituent firms.

As mentioned above, whether the case falls under an infringement of the AMA is decided by the fact that businesses undertake information activities relating to important dimensions of competition. It is not important whether information is “exchanged with each other” or information is provided in a “one-sided way.”

If a trade association undertakes information activities on competition related variables such as pricing, which make it possible for competing firms to predict each other's present or future business activities, and if an information activity of this kind results in a tacit understanding or common intent among members to restrain competition, the case shall in principle be found to constitute a violation of the Act.

#### **4. Prior consultation cases from trade associations and the reply of the JFTC**

The JFTC gives prior consultation services to provide advice regarding whether a specific action planned by an undertaking or trade association would be considered to be an infringement under the AMA. As mentioned above, since information exchange among competitors can be competition-promoting as well as competition-restricting, it is desirable that each party exchange information in the less competition-restrictive way.

The following introduces a case that would be considered to be an infringement under the AMA, as well as one that would not.

##### **4.1 *A case that would be considered an infringement under the Antimonopoly Act (FY 2005)***

###### **4.1.1 *Consulting parties***

- Industrial Association A (Association of construction component X manufacturers)

#### 4.1.2 *Summary of the consultation*

Industrial Association A consists of 13 manufacturers producing construction component X. These member companies produce more than 95% of construction component X, out of which 3 top companies occupy a 70% share in the market, and this share has remained at the same level for a long time.

As a detailed technological standard is set for this construction component X, there is no difference in product quality, etc., among manufacturers.

Industrial Association A is considering compiling a demand forecast of construction component X, broken down into six sub-categories of this product, for a 5-year period every year, using the materials published by government offices and economic research institutes, etc., and making the forecast public on its website. Does such an activity constitute a problem under the AMA?

As mentioned above, the Industrial Association A intends to forecast the demand for construction component X at the level of the 6 sub-categories. While there are 13 member companies in the Industrial Association A, not all of the 13 members produce the product of each sub-category. At the sub-category level, a few companies produce the product.

#### 4.1.3 *The JFTC's view*

In this case, the issue is to determine the impact of the demand forecast planned on competition.

Generally, the activity by a Trade Association to compile a demand forecast of a product supplied by the member companies by collecting objective information does not immediately constitute a problem under the AMA. However, if this demand forecast gives a specific target to the member companies for their future supply volume, this will constitute a problem under the AMA. (Article 8, No. 1, and No. 4)

When Industrial Association A compiles a demand forecast based on material which already was published, and if its contents are aggregated and summarized, such a forecast is unlikely to give a specific target of future supply volume for each member company.

However, construction component X is standardized and product quality is not differentiated. In addition, the market is oligopolistic and its market share remained more or less at the same level for a long time, where more than 95% of the market is dominated by member companies of Industrial Association A, with the top 3 companies holding 70%. Furthermore, only 2 or 3 companies manufacture construction component X at the sub-category level.

Considering the above situation, compiling demand forecasts for each sub-category cannot remain a general forecast of the industry trend. It can serve as a concrete target of future supply volume for the member companies, and it is highly likely for them to be used as a tool to adjust supply volume.

Summing up the above mentioned, even the activity to compile and publish a demand volume forecast may constitute a problem under the AMA.

#### 4.1.4 *The JFTC's reply*

Such activity by the Industrial Association A to compile and publish a demand volume forecast will be problematic under the AMA.



## **4.2 A case that would not be considered an infringement under the Antimonopoly Act**

### *4.2.1 Consulting parties*

- Association of Exploration Companies (FY 1997)

### *4.2.2 Summary of the consultation*

Since the exploration work requires the use of specific machinery and the knowhow to use it, the association provides lectures, sets a standard of working skills needed, etc., and administers examinations on firms' skill. According to the result of this examination, qualifications are given by the level of working skill, serving as the evaluation criteria on the exploration work.

Since the exploration work involves new technology that has not yet been spread in the market, the Association of Exploration Companies is considering to clearly present the characteristics and costs, etc., for exploration work using this new technology by compiling the standard calculation material, so that related parties can properly calculate the cost.

The Association also plans to include items such as the technology fee in the calculation of the exploration costs because it considers the exploration work should be evaluated by taking into account its technology level and know-how and hopes that the calculation of the exploration cost will include factors such as the technology level of firms.

The standard calculation material contains items such as the steps that are necessary for conducting exploration, the formula to calculate the exploration fee, and the adjustment coefficient, etc. (When the exploration is undertaken under severe environmental conditions causing a deterioration in working efficiency, this figure is multiplied on the total cost.) This material does not include specific figures such as standard prices, etc., for each cost item.

Does such an activity of the Association of Exploration Companies to compile the standard calculation material and distribute it to the ordering parties as well as the association's member companies constitute a problem under the AMA?

### *4.2.3 The JFTC's view*

Regarding the products or services whose prices are difficult to be compared in the market, the approach of the Trade Association to provide the material or the technological indicators dedicated to the fair and objective comparison of the price-related factors such as the cost item, level of difficulty in exploration work and quality, etc., to the related party, including the users, will not constitute a problem under the AMA in principle, unless such material and indicators suggest a common target price among related parties.

In order to appropriately calculate the exploration work, the activity of the Association of Exploration Companies to compile and provide the standard calculation material defining items such as the general cost, level of skill/technology and time, etc., necessary for the exploration work to not only the members but also the ordering parties will not constitute a problem under the AMA in principle, unless such material includes the standard price of each cost item, thereby not giving a common target amount of calculation. However, if this material provides factors which can be used for price-setting by such means as creating a man-hour chart or establishing a numerical rating through the comprehensive evaluation of each factor for the exploration work, it will constitute a problem under the AMA, since such material would give a common target price.

4.2.4 *The JFTC's reply*

The activity of the Association of Exploration Companies to identify the items such as the cost criteria necessary for the exploration work, the standard formula for calculation, and the definition of difficulty in exploration work, etc., does not constitute a problem under the AMA.

## KOREA

### Introduction

This paper is Korea's response to the invitation to make a written contribution to the October Roundtable on Information Exchanges between Competitors under Competition Law.

#### 1. General effects of enhanced price transparency

*Please describe one or more actual situations in which transparency played a role in the degree of competition in the market. Are there cases in your jurisdiction where changes in the degree of transparency clearly resulted in changes in the existing degree of competition?*

In April, 2008, the Korean government introduced "Oil Price Information Network (OPINET)", all-inclusive gasoline prices information system, to make public gasoline prices of individual gas stations across the nation. OPINET was established to help consumers easily compare prices and purchase gasoline at cheaper prices so that competition among gas stations will be increased, thereby stabilizing gasoline prices. There has yet to be thorough analysis on how the introduction of OPINET and the consequent enhanced transparency had impact on competition among gas stations. The recent research, however, found that OPINET reduced sales margin of gas stations, and that large cities or metropolitan cities saw more reduction in gas prices than small and mid-sized cities or non-metropolitan cities. It is assumed, therefore, that the introduction of the price information system and the resulting enhancement in price transparency contributed to narrowing price gaps among gas stations, dropping sales margin by increasing competition among gas stations.

*Besides the possibility for consumers to better compare products and services and for the sellers to engage in anti-competitive co-ordination, what other pro- or anti-competitive effects might be associated to higher levels of transparency in a market? Please illustrate your remarks with actual situations.*

Higher level of price transparency is a double-edged sword which has both positive and negative effects.

The publicizing of prices generally intensifies competition among sellers by driving down search costs and strengthening bargaining power of buyers. In particular, making the information which was once exclusively restricted to sellers known also to the public is highly likely to eliminate the problem of asymmetry of information, increasing price competition.

Under the certain market structure, however, the enhanced transparency could serve as instrument of anticompetitive coordination which rather lessens competition. Particularly in a highly concentrated, oligopolistic market where companies produce practically identical products under the same cost structure, publicized prices strengthen cartel by enabling cartel members to easily detect and punish deviating companies. It also has potential to increase overall prices especially when companies strategically respond to consumers' demands for price reduction with tacit cartel schemes to avoid price competition.

*What factors and market characteristics do you take into consideration when assessing if transparency is a competition enhancing factor or not? Please illustrate your remarks with actual situations.*

Various factors should be considered in terms of both structural and behavioral aspects to assess whether the enhanced transparency has pro-competitive effects or not. Generally, these include market structure (e.g., concentration, stability and complexity of the market, barriers to entry, etc.), characteristics of products (i.e. whether products in the market are identical or differentiated in characteristics), similarity of cost structure and behavioral characteristics of market participants (i.e. whether maverick companies exist).

## **2. Information exchanges between competitors**

*When are information exchanges amongst competitors permissible in your country? In what circumstances an exchange of information between competitors can be pro-competitive?*

The current system of competition law of Korea does not stipulate circumstances in which information exchange among competitors is allowed or seen as pro-competitive. But generally a simple form of information exchange, for example, business associations compiling and sharing their past statistics, is not regarded as anticompetitive. The spread of technological know-how and other information which results in higher efficiency in the overall industry or helps transaction parties make a reasonable and efficient decision is seen as pro-competitive.

*If information exchanges restrict competition, will they restrict competition by “effect”? Or will they restrict competition by “object” or constitute a per se infringement?*

In the preceding cases handled by the KFTC, information exchange has not been considered to constitute *per se* infringement or to restrict competition by “object”. However, it is deemed to have anticompetitive “effect” when it entails or tolerates explicit or implicit agreements among companies.

*In order to establish an infringement, is it necessary to prove that firms agreed to share information? Or can the mere fact that they exchanged information be sufficient to establish a competition law violation? Does your competition law apply to a mere concerted practice of exchanging information among competitors?*

Under the Korean competition law, information exchange in itself is not regarded as unlawful, and the mere fact that companies agree to share information does not constitute anticompetitive coordination. Subordinate rule of the competition law, “*Guidelines for Cartel Review*” provides that an exchange of or agreement to exchange price or output data can be used as circumstantial evidence on the existence of an agreement.

### Guidelines for Cartel Review

#### II. Concept and Presumption of an Agreement

4. In the case where two or more companies engage in practices falling into any Subparagraph of the Article 19 (1) of the Monopoly Regulation and Fair Trade Act (hereinafter “MRFTA”)<sup>1</sup>, although there is no direct evidence of agreement among companies, if there is high possibility of collusion considering such factors as transaction field, characteristics of traded products or services, economic rationale behind the concerned behavior and the resulting impact and the number and forms of contacts among the companies, the companies are presumed to have reached an agreement to conduct the practices of any subparagraphs of the Paragraph 1. The followings can be regarded as circumstantial evidence which reinforces the presumption.

##### A. Evidence on direct or indirect communication or information exchange

(Example 1) The same memorandum of companies on price hikes, output reduction, etc.

(Example 2) Coordinated behavior resulting from a meeting or communication

(Example 3) The sharing of or an agreement to share information on prices or output, etc. by companies

(Example 4) A company’s price increase or output reduction conducted after expressing such intention and observing responds from other rival companies

As shown above, information exchange in itself is not enough to be regarded as competition law violation no matter whether there exists evidence on an agreement to share information, and can be used only as circumstantial evidence which complements the presumption on an agreement along with other factors.<sup>2</sup>

<sup>1</sup> Subparagraphs of the Article 19 (1) of MRFTA: 1. Act of fixing, maintaining, or changing prices / 2. Act of determining the terms and conditions for the transactions of goods or services or payment of prices thereof. / 3. Act of restricting production, delivery, transportation, or transaction of goods or services / 4. Act of limiting the territory of trade or customers / 5. Act of preventing or restricting the establishment or extension of facilities or installation of equipment required for the production of goods or rendering of services / 6. Act of restricting the types or specifications of goods or services in producing or transacting goods or services / 7. Act of jointly carrying out and managing the main parts of a business or establishing a company, etc., to carry out and manage the main parts of a business jointly / 8. Act of deciding matters prescribed by the Presidential Decree, e.g., bidding price, auctioning price, auctioneer, or bidder in bids or auctions / 9. Any practice that substantially minimizes competition in a particular business area by means other than those under Items 1~8 or interferes with or restricts the activities or contents of the business.

<sup>2</sup> MRFTA Article 19 (5) provides that the existence of an agreement can be presumed where certain requirements are met. This is intended to address the difficulty of proving the existence of an anticompetitive agreement in implicit cartels. Under the provision, an anticompetitive agreement can be presumed in the case where there is apparent coordinated conduct and high possibility of concerted acts given various conditions. Information exchange among competitors serves as circumstantial evidence that indicates this “high possibility”.

*What factors can be used to distinguish in these cases between unilateral actions by firms and coordinated actions that could potentially be subject to a prohibition against unlawful agreements? Is reciprocity required to find that information exchanges are unlawful? Conversely, could it be unlawful if one firm unilaterally makes information available to competitors or the market place, for example information about intended price increases or other future competitive conduct?*

Unilateral action of a company to make information known to rivals, as well as mutual information exchange, also can be considered as circumstantial evidence on an anticompetitive agreement if it, in some aspects, facilitates price increases of rival companies by prompting them to react to the information. This is the case falling under the above-mentioned clause in the *Guidelines for Cartel Review*. [II.4.A-(Example 4) “A company’s price increase or output reduction conducted after expressing such intention and observing responds from other rival companies”]

*In your practice, have you developed “safe harbours” that can help the industry to structure information exchanges in a way which does not infringe competition law? Have you published guidelines in this area?*

There are no guidelines in place on “safe harbor” of information exchange that does not infringe the competition law.

*Under what circumstances, if at all, would your competition authority prohibit information exchanges? If information sharing is not prohibited per se, what factors should be used to decide whether an information sharing practice was unlawful? Would it always be necessary to show that information sharing had anticompetitive effects?*

Various factors are taken into careful consideration when assessing illegality of information exchange including the purpose and methods of information exchange, feature of the information shared, structure of the market where information exchange takes place and characteristics of the concerned product or service. In other words, information exchange is prohibited only when it has anti-competitive effects instead of being prohibited *per se*.

*More specifically, what kind of factors play role in decisions to prohibit such practices?*

Numerous factors are taken into full consideration such as anticompetitive intention of information exchange, the market condition (degree of concentration, barriers to entry, etc.) and period, frequency and other behavioral aspects of the information exchange.

For example, in a lawsuit regarding collusive acts by flour manufacturers where illegality of the KFTC’s order to cease information exchange was at issue, the court decided that the prohibition order was not illegal on the grounds that; (1) defendants had engaged in coordinated interaction by frequently sharing information on the prices, sales volume or output; (2) the sharing of information was intended to create the environment conducive to collusion; (3) the domestic flour market was susceptible to price fixing as the market had oligopolistic structure where the top three companies represented 75% of the market in total, and products were not highly differentiated; (4) the information was shared on a regular basis limited to members of the milling industry excluding third parties such as consumers and administrative agencies; (5) the information shared such as price, sales volume and output was detailed and regarded as trade secrets which can have impact on competitive situation; (6) the information enabled identification of its providers and (7) the information shared in this case was about the recent, present or future prices or output as from the time when the information was provided.

*Do you distinguish between the types of information exchanges? If you do, how do you assess of these different types of information exchanges?*

Theoretically, the distinction can be made between direct information exchange between competing companies and indirect one through business associations, between vertical and horizontal information exchange, companies' voluntary and involuntary exchange based on administrative guidance, or private and public exchange such as disclosure. However, these categorizations have yet to be applied to actual cases affecting the case results.

*In your jurisdiction, to what degree and under what particular circumstances information exchanges taken as circumstantial evidence of an anti-competitive agreement?*

Generally speaking, where the sharing of information involving trade secrets such as prices or output takes place in the regular and sustainable manner in a highly concentrated, oligopolistic market of identical products, information exchange is regarded as circumstantial evidence on an anticompetitive agreement. Furthermore, the coordinated timing and levels of price hikes, price increases that would undermine profitability of the company when conducted without collusion, unreasonably high profit rates and others were used as circumstantial evidence in the case precedents by the KFTC.

*How do you assess possible countervailing efficiencies?*

To what degree efficiency-enhancing effect of information exchange in an antitrust case should be considered has not been reviewed closely yet. Under the current standards to assess illegality of concerted acts, the mere fact that information exchange results in increased efficiency cannot offset its anti-competitiveness. It is thought, however, efficiency-enhancing effect should be weighed against competition restriction in deciding whether the concerned information sharing is unlawful.

### **3. Cases in which the information exchange was part of a broader antitrust infringement**

There was a price-fixing case of six LPG (Liquefied Petroleum Gas) suppliers. In this case, LPG importers and refiners had kept their sales prices at the practically same or similar levels with one another for six years through constant information exchange. The KFTC found this practice unlawful and imposed surcharge on the involving companies along with other corrective measures (Dec. 2, 2009). LPG prices are supposed to be different among companies due to gaps in import prices, extra costs in importation, domestic supply costs, etc. The two importers, however, set prices at substantially the same with each other by having their staff members in charge of pricing constantly exchange information. As refiners accepted this collusively decided prices as their sales prices, LPG prices of importers and refiners showed little gap.

The KFTC decided the pricing practice of the suppliers was unlawful by suggesting circumstantial evidences including; (1) pricing staffs of the defendant companies constantly shared price data through telephone communications or irregular meetings; (2) there were frequent executive-, director- or working-level meetings; (3) Korea LPG Industry Association made and notified a list of sales prices of individual companies at the end of every month; (4) the LPG industry by its nature is prone to cartel schemes due to high entry barriers, very low price elasticity of demand and undifferentiated products and (5) defendant companies had shown unreasonably high sales performance.

In another cartel case involving five beverage manufacturers and sellers, the KFTC found the involving companies guilty and took corrective measures including surcharge imposition (Aug. 13, 2009). The five companies colluded to fix beverage prices through presidents and working-level meetings and regular communications on pricing which took place constantly in the name of "information exchange".

The defendant companies created consensus on price hikes and agreed on the method, timing, items and levels of price increases through meetings and contacts among the presidents and elaborated the plan through telephone communications or other contact channels among executives responsible for price setting. Especially, the companies shared the information on whether and how they raise prices through working-level meetings and the communication channel of market research staffs on a regular basis. The purpose of the meetings went beyond just collecting information on price hikes of other companies to coordinate and confirm price raise plans.



## MEXICO

### 1. General Effects of Enhanced Price Transparency

1. *Please describe one or more actual situations in which transparency played a role in the degree of competition in the market. Are there cases in your jurisdiction where changes in the degree of transparency clearly resulted in changes in the existing degree of competition?*

The Federal Competition Commission (hereinafter CFC or Commission) has handled several cases in which transparency played an important role by limiting competition and facilitating collusion. Two examples that illustrate this situation are:

- In a bid-rigging case by pharmaceutical companies that sold medicines to the Mexican Social Security Institute (IMSS for its acronym in Spanish), the CFC found that Federal Law to Access Government Information and Transparency (FLAGIT) enabled firms involved in the cartel to monitor the positions presented by each participant in the bidding processes. Particularly, the FLAGIT required the Institute to publish the results which helped firms to determine its competitor's positions, thus facilitating the cartel operation. When the contractor's procurement rules changed the illegal price arrangements ceased, even when the FLAGIT was not amended.
- In the Website of Mazatlan's Mexican Realtors Association (AMPI Mazatlan for its acronym in Spanish), the CFC found a fee chart mandatory to its members when they acted as intermediaries in real estate transactions.

These are clear examples in which the level of price transparency has helped market participants to collude and monitor the compliance of an existing collusive agreement.

2. *Besides the possibility for consumers to better compare products and services and for the sellers to engage in anti-competitive co-ordination, what other pro- or anti-competitive effects might be associated to higher levels of transparency in a market? Please illustrate your remarks with actual situations.*

The CFC considers that the publication of price information may contribute to improve purchase or sale decision making by reducing search costs. However, price transparency systems may also produce negative effects on competition by facilitating collusive agreements<sup>1</sup> among competitors, especially when transparency involves the exchange of prices and other sensitive information among market participants.

The CFC is also concerned with the effect of transparency in concentrated markets because increased access to information on prices in these markets might lead to collusive activity. In particular, if the information exchange is of a private nature among competitors in a concentrated market.

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<sup>1</sup> In this contribution agreements will be understood as any agreed measure whether oral or written taken among competitors.

Additionally, the CFC has found that although trade associations can increase price transparency by facilitating the exchange of information among members and enforcing standards in advertising, the CFC has conducted investigations where those associations have acted limiting competition among their members by issuing price related recommendations or suggestions, and even issuing documents with specific prices to be charged for a given service. In most cases information has been compiled, processed, stored and published by the directive boards of those business associations.

Information transparency can enhance market efficiency by providing valuable information to economic agents during their decision making process, in particular over future investments and market strategies planning. Although more information is desirable, the CFC has sometimes sanctioned the exchange of information in this type of markets because it has found that in most cases it leads to collusive agreements.

3. *What factors and market characteristics do you take into consideration when assessing if transparency is a competition enhancing factor or not? Please illustrate your remarks with actual situations.*

When transparency might become a competition concern, the CFC examines whether the exchange of information has as purpose or effect to fix, raise, or manipulate the purchase or sale price among competitors. If so, this type of exchange of information is considered a violation of Article 9 of the Federal Law of Economic Competition (hereinafter FLEC).

## **2. Information Exchanges between Competitors**

1. *When are information exchanges amongst competitors permissible in your country? In what circumstances an exchange of information between competitors can be pro-competitive?*

There is no *per se* approach for the exchange of information in general; a case-by-case approach is fundamental for the assessment of whether an information exchange system is restrictive of competition. However, section I of Article 9 of the FLEC provides that any exchange of information among competitors with the purpose (object) or effect of fixing or manipulating the purchase or sale price of goods and services constitutes a *per se* infringement of the law.

2. *If information exchanges restrict competition, will they restrict competition by 'effect'? Or will they restrict competition by 'object' or constitute a per se infringement?*

See answer 7 above.

3. *In order to establish an infringement, is it necessary to prove that firms agreed to share information? Or can the mere fact that they exchanged information be sufficient to establish a competition law violation? Does your competition law apply to a mere concerted practice of exchanging information among competitors?*

In the FLEC, there is not a *per se* approach when analyzing the exchange of information in general, however, a case by case approach must be considered to determined whether the exchange of information has been implemented with the purpose or effect of fixing or manipulating the purchase or sale price of goods and services. In this regard Section I of Article 9 of the FLEC provides that any exchange of information among competitors with the purpose or effect of fixing or manipulating the purchase or sale price of goods and services constitutes a *per se* violation. There is no need to prove any previous agreement.

4. *What factors can be used to distinguish in these cases between unilateral actions by firms and coordinated actions that could potentially be subject to a prohibition against unlawful agreements? Is reciprocity required to find that information exchanges are unlawful? Conversely, could it be unlawful if one firm unilaterally makes information available to competitors or the market place, for example information about intended price increases or other future competitive conduct?*

The main factors used by the CFC to distinguish between unilateral and coordinated actions, regarding exchange of information, are its nature and scope. Generally, the CFC will closely scrutinize the exchange of sensitive information such as quantities produced and sold, prices and future price increasing, discounts or decisions to withdraw discounts, customer base, and delivery, to decide whether the exchange of information would be unlawful.

Reciprocity is required to find that information exchanges among competitors are unlawful. Generally, under the FLEC's terms, it would not be unlawful if one firm unilaterally makes information available to competitors or the market place. In these cases the CFC could analyze a conscious parallelism possibility.

5. *In your practice, have you developed "safe harbours" that can help the industry to structure information exchanges in a way which does not infringe competition law? Have you published guidelines in this area?*

The CFC has not published any specific guidelines on information exchange among competitors. Nevertheless, the FLEC provides a consultation procedure that has been used by economic agents to consult with the CFC whether a particular exchange of information could be considered a violation of the FLEC.

6. *Under what circumstances, if at all, would your competition authority prohibit information exchanges? If information sharing is not prohibited per se, what factors should be used to decide whether an information sharing practice was unlawful? Would it always be necessary to show that information sharing had anti-competitive effects?*

Article 9 of the FLEC provides that information exchange among competitors with the purpose or effect of fixing prices is prohibited *per se*. As there is no *per se* approach for the exchange of information in general, a case-by-case approach is fundamental for the assessment of whether it harms competition or not.

In order to assess whether a general exchange of information would be against the LFCE, the CFC would consider factors such as the structure of the market –how concentrated it is-, the nature and scope of the information exchanged, whether it is of a private nature or has a wider public impact, the kind of evidence available –minutes of meetings, emails, phone call reports-. Due to the formality of the Mexican legal system, it is always necessary to show, either by direct or by circumstantial evidence, that information exchange had an anticompetitive object or effect.

7. *More specifically, what role would the following factors (please feel free to extend the list) play in decisions to prohibit such practices?*
- a. *evidence of pro- or anti-competitive intent and/or effects;*

See answer to question 6 above.

- b. *general market structure and conditions affecting the probability of successful co-ordination (e.g. degree of concentration; height of barriers to entry/expansion/exit; degree of product differentiation; lumpiness in order volumes; etc.);*

See answer to question 6 above. It is also important to mention that information exchange mechanisms among competitors represent less risks to competition when they are implemented in markets with many competitors, no entry barriers and heterogeneous products; with information that is aggregate and publicly available; and when the system is operated by an independent party.

Therefore, the structure of the market becomes a relevant issue insomuch as it is likely to affect the probability that these sorts of contacts between competitors might end in collusive behavior.

- c. *degree to which such practices are widespread in the market;*

The degree to which information exchanges, with anti-competitive purposes, occur in the market is important to define the scope of the investigation, identify the possible suspects and the possible amount of the penalty. This factor is closely related to the type of product, market concentration and the existence of associations in the market.

- d. *evidence that information exchanges were adopted by agreement with competitors, versus being unilaterally deployed;*

When assessing possible anti-competitive behavior, the CFC is always more sensitive to the exchange of information among competitors pursuant to an agreement, rather than unilateral activity, because if one competitor unilaterally announces its price increase, it is unlikely that others would follow, due to market dynamics. And even if they did follow, easy entry may reinvigorate competition and defeat any price increase.

- e. *evidence that one or more transparency enhancers are being used to support an anticompetitive agreement; and*

In the AMPI Mazatlan case referred to above, information published on the web allowed CFC to determine the objective cause, based on which the investigation was opened, since it represented a strong indication of price fixing. Moreover, in the course of the investigation it was found that internet was the specific instrument to communicate the commissions and fees realtors should charge for their services as members of the association.

In the IMSS case, the publication of the bids' results eased the operation of the anticompetitive agreements, since it was the instrument to monitor the behavior of the economic agents involved in those agreements. This means that through this information, they monitored the positions of their competitors and punished any deviation from those agreements. On the other hand, some of this information was contained in a public database on the web, which was obtained by the CFC and used to determine how profits were shared among the economic agents involved in the anti-competitive agreements and determine collusive patterns.

- f. *characteristics of the information exchanged, such as its subject matter, level of detail, age and frequency;*

In the AMPI Mazatlan case, the internet allowed the identification of economic agents involved in anticompetitive practices and their characteristics. It also helped to define the market under investigation, the period in which the anticompetitive practice incurred; prices, rates and/or ranges fixed by economic agents.

g. *the public or private nature of the information exchanged.*

To date, the CFC has not conducted any investigation into the analysis of public or private nature of information exchanged between competitors.

8. *Do you distinguish between the following types of information exchanges? If you do, how do you assess of these different types of information exchanges?*

a. *“Direct” exchanges between competitors and “indirect” exchanges, i.e. exchanges which take place with the intermediation of a third party (e.g. a consultant or a trade association)?*

As stated before, article 9 of the LFCE forbids in all cases the exchange of information among competitors with the aim or effect of fixing prices (direct or indirect exchanges). Moreover, the Regulations to the FLEC, provide that instructions or recommendations issued by trade chambers and associations to their members may constitute circumstantial evidence of an absolute monopolistic practice (cartel activity), as described in article 9 of the LFCE.

Among others, there are two specific behaviors considered indicative of the performance of the acts referred to in article 9 of the LFCE:

*i. The purchase price offered in the national territory by two or more competitors of goods or services that could be exchanged internationally are significantly higher or lower than the international reference price, except when the difference results from the application of tax provisions, transport costs or distribution.*

*ii. Two or more competitors establish the same maximum or minimum prices for a good or service, or adhere to the sale or purchase price of a good or service issued by a trade association or chamber or any competitor.*

b. *“Horizontal” information exchanges (i.e. between companies on the same level of trade) and “vertical” information exchanges (i.e. between companies on different levels of trade)?*

Any agreement to exchange information horizontally is unlawful if it has the purpose or effect to fix or manipulate prices among competitors.

If the conduct is “vertical” it could be subject to analysis under the rule of reason, and in case of falling into one of the violations under Article 10 (Monopolistic Relative Practices) the information exchange shall be sanctioned by the CFC if it covers the prerequisites to be considered illegal.

c. *Information exchanges which are set up by companies and information exchanges which are favoured or required by the government or by other public entities?*

In case the information exchange is set up by companies, it becomes unlawful if the exchange has the purpose or effect to fix prices. On the other hand, the CFC analyzes on a case-by-case basis if the information exchange is required by the government or any other public entity.

d. *“Private” information exchanges (i.e. among suppliers only) and “public” information exchanges (i.e. among suppliers and buyers)?*

The FLEC prohibits any exchange of information among competitors with the purpose or effect of price fixing regardless of the private or public nature of the exchange.

9. *In your jurisdiction, to what degree and under what particular circumstances information exchanges are taken as circumstantial evidence of an anti-competitive agreement?*

Article 9 of the FLEC's regulations, provides that instructions or recommendations issued by business chambers and/or associations to their members may constitute evidence of an absolute monopolistic practice. Both higher prices offered in the country than the international price reference and recommendations on prices issued by associations to their members, can be used by the CFC as circumstantial evidence of an anti-competitive agreement. .

10. *How do you assess possible countervailing efficiencies? For example, the parties may argue that information exchanges can bring about productive efficiencies and increase welfare. If the conduct has plausible efficiencies, would that be sufficient to undermine an infringement case or would it be necessary to engage in a broader balancing exercise of restrictive effects and efficiencies?*

See answer to question 6 above.

### 3. Cases

*Please describe any recent case in which you have assessed the effect on competition of an information exchange scheme, whether the information exchange was part of a broader antitrust infringement (i.e. price fixing) or a stand-alone infringement of your competition rules.*

#### 3.1 *Real Estate Brokers, Chapala, Jalisco*

The case concerns an agreement between real estate agencies and brokers, and their trade association, with the purpose and effect of fixing the commission for services provided by real estate brokers and real estate professionals on the shore of Chapala Lake, Mexico, and the exchange information with the same purpose and effect.

Although cartel members denied the existence of the agreement, one of them applied to the leniency program and gave relevant information to the CFC proving the exchange of information among brokers in order to establish the commission for real estate professional services in the market.

This behavior proved that buyers and sellers who used the services provided by real estate brokers were charged a higher fee as a result of a price fixing agreement. Moreover, the few buyers and sellers who use brokers that are not part of the collusive agreement are also affected because they set their own fees using as a benchmark the fees charged by the cartel members.

Accordingly, on July 2009 the CFC decided the following:

- The brokers responsible should refrain from including fees or setting commissions for their profession services in its bylaws, regulations or any other document, including electronic media.
- Brokers were ordered to refrain from exchanging information concerning fees charged for their professional services.
- The CFC ordered that brokers would have to publish in a local media advertising regarding the cessation of the anti-competitive practice, that the trade association amended its rules and that it would refrain in the future from setting any fixed fee for these professional services.
- The CFC imposed an important fine to the cartel participants (agents, brokers, agencies and the trade association itself).

## NETHERLANDS

### 1. Introduction

This paper describes the general attitude of the Netherlands Competition Authority (NMa) towards the exchange of information. This introduction will discuss the policy (NMa Guidelines on the Cooperation between undertakings 2008)<sup>1</sup> that has been developed by the authority in this regard, as well as a summary of the most illustrative cases that the NMa has dealt with so far. The key question we will deal with in this paper will be at what point a certain type of information exchange is likely to violate Section 6 of the Dutch Competition Act (DCA)<sup>2</sup> and when it is not.

For the purpose of this paper, an information exchange is to be understood as a contact between two or more undertakings that are (actual or potential) competitors on a market. Such a contact must involve an exchange of information regardless of its form or content. This paper will restrict itself to a discussion of "pure" information exchanges that are not part of a cartel (i.e. contact between competitors where information exchange is the *only* form of collusion, such as a monitoring mechanism that enables the members of the cartel to monitor their behavior).

In practice, the NMa comes across numerous sorts of information exchange schemes. Although most of these exchanges of information are unlikely to restrict competition, some of them do. There are those which are in the 'black' area of Section 6 DCA and which are clearly prohibited, and there are those that are in the 'white' area of Section 6 DCA and which are clearly permitted. The difference between these two can be illustrated by the two examples from the NMa practice below.

The first case from the NMa practice is a "white" one. This case<sup>3</sup> concerns the mobile-communications sector. Here, the Dutch market research agency GfK collected, edited and dispersed information to the mobile operators active in the Netherlands. This information concerned recent, individualized information on the numbers and types of sold plans, outlet types, and brands of cell phone units. GfK gathered this information on its own initiative. GfK's core business is to sell market information gathered from sales figures of large retail stores and not directly from the mobile operators themselves. In an informal guidance letter, the NMa concluded that this type of information exchange is not likely to violate Section 6 of the DCA, since GfK did not restrict access to the information. Other, or new, players on the market were also able to gain access to the information on equal terms from GfK. It therefore did not concern a 'private exchange' between only a few mobile operators. The fact that GfK gathered the information on its own initiative also played a role, since the information exchange did not constitute an illegal type of collusion *between* competitors.

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<sup>1</sup> Netherlands Competition Authority (2008). Guidelines on cooperation between undertakings. [www.nmanet.nl](http://www.nmanet.nl).

<sup>2</sup> Section 6 DCA is similar to Article 101 of the Treaty on the Functioning of the European Union (TFEU) and prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition of competition on the Dutch market, or any part thereof.

<sup>3</sup> Not published.

Exchanges between competitors of information concerning future market behavior will generally be considered "black". This category is not so interesting for the purposes of this paper, since this category basically coincides with the other types of collusion that are considered to restrict competition by object and which are illegal regardless of their actual effects.

Between what is 'black' and 'white' lies an area that is 'grey'. Although it is acknowledged that information exchanges falling within the grey zone of Article 6 DCA could benefit competition by enhancing the level of transparency in the market, they may also restrict competition and violate Article 6 DCA, depending on the specific circumstances of the case. This 'grey' area is described in Chapter 4 of the *NMa Guidelines on the Cooperation between undertakings 2008*. NMa policy essentially follows the approach of the European Commission and the Community Courts with regard to information exchanges, as in the famous cases in *UK Agricultural Tractors Exchange*<sup>4</sup> and *Thyssen Stahl v Commission*<sup>5</sup>. In general, when assessing the competitive harm or benefits, regard should be had to:

- the information that is being exchanged: whether the information relates to a relevant competition parameter in the market.
- the market structure: information exchanges are more likely to harm competition on oligopolistic markets.
- the nature of the information exchange: whether the information exchanged is (i) public or private, (ii) individual/detailed or aggregated and (iii) recent or historical.
- the frequency of the information exchange: the information can, for example, be exchanged on a daily, weekly, monthly or annual basis.
- the purpose of the information exchange.

A good example of a "grey" case in which the NMa had to assess an information concerned the *Bicycle Case* from 2004. The facts of the case were as follows: SOM-F was a foundation established in 1998 by 9 participants, including the 5 largest bike manufacturers in the Netherlands. The goals of SOM-F were to collect market data about the bicycle trade business and to archive historical data. New participants had to be approved by the existing members and they were required to pay an admission fee. SOM-F cooperated with marketing research agency GfK. All participants would contribute in the expenses of SOM-F. GfK, in its turn, formed a panel of +/- 150 bicycle dealers to gather its information from. It concerned non-anonymous and non-historic (6-8 weeks old) information on brand, type, colour, market share as well as the average selling prices. This database was updated every 2 months.

In its Statement of Objections<sup>6</sup>, the NMa initially stated that the information exchange was a separate infringement of Article 6 DCA and restricted competition between the bicycle-producers.<sup>7</sup> The following circumstances were considered relevant in this regard: i) the bicycle market could be characterized as an oligopoly (5 participating bicycle producers covered 80% of the market); ii) there were substantial barriers to entry; and iii) the cost structure of the bicycle manufacturers were similar since they bought their

<sup>4</sup> UK Tractor Registration Exchange, OJ 1992, L68/19.

<sup>5</sup> Thyssen Stahl vs Commission, C-194/99.

<sup>6</sup> According to Dutch rules of administrative law, the investigation that is carried out by the Competition Department of NMa is closed by a Statement of Objections after which the case is handed over to the Legal Service of the NMa which is responsible for the adoption of the final decision after hearing the parties.

<sup>7</sup> In this case also other infringements were established, but these are not relevant for this discussion.



products from identical suppliers and the wages in the sector were covered by a collective labour agreement.

In its final decision, the NMa ultimately came to the conclusion that the information exchange did not constitute an infringement, because the source of the information exchanged between the parties was considered sufficiently public. Foreclosure of non-members was ultimately considered unlikely as the information was also accessible for every single member producer (albeit against higher costs). It was also questionable whether there really were substantial barriers to entry, since non-members managed to compete rather successfully on the market. This case is a good example of how the complexities that surround the subject of information exchange, may influence the outcome. It also reflects the fact that it is important to choose a rational economic approach when dealing with restrictions of competition by effect.

The theory of harm should be the starting point of any assessment, this will determine the way the elements of information exchange play a role in the assessment. For example, on markets only the exchange of very recent information can potentially harm competition, the exchange of less recent information is unlikely to cause any harm at all. Each information exchange scheme should therefore be assessed on its own merits. It may be difficult to collect enough evidence to prove any anti-competitive object or effects of the information exchange and competition authorities may face various difficulties or dilemmas when determining the potential harm of the exchange of information. In the next sections, several of these dilemmas and difficulties will be dealt with by analyzing two hypothetical cases<sup>8</sup>: first, the case of Widgets in section 2, and, second, the case of Blodgets in section 3. The case of Widgets will deal with some general dilemmas such as (i) the structure of the relevant market; (ii) possible pro-competitive effects of information exchange; and (iii) parameters of competition. In addition, some case-specific dilemmas will be assessed, such as (i) the fact that competitors also act as customers; (ii) post-pricing information exchange in a dynamic market; and (iii) exchange of information by an independent third party. The case of Blodgets will deal with dilemmas such as (i) having a competition parameter other than price; (ii) collecting evidence of exchanging information; (iii) pro-competitive effects; and (iv) the assessment of a third party. These cases are followed by some final remarks in section 4.

## **2. Case A “Widgets”**

### **2.1 *The relevant market and its characteristics***

In this case, the exchange of information in the market for widgets will be examined and the harm of this exchange of information will be assessed. The focus of this case is on widget manufacturers. Widgets can be used by end consumers on a daily basis, but are not a primary good. Widgets can be divided into three subproducts: X, Y and Z. These subproducts are homogenous, with the only difference being the quality levels. Widget manufacturers sell their widgets to their customers, who subsequently sell the widgets to end consumers. A considerable number of widget manufacturers is active, but the concentration ratio in the market is quite high. Barriers to entry into the widget market are high. Widget manufacturers need to raise a considerable amount of capital in order for them to become active in the widget market. Furthermore, manufacturers have long-standing relationships with their customers, something that can be challenging for newcomers. Production of widgets takes about three months, and supply and demand fluctuate strongly. Therefore, widget manufacturers purchase widgets from their competitors on a structural basis in order to meet their customers' demands. Because of this fluctuating supply and demand, prices are negotiated on a weekly bilateral basis and are not made public.

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<sup>8</sup> We use these cases in the NMacademy which is designed to introduce casehandlers to the more practical aspects of analyzing cases in teams.

In this hypothetical case, the relevant market for widgets is the Netherlands. In the relevant market, 5-10 undertakings are actually involved in information exchange. All of these undertakings are seen as competitors, and have a combined market share of 60 percent. These widget manufacturers are organized in the Association of Widgets Manufacturers (AWM), which has a significant influence in the market. During AWM meetings, manufacturers discuss the promotion of widgets, widget quality, and general market developments. The AWM also frequently distributes information among its members. There are several other organizations active that also act in the interest of widget manufacturers. Table 1 is a summary of the relevant information about the market for widgets.

**Table 1. The market for widgets**

Variable	Market for widgets
Number of firms	5-10 players
Combined market share	60 percent
Concentration ratio	60 percent
Product differentiation	Homogenous
Barriers to entry	High

## 2.2 *Information exchange and dilemmas in the widget market*

In the widget market, three types of information are exchanged. Firstly, undertakings exchange pre-pricing information. The undertakings concerned exchange this price information by telephone. The information is exchanged on a bilateral basis and can be considered private information. Simultaneously, the undertakings involved buy widgets from each other on a structural basis to fulfill the needs of their customers. In their role as buyers, the undertakings need to ask their competitors what prices they are asking. The fact that the manufacturers act as competitors as well as customers of each other needs to be taken into account in the analysis of information exchange. The analysis should establish whether the object of the information exchange is to reduce uncertainty about prices, or whether this is merely the way the widget market normally works.

Secondly, undertakings exchange post-pricing information. This information is based on price information of the previous month, and is distributed every quarter among the undertakings involved. This information enables the undertakings to compare their prices and performances with those of their competitors. The information is exchanged on a multilateral basis and is considered private and confidential information. Generally, information that is older than one year is considered not to be harmful to competition.<sup>9</sup> However, the widget market is a dynamic one, and this raises the question of at what point does exchanging post-pricing information on a quarterly basis in a dynamic market become potentially harmful?

Thirdly, the AWM distributes information about industry forecasts, production and total production capacity among its members. The information is exchanged on a multilateral basis, whereby public as well as private information is exchanged. The industry forecasts are distributed every month, while the information concerning total production capacity is distributed once a year, and the information about production is distributed every month. In order to assess this case, it needs to be determined whether the exchange of this kind of information is harmful to competition in this specific market.

<sup>9</sup> Faull, J. and Nikpay, A. (2007). *The EC Law of Competition*. Oxford: Oxford University Press, p. 735-736.

## 2.3 Assessing the general dilemmas of the information exchange

In order to determine the potential harm of the exchange of information in the widget market, the types of information exchanged and market structure needs to be assessed. While doing so, the dilemmas that have come up while describing the exchange of information also need to be analyzed. First, one needs to look at the general dilemmas.

### 2.3.1 Theoretical market versus the market structure in practice

In general, information exchange is most harmful in oligopolistic markets with a high concentration ratio, homogenous products, and high barriers to entry.<sup>10</sup> The relevant market for widgets presents some characteristics of traditional oligopolistic markets in which information exchange is most harmful, but it also presents other characteristics that differ from this type of market. In the case of widgets, i) the market share of the undertakings involved is high; ii) the concentration ratio is quite high; iii) widgets are a homogenous product; and iv) the barriers to entry are high. These are all characteristics of an oligopolistic market where information exchange can be harmful to competition.<sup>11</sup> In the market for widgets, the number of undertakings that are involved in exchanging information is high. This is not typical of oligopolistic markets, where often only a few undertakings are involved. The market for widgets can therefore not be considered a purely oligopolistic market. This will affect the assessment of the potential harm of information exchange in this market.

Given that the market structure of widgets is not oligopolistic, it needs to be determined whether the exchange of information can be harmful at all in this market. The European Commission has determined in previous cases what markets can be considered as highly concentrated. The Commission determined in *Wirtschaftvereinigung Stahl*<sup>12</sup> that a highly concentrated market is a market with less than twenty producers, where the four main producers have a market share of more than 50 percent, and where there are high barriers to entry and structural links between the producers. The Commission defined a highly concentrated market in several other cases as well. In *Fatty Acids*<sup>13</sup>, a highly concentrated market was determined as a market with 3 parties with a market share of 60 percent, in *UK Tractor Registration Exchange*<sup>14</sup> a market share of 88 percent and 8 parties involved was considered a highly concentrated market, and in *Steal Beams*<sup>15</sup>, in a highly concentrated market the largest 10 producers have a combined market share of 65 percent.<sup>16</sup> The Commission has also determined when a market is not considered highly concentrated and when information exchange is therefore unlikely to have an appreciable effect on competition. In *Eudim*<sup>17</sup>, the information exchange did not harm competition, because the market share of the parties involved was only 20 percent. In *Nuovo*<sup>18</sup>, the market share was 26 percent and the Commission determined that the parties involved could not eliminate competition. When comparing the market

<sup>10</sup> Whish, R. (2006). Information agreements. Swedish Competition Authority, The pros and cons of information sharing, p. 22-23, 30.

<sup>11</sup> See for example Whish, R. (2006). Information agreements. Swedish Competition Authority, The pros and cons of information sharing.

<sup>12</sup> *Wirtschaftvereinigung Stahl*, OJ 1998 L1/10.

<sup>13</sup> *Fatty Acids*, OJ 1987, L3/17.

<sup>14</sup> *UK Tractor Registration Exchange*, OJ 1992, L68/19.

<sup>15</sup> *Steal Beams*, OJ 1994, L116/1.

<sup>16</sup> Van Bael en Bellis (2005). Competition Law of the European Community, p. 422-423.

<sup>17</sup> *Eudim*, OJ 1996, C111/8.

<sup>18</sup> *Nuovo*, OJ 1984, L99/29.

structure of widgets to the Commission's cases, the market structure is much closer to a highly concentrated market in which information exchange can be harmful to competition than to a market that is determined not to be concentrated. Given the inability to determine the effect purely based on the level of concentration, in this case, the exchange of information needs to be assessed on its content.

### 2.3.2 *Pro-competitive effects under Article 101 § 3 TFEU*

The anti-competitive effects of the specific exchange of information in the case of widgets will be discussed in the next paragraph, but it is interesting to determine if there are also overriding pro-competitive aspects of the exchange of information in this specific case. Information sharing, targeted at consumers, could be a pro-competitive factor, but this is not the case in the market for widgets.<sup>19</sup> Other pro-competitive factors are i) firms being able to benchmark themselves against their competitors; ii) the improvement in allocative efficiency; iii) being able to better match supply and demand; iv) reducing the effects of adverse selection and moral hazard; v) achieving economies of scale and vi) the necessity for information exchange in the light of other horizontal agreements, like R&D joint ventures.<sup>20</sup> In the next paragraph, we will see that i) benchmarking themselves against their competitors and ii) being able to better match demand and supply can be a justification for the information exchange between competitors in the market for widgets. The other types of pro-competitive effects do not appear to exist in this case.

### 2.3.3 *Parameters of competition*

Information exchange between competitors can only cause harm to competition if it removes uncertainties about the way competitors will act and these anti-competitive aspects are not outweighed by pro-competitive aspects of the information exchange, as mentioned above.<sup>21</sup> Therefore, the information needs to be exchanged on a horizontal basis, which is the case in Case A, and the information exchanged needs to concern relevant competition parameters.<sup>22</sup> Manufacturers of widgets compete for customers on the basis of the price they ask for their widgets, the quantity of widgets they can deliver, and the quality of the widgets.

## 2.4 *Case specific assessment of the exchange of information*

We will now assess the case-specific dilemmas of the exchange of information in the market for widgets.

### 2.4.1 *Competitor versus customer*

In the case of widgets, the information about future prices is exchanged by undertakings that act as competitors on the downstream market, and also as customers on the upstream market. Because of these relationships, the undertakings are aware of each others' prices, which could significantly reduce the uncertainty about how their competitors will act. Therefore, it is important to decide whether the exchange of information has as its object or effect the restriction of competition. If the exchange of pre-pricing information in the market for widgets is assessed based on the sensitive nature of the information that is

<sup>19</sup> Bennett, M. and Collins, P. (2010). The law and economics of information sharing: the good, the bad and the ugly. *European Competition Journal*, august 2010, p. 314-318.

<sup>20</sup> Bennett, M. and Collins, P. (2010). The law and economics of information sharing: the good, the bad and the ugly. *European Competition Journal*, august 2010, p. 318-320.

<sup>21</sup> European Court of Justice, 4 June 2009, T-Mobile e.a. vs. NMa, case C-8/08.

<sup>22</sup> Loozen, E.M.H., 'T-Mobile Netherlands: het Hof schenkt klare wijn over de uitleg van een doelbeperving bij een economische benadering', *NtEr*, september 2009 I, 7.

being exchanged and the fact that it concerns a relevant competition parameter, the outcome would probably be that it is a violation of Article 101 § 1 TFEU by object.<sup>23</sup> Therefore, no further analysis would be needed. However, the exchange of information by the undertakings involved *could* be necessary in order to fulfill the needs of their customers in the downstream market. It could therefore be argued that an assessment of the effects of the information exchanged is needed in this case. However, even if the effects of the exchange of information were negative and thus harmful to competition, it could still be argued that this restriction is necessary and proportional because of specific market characteristics. It could even be argued that the fact that widget manufacturers purchase widgets from each other on the upstream market on a structural basis has pro-competitive effects which are covered by Article 101 § 3 TFEU. A pro-competitive effect could be that competitors are better able to match supply and demand when acting as customers.<sup>24</sup> If undertakings are not allowed to purchase widgets from their competitors, the undertakings would probably not be able to fulfill the demand of their own customers on the downstream market.

#### 2.4.2 *Post-pricing information exchange*

The more recent the information that is being exchanged, the more harmful it is to competition.<sup>25</sup> The Commission determines future information as the most sensitive information. Generally, historical information is unable to affect future conduct of the undertakings that exchange this kind of information and is therefore unlikely to be harmful to competition. In *UK Agricultural Tractor Exchange*, the Commission's general rule of thumb was that information can be considered historical when it dates back more than 12 months. This would mean that the post-pricing information that is exchanged in the market for widgets would be considered recent information and Article 101 § 1 TFEU would therefore be applicable. However, the Commission also held that assessing what is historical information depends on the industry affected; and needs to be done on a case-by-case basis. In *CEPI-Cartonboard*<sup>26</sup>, the Commission considered data of four weeks old historical data.<sup>27</sup> One could imagine that in this specific case concerning a dynamic market, there could be less harm in exchanging post-pricing information on a quarterly basis than in a market where prices are determined less frequently. Therefore, it has to be determined whether the exchange of post-pricing information reduces the uncertainty of competitors' future conduct. If this were the case, it would be important to consider possible pro-competitive effects of this type of information exchange in order to determine whether Article 101 § 3 TFEU is applicable. Firms could, for example, use the post-pricing information to benchmark themselves against competitors, which could promote innovation and efficiency and thus competition.<sup>28</sup>

#### 2.4.3 *Information exchanged by AWM*

The AWM distributes aggregated information concerning industry forecasts, which is public information. The information concerning industry forecasts is both aggregated information as well as public information. Exchanging aggregated information is more harmful in markets with homogenous

<sup>23</sup> Bennett, M. and Collins, P. (2010). The law and economics of information sharing: the good, the bad and the ugly. *European Competition Journal*, august 2010, p. 328-329.

<sup>24</sup> Bennett, M. and Collins, P. (2010). The law and economics of information sharing: the good, the bad and the ugly. *European Competition Journal*, august 2010, p. 318-319.

<sup>25</sup> Faull, J. and Nikpay, A. (2007). *The EC Law of Competition*. Oxford: Oxford University Press, p. 735.

<sup>26</sup> *CEPI-Cartonboard*, OJ 1996, C310/3.

<sup>27</sup> Capobianco, A. (2004). Information Exchange under EC Competition Law. *Common Market Law Review*, 41, p. 1265.

<sup>28</sup> Bennett, M. and Collins, P. (2010). The law and economics of information sharing: the good, the bad and the ugly. *European Competition Journal*, august 2010, p. 318.

products with uniform prices than in markets with heterogeneous products and individually negotiated prices.<sup>29</sup> Although widgets are homogenous, widget prices are not uniform because of the dynamism in the market. Therefore, together with the fact that the information is public, this type of information exchange will probably not be harmful. The AWM also distributes information relating to production and production capacity, which is private and confidential information. In theory, the exchange of information about production and production capacity is harmful to competition. The information is exchanged regarding an important competition parameter and is private and individual information and is distributed monthly. Therefore, it is likely to restrict competition.<sup>30</sup>

### 3. Case B: "Blodgets"

#### 3.1 *Relevant market and its characteristics*

In this case, the exchange of information in the market for blodgets is examined and the harm of this exchange of information is assessed. The focus of this case is on the manufacturers for the market of blodgets. Blodgets are a primary good, prices are fixed, and the market for blodgets is very distinct, compared to other manufactured products. There is a certain degree of product differentiation within the market of blodgets. It can be divided into two main groups, X-blodgets and Y-blodgets. Both X- and Y-blodgets come in various forms and shapes. Whereas some substitution on the supply side exists, there is no substitution on the demand side. The relevant geographic market is a specific region in the Netherlands, region "O". All of the undertakings involved supply X-blodgets; some also supply the more costly, more capital-intensive Y-blodgets. Y-blodgets cannot be produced without some production of X-blodgets. The optimal production of Y-blodgets requires an optimal production mix of both X- and Y-blodgets. Suppliers are bound to supply no more than an annually negotiable quota of blodgets. Supplying blodgets above the negotiated quota is possible, but risky, since there is no guarantee for compensation of the extra supplied blodgets. Since prices are fixed, competition in this market focuses on market shares (output). Budget negotiations use last years' output as reference point. Other characteristics of the market are described in the table below.

**Table 2: characteristics of the blodgets market**

Variable	Market for blodgets
Number of players	8 to 10 players, all of them are involved
Combined market share	95 percent
Concentration ratio biggest four firms (C4)	45 percent
Barriers to entry	Y-blodgets very high. X-blodgets lower, but not negligible.
Reasons for the entry barriers	Labor is scarce, investments are high and locations are rare
Competition from third parties	Small and fragmented and only on the market for X-blodgets
Demand for blodgets	Relatively stable and predictable
Customer preferences	Customers who purchase Y-blodgets tend to prefer buying X-blodgets from the same supplier
Prices	Government-regulated and therefore fixed and publicly available
Output levels	Not public
Regional blodget-meetings	Suppliers meet regularly and have been doing so for a long period of time

<sup>29</sup> RBB Economics (2009). Catch-22: The role for economics in the assessment of information exchanges under article 81. RBB Brief 31, p. 2.

<sup>30</sup> Faull, J. and Nikpay, A. (2007). The EC Law of Competition. Oxford: Oxford University Press, p. 734.

### 3.2 *Practices concerned*

The undertakings exchange information on current and past sales levels and on their level of production. The undertakings exchange information on a regular basis. This information is current (i.e. a few months old), individual (i.e. not aggregated), not public (i.e. or accessible by third parties) and very detailed. One could argue that, as a result of the information exchange, the undertakings have as much information about their competitors, as they do about themselves. The theory of harm is that the increased transparency facilitates collusion by enabling companies to reach a common understanding on the terms of coordination and by increasing internal and external stability.<sup>31</sup>

### 3.3 *Competition parameter?*

This paragraph elaborates on a few issues that may arise during the assessment of the merits of this case. As described in the introduction, the first issue to consider is whether the exchanged information concerns the competition parameter. The relevant parameters of competition define the potential harm of information exchange. If the information exchanged concerns relevant parameters of competition, this may create harm to competition. Information exchange about prices will almost certainly have an influence on the strategy of a certain undertaking. In the case of blodgets, prices and costs are not exchanged and since prices are fixed, it is unlikely that they would constitute a relevant competition parameter. Most antitrust cases concerning information exchange involve the exchange of price information. However, even if this is not the case, parameters other than price may still be affected. In the absence of relevant case law, assessment in such cases can be more challenging than in a case where price information is exchanged. The European Commission's decision in *UK Agricultural Tractors Exchange*<sup>32</sup> was the first case, which did not directly concern prices and, provides a relevant outline for analyzing cases which involve the exchange of parameters other than price information.<sup>33</sup>

Following the *UK Agricultural Tractors Exchange* framework, the negotiated amount of blodgets could be a relevant competition parameter because the undertakings will possibly change their strategy if they had information on their competitors negotiated amount of blodgets. However, in case B, this information is not exchanged by the undertakings. In cases in which information about sales and production of a competitor may lead to strategic actions by an undertaking in the short term (they know they are losing sales to a specific competitor and can enhance competition), or in the long term (not investing, extra investing) and can therefore harm or enhance competition, such information will constitute

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<sup>31</sup> Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", Brussels, SEC(2010) 528/2, paragraph 62: "*One way is that through information exchange companies may reach a common understanding on the terms of coordination, which can lead to a collusive outcome on the market. Information exchange can create mutually consistent expectations regarding the uncertainties present in the market. On this basis companies can then reach a common understanding on the terms of coordination of their competitive behaviour, even without an explicit agreement on coordination.*" And Bennett, M. and Collins, P. (2010). The law and economics of information sharing: the good, the bad and the ugly. European Competition Journal, august 2010, p. 322, states: "*Secondly, sharing information about past or current costs or demand may make it easier for firms to come to a tacit understanding on a focal point for coordination. For example, sharing detailed current price information provides firms with a clearer idea of each other's position in the market. This reduces the number of possible focal points on which price coordination may take place and therefore makes it easier to pick a single point.*"

<sup>32</sup> See Case IV/31.370 and 31.446 UK Agricultural Tractor Registration Exchange.

<sup>33</sup> Faull, J. and Nikpay, A. (2007). *The EC Law of Competition*. Oxford: Oxford University Press, p. 735 and A. Capobianco, "Information exchange under EC competition law" (2004)CMLR vol 41 at p 1249.

a relevant competition parameter<sup>34</sup> -particularly since the sales levels of the previous year are the starting point for negotiations for the next year. The European Commission condemned exchange of information which concerned the output and sales figures of individual firms as an infringement of competition law.<sup>35</sup> This argument may show that exchange of other competition parameters than price may constitute a violation of competition law and can be evaluated by the assessment criteria of past case law<sup>36</sup> and particularly the broad rules of thumb in the European Commissions *UK Agricultural Tractors Exchange* case decision.<sup>37</sup>

### 3.4 Collecting evidence on effects of information sharing

The European Commission's revised draft horizontal guidelines<sup>38</sup> have provided a clarification regarding the delineation of object and effect, and of how to assess the effects of information sharing.<sup>39</sup> The focus below attempts to provide some guidance in cases where the assessment of the (possible) effects of the exchanged information is problematic, or where collecting evidence is practically challenging because the information exchange goes way back and no proper benchmark can be made without measuring the effects of the information exchange. As case B is not a type of information exchange that constitutes a violation by object<sup>40</sup>, the possible (anti)competitive effects must be examined in order to determine whether the information exchange constitutes a violation of competition law. The competition authority will use statistical and **qualitative evidence to prove the violation**. Difficulties in this analysis may arise if the information exchange is institutionalized, has existed for a long time and/or if the relevant market has recently been liberalized.

In any of these cases, it is likely that it will be hard to gather reliable statistical evidence and that the competition authority will only be able to depend on **qualitative evidence** to show the (possible) counterfactual of the exchanged information. This is especially the case if it is not possible to benchmark the activities on the market where information has been exchanged with a similar market where the information is not exchanged. Collecting the necessary **qualitative evidence can be even more challenging under the above** circumstances, where the statements of customers and third parties will be on a "what-if basis" rather than experience-based or evidence-based answers. In such circumstances, the competition authority should focus on the possible effects of the violation in question and not only on collecting evidence on the behavior between the undertakings from the very start of the investigation. In a dawn raid, the competition authority should not only collect evidence of the behavior but also documents that may be

<sup>34</sup> Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", Brussels, SEC(2010) 528/2, paragraph 81.

<sup>35</sup> Wish. R., "*Competition Law*", third edition, p. 419.

<sup>36</sup> EEC v associated Lead Manufactures OJ [1979] L 21/16, [1979] 1 CMLR 464; Atka A/S v BP Kemi A/s OJ [1979] L 286/32, [1979] 3 CMLR 684; Benelux Flat Glass OJ [1984] L 212/13 [1985] 2 CMLR 350 and commission Decision, Wirtschaftvereinigung Stahl, O.J. 1998 L1/10.

<sup>37</sup> Capobianco, A. (2004). Information Exchange under EC Competition Law. *Common Market Law Review*, 41, p. 1276.

<sup>38</sup> "Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", Brussels, SEC(2010) 528/2.

<sup>39</sup> Bennett, M. and Collins, P. (2010). The law and economics of information sharing: the good, the bad and the ugly. *European Competition Journal*, august 2010, p. 312.

<sup>40</sup> The information shared by the undertakings concerned is not individual, detailed, confidential information on future intentions. Case law and decisional practice clearly states that this would be an infringement of Article 101 by object. See e.g. Bennett, M. and Collins, P. (2010). The law and economics of information sharing: the good, the bad and the ugly. *European Competition Journal*, august 2010, p. 328.



relevant for the (possible) effect-based assessment of the case. These documents may include strategic documents, competitor analysis, emails and memos which constitute evidence of the implementation of the exchanged information and of any anticompetitive object or effects of the information exchange. Such information could possibly prove that the undertaking's strategy is influenced by the exchanged information and whether this (could have) had a possible influence on competition parameters.

It may also be advisable to interrogate employees involved in the information exchange, the strategic plans of the undertaking or employees implementing strategic choices on production levels. Thus, interrogation should not only take place with people that enhance the information exchange, but also with people involved in implementing this information in the undertakings' strategic policy. If employees are interrogated in an early stage of the investigation, the information could be used in the further assessment of the (possible) effects and form a focused starting point for additional research. Another reason for holding these hearings at the beginning of the investigation is that this reduces the likelihood of coordination of the statements.

### **3.5 Justification under article 101 § 3 TFEU**

Another interesting issue concerning information exchange occurs when undertakings argue that there are justifications for the information exchange under article 101 § 3 TFEU. In case B, the undertakings may argue that the information exchange can have economic benefits. However, restrictions that go beyond what is necessary to achieve the possible efficiency gains generated by an information exchange do not meet the conditions of Article 101 § 3 TFEU. This argument may be refused by the competition authority by positing that the parties could, for example, exchange the information aggregated in a non-exclusive way.<sup>41</sup> Another dilemma under article 101 § 3 TFEU could arise if parties argue that the information exchange would lead to improvements in quality and service<sup>42</sup>, and is therefore beneficial for consumers. Parties may argue that consumers will not be harmed, but will benefit from the information exchange since they are guaranteed better quality and better service, while still having access to the right type of blodget. The undertakings may also argue that in order to guarantee access to blodget type Y, it is necessary to monitor customer preferences.

In case B, the competition authority may argue that competition is harmed by the information exchange, as the increased transparency facilitates collusion by enabling companies to reach a common understanding of the terms of coordination. The authority will then need to investigate whether the efficiencies claimed by the undertakings involved meet the conditions of Article 101 § 3 TFEU. As stated earlier, restrictions that go beyond what is necessary, do not meet these requirements. Since in case B, information could be exchanged in an aggregated manner, it is unlikely that the justification will meet the requirements. Furthermore, the information exchange would be less harmful if the information were also available to third parties. Therefore, regardless of its intent, the conduct is likely to constitute a violation of competition law. Regardless of the question whether the authority takes the circumstances in consideration in its final decision, it is also a question whether the authority must elaborate and rebut about the intent in its injunction. An argument like this may raise some communicative issues. It is important for the competition authority to address certain issues in the decisions and to be aware of the fact that undertakings may take issue with the absence of a malicious intent and the wish to improve quality and service to influence the public. The NMa's statutory task is straightforward: 'making markets work'. This may involve not only enforcing competition laws but also an enforcement policy which includes, to a certain extent, guidance. Communication is an important tool in the fight against anti-competitive conduct.

<sup>41</sup> "Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", Brussels, SEC(2010) 528/2, paragraph 94.

<sup>42</sup> Possible environmental efficiencies are not discussed here, but are extensively discussed in the NMa's paper on Environmental Issues.

### 3.6 Association or third party involved

A different dilemma in case B may arise if the manufacturers involved are organized in an association (ABM), and this association is involved in the information exchange through its advice to the undertakings to exchange information to improve quality and service. In that case, it can be challenging to prove whether or not the ABM should also be held responsible for the violation, especially if the ABM argues that they had no malicious intent and the undertakings are responsible for the information exchange beyond competition law restrictions. The suggestions made in paragraph 3.4 of this paper (about not only collecting evidence about the behaviour) may also be applicable in such a situation.

Another assessment may be necessary if a different undertaking (C), active on the consultancy market, is involved. Undertaking C is responsible for collecting the information sent to it on a regular basis by the individual undertakings. It processes the information, enhances the potential of this information for it to clarify the structure of the market, then sends this enhanced file to the undertakings. Can the competition authority take actions against undertaking C for its role in the information exchange? As stated in Ritter/Braun, any association of undertakings, whether or not it has legal personality, is subject to articles 101 and 102 TFEU, provided they exercise a commercial activity and may take action on their own initiative. The European Commission's decision in *AC Treuhand*<sup>43</sup> provides an extensive framework from which relevant considerations could be used to determine whether there is "own initiative" and whether undertaking C could be held liable as a facilitator. According to this framework, the secretarial support (collecting and sending out the information) of C is not sufficient to pass this test. However, the authority should also question whether C played a crucial role in the organization of the information-sharing.<sup>44</sup> In *AC Treuhand AG Commission*, this facilitator had authority over its members by auditing and calculating the deviations.<sup>45</sup> The dilemma in this case is whether the auditing of the information would be sufficient to meet this standard. A bigger dilemma however, is whether the authority should focus on C. In the absence of much case law (and no case law regarding to information exchange and facilitators), such an assessment could be challenging and intensive. A further consideration is that, although the possible fine may not be very high, the symbolic value could be considerable.

## 4. Conclusions

Although there are cases that are clearly within the "black" area or the "white" area of competition law, many cases on information exchanges are "grey". European competition law provides useful guidelines for the assessment of information exchange schemes for the assessment of these sorts of cases, particularly the *UK Agricultural Tractors Exchange* decision is practically useful as it offers a practical framework in these scenarios described in the cases widgets and blodgets.

First, the market structure needs to be determined and assessed in order to discover whether it resembles an oligopolistic market. Second, the type of information exchange needs to be determined, and the general and case-specific dilemmas need to be clarified and assessed. These elements of the information exchange must be assessed in the light of the theory of harm that is the starting point of any assessment. It is essential to establish whether the characteristics of the information exchange are such that, given the specific market circumstances, the exchange can potentially harm competition. Finally, when one is assessing an exchange of information, one must always be aware of any possible pro-competitive effects the exchange can have. A case-by-case analysis implies that every situation requires a full investigation of all the economic facts and circumstances in order to determine whether the information exchange violates

<sup>43</sup> Commissions Decision 10 December 2003, Case COMP/E-2/37.857 – Organic peroxides.

<sup>44</sup> Commissions Decision 10 December 2003, Case COMP/E-2/37.857 – Organic peroxides , Paragraph 95.

<sup>45</sup> Commissions Decision 10 December 2003, Case COMP/E-2/37.857 – Organic peroxides , Paragraph 95.

competition laws. This assessment may raise many questions. In the two hypothetical cases described above, we elaborated on some of those questions and dilemmas, and we presented some considerations. The widget case showed that each aspect of an information exchange needs to be considered and that the importance of these aspects varies per case. Even the exchange of fairly recent price information, which would normally be seen as a restriction of competition by object, might not be capable of restricting competition and in some circumstances, have pro-competitive effects. The blodget case was used to show that exchanges of information relating to competition parameters other than price can still restrict competition. The blodget case also showed that collecting evidence of the implementation of the exchanged information and of any anticompetitive object or effects of the information exchange can be very challenging in certain circumstances. Finally, parties to an information exchange scheme might (justifiably) claim certain benefits under Article 101 § 3 TFEU.



## POLAND

### Summary

Present paper examines the case-law of the President of the Polish Office of Competition and Consumer Protection (UOKiK) with respect to the information sharing<sup>1</sup>. It is divided into three main parts. First part offers preliminary remarks on the concepts of information sharing and market transparency. Subsequent part is devoted to the case-law of the President of the UOKiK concerning information sharing directly between competitors, as well as within trade associations. The findings of this part are mainly based on the analysis of the recent decision of the President of the UOKiK in the cement cartel case which resulted in the imposition of the highest fines in the twenty years history of the Office. Finally, the last part contains concluding remarks.

### 1. General effects of enhanced price transparency

Information *sensu largo* is considered beneficial to the functioning of all competitors, as well as consumers on the market, and thus to the competitive process. Existence and exchange of information increases transparency of the market. Market transparency for consumers is essential for competition: absent consumers' possibility to make informed price comparison, undertakings could essentially act as monopolists even in the markets with many professional participants<sup>2</sup>. Therefore disseminating information on prices and other market conditions among consumers is generally viewed as pro-competitive.

Exchange of information among competitors may also be beneficial. Sharing information on market conditions and trends may allow market participants to reduce market uncertainty and better match supply with demand. Keeping undertakings in the dark with respect to market conditions could result in significant inefficiencies, as more or less frequent occurrence of imbalances due to over- or undersupply would be likely. Undertakings may also exchange information on best practices, which allows their wider adoption and thus increases efficiency. Further examples of beneficial information exchange involve undertakings active in markets characterized by information asymmetry between producers and consumers, such as banking. Wary of opportunistic behavior, banks might be less willing to extend loans to new, untested customers, charging them higher rates to compensate for higher risk, and thus increasing switching costs. Exchange of information among banks on their customers' behavior (credit history) results in greater competition, as all the banks have relevant information on the risk associated with a given customer, and can adjust their rates accordingly. Under such circumstances switching services providers is no longer associated with an artificial increase in price.

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<sup>1</sup> For general remarks see also: Jozwiak S. (Polish Office of Competition and Consumer Protection), Information sharing in the case law of the President of the Polish Office of Competition and Consumer Protection – the role of trade associations on the special example of the cement cartel decision, presented at: Amsterdam Center for Law & Economics' (ACLE) 6th annual Competition & Regulation Meeting: Information, Communication and Competition.

<sup>2</sup> Kühn K.U., Vives, X., Information Exchanges among Firms and their Impact on Competition, p. 92.

Increased transparency for competitors may, however, facilitate collusion. Anticompetitive exchange of information may adversely influence rivalry among undertakings in two basic ways. First, information exchanged may be forward-looking, revealing future behavior in the market, e.g. pricing strategies, and thus making it easier to agree on a common, cooperative strategy, at the expense of trading partners. Second, exchange may concern information on actual behavior, such as prices offered and quantities sold, making it easier to monitor actions of competitors and discipline those, who deviate from a collusive strategy. Agreements of the first type are rarely difficult to assess – their object and often effect are usually anticompetitive. The assessment of the second type of agreements is much more difficult - their anticompetitive potential depends on many facts influencing their effectiveness in sustaining collusion, e.g. type of information exchanged (historical or recent, aggregated or detailed/individualized) or market structure (tight oligopoly or atomistic, symmetric or asymmetric). This kind of information exchange is much more likely to be pursued for legitimate reasons than the former.

As a general rule, confirmed by the recent case-law of the President of the UOKiK, based on the jurisprudence of the Court of Justice of the European Union, agreements on the exchange of information are incompatible with the rules of competition if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted<sup>3</sup>.

Transparency of the market might not only be triggered by positive actions undertaken by the entrepreneurs, it might also result from the conditions of the market itself, such as symmetry and market concentration. In a transparent market, conscious parallelism may appear as a consequence of independent decisions of entrepreneurs concerning their prices and production volumes. While the effects of such parallelism may indeed be similar to those associated with agreements between competitors, the mechanism of obtaining those results is different<sup>4</sup>. In oligopolistic markets, where the number of undertakings is limited, information about the relevant policy of competitors is relatively easily accessible. However, should information exchanges occur in such markets, their anticompetitive effects are more likely.

Communication among competitors may have the object of fixing prices or sharing markets or customers, such exchanges run the risk of being investigated and, ultimately, fined as cartels. Similarly, information exchange might occur in a context of other anticompetitive practices, as a means of their preparation or implementation; these types of information exchanges are assessed as parts of the cartel<sup>5</sup>. Finally, information exchange might constitute a stand-alone infringement of the competition law rules. The President of the Polish Office of Competition and Consumer Protection so far considered *inter alia* information sharing as having price-fixing as its object, as one of the factors facilitating other anticompetitive practices, as well as applied competition law rules on anticompetitive agreements to the

<sup>3</sup> Decision of the President of the UOKiK, 8 December 2009, ref. nr DOK-7/2009, par. 490, compare: Subsection 2.1 here-below. See: ECJ, 28 May 1998, *John Deere Ltd v. Commission*, C-7/95, par.: 90 and ECJ, 2 October 2003, *Thyssen Stahl AG v. Commission*, C-194/99, par.: 81, as well as ECJ, 23 November 2006, *Asnef-Equifax v. Ausbanc*, C-238/05, par.: 51.

<sup>4</sup> A good example in this respect constitutes the decision of the President of the Polish Office of Competition and Consumer Protection of 22 April 2005 (ref. nr RPZ-11/2005). The President of the Office decided that aligning of prices for fuels by local gas stations resulted from parallel actions by the undertakings which “cannot be deprived of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors” (see: ECJ, 14 July 1981, *Gerhard Züchner v. Bayerische Vereinsbank AG*, 172/80). In this case, the parallelism was due to publicly available information about fuel prices at gas stations, displayed on pylons, easily seen from a distance. See also: Fornalczyk A., *Economic Approach to Counteracting Cartels*, Yearbook of Antitrust and Regulatory Studies 2009, nr 2(2), p. 37- 47.

<sup>5</sup> European Commission, *Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, 2010.

practices of information sharing by the undertakings constituting separate infringements, however committed within a cartel.

Article 6(1) of the Polish Act of 16 February 2007 on Competition and Consumer Protection<sup>6</sup> (hereinafter also referred to as Antimonopoly Act) prohibits agreements which have as their object or effect elimination, restriction or any other infringement of competition in the relevant market. Upon a broad legal definition, ‘agreements’ mean: i) agreements concluded between undertakings, between associations thereof and between undertakings and their associations, or certain provisions of such agreements, ii) concerted practices undertaken in any form by two or more undertakings or associations thereof, iii) resolutions or other acts of associations of undertakings or their statutory organs (Article 4(1.5) of the Antimonopoly Act).

Information sharing agreements perceived as stand-alone competition law infringements usually demand effects-based analyses (except for the exchange of individualized data on intended future prices or quantities, or other exchanges, which are considered as restrictions of competition by object)<sup>7</sup>, to be pursued by the competition authorities *in casu*; on a case-by-case basis<sup>8</sup>.

According to the case-law of the President of the UOKiK when scrutinizing information sharing agreements, primarily the three groups of the following factors should be analyzed: (i) the economic conditions of the relevant market, (ii) the characteristics of the system of the exchange of the information, as well as (iii) the types of information exchanged need to be scrutinized<sup>9</sup>.

It should be also noted that the historical circumstances and conditions of the functioning of a given sector in the past might certainly influence its [proneness](#) to anticompetitive exchange of information between competitors active thereon. Similarly, these factors might affect the level of transparency on the markets, by increasing it, still prior to the exchange of information taking place. Especially the conditions of the functioning of some (strategic) sectors in the centrally-planned economies might have a bearing on their development after the transition into the market economies.

There are different channels by which information may be exchanged between the undertakings. Direct contacts and meetings constitute one possible means of shearing information. Exchanges may also take place via intermediary of a common supplier. Communications may also take place within organized structures and institutions. Similarly, trade association, industry chambers and professional self-governments, especially when granting competitors opportunities to meet repeatedly, can contribute to the contacts taking place under their [auspices](#) spilling over into illegal anticompetitive activities<sup>10</sup>. What is more, it should be also noted that dissemination of information by independent third parties, such as e.g. consultancy firms, might also influence the transparency of the market<sup>11</sup>.

<sup>6</sup> O.J. 2007, Nr 50, Pos. 331, with changes.

<sup>7</sup> European Commission, Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2010.

<sup>8</sup> ECJ, 23 November 2006, *Asnef-Equifax v Ausbanc*, C-238/05, par.: 54.

<sup>9</sup> See also: Whish R., *Competition Law*, Oxford University Press 2009, p. 526.

<sup>10</sup> See e.g.: Bissocoli E. F., *Trade Associations and Information Exchange* under US Antitrust and EC Competition Law, *World Competition*, 23(1), p. 79-106 and references given therein.

<sup>11</sup> Compare: Capobianco A., *op. cit.*, p. 1261-1262.

## 2. Information exchanges between competitors

### 2.1 *Direct information exchange between competitors*

Information exchanges take place in different contexts. They might constitute an agreement, a concerted practice, or a decision of an association of undertakings. As it was already noted, also channels of communications may differ. Direct, horizontal, communications between competitors are often both amongst least sophisticated schemes and most anticompetitive ones.

In the decision of 8 December 2009, the President of the Polish Office of Competition and Consumer Protection for the first time charged the undertakings with the exchange of information, constituting a separate infringement of competition law<sup>12</sup>. Two leniency applications were filed during the proceedings. The antimonopoly proceedings were instituted on 28 December 2006. As a result thereof, in the decision of 8 December 2009 the President of the Office established that seven grey cement manufacturers, namely – Lafarge Cement S.A., Górażdże Cement S.A., Grupa Ożarów S.A., Cemex Polska Sp. z o.o., Dyckerhoff Polska Sp. z o.o., Cementownia Warta S.A., Cementownia Odra S.A., - the combined market share of which amounted to almost 100 % of the Polish market for production and sale of grey cement, concluded anticompetitive agreement consisting in (i) price-fixing, (ii) market sharing and (iii) exchange of confidential commercial information, at least as of 1998. The decision was issued on the basis of the provisions of both Polish Antimonopoly Act, as well as the Treaty on the functioning of the European Union<sup>13</sup>.

The President of the Office pursued the assessment of the effects of the information exchange in the market compared to the competitive situation occurring in the absence of the information sharing agreement<sup>14</sup> and analyzed the following factors: (i) the economic conditions of the relevant market, (ii) the characteristics of the system of information exchange, (iii) as well as the type of information exchanged, taking account of the case law of the European Commission and the Court of Justice of the European Union.

#### 2.1.1 *Characteristics of the relevant market*

As it was already underlined, competition restricting effects are more likely to occur in the oligopolistic markets, where products are homogenous, than in the markets of more atomistic structure, where products are differentiated<sup>15</sup>. The degree of transparency on this kind of markets is usually already relatively high even prior to information exchange. Accordingly, the characteristics of the relevant market on which the information exchange took place (the degree of concentration and the structure of the supply and demand sides on the market) were considered. According to the analysis pursued by the President of the UOKiK, the grey cement market in Poland constitutes a mature, relatively transparent oligopolistic market, with relatively high barriers to entry<sup>16</sup>. Similarly, although numerous different kinds of grey cement exist, which mainly differ in their properties, depending on proportion of the ingredients used for

<sup>12</sup> See: Decision ref. nr DOK-7/2009, point: 405.

<sup>13</sup> O.J. 9.5.2008, C 115/47.

<sup>14</sup> Compare: European Commission, Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007, C 215, p. 3-15, para: 45, see also: ECJ, 28 May 1998, John Deere Ltd v. Commission, C-7/95, par.: 75-77.

<sup>15</sup> See: Decision of the European Commission, 17 February 1992, UK Agricultural Tractor Registration Exchange, 92/157/CEE, see also: Whish R., op. cit., p. 527.

<sup>16</sup> Decision, ref. nr DOK-7/2009, point: 495.



their production, or according to the process of the production itself, the grey cement was qualified as a homogeneous product<sup>17</sup>.

It was also noted that the political and economic changes of 1989/1990 influenced the nature of cooperation between cement companies in Poland. Prior to the transformation, all cement manufacturers were members of *inter alia* Union of Cement Manufacturers, organization which centrally managed all cement companies in Poland. Economic decisions in relation to all member companies were taken by the Union. The arrangements between the cement companies concerning production and sales were a common practice and the government was aware of the process<sup>18</sup>. In the first years of political transformation, the cement sector in Poland underwent privatization and the main international cement manufacturers launched their production on the Polish market. In the early 1990s, at least 21 cement mills functioned on the market. Following the consolidation of the cement sector and transformations within particular groups, as well as consecutive takeovers and restructuring processes, in 2006 at least 13 cement mills remained on the market and one new mill was being built<sup>19</sup>. Moreover, the transformation also led to decisions being taken to establish a new association bringing together cement manufacturers, which in June 2005 received its current name: the Association of Cement Manufacturers (hereinafter also referred to as: SPC).

### 2.1.2 System of information exchange

Specific characteristic of the system of exchange of information were envisaged by the President of the UOKiK, i.e. (i) duration of the exchange and frequency of the exchange, (ii) availability of the system to third parties, (iii) as well as formal organization of the exchange<sup>20</sup>. It was established that at least as of 1998, the undertakings restored some of the mechanisms that they were familiar with in the period of centrally planned economy, namely agreements consisting in *inter alia* exchange of confidential commercial information.

The information was exchanged via intermediary of the Association of Cement Manufacturers and an industrial property law firm, as well as directly, between the undertakings concerned. Throughout the whole period covered by the decision (1998-2008), i.e. both in the period when information was exchanged via intermediary of the Association of Cement Manufacturers, and when the data was collected, cement producers also exchanged information concerning their current monthly sales in Poland directly within so-called "parallel system". Within the "parallel system", information exchange was mostly based on telephone conversations, which took place at the beginning of each month. In 2001 and 2002 exchange of information was related to volumes of sale per each 10 days per month<sup>21</sup>. The contacts between cement manufacturers within this system did not follow any specific pattern. The information was mainly exchanged by telephone, e-mail and fax. Cement manufacturers also used special pre-paid mobile phones. Moreover, under this system of direct information exchange, cement manufacturers appointed a coordinator of the exchange, who was selected from the staff of the undertakings<sup>22</sup>. The undertakings did not prepare any shared chart or data report on the sales of all cement companies.

<sup>17</sup> Compare: Commission Decision of 30 November 1994 (C.33.126 and C.33.322), and 11 November 1998 (IV/M.1157 – Skanska/Scancem).

<sup>18</sup> See: Decision ref. nr DOK-7/2009, point: 98.

<sup>19</sup> See: Decision ref. nr DOK-7/2009, point: 32.

<sup>20</sup> Compare: ECJ, 23 November 2006, Asnef-Equifax v Ausbanc, C-238/05, par. 51 – 60, ECJ, 2 October 2003, Thyssen Stahl AG v. Commission, C-194/99, par. 81.

<sup>21</sup> See: Decision ref. nr DOK-7/2009, points: 130-131.

<sup>22</sup> See: Decision ref. nr DOK-7/2009, points: 133-135.

### 2.1.3 Characteristics of information exchanged

Finally, the type (i.e. subject-matter), the level of aggregation, the level of detail, as well as the age of information exchanged was taken into consideration by the President of the UOKiK. Exchange of information about intentions on conduct to be pursued in the future is most likely to enable companies to reach an anticompetitive agreement. However, information on current conduct that serves as a comparison basis and reveals intentions on future conduct can also raise anticompetitive concerns<sup>23</sup>. It seems that as a general rule, exchange of (i) confidential, (ii) individual<sup>24</sup>, and (iii) future or current data<sup>25</sup>, by the competitors, if it is not found to be already restrictive by object, potentially has the restrictive effect on competition, as opposed to exchange of (i) public, (ii) aggregated or statistical, and (iii) historical data.

The information shared within the direct system of exchange constituted commercially sensitive data, as it *inter alia* concerned the volumes of production and sale. Data exchanged concerned individual volumes of production and sale of each undertaking. Moreover, information exchanged was current and as a rule concerned periods of one month. As it was already underlined, it also happened that competitors exchanged information directly every 10 days.

### 2.1.4 Recent Developments in the Polish Enforcement

On 21 September 2010, President of the Polish Office of Competition and Consumer Protection instituted antimonopoly proceedings concerning *inter alia* practices of information exchange by the undertakings operating on the mobile telephony market in Poland<sup>26</sup>. The subjects concerned by the proceedings are four mobile telephony operators who had formed a consortium jointly-bidding in a tender organized by the Polish regulator - Office of Electronic Communications for the mobile TV DVB-H standard allowing to operate in the wholesale market for the mobile TV services. The consortium lost the tender against a small alternative operator. The proceedings aim at examining the exchange of information between the four mobile telephony operators concerning the offers made by the tender-winner related to the mobile TV services. In particular, it will be verified whether the operators exchanged their views on the offers and carried out joint analysis of financial conditions and business value of the offers, as a result of which they agreed to refrain from negotiating with the winner, which - no contracts being concluded - eventually prevented Polish consumers' access to the mobile TV services.

## 2.2 Indirect information sharing

Trade associations<sup>27</sup> constitute forums for discussion of the issues of common interest for the representatives of many industries, benefiting their members and triggering efficiency of the market. Sharing of information constitutes an emanation *par excellence* of their statutory functions. Accordingly, such practices receive constantly growing attention from the competition authorities.

<sup>23</sup> European Commission, Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2010.

<sup>24</sup> See e.g.: European Commission, Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, O.J. 2007, C 215, p. 3-15, par. 51.

<sup>25</sup> See e.g.: *ibidem*.

<sup>26</sup> Ref. nr DOK2-410-00001/10. Consult: [http://www.uokik.gov.pl/aktualnosci.php?news\\_id=2246](http://www.uokik.gov.pl/aktualnosci.php?news_id=2246).

<sup>27</sup> Polish Antimonopoly Act in Article 4(1.2) advances a broad legal definition of "associations of undertakings" as encompassing chambers, associations and other organizations associating undertakings, as well as associations of such organizations. Hereinafter we also use the terms association, as well as trade association in this broad meaning.

Upon the case-law of the President of the UOKiK the following three patterns of the anticompetitive practices, mirroring different roles of trade associations with respect to their engagement in the infringement, may be identified:

- the practices pursued on the initiative of an association, which play the role of an initiator, or a leader,
- the practices with respect to which an association was only an executor of a strategy of associated entrepreneurs, and could have been established mainly for this reason,
- the practices which consisted in the participation of the associations in broader agreements with other associations or other undertakings<sup>28</sup>.

It is not only trade associations, however, which serve as conduits for information exchange. Such exchange is sometimes outsourced to external data providers, who gather information from participants of the system, aggregate and send it back to the originators.

### 2.2.1 *Association as an initiator or a leader of the anticompetitive practices*

The first pattern often concerns the markets where a larger number of undertakings exist, typically having each quite limited market power and/or where there exist the associations with a well established position, often finding their foundation directly in legal regulations or in traditionally important public policies, such as the associations constituting professional self-governments. The pattern is likely to occur for instance at the local level, where many associations act independently. In the decision of 29 November 1999, the President of the Polish Office of Competition and Consumer Protection fined the participants of a so-called *Lower-Silesian transportation cartel* who were jointly fixing prices of regular fare and reduced fare bus tickets for the national regular and express lines on the local Lower-Silesian market for intercity bus communication. The combined market shares of the undertakings amounted to 90%. The President of the UOKiK established that upon initiative of the National Chamber for Motor Vehicle Transportation and Shipments, Branch Office in Wrocław, the directors of the undertakings met and exchanged information on the price-lists to be implemented. This type of information exchanges was investigated and, ultimately, fined as cartel. The Antimonopoly Court in its judgment issued in the appeal against said decision underlined the role of the Chamber absence whose initiative the agreement would not have taken place and who played the role of its moderator<sup>29</sup>. In the appeal against the decision the undertakings claimed *inter alia* that no antitrust liability can be found as their conduct was determined by lawful public measures, i.e. that they were compelled by the provisions of Article 11(1) the Act of 15 November 1984 Transportation Law<sup>30</sup> to render public the information on prices they charge (so called state action defense). This defense was not sustained by the Court, which underlined the difference between making public the information on the prices that had already been implemented and exchanging information in order to jointly fix prices.

### 2.2.2 *Association as an executor of a strategy of associated undertakings*

The practices of the second pattern are often encountered in the markets where there is a relatively small number of undertakings, each with relatively high market power. The role of a trade association in the anticompetitive behavior on the markets of this kind may be entirely shaped by the competitors and

<sup>28</sup> See: OECD, Competition Committee, Trade Associations Policy Roundtable, Contribution of Poland, DAF/COMP(2007)45, p. 177-187.

<sup>29</sup> Judgment of the Antimonopoly Court of 7 February 2001, Ref. Nr XVII Ama 25/00, p.7.

<sup>30</sup> O.J. 2000, Nr 50, Pos. 601 with changes.

their policies. Therefore, members of the association should not escape antitrust enforcement by acting through the intermediary thereof, its role being purely instrumental.

Some practices of the information exchange by the participants of the abovementioned cement cartel represent the second pattern. In this case exchange of information took place on three different levels, i.e. via intermediary of (i) the Association of Cement Manufacturers and (ii) an industrial property law firm, in parallel confidential commercial information was also (iii) directly exchanged by the undertakings<sup>31</sup>.

The system of exchanging information through the Association of Cement Manufacturers (hereinafter also referred to as SPC) was developed in 1990 when the Association was established and was patterned on this taking place within the Union of Cement Manufacturers, established already under centrally planned-economy. Between 1994 and 2002, the Association collected detailed data on production volume of clinker and cement, total clinker sales, including export and cement sales in Poland and abroad. Throughout the years, the type of the data which was gathered and reported did not change considerably. On this basis SPC elaborated summaries containing commercially sensitive data related to individual producers which were subsequently, on a monthly basis, rendered accessible to the members of the Association<sup>32</sup>. Moreover, in this period, the Association participated also in exchange of the information on the basis of non-exclusionary disclosure rules. Accordingly, it elaborated annual summaries of the information received monthly, also containing data related to individual undertakings, which were rendered accessible to third parties. Finally, the SPC issued annual bulletins also containing individual information to which third parties had access.

Following decisions issued by the Bundeskartellamt in 2002 concerning the cement cartels in Germany<sup>33</sup>, the antitrust compliance of the information sharing system within SPC had been verified and in consequence thereof the system of exchange of information was changed<sup>34</sup>. Since January 2003 an industrial property law firm started collecting data from cement producers and preparing aggregated reports. According to new rules of the exchange system the data formerly submitted to the SPC was to be reported directly to the law firm which was required to treat this data in a confidential manner and not to make it available to the SPC and its members. On the basis of information received the law firm prepared monthly reports containing aggregated data on *inter alia* total clinker and cement production, total sales and export of clinker and cement per country, etc. The collected data was then submitted in the form of an aggregated report to the SPC, which made this data available to its members. Since 2005, aggregated monthly reports were made available on the SPC's website. After the end of a given year, the law firm prepared annual aggregated statistical bulletins and submitted them to the SPC. Moreover, once a year has passed after the end of a given year, the law firm prepared detailed annual statistical bulletins for this year and submitted these to the SPC (e.g. the bulletin of 2006 presented the data of 2004). These bulletins present individual data concerning particular undertakings. Therefore, it was established that the data exchanged via intermediary of the law firm was either current but aggregated, or individual but historical.

Since the role of the Association of Cement Manufacturers in the information exchange was solely instrumental and subordinated to the initiative of the undertakings, SPC was not found liable for the infringement. It was also established that information exchange system *via* the intermediary of an industrial

<sup>31</sup> See also: subsection 2.1.

<sup>32</sup> See: Decision ref. nr DOK-7/2009, points: 116-118.

<sup>33</sup> See: [http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003\\_07\\_23.php](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003_07_23.php). Compare also: Heitzer B., Unlawful forms of cooperation – case studies, presentation given during International Competition Law Forum, Warsaw, April 2009, available at: [http://forum.konsumenckieabc.pl/download/presentation\\_bernhard\\_heitzer\\_en.pdf](http://forum.konsumenckieabc.pl/download/presentation_bernhard_heitzer_en.pdf).

<sup>34</sup> See: Decision ref. nr DOK-7/2009, point: 123.

property law firm did not reduce or remove, to a significant degree, uncertainty between the undertakings and therefore did not constitute breach of competition law.

### 2.2.3 *Association directly participating in anticompetitive practices together with other associations or other undertakings*

The third of the mentioned patterns concerns active cooperation of associations between themselves or with other undertakings. Anticompetitive agreements of this kind might be concluded due to specific market structures' characteristics. Such agreements might be concluded by local trade associations with the aim of increasing the territorial scope of particular anticompetitive practices, already pursued locally, and thus ensuring their greater stability and reducing the risk of competitive entry of the undertakings acting in other parts of the country. In the decision of 7 June 2006 the President of the Office found that seven tax and financial advisers' associations<sup>35</sup> concluded an agreement restricting competition on the national market for tax advisory services, consisting in direct or indirect fixing of prices by publishing price lists, based on surveys among tax advisers, for tax advisory services in the monthly magazine „Tax Advisers Forum”.

### 2.2.4 *Information exchange via outside service providers*

Undertakings may choose to use an external data provider to exchange information for several reasons. They may be afraid that contacts within a trade association are more likely to be questioned by competition authorities, may consider external firm as more professional, or trade association may simply not exist in a given sector.

An interesting case concerning this type of information exchange was recently considered by the competition authority in the hotel industry. The exchange was organized by an international firm, which offers its services to hotels all over the world and serves several large hotel chains. Hotels in a given town, which participated in a system, would daily send information on occupancy rate, average daily rate and revenue per available room to the service provider. The information would be then aggregated – by calculating an average for all participants – and sent back in that form the next day. The system drew attention of the competition authority following allegations of coordinated price hikes by local hotels, aimed at participants of a UN conference on climate change, which took place in Poznan in December 2008. It turned out that major players in the Poznan hotel market were participants in the system. In a market, preliminarily defined as higher class hotels, including three and four star ones, there was one clear leader, with almost half the market share, whose market position has been declining slightly, but steadily. Participants in the system accounted for about 60% of the market. A hypothesis emerged, that the information exchange system facilitated collusion in an oligopolistic market, where focal point for market strategies would be provided by the activities of the market leader.

After a careful look at the market, the hypothesis was rejected and the competition authority decided not to pursue the case, as the system was found unlikely to have anticompetitive effects. Participants of the system (4 firms) ran hotels of different standard (from 3 to 5 stars) and the data received were thus an aggregate of different products, which made it unlikely that any kind of precise information on the actions of competitors could be gleaned from the system. It was also taken into account, that a significant number of hotels (about 40% of the market) were not participants in the system (which could possibly undermine its anticompetitive effects) and if they were to join, it would further reduce the possibility of aggregate data being broken down into any meaningful information on the behavior of competitors. Finally, the system was not closed to new participants, which ruled out its possible use as a device to raise rivals' costs by denying them access to market information.

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<sup>35</sup> Decision ref. nr RKT-31/2006.

A noteworthy feature of the case seems to be that the competitive assessment of the system in question was to a very large extent context-dependent, with particular emphasis on the characteristics of the relevant geographic market. If there were few participants running hotels of the same standard, its effects could be anticompetitive. Therefore competitive assessment of the system may vary, even though it might operate everywhere in the same manner.

### **3. Conclusions**

The practices of information sharing between undertakings raise different controversies in Europe, as well as in Poland, where many debates are being ignited analyzing such activities from both legal, as well as economic perspective<sup>36</sup>. However, it is very difficult to derive a general conclusion on the pro- or anticompetitive nature of exchanging of information, which appear to be to the greatest extent case-specific. There is a growing need for guidance on whether, and under which conditions such practices might constitute an infringement itself of the competition law. Accordingly, competition authorities are increasingly offering sophisticated guidance for self-assessment. It is also important that any guidelines, regulations, or case-law in this respect is founded on a sound economic analysis

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<sup>36</sup> Compare: Capobianco A., *op. cit.*, p. 1252.

## SLOVENIA

### 1. Introduction

Information exchange could, under certain circumstances, be used as evidence for collusion. However, it is not automatically the case, as long as there is a non-collusive explanation for the information exchange that is not clearly indicating the attempt to collude. Consequently, it is difficult to distinguish between information exchanges that are neutral or even pro-competitive from those that restrict competition. For this reason a careful analysis and a case-by-case approach are required.

### 2. Information Exchanges between Competitors

Every undertaking must determine autonomously the policy which it intends to pursue on the market.

According to settled case-law of the Court of Justice of the European Union<sup>1</sup>, the requirement of autonomy precludes any direct or indirect contacts between undertakings that could either influence the conduct on the market of actual or potential competitors or reveal to such a competitor the conduct, which an operator has decided to follow itself or is intending to adopt on the market. Such contacts alternate the normal conditions for competition in the market.

In practice, the Competition Protection Office (hereinafter: CPO) has looked at different kinds of information exchange among competitors and assessed their potential as instruments of anticompetitive or pro-competitive nature.

Confidential information, such as prices, quantities and commercial strategies, cannot generally be disclosed to competitors. However, the requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors.

That's why the CPO carries out a case by case assessment of exchanges of information issue. When assessing the compatibility of the exchange of information between competitors with the competition rules and the potential anticompetitive object or effect of exchanging of such information, the CPO takes into consideration mainly the following factors:

- the purpose of exchange,
- type of the information exchanged; for example public or confidential or sensitive information,
- level of detail: aggregated or detailed information - the greater the detail, the greater the possibility to coordinate the actions on the market,
- frequency of exchange: the more frequent the data exchanges the easier and more timely for companies to adapt their strategies to strategies of their competitors,
- the characteristics of the product in question: product homogeneity or differentiated products,

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<sup>1</sup> See Case C-49/92 Commission v Anic Partecipazioni, paras 116 and 117 and Case C-238/05 Asnef-Equifax, para 52.

- level of market concentration: the size and number of companies present in the relevant markets - i.e. the more concentrated the market, the easier it is for competitors to collude,
- importance of the information exchanged for setting of prices, volumes or predicting (forecasting) commercial policies of other players,
- assessment of the efficiency benefits.

### 3. Legal provisions

Slovenian competition protection act (PRCA-1)<sup>2</sup> is based on EU concepts, prohibiting restrictive agreements and abuse of dominance, and requiring notification and approval of mergers.

The prohibition of restrictive agreements follows the terms of the TFEU. The law prohibits agreements and concerted practices between undertakings, as well as decisions taken by associations of undertakings, whose object or effect is to prevent, restrict, or distort competition [Article 6(1)].

Efficiency enhancing agreements, as well as certain types of agreements of minor importance, are not prohibited. The PRCA-1, similarly as Article 101 of the TFEU, provides that agreements that contribute to improving production or distribution of goods, or to promoting technical and economic progress, may be exempt from the prohibition. This exemption is not available if the agreement fails to afford consumers a fair share of the benefits, imposes restrictions which are not indispensable to obtaining the efficiencies, or affords the possibility of eliminating competition in a substantial part of the market that is the subject of the agreement [Article 6(3)].

### 4. Practice and cases of the CPO

In this section the CPO presents recent practice and cases relating to the exchange of information. So far, the CPO has not yet issued a decision establishing that the exchange of information alone had infringed Slovenian competition law. However, the CPO had regarded the exchange of information as a supporting evidence of a concerted practice or some other anti-competitive practises. There is also a borderline case involving the exchange of information described below, which was not assessed by the Supreme Court of Slovenia, as the CPO accepted the proposed commitments. Finally, in certain circumstances, exchange of information was established as neutral or pro-competitive, as in the case of information exchange between financial institutions.

#### 4.1 Collusion in the banking sector

In 2007 the CPO dealt with a case related to the introduction of an ATM withdrawal fee by several Slovenian commercial banks. It involved 4 major banks, which combined for a market share around 80% in Slovenia. They have set up a joint undertaking for ATM network management, as well as several debit card activities; moreover, all banks cash withdrawal machines are operated by this joint undertaking.

The CPO found that four banks, including the two state owned banks which were the largest banks in Slovenia, had acted in concert by charging the same fee for ATM withdrawals. Although there was no direct evidence of an agreement, evidence on which the CPO based its finding that the banks acted in concert included simultaneous announcement of the fee, followed by a second announcement changing the starting date of the fee; identical fees charged; and the same day for starting the charge for all four banks. There was no other reasonable explanation than that that the decision was taken collusively; furthermore

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<sup>2</sup> Prevention of the Restriction of Competition Act-1(PRCA-1), OG RS No. 36/2008 and PRCA-1A), OG RS No. 40/2009.



there was no evidence to suggest that the banks were not able to set different withdrawal fees. The CPO decision declared the fee null and void, and ordered the banks to abstain from further discussions or concerted actions regarding ATM withdrawal fees.

On the other side, the CPO concluded that the fifth largest bank in Slovenia, which is also a partner in the joint venture operating the ATM network, was not found in breach of the competition law. The bank had introduced the same ATM withdrawal fee, but during the investigation the CPO found that it was only following the lead of the other four major banks, since its decision and announcement to introduce the withdrawal fee came after the announcement of other banks made their decision regarding the amount and exact time of introducing the fee public. It had, therefore, learned about its rivals' intention through the media and consequently adopted a parallel pricing behaviour.

#### **4.2 Information exchange between financial institutions**

The Bank Association of Slovenia has contacted the CPO in order to verify the consistency of the established information system with the provisions of the competition rules.

The Bank Association of Slovenia presented the operation of the credit scoring information system *Sisbon*, which operates since January 2008. *Sisbon* is a system which provides information on the creditworthiness of clients of banks and savings banks and thus enables the banks to exchange and process personal client data, especially the data referring to their indebtedness and the regularity they demonstrate in meeting their contractual obligations. The system enables clients to easily prove their creditworthiness and simplifies the approval of loans.

The registry is accessible to all financial institutions on a non-discriminatory basis against the payment of a corresponding fee. The information<sup>3</sup> is aggregated in a manner that it is not possible to disclose the lender.

When analyzing the presented information system, the CPO established that the system can improve the supply of credit and banks will be capable to evaluate probability of repayment of potential borrowers better and more precisely. The borrowers, who are less likely to default, will thus bear lower cost of credit than they would, if the institutions did not share this information. The overall effect on consumers was evaluated as positive and the system should also motivate customers to better move between different credit providers and make it easier for potential new competitors to enter into the market.

#### **4.3 Price fixing of ski lift ticket prices**

On 11 May 2010, the CPO issued a decision establishing that at least from the year 2000 the undertakings managing six biggest ski resorts in Slovenia and the Association Ropeways of Slovenia, whose members were - all except one - the managers of those ski resorts, infringed the national and EU competition law by fixing the prices of ski lift tickets for recreational skiers in Slovenia.

In October 2009, the CPO initiated ex-officio proceedings against the undertakings involved for breach of competition rules regarding price fixing of ski lift tickets. Every year before the opening of a ski

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<sup>3</sup> Data structure: Customer's personal data, type of contract: current accounts with overdrafts, overdrafts, loans (personal/consumer loan, mortgage loan, home loan), guarantees, credit cards, revolving loans, other outstanding debts, positive and negative information on contract: positive: repaid debt, prepayments, changes of annuity, changes in maturity and negative criteria: cancellation-outstanding debt, arrears, (de)blockades, late payments.

season all of the above mentioned managers of ski resorts in Slovenia published tariffs on the websites of the ski resorts that they were managing. Furthermore all the tariffs were later also sent to the Association Ropeways of Slovenia, which made an aggregate tariff for each year and published it.

The CPO made an analysis of these tariffs. It showed that the prices for daily ski lift tickets for adults were similar or even the same although the concerned ski resorts differ in several ways (number and length of ski slopes, age of ski lifts...).

In its investigation, the CPO discovered that the undertakings shared information on prices at the meetings of the Association Ropeways of Slovenia, which served as a forum for discussion. The meetings took place every year before the beginning of the ski season. At these meetings the undertakings agreed on minimum, maximum and also on recommended prices for daily lift tickets. Furthermore, direct contacts between the undertakings involved concerning fixing of prices of ski lift tickets were discovered.

It was also discovered, that the undertakings were obliged to send the indicative prices to the Association before they published their tariffs on the websites of the ski resorts that they were managing. The undertakings thus put in place a system for monitoring that enabled them to be sure that each participant is complying with the agreements.

The CPO found that the undertakings involved agreed on prices for ski lift tickets at least from year 2000. The supporting evidences of agreements/concerted practices were the published tariffs and also the documentation the CPO gathered during the investigation regarding the information exchange. The ski resorts differ in several ways and the CPO found no justified cause for the same or similar prices for ski lift tickets on the six biggest ski resorts in Slovenia. Therefore the CPO concluded that the conduct of the undertakings concerned is prohibited both under Article 81 of the Treaty (Article 101 TFEU) as well as Article 6 of PRCA-1.

#### **4.4 Information exchange in the retail sector**

In 2007, the CPO conducted a market analysis of purchases and sales of daily consumer goods. Following a detailed investigation, ex-officio procedure was initiated in December 2007 concerning alleged concerted practises among three biggest retail companies (SPAR Slovenija d.o.o., Engrotuš d.d. and Mercator d.d.) regarding the price fixing as well as foreclosure of other retailers' (discount chains) access to Slovenian market.

Three biggest retailers in Slovenia had put in place, at least since 2005, a system of exchange of information regarding changes of suppliers' prices for daily consumer goods. The system functioned in the way that each retailer conditioned its approval of supplier's price change (increase or decrease) upon confirmation that the other two retailers would also approve and that those changes would become effective on the same date. In this case the CPO assessed the nature of anti-competitive practice as horizontal, because a supplier simply acted as an intermediary connecting the competing retailers.

The described practice was initiated by Mercator, which already in 2004 introduced a clause in its contracts with suppliers that suppliers' prices must be the same for all the retailers in Slovenia. It was evident from e-mails that were gathered as a part of the investigation that other two retailers have adopted the same system.

In its investigation, the CPO had gathered enough evidence to issue the statement of objections regarding only the first part of the alleged infringements. Regarding the second infringement the CPO could not gather enough evidence to conclusively prove the infringement. Afterwards, all the three retail companies presented to the CPO a set of commitments, which would remove all competition concerns

regarding both of the alleged infringements. On 7 May 2009, the CPO decided that the offered commitments were sufficient and was ready to adopt a decision.

In the statement of objections the CPO found that there was a concerted practice among the three biggest retailers in Slovenia concerning fixing of supply prices, since they fixed the starting price for negotiations with suppliers, as well as retail prices, since they are based on supply prices, by allowing one another to know in advance how and when each of them will accept the change of suppliers' prices.

The described practice could have led to the infringement of Article 81 of the Treaty (Article 101 TFEU) as well as the Slovenian Competition law, but the infringement was not conclusively proven.

The CPO came to conclusion that the exchange of information on the future increases of prices, the retailers' consent on changes of prices and the exact date on which these prices will become effective enabled the retailers to monitor each other. Furthermore, the described characteristics of the information exchanged and the market structure (oligopolistic market) had a potential to facilitate the collusion.

Commitments offered by the retailers were behavioural and introduced number of rules that retailers have to follow when dealing with their suppliers. They offered to provide the CPO an insight to the retailers' dealing with suppliers as well as to the price movements of daily consumer goods at the wholesale and retail level. This allows the CPO to monitor possible future infringements of competition rules.

Finally, taking into consideration the potential welfare losses of the consumers the CPO was heavily motivated to remedy the market situation with reasonable and necessary means with a view to eliminate the circumstances leading to the likelihood of the existence of infringement of competition rules.

## **5. Conclusions**

As already stated above, the CPO is assessing the restrictive nature of the exchange of information on a case by case basis. However, the CPO is aiming to prohibit only the exchanges of information, which have a potential to facilitate the unlawful collusion.

The outstanding issue for competition assessment in such cases is mainly to distinguish those exchanges of information that have a neutral or beneficial effect on efficiency from those which could prevent, restrict or distort competition. The line between both situations may be difficult to define. Nevertheless, it is necessary to consider the structure of the market, the nature and means of exchanged information, all in the light of the theory of harm as the starting point of any investigation.



## SPAIN

### 1. Introduction

One of the issues which has always drawn the attention from competition enforcers is undoubtedly information exchanges between competitors.

In a competitive market, companies must be able to set its trade and price policy in an independent way. Therefore, companies have to refrain from conducting any sensitive commercial information exchange between them that could affect free competition in the markets.

The Spanish experience in recent years has shown that there have been a few cases in which competitors have used their membership of a trade association to carry out commercial information exchanges, benefiting from the facilities an associative structure grants (meetings, minutes, representation of president and secretary, etc) and thus trying to avoid or, indeed, disguise the potential anticompetitive effects of such exchanges, alleging the legitimate object of their association contained in the statutes.

The purpose of this paper is to put forward the key characteristics of information exchanges between competitors carried through trade associations, by describing different cases that have been identified and sanctioned in Spain.

However, first of all, a brief description of the positive effects of information exchanges subject to certain limits will be carried out to shed some light on the “safe harbours” for associations and other forums of competitors.

### 2. General effects of enhanced price transparency

Enhanced price transparency could cut two ways. On the one hand, it could promote competition by enabling consumers to compare prices offered by sellers. On the other hand, it could facilitate coordination by making it easier to collude for higher prices and then to detect and punish deviations from agreed prices.

Within the business associations, initiatives that involve information exchanges between partners tend to be quite frequent and may be useful for companies to get relevant information in order to adopt unilaterally an autonomous and independent trade policy.

However the development by a trade association of databases, reports, statistical yearbooks, etc... from information provided by its partners could lead or be part of an agreement to fix prices, share markets or other trading conditions, falling therefore under the prohibitions of the Spanish Competition Act. Even by itself, the exchange of commercially sensitive information (price, quantity, customers, forecasts, etc) between members of the same sector, and therefore competitors, despite the absence of an agreement to act together after dissemination of such information, may have the capacity to interfere in their business strategic decisions, given that the mere access to such information reduces uncertainty about other partners (competitors) current and future reactions.

To the extent that competitors have access to commercially sensitive information (i.e. billing, pricing, investment, advertising expenses, costs, customers, etc...) the risk of distorting competition in the markets will arise, especially the more frequent and recent the exchanged data is.

In recent years, due to the various cases on information exchanges that have been investigated in Spain, the Spanish Competition Authority published last June a Report on competition and food industry ("Report on Competition and the Agrifood Sector"<sup>1</sup>) which focuses, among other things, on the pros and cons of information exchanges through partnerships.

The report highlights as one of the possible measures to improve competitive conditions in the agricultural sector improving access to information on key market data, especially through increasing price transparency across the value chain, activity that associations and public institutions are strengthening in recent times.

The aim of this type of measure is to remove possible imbalances in terms of information between those traders with less information or fewer possibilities for obtaining information due to their weak position on the market and other traders who are better informed due to their greater market power or greater financial, technical or technological capabilities, so that they can all take economic decisions with less risk and uncertainty

In this sense, as pointed out in this report, the markets throughout the value chain are not transparent in terms of prices and lack predictability. At the start of the value chain (that is production), in particular, increased transparency may be an important means of facilitating adaptation to fluctuations in the price of basic agricultural products and predicting the disconnection of those prices between the different phases of the chain, to the extent that a better knowledge of sector forecasts may help producers to adjust their production to the needs of the market in a more efficient way.

In other words, a better global vision of the activity of the different categories of participants on the market also provides useful information about levels and trends in prices throughout the food chain and this enables more pressure to be put on interested parties to act more quickly when it comes to passing on the prices. In addition, greater transparency makes it easier for consumers to compare the prices of foodstuffs between different retailers, thus increasing competitive pressure.

The same arguments to support price transparency in the food industry may be applied to sectors with similar imbalances along their production chain.

Nevertheless, it has to be pointed out that greater transparency is not automatically associated with a better functioning market. Excessive transparency may make it easier for competitors to align their terms and conditions, with similar effects to concerted agreements. This is where competition enforcement must then come along to prevent price transparency from becoming a collusion facilitator.

To eliminate or at least reduce these risks, the report in the food industry (which is equally applicable to other sectors) identifies a number of conditions that both companies and associations must meet in order to prevent the exchange of information between associations and associates from being anticompetitive.

Specifically, the report puts the stress on the following measures:

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<sup>1</sup> Report on Competition and the AgrifoodSector" "http://www.cncompetencia.es/Inicio/Informes/Informes/tabid/166/Default.aspx

- Avoid the existence of an unbundled exchange of information, because information disaggregated in excess increases the risk of price fixing, limiting production or sharing markets, since it may facilitate alignment of behaviour by competitors.
- Avoid that the information disseminated is referred to recent statistics, especially if the statistical universe is very small.
- The process of gathering information and making it available to business operators must be especially scrupulous to avoid highly disaggregated or commercially sensitive trade data between firms in the same sector.
- Thus it is preferable that the statistics used to increase transparency in the market come from public institutions, mainly through the implementation of Public Price Observatories that meet the above requirements.

In Spain, for instance, the Price Observatory of the Ministry for Environment, Agricultural and Marine Affairs has published sixteen reports related to prices in different sectors<sup>2</sup>, focusing on the margins in each step of the value chain of these products but keeping a sufficient degree of aggregation of the published data.

### **3. Recent antitrust cases about information exchanges**

In the field of information exchanges between competitors, it must be pointed out that in recent years the Spanish Competition Authority has dealt with some important cases.

Before describing some of these few cases and their main characteristics, it must be highlighted that the Spanish case law has drawn the line between two types of exchanges of information between competitors: on the one hand, information exchange between competitors as a single infringement of competition rules; on the other, information exchange between competitors as part of a cartel, that is, considered as a tool for achieving a comprehensive agreement between the members of the cartel.

As for the first case, when considering the exchange of information is *per se* a violation of competition rules, we note that both Spanish and Community law require that in determining whether an agreement on exchange of information between competing firms is restrictive of competition, it is necessary to address the economic and legal context in which it takes place and, in particular, the economic conditions in the market –highly concentrated or atomized structure- and the characteristics of the system, regarding the type of data exchanged. Therefore, it is the ability of each information exchange to have effects what becomes crucial in the assessment of competition enforcers and not the effects production itself or the intent/objective pursued by such action. Nevertheless, a recent overruling of the Spanish Courts on this issue has created a certain debate on whether effects or just the ability to have effects is the key element in determining the infringement, as discussed below.

We will now briefly summarise an example of each of the existing types of information exchanges mentioned before, on the basis of two recent antitrust cases in Spain.

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<sup>2</sup> The citrus, sheep, milk (April 2009) bread, tomato, banana, pimiento, eggs, courgette pear, apple (November 2009), rabbit, poultry, pork y bovine (December 2009) and olive oil sectors (January 2010).

### 3.1 *Information exchange between competitors as a single infringement of competition rules*

In relation to this first type of infringement, a recent example may be found in Case 588/05 Film Distributors<sup>3</sup>. The Spanish competition Authority fined the Federation of Film Distributors (FEDICINE) after considering that the development by the association of a data base that allowed its distribution companies to share information relevant to their business strategy (such as the planned dates for premieres, fundraising and attendance figures for admissions by type of movies, theatres and cities) represented a major obstacle to the competitive functioning of the market because such information was key for defining individual business strategies.

The infringements consisted, thus, in the information exchange which, by itself, was capable of distorting competition among film distributors.

### 3.2 *Information exchange between competitors as part of a cartel*

As far as the second type of infringement is concerned, which considers exchanges of information as a tool used by companies and associations to reach an anticompetitive agreement, there are two relevant cases which the CNC has dealt with very recently, one of them under the leniency program which came into force in Spain in February 2008.

#### 3.2.1 *The savings banks case*

In 2007 the CNC's Council fined the four largest savings banks (Bilbao Bizcaya Kutxa, Caja de Ahorros y Monte de Piedad de Guipuzkoa, Caja Vital and Caja Navarra) operating in northern Spain, particularly in the Basque Country, for carrying out an anticompetitive conduct consisting of a non-competition agreement and coordination of competitive behavior against third parties through the Industry Association to which they belonged (Federation of Savings Banks Basque-Navarre).

Specifically, and as a means of instrument in the global anticompetitive agreement, the savings banks agreed on four information-sharing system in order to keep their market share and create entry barriers for third parties:

- System to exchange strategic information on how to compete in the market
- Information exchange system on charges/fees for the use of cards
- Information exchange system on advertising campaigns on Investment Funds
- Information exchange system on activity related to big accounts.

The CNC's Council concluded on the existence of an infringement of article 1 of the Spanish competition Act (equivalent to art. 101 in the EC Treaty) and imposed a penalty on the four companies.

Nevertheless, the decision was appealed to the National Court of First Instance, whose ruling in December 2009 stated, among other things, that in the case of information exchange agreements between competitors it is necessary to check (an proof) whether they produce anticompetitive effects, an assessment which can not be detached from the circumstances in the case, such as the economic context, structure and functioning of the market conditions and nature of the goods or services affected.

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<sup>3</sup> <http://www.cncompetencia.es/Default.aspx?TabId=116&sTipoBusqueda=3&sNumero=588%2f05&sAmbito=+&sSector=+&sCalificacion=+&sEstado=+&PrPag=1&PagSel=1>



The ruling was based on the existing Community jurisprudence at the time and as set forth in the in the "Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements" (OJ 2001 / C 3 / 02), it considered that infringements due to their anticompetitive object can only take place on the grounds of price fixing, production limitation or market sharing agreements. However, this decision has created some debate within the Spanish legal system because the new draft "Guidelines on the Applicability of Article 101 of the EU Treaty to Horizontal Cooperation Agreements" of the European Commission (which have not yet been approved) recognize that information exchanges between competitors should be considered a restriction of competition because for their object given the likelihood of a collusive outcome of such information exchange.

### 3.2.2 *The manufacturers of bath and shower gel case*

This case was originated by a leniency application in 2008 against the leading manufacturers of bath and shower gel and was, in fact, the first sanctioning decision under the Leniency Program.

The Council of the CNC issued its decision on 21<sup>st</sup> January declaring the existence of a cartel, since late 2005, between the leading manufacturers of bath and shower gel.

The proceeding was initiated on the same date the leniency programme had come into effect in Spain. On that day, two of the cartel participants – HENKEL and SARA LEE – submitted respective statements to the CNC disclosing the existence of the cartel and their participation, as well as the involvement of PUIG, COLGATE and COLOMER.

The CNC conducted inspections in the offices of all companies involved in the cartel, after granting a conditional exemption to HENKEL as the first company to provide the CNC with evidence that allowed the competition authority to carry out investigation into the cartel. This also implied denial of the exemption for SARA LEE, although this company finally benefitted from a reduction in the amount of the fine in consideration of its additional evidence on the cartel of significant added value to the CNC's probe.

The cartel agreement was adopted after several meetings between the top executives of the aforesaid sector leaders and consisted in a disguised price hike in bath and shower gels (by more than 15%). The arrangement entailed phased implementation of change in the product format, without raising the product price, as a means of making an increase in the unit price paid by consumers.

In this sense, in the first meeting held one the companies shared its decision to reduce the format of its gel packs while maintaining price, inviting those present at the meeting to follow that policy and telling them it would be prepared to show the new formats in the following meetings.

The price increase was achieved by selling the gel in a smaller container than the one previously marketed, while maintaining the same price per container. Pursuant to the agreement, from June 2006 to May 2007 HENKEL, SARA LEE and PUIG reduced the capacity of the containers for their Fa, La Toja, Magno, Sanex, Lactovit, Kinesia, and Heno de Pravia brands by 15%. COLGATE did not reduce its containers by the agreed date.

For the object of this paper, the importance of this case lays on the fact that the information exchange which took place between competitors was the starting point for the formation of the cartel. The CNC Decision points out that this information exchange was aimed at achieving consensus on the reduction of size of the packaging gels, and so, given that the information exchange took place within the cartel, it worked as part of it, serving to successfully implement the action agreed.

The initial exchange of information was so important in the file to the extent that the CNC's Council concluded in its decision that although one of the competitors had only attended the first meeting (which

was a first exchange of information) it had to be assessed whether the access to such information could have led to an anticompetitive behavior by such company, thus taking part in the cartel.

#### **4. Final remarks**

As it has already been mentioned, in recent years the Spanish Competition Authority has dealt with several cases related to information exchanges, especially within trade associations. Most of these cases have ended with high fines for the companies and associations taking part in such information exchanges, given the ability of such type of infringement to distort competition in the markets.

For this reason, and in order to inform in particular trade associations in Spain about the risks of information exchanges, the Spanish Competition Authority has published a "Guide for Professional Associations" in which, among other things, a series of recommendations to these associations is included to avoid anticompetitive information exchanges are carried out at the expense of consumer welfare and well-functioning markets.

## TURKEY

### 1. Introduction

This contribution is intended to reflect the attitude of the Turkish Competition Authority (TCA) on exchange of information among competitors by considering the relevant decisions taken so far.<sup>1</sup> The contribution is mostly dependent on decisions of the Competition Board, which is the decision making organ of the TCA, and opinions forwarded by the TCA involving association of undertakings as exchange of information is mostly carried out with their involvement.

### 2. The Opinions and Decisions involving Exchange of Information between Competitors

Information exchange facilitated by “*associations of undertakings*” has been evaluated various times in the past under the Competition Act. For instance, the TCA has formulated its opinion as a response to an application by Turkish Cement Manufacturers’ Association (TCMA) which, after gathering relevant information monthly, made short, medium and long term projections concerning production, domestic sale, export and stocks of cement and then sent them to all cement manufacturers.<sup>2</sup> In this application, the TCMA asked the TCA to forward its opinion on its practice of gathering information, making projections and sending them to cement manufacturers.

The Opinion of the TCA was as follows:

*“...Together with the features of the cement market, information exchange systems including the interchanging of quantity data on an undertaking basis have the potential to facilitate the creation of structures and practices which the Competition Law aims to prevent. It is clear that in such market, frequent and detailed information exchange may be a means to create artificial market conditions containing abnormally transparent and stable flow of goods in order to eliminate the flexibility of the practices of economic units and risks inherently existing in competition. Similar information exchange systems carrying detailed information on an undertaking basis may lead to these consequences: determining undertakings’ conducts according to factors other than individual choices made under free competitive conditions, coordinating market behaviour, supervising the operation of anticompetitive structures.”*

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<sup>1</sup> This contribution repeats, updates and enriches the information on the topic already submitted in written contributions by the TCA mainly for the *Roundtable on Potential Pro-competitive and Anticompetitive Aspects of Trade/Business Associations* and partly for the *Roundtable on Facilitating Practices in Oligopolies* held in October 2007 within the Working Party No. 3 on Cooperation and Enforcement and Competition Committee respectively.

<sup>2</sup> The Opinion is dated 15.5.1998 and available in the following decision: *Cement* (dated 1.2.2002 and numbered 02-06/51-24). The decision is reassessed and retaken by the Competition Board upon repeal by the Council of State, the supreme administrative court. The new decision (dated 24.4.2006 and numbered 06-29/354-86) reiterates the findings of the initial decision regarding information exchange.

With these concerns, the TCA refused to clear the information exchange under Article 8<sup>3</sup> of the Competition Act and provided that following principles should be followed at data collection and distribution stages by the TCMA in order to eliminate its concerns and prevent infringements of competition law:

*“1. The tables showing the data related to quantities (production, sales, inventory, export, etc.) should be prepared in a manner that prevents their disclosure on the basis of an undertaking or groups of undertakings which form an economic unit. Therefore, these tables should contain only data related to total production, sales, import, export and inventory for each geographic region. If the number of groups of undertakings forming an economic unit is less than three in a region, the data related to that region should be shown in a table combined with the data from one of the neighboring regions so that it would not be possible to make calculations on an individual basis.<sup>4</sup>*

*2. Tables showing comparisons between undertakings depending on any kind of data should not be prepared.*

*3. Statistical data included in the tables should not be discussed in meetings where representatives of undertakings are present.*

*4. Any comment, analysis or advice, as well as the distributed statistics that may affect competitive behaviour of undertakings should not be given.*

*5. Tables showing the quantities of the production of each good in a certain period should be prepared in accordance with the principles related to the concealment of individual information. Therefore, product types should be divided into three groups at the most and published in regional sums.*

*6. Estimations related to the future conditions of prices, sales and use of capacity rates should not be made.<sup>5</sup>*

*7. Associations of Undertakings should ensure that officials responsible for the collection and tabling of data conceal competition sensitive information (in particular individual quantity data collected from undertakings) from members of the Association and third parties.*

*8. In case there is a possibility that competition sensitive information related to a particular undertaking could be inferred, summaries and total sums should not be published.*

*9. Tables showing monthly data should not be distributed in two months following the respective month. ...*

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<sup>3</sup> Article 8 of the Competition Act empowers the Competition Board to grant a negative clearance certificate indicating that an agreement, decision, practice or a merger and acquisition do not violate the Competition Act.

<sup>4</sup> Similar guidance is observed in subsequent decisions of the Competition Board. For instance, in *Chipboard and/or Fiberboard* decision (dated 24.4.2006 and numbered 06-29/365-94), it was accepted that exchange of statistical aggregate data or information concerning the past would not cause negative impact on competition.

<sup>5</sup> See also the explanations in ensuing decisions of the Competition Board. For example, in *Chipboard and/or Fiberboard* decision (dated 24.4.2006 and numbered 06-29/365-94) it has been stated that exchange of information concerning future competitive behaviours and strategies of the undertakings removes the uncertainty of the future behaviours thereby facilitating coordination of competitive behaviours and emergence of cooperative effects. Moreover, in *Petder* decision (dated 20.9.2007 and numbered 07-76/907-345) concerning collecting and publishing information by Petroleum Industry Association on developments and size of various markets such as fuel and LPG, it was considered that information exchanges on future forecasts might create the risk of coordination among rivals in oligopolistic markets.

10. *The relationships with public bodies that request statistical information (TSI [State Statistics Institute], SPO [State Planning Organisation], etc) may continue in the same way. ...*<sup>6</sup>

In another case<sup>7</sup> concerning a decision by Automobile Distributors' Association to prepare a website that would include, among others, statistical information on monthly and annual aggregate sales and import data for new automobiles and light commercial vehicles sold in Turkey, countrywide monthly and annual aggregate sales data and market shares on the basis of brands, brand based domestic-import distributions regarding the sales of automobiles and light commercial vehicles, the Competition Board emphasized market peculiarities. Accordingly, the Competition Board, especially, distinguished information exchanges in oligopolistic markets with homogenous products such as cement and fertilizer markets from less concentrated markets with heterogenous products.<sup>8</sup>

In this sense, the Competition Board took into account that concentration level of the motor vehicles market has decreased to a great extent compared to the past ten years as a result of the increase in the number of producers and in imports. Demand in the motor vehicle markets was also characterized by high volatility from year to year depending on the economic situation of the country, the stagnation of which in recent years (at that time) had deep impact in the motor vehicle market. Moreover, the products are far from being homogenous and competition in the market is not totally dependent on price. Apart from price; quality, efficient marketing, rapid response to changing demand, ability to develop new models, product variety and widespread service network constitute very important elements of competition in this market. With these facts in mind, the Competition Board thinks that probability of information exchange to result in coordination of competitive behaviours among market players is limited in motor vehicle sector. As a matter of fact, the information in the website would include only quantities sold and market shares of the brands in the whole country with no detailed statistics prepared on the basis of regions or cities. Furthermore, statistics regarding brands would contain aggregate sales data of automobiles and light commercial vehicles with no detailed information on price, quantity, and market shares in different sub-segments. Moreover, there would be no data including projections on prices, production, sales and capacity utilization rates. Therefore, these features of the statistical information also do not have the potential to coordinate the competitive behaviours in the market. As a result, the Competition Board cleared the decision by the Automobile Distributors' Association to prepare a website on the condition that it would not cause exchange of information and data that could prevent formation of a competitive market at gathering, publishing and distributing stages in the future. Furthermore, it should be mentioned that in an ensuing decision<sup>9</sup> of the Competition Board regarding exchange of monthly and weekly information on sales amounts of vehicles based on all submodels on the basis of individual undertakings (through Automotive Distributors' Association and Automotive Manufacturers Association and via individual

<sup>6</sup> When the entirety of the opinion of 15.5.1998 is taken into account, the explanations in one of the subsequent decisions of the Competition Board (*Turkish Ready Mixed Concrete Association*, dated 23.5.2007 and numbered 07-42/466-178) are also relevant where it was decided that there was no infringement of competition rules when annual production data of ready-mixed concrete were collected and used for only scientific purposes, they were not directly or indirectly exchanged or shared between the undertakings, and were kept only within the relevant association of undertakings. Moreover, according to the decision the studies of the association of undertakings do not violate the Competition Act provided that they are not carried out to enable exchange of sensitive competitive information among undertakings, data subject to such studies are either not published on a monthly basis or are published only after lapse of a certain period of time and secrecy of sales data of the individual undertakings are ensured.

<sup>7</sup> *Automotive Distributors' Association* decision (dated 15.4.2004 and numbered 04-26/287-65).

<sup>8</sup> For instance, in *Flat Steel* decision (dated 16.6.2009 and numbered 09-28/600-141), it was considered that information exchange may restrict competition and coordinate competitive behaviours in markets where there are few undertakings, high concentration levels and entry barriers as was the case in flat steel market.

<sup>9</sup> *Automotive Distributors' Association/Automotive Manufacturers Association* decision (dated 9.9.2009 and numbered 09-41/998-255).

communication among the members of these associations) and exchange of existing recommended price lists (via e-mails) it was considered that exchange of sales amounts did not lead to coordination effects as access to information in the automotive market was easy. Moreover, as the recommended price lists were announced on the websites of the undertakings, changes in the lists following price announcements was not regarded as restrictive of competition. Finally, it was considered that sharing of forecasts regarding sales amounts for the entirety of the market in terms of passenger cars, light commercial vehicles and commercial vehicles through meetings in Automotive Distributors' Association and Automotive Manufacturers Association, phone calls and e-mails aimed to determine the state of the sector and was not restricting or distorting competition when the existing structure of the automotive sector was considered.

The sensitivity of the Competition Board regarding information exchanges is justified when a decision is taken into account where grave violations of competition have been detected and which involved an association of undertakings gathering information sensitive for competition. In *Fertiliser*<sup>10</sup> decision, Association of Fertiliser Producers played an important role in exchanging information via meetings and a monthly statistical bulletin. For instance, regular Board of Directors meetings of the association in question were held with the participation of general managers of fertiliser producers. Some of these meetings were also held in headquarters of these producers. In these meetings, discussions were held on the state of supply and demand, sales policies, prices, costs, and sales systems. With the documents found during inspections by the TCA, it was seen that such information exchange that could lead to price fixing and market sharing was being carried out for years in meetings within the association with the participation of high level people of the relevant fertiliser producers. Moreover, publication of statistical information including data on individual producers enabled the producers to learn production and sale amounts of the rivals which contributed to the transparency in the market and the predictability of the behaviours of the rival undertakings. In another decision,<sup>11</sup> member rival undertakings, after coming together within the relevant association, exchanged information, took decisions and reached understandings having anti-competitive object and effect. It should be said that these enabled the undertakings to infringe the Competition Act via cartels fixing prices, purchase and sales conditions, and controlling supply.

A similar and a more recent decision in which the relevant association of undertakings also played an important role is the *White Meat*<sup>12</sup> decision. In this case, rival undertakings tried to increase market transparency by sharing future price lists to serve the cartel involving price fixing and restricting supply. Moreover, the practices of the association of undertakings facilitated the cartel. For instance, the association of undertakings increased transparency in the market by sharing confidential company information with the rival undertakings and facilitated the violations of competition. The association prepared a projection including confidential company information which contributed to restriction of supply.<sup>13</sup> Furthermore, the association submitted to the undertakings a plan regarding future production

<sup>10</sup> The decision is dated 8.2.2002 and numbered 02-07/57-26. Following this case, the Competition Board reiterated more or less the guidance it provided to TCMA in its Opinion of 15.5.1998 upon a request by Association of Fertiliser Producers regarding the publication of information in its Monthly Statistical Information Bulletin. See *Association of Fertiliser Producers* (dated 8.8.2002 and numbered 02-47/586-M) the content of which is available in *Ceramics* decision (dated 3.8.2007 and numbered 07-64/794-291). It should be said that the initial decision (dated 8.2.2002 and numbered 02-07/57-26) was reassessed and retaken by the Competition Board following repeal by the Council of State, the supreme administrative court. The new decision (dated 26.7.2007 and numbered 07-62/738-266) reiterates the findings of the initial decision regarding information exchange.

<sup>11</sup> *Cartel in Iron and Steel Market*, dated 14.10.2005 and numbered 05-68/958-259.

<sup>12</sup> The decision is dated 25.11.2009 and numbered 09-57/1393-362.

<sup>13</sup> The decision mentions that the activities of the association of undertakings concerning scientific data collection and its sharing with the undertakings are not competition concerns. Moreover, it is also not a competition concern to satisfy information requests from the public entities. The information requests by public entities concerned export data of the past belonging to individual undertakings or predictions of aggregate

quantity and controlled whether the undertakings complied with it. Besides increasing the transparency in the market, the association enabled a more advantageous position to some undertakings in the market vis-à-vis others by sending the results of the projection to those undertakings. These practices of the association were regarded as *per se* violation of the Competition Act and it was decided that exemption conditions were not satisfied.<sup>14</sup>

Apart from decisions involving association of undertakings, there are also various decisions of the Competition Board where exchanges of information among competing undertakings facilitated cartels. For instance, in *Chipboard and/or Fibreboard*<sup>15</sup> decision it was considered that the exchange of information was used to facilitate and set the stage for price fixing; in *Imported coal*<sup>16</sup> decision relevant undertakings exchanged information on the amount of coal in the market and in their inventories with an aim to fix the amount of supply; in *Aerated Concrete*<sup>17</sup> decision the rival undertakings sent price lists to each other as part of the attempts to fix sales prices and discounts and selling terms and they shared customers or business and exchanged information on prices and amounts with respect to individual customers. Finally, in *Ready-Mixed Concrete in Aegean Region*<sup>18</sup> decision, rival undertakings exchanged monthly and even daily information on sales amounts and market shares calculated based on them. It was considered that this would obviously increase the transparency in the market for ready-mixed concrete having an oligopolistic structure and lead to anti-competitive effect. The information exchange on market shares and sales amounts in this case was regarded as a presumption that a concerted practice to share the market existed.

### 3. Conclusion

To summarise<sup>19</sup> the attitude of the Competition Board regarding information exchanges, it can be argued that exchange of information sensitive for competition among competitors may limit competition. Information sensitive for competition relates to prices,<sup>20</sup> costs, sales, production, capacity utilization, stocks and information having the character of trade secrets which, when known by undertakings operating in a market, increase predictability of prospective behaviours of competitors.<sup>21</sup> Exchange of such

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production quantities of the following year whereas the projections of the association of undertakings in this case included more detailed information such as production quantities by individual undertakings.

<sup>14</sup> See also *International Transporter's Association - UND* (dated 28.1.2010 and numbered 10-10/94-42) and *Flat Steel* (dated 16.6.2009 and numbered 09-28/600-141) decisions where exemption was also denied. Information exchanged in the latter case concerned amount of purchase and sales in the domestic market and that of exports, and shipping premiums, all on a monthly basis. It was considered that information exchanged, which was enabled by minority shares and the resulting right to appoint one member in the board of directors in the relevant undertaking, had the object and effect of restricting competition and therefore violated the Competition Act.

<sup>15</sup> The decision is dated 22.5.2006 and numbered 06-35/441-113.

<sup>16</sup> The decision is dated 25.7.2006 and numbered 06-55/712-202.

<sup>17</sup> The decision is dated 30.5.2007 and numbered 06-37/477-129.

<sup>18</sup> The decision is dated 25.9.2008 and numbered 08-56/898-358.

<sup>19</sup> See *Automotive Distributors' Association* decision (dated 15.4.2004 and numbered 04-26/287-65). Another decision, namely *Petder* (dated 20.9.2007 and numbered 07-76/907-345) also refers to the guidance provided in this earlier decision.

<sup>20</sup> According to *Milk Market in Konya and Isparta* (dated 26.7.2006 and numbered 06-56/714-204) and *Chipboard and/or fibreboard* (dated 22.5.2006 and numbered 06-35/441-113) decisions, price is the most important variable and tool of the competitive strategy of the undertakings and its exchange is restrictive of competition.

<sup>21</sup> See also *Chipboard and/or Fiberboard* decision (dated 22.5.2006 and numbered 06-35/441-113). Similarly, in *Milk Market in Konya and Isparta* decision (dated 26.7.2006 and numbered 06-56/714-204) it

information among competitors increases transparency of the market and results in coordination of competitive behaviours. Therefore, exchange of such information should be limited and be far from creating coordination among competitors. While considering the impact of information exchanges, structure of the market and the characteristics of the information are important.<sup>22</sup> In competitive markets, flow of information is beneficial for manufacturers as well as consumers and enables the market to reach equilibrium in a shorter time period by transmitting signals regarding changes in supply and demand.<sup>23</sup> In oligopolistic markets, however, information exchange is a more sensitive matter. In these markets, it is easier for competitors to meet each other, reach agreement and implement it. Information exchange not only becomes effective in concluding anti-competitive agreements or entering into concerted practices, but also turns into an instrument in monitoring whether the relevant agreement or concerted practice is implemented.<sup>24</sup> Limitation or prevention of competition is easier in markets especially where the product is homogeneous. As product differentiation increases, it would be hard to agree on a price and cartel agreements would easily be broken. While making assessments regarding agreements and practices enabling information exchange, nature of the market, level of concentration, entry barriers, and characteristics of information exchanged gain importance.<sup>25</sup> This makes it necessary to take into account such agreements in their economic context and observe them carefully in oligopolistic markets. Finally, it could be argued that information exchanges are not regarded as *per se* violations of competition and case-by-case analysis is required.<sup>26</sup>

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is argued that exchange of such information would lead to awareness of competitive strategies of each other and therefore coordination of their market behaviours.

<sup>22</sup> For the same guidance, see also *International Transporter's Association - UND* (dated 28.1.2010 and numbered 10-10/94-42) and *Flat Steel* (dated 16.6.2009 and numbered 09-28/600-141) decisions.

<sup>23</sup> Among beneficial impacts of information exchange, it is argued in *Chipboard and/or Fiberboard* decision (dated 24.4.2006 and numbered 06-29/365-94) that exchange of statistical aggregate data or information concerning the past could contribute to efficiency by enabling planning of especially the investment strategy in a more correct manner and by preventing incorrect decisions. Moreover, another decision in the same market, namely *Chipboard and/or fiberboard* (dated 22.5.2006 and numbered 06-35/441-113), also mentions that information exchange may increase efficiency.

<sup>24</sup> The same guidance is also granted in *Petder* decision (dated 20.9.2007 and numbered 07-76/907-345) where it was taken into account that data regarding the past could be used to control compliance with an existing agreement or concerted practice. In *Ready-mixed concrete in Aegean Region* decision (dated 3.10.2006 and numbered 06-69/931-268) involving market sharing, the relevant undertakings regularly exchanged information on monthly and annual sales amounts to follow compliance with market shares agreed between the rival undertakings. In *Ceramics* decision (dated 3.8.2007 and numbered 07-64/794-291), exchange of information not only had the role of enabling the parties to reach an agreement but also enabled to detect and punish those who did not comply with it.

<sup>25</sup> According to *International Transporter's Association - UND* (dated 28.1.2010 and numbered 10-10/94-42) decision, frequency of the information exchange and its scope are also important in competitive analysis of the information exchange. Moreover, involvement of a great deal of the market players in the exchange of information may also increase its probability to facilitate potential cooperation.

<sup>26</sup> See *International Transporter's Association - UND* (dated 28.1.2010 and numbered 10-10/94-42) and *Automotive Distributors' Association/Automotive Manufacturers Association* decision (dated 9.9.2009 and numbered 09-41/998-255).



## UNITED KINGDOM<sup>1</sup>

### 1. Introduction

How we treat information sharing is not a trivial debate. Many sectors of our economies now depend upon ready access to detailed information and certain firms have made information their business. For example, some collect, analyse and resell information about the activities of firms in other sectors. The information they supply includes current sales figures, market shares and pricing data, giving market players immediate access to precise information on the performance of their competitors, including, for instance, the impact of events such as new product introductions, price changes and promotions. In addition, price comparison websites collate information from suppliers and other sources and provide consumers and competitors with immediate access to current information, including prices and terms. However, although information is easily available and accessible, the concept of ‘an era where individuals can access and transfer information freely’ is an oversimplified concept: there is general consensus that certain information flows can clearly harm market outcomes.

Despite a good deal of debate, at the moment the law and economics are not entirely clear or consonant with each other on some of these issues – in particular in the context of prohibitions on anticompetitive agreements on the issue of where to draw the line between so-called ‘object’ and ‘effect’ information sharing cases. This is further complicated due to different viewpoints among lawyers and economists, reflecting the potentially conflicting effects of information sharing. Ask a consumer lawyer the main problem with information, and he or she might reply that firms do not disclose enough of it and there is often too little transparency in the market for consumers to make informed decisions. However, ask a competition lawyer the same question and he or she might reply that firms disclose too much of it, with too much transparency limiting competition and harming consumers. Then, of course, if you ask an economist, the answer is too often ‘it depends’ – an answer that may be true, but not one that is particularly helpful for legal certainty or for businesses.

The European Commission’s revised draft horizontal guidelines have provided some very helpful clarification regarding the delineation of object and effect, and how one should assess the effects of information sharing.<sup>2</sup> This paper seeks to build on the work done in the guidelines in several ways. First, it provides an economic framework for the legal concepts of ‘object’ and ‘effect’ infringements. Second, it provides a wider view, drawing on examples from competition (including the UK market investigation regime) and consumer policy, of why information sharing may be beneficial. Third, it looks at the main economic theories of harm from information sharing, and seeks to clarify why the legal approach to reductions in uncertainty in markets is different from the economic approach. The final section seeks to delineate clearly the types of information sharing that should fall within the object and effect categories and suggests a possible public/private distinction for the types of ‘grey’ information sharing that are on the boundaries.

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<sup>1</sup> This paper is based on a paper published in the European Competition Journal under the authorship of Matthew Bennett and Philip Collins, both of the OFT, and on the experiences of the Competition Commission in the area of introducing information-based remedies.

<sup>2</sup> ‘Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements’, Brussels, SEC(2010) 528/2.

## 2. The framework for analysing horizontal arrangements – Object and effect

Economics, by its nature, depends on assumptions and facts. Different assumptions or facts can often produce different conclusions. This explains why economists are frequently loath to condemn an agreement, arrangement, conduct or practice by reference to a single specific rule. Economists sometimes argue that everything besides blatant price fixing and market sharing (and, indeed, sometimes even price fixing and market sharing) should be analysed on a case-by-case basis.

However, since investigations involve commitment of time and money for both firms and competition authorities, looking at every situation on a case-by-case analysis has two negative impacts.

First, a case-by-case analysis places a high cost and burden on firms, who may not be in a position, let alone wish, to carry out complex economic analysis for every individual situation. A requirement to undertake such an analysis for every situation may mean that firms simply do not engage in certain activities, even though some may provide benefits (Type I errors). So, quite apart from cost and practicalities, a case-by-case approach runs the risk of chilling beneficial firm activity, and thus being detrimental to a competitive economy.

Secondly, a case-by-case approach places a high burden on competition authorities and private claimants in bringing cases, which could result in under-enforcement and therefore insufficient deterrence of anticompetitive behaviour (Type II errors). Such concerns are likely to be more significant for less mature competition regimes or authorities with tight resource constraints, but nevertheless of concern to all regimes as they run the risk of detriment to a competitive economy.

As argued by Bennett et al<sup>3</sup>, the two considerations above provide an economic justification for grouping together similar types of agreements: for example, agreements which, on a case-by-case basis, are highly unlikely to be found anticompetitive; agreements which are highly likely to be found anticompetitive; and agreements for which there is no a priori grouping. In the EU, these distinctions are very similar to three legal distinctions: agreements falling outside of Article 101 entirely; ‘object’ agreements; and ‘effect’ agreements.

This economic perspective on the grouping of cases appears to fit broadly with the legal framework. Practices that are anticompetitive by ‘object’ are presumed anticompetitive. For these cases, a competition authority is only required to prove the existence of the agreement, arrangement or practice and is not required to provide any economic (or other) evidence of likely anticompetitive harm. It is sufficient to demonstrate that the agreement fits into the object category and hence breaches Article 101(1). However an object infringement can still be exempted from Article 101(1) if it meets all of the conditions under Article 101(3).

One important point to make is that it may be optimal, in policy terms, to have an agreement, arrangement or practice within the object category even if individual instances, based on their own facts and circumstances, provide benefits. What matters here is whether, more often than not, the practice will turn out to be harmful. Of course, the most difficult thing to do is to determine exactly what kinds of agreement, arrangement or practice should fall within the object category, and hence carry the presumption of harm. Whilst certain types of practices such as price setting may be straight forward, other types of practices such as the information sharing discussed within this paper, may be more complicated.

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<sup>3</sup> M Bennett, A Fletcher, E Giovannetti and D Stallibrass, ‘Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy’ in BE Hawk (ed), *International Antitrust Law & Policy: Fordham Competition Law 2009* (New York, Juris Publishing, 2010).

In order to determine whether information sharing should be classified as object or effect, it is necessary to consider both its potential benefits and costs.

### **3. The Good: When is information sharing beneficial/procompetitive?**

Before describing the benefits from information sharing, it is important to note that, although information sharing may create benefits, the same information may allow firms to collude and harm consumers. Thus, just because information sharing may generate benefits, it does not, in itself, create a justification for the activity. In this context, some types of information sharing may be prohibited by competition law even if they have the potential to generate economic benefits, notably where the activity infringes Article 101(1) by object or effect yet does not meet all the conditions for exemption contained in Article 101(3). Therefore it should be emphasised that, whilst the examples below provide benefits, they may also give rise to coordinated effects and there may be significant challenges in showing that the exemption conditions under Article 101(3) are met.

#### **3.1 Disclosure of information to consumers can be procompetitive**

Information can assist consumers to make sound purchasing choices, allowing them to make well-informed and well-reasoned decisions that reward those firms which best satisfy their needs. Markets work well when there are efficient interactions on both the consumer and the firm side. Well-informed and confident consumers can play a key role in promoting vigorous competition between firms.<sup>4</sup>

Asymmetric information (that is, one party having more information than another) is one of the three main ways in which markets can fail – the other ways being misuse of market power and externalities. In a competitive market, firms should strive to cater better to the information needs of consumers.<sup>5</sup> However, in order that consumers can provide the driving force behind competition between firms they need to be able to access, assess and act on relevant information:

Consumers must have access to information from individual firms that will allow them to make the most suitable choice for their needs. Information about offerings of goods or services may not always be made available to consumers in order to help them determine which good/service best suits their particular needs.<sup>6</sup>

Consumers must be able to assess the information available to them in order to compare firm offerings and pick the most suitable choice. Without clear information on each firm's offerings, this will not be possible. Indeed, even when the information on individual offerings for goods and services is available to consumers, it may still be difficult to make effective choices due to the way the information is

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<sup>4</sup> For a further discussion of this, see M Bennett, J Fingleton, A Fletcher, L Hurley and D Ruck. 'What Does Behavioral Economics Mean for Competition Policy?' (2010) 5(2) *Competition Policy International* 111.

<sup>5</sup> Examples of the way in which information plays a key role in ensuring consumers make well-informed and well-reasoned decisions are contained in 'Choice and Competition in Public Services. A Guide for Policy Makers', report prepared for the OFT by Frontier Economics (March 2010), OFT1214.

<sup>6</sup> In the OFT market study into personal banking accounts the OFT found that a significant number of customers do not know how much they actually pay in bank charges, either before or after they are incurred. The market study found that, while consumers incurred significant charges for exceeding the borrowing limits on their accounts (in the UK known as 'overdrafts'), many of the conditions for unauthorised overdraft borrowing, and the charges for doing so, were unknown by consumers and difficult to find in the standard terms and conditions used by banks. 'Personal Current Accounts in the UK: An OFT Market Study' (OFT, July 2008). The CC reached similar findings in relation to in Northern Ireland in its 2007 report 'Northern Irish Personal Banking'.

presented.<sup>7</sup> Certain services, in particular, are complicated, and simple information may leave out too much that is important and lead to choices being distorted; complex information may confuse and have the same effect. Having an intermediary available, such as a price comparison website, that shares relevant comparative information can be a solution to this.<sup>8</sup>

Consumers must be able to act on that assessment in order to exercise their choice. Even with all the information in front of them, individuals may not, in practice, exercise choice in the market.<sup>9</sup>

The problems discussed above are particularly prevalent in differentiated, complex product markets such as financial services, insurance and telecommunications. In these types of markets consumers are particularly sensitive to the way that pricing information is presented. This was seen in recent research commissioned by the OFT which showed that the way in which prices were presented had a significant impact on consumer consumption patterns.<sup>10</sup> Moreover, the economic literature also acknowledges that this absence of information may not only distort consumer behaviour but may also adversely impact competition and competitive outcomes.<sup>11</sup>

Firms might not always have incentives to provide the information that consumers need. There is a growing economic literature that suggests that, under certain circumstances, firms could have incentives to

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<sup>7</sup> See for example VG Morwitz, EA Greenleaf and EJ Johnson, 'Divide and Prosper: Consumers' Reactions to Partitioned Prices' (1998) 35 *Journal of Marketing Research* 453 find that, when prices are presented in parts, consumers' ability to recall the entire price for the good is diminished and demand is increased. Similarly, based on a natural field experiment they conducted using eBay auctions, T Hossain and J Morgan, 'Plus Shipping and Handling: Revenue (Non) Equivalence in Field Experiment on eBay' (2006) 6(2) *Advances in Economic Analysis and Policy* suggest that consumers treat the base price separately from the handling fee. See also 'Warning: Too Much Information Can Harm', final report by the Better Regulation Executive and National Consumer Council on maximising the positive impact of regulated information for consumers and markets (November 2007).

<sup>8</sup> It is important that the interests of intermediaries are aligned with those of consumers. A key finding of the Choice and Competition in Public Services Report was that the interests of intermediaries are 'not always aligned where there are significant sums of money to be made from a particular course of action. Intermediaries must be 'on side' of exercising the choice otherwise they will block the choice' (*supra* n 6).

<sup>9</sup> For example, there may be high transaction costs that may discourage them from making changes, or there may be geographical or supply-side constraints, such as long-term contracts, that prevent users from acting on their choice. Furthermore, behavioural biases also may play a role here. For example, if consumers are overconfident about their ability to act in the future, this can create inertia and a tendency to fail to act today. See Bennett *et al* (*supra* n 5).

<sup>10</sup> The research uses a controlled economic experiment to test five pricing practices, whereby the true price is provided in a complex way. The report found that all of the pricing practices have some adverse effect on consumer choice and that most of them negatively impact consumer welfare. It suggests that the root of the errors can be found in the existence of the behavioural biases, largely the endowment effect and cognitive errors. Office of Fair Trading, 'The Impact of Price Frames on Consumer Decision Making', Economic Discussion paper OFT 1226 (May 2010).

<sup>11</sup> The role of search costs in obstructing consumers' ability to access information, and the impact this has on competition, was shown nearly 40 years ago by Diamond, who found that when it is costly to search the market consumers may choose a firm randomly. The best response of firms is then to charge a monopoly price to these consumers. P Diamond, 'A Model of Price Adjustment' (1971) 3(2) *Journal of Economic Theory* 156. See also Klemperer, who finds that in a simple multi-period model with two firms both firms are able to maintain higher prices and earn higher profits when there are switching costs. P Klemperer, 'Competition when Consumers Have Switching Costs: An Overview with Applications to Industrial Organization, Macroeconomics, and International Trade' (1995) 62 *Review of Economic Studies* 515.

actively obfuscate, either by complicating their tariffs,<sup>12</sup> thus hiding important information,<sup>13</sup> or by providing the wrong type of information.<sup>14</sup>

In these situations, dissemination of information and better tools to allow consumers to use the information may improve consumer welfare.

### 3.2 *Informational remedies in UK competition cases*

Remedies have been implemented by UK competition authorities to improve the provision of information to consumers. These have been used to address competition problems that result, in part or in full, from shortfalls in the information that customers have about products in a market. Informational remedies are therefore part of the ‘toolkit’ of remedy options that competition authorities can use to address competition problems. Depending on the nature of the underlying competition problem, informational remedies may be used on their own or in combination with structural measures or other interventions aimed at opening up markets to greater competition, such as measures to reduce switching costs or barriers to entry.

Informational remedies can lead to changes in customer behaviour, by reducing search costs, increasing customers’ awareness of alternatives and making it easier for customers to make comparisons between competing products.

Informational remedies can also lead to beneficial changes in suppliers’ behaviour – for example, suppliers may cut their prices or otherwise change their products, in order that their products appear attractive in terms of the information that customers receive. Information remedies may also facilitate new entry, if a lack of awareness by consumers of alternatives was a factor that was restricting entry.

In the personal current account (PCA) market the OFT called for PCA providers to make PCA costs more transparent to customers.<sup>15</sup> In printers and cartridges, the OFT called on firms to simplify their pricing such that a single ‘whole life’ price of their printer was publically displayed to consumers.<sup>16</sup>

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<sup>12</sup> Indeed, one strategy consultancy advises banks on how to minimise banking competition by increasing the difficulties for consumers to compare across products, stating that: ‘The likelihood that banks continually try to undersell one another is greater if their price structures make it easy for customers to compare offers. In order to prevent easy comparisons, a bank should create price structures that are clearly distinguishable from those of its rivals. Price systems with several price components are especially effective.’ G Wuebker and J Baumgarten, *Strategies against Price Wars in the Financial Service Industry* (Simon-Kucher and Partners). [http://www.simon-kucher.com/ita04/local\\_whitepapers/whp\\_strategies\\_against\\_price\\_wars\\_fs-industry.pdf](http://www.simon-kucher.com/ita04/local_whitepapers/whp_strategies_against_price_wars_fs-industry.pdf)

<sup>13</sup> Ellison and Ellison examine price data for internet retailers. They show that some retailers engage in obfuscation in order to frustrate consumer search, thus resulting in much less price sensitivity on products. G Ellison and SF Ellison, ‘Search, Obfuscation, and Price Elasticities on the Internet’ (2009) 77(2) *Econometrica* 427.

<sup>14</sup> For example, firms may have an incentive to exploit naïve consumers by hiding the true price in add-on charges. Competition forces them to compete away some of the resulting rents on low upfront prices in order to entice them in the first place. This is competition from which the sophisticated gain. In such a situation, any firm that publicised and lowered its add-on price would have to raise its initial price. However, this would cause both types of customer to switch away. Under certain conditions, no firm can profit from revealing their prices by providing more information unless all firms do. See X Gabaix and D Laibson, ‘Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets’ (2006) 121(2) *The Quarterly Journal of Economics* 505.

<sup>15</sup> The OFT called on banks to introduce several price transparency measures so that consumers could more easily understand the costs of their accounts and compare with others. See OFT Press Release, ‘Banks Agree

The CC has introduced informational remedies as part of its remedy package following five of its market investigations to date (Store Cards, Home Credit, Domestic Bulk LPG, NI Banks and Rolling Stock). The CC has also proposed informational remedies as part of the remedy package in the ongoing PPI market investigation.

Informational remedies that have been introduced following CC market investigations include the creation of a price comparisons website for home credit and other small sum loans ([www.lenderscompared.org.uk](http://www.lenderscompared.org.uk)), obligations on suppliers to include a ‘wealth warning’ on store card statements alerting customers to the availability of credit from other sources and improved provision of information to customers in Northern Ireland when choosing, opening and running a current account.

In evaluating whether or not to introduce an information remedy that will have the effect of introducing transparency in a market, the OFT and the CC are always mindful of the risk that remedies that seek to improve the transparency of the provision of information to customers (eg about prices offered by suppliers) could increase the ability and incentives on firms to collude. Annex A illustrates a possible framework, based on research conducted for OFT and CC, for considering whether an informational remedy is likely to facilitate collusion. One case in which such considerations informed the design of the CC’s remedy was domestic bulk LPG (see box A).

#### **Box A – Informational remedies in the domestic bulk LPG market**

The CC identified a number of features of the domestic bulk LPG market that gave rise to an adverse effect on competition. The most significant of these features were barriers to switching and the CC introduced specific measures to make it easier to switch providers. In addition, the CC identified problems arising from a lack of customer awareness of prices on offer from other suppliers and the difficulty in comparing those prices.

The CC considered whether, as part of a package of measures to open up this market to greater competition, pricing should be made generally more transparent, eg via published prices lists. However, although the CC had not found coordinated effects in the LPG market, it had found that a number of the conditions for coordinated effects were already met. Price transparency was one of the conditions for coordination that was not already met and the CC was concerned that measures to promote price transparency may facilitate coordination. The CC therefore decided not to facilitate greater transparency of prices in such a way that would make suppliers’ prices more visible to other suppliers.

The CC did, however, put in place a number of other informational remedies that were aimed at making easier for customers to find out about and compare the price of LPG suppliers that did not create the same risks of coordination. These measures included:

- obliging suppliers to ensure that their trade associations provide on their websites and on the basis of a telephone call a list of suppliers, the areas they serve, and their contact details;
- obliging suppliers to include on their invoices a statement that further information on the LPG industry can be obtained on these websites and via those telephone numbers;
- obliging suppliers to provide customers with quotes (subject to site visit) over the telephone and/or via their websites without previously visiting the site;
- obliging suppliers to provide on invoices the amount of LPG delivered in litres and the price paid on a comparable (pence-per-litre) basis.

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to Make Improvements to Personal Current Account Market in the UK’ (7 October 2009). The CC introduced similar measures in Northern Ireland following its 2007 report ‘Northern Irish Personal Banking’.

<sup>16</sup>

The OFT recommended the development of a test standard against which the performance of inkjet cartridges could be measured uniformly. They recommended that the results should be made available by retailers to consumers at the point of sale. See OFT Press Release, ‘Consumer IT Market Working Well – but Room for Improvement – OFT Reports on Consumer IT Goods and Services’ (5 December 2002).

### 3.3 *Sharing information with suppliers can assist in achieving more efficient market outcomes*

This section has discussed the benefits of information provided to consumers. However, information sharing may also be beneficial in situations where it is not directly targeted at consumers.

First, information dissemination and sharing can allow firms to benchmark themselves in critical areas against other firms, including actual or potential competitors. This can promote innovation and best practice and enhance efficiency, which can drive competition in sectors. For example, comparing business processes and performance against best practices within a sector or across sectors may allow firms to develop plans on how to make improvements in quality or to adapt specific practices with the aim of doing things better, faster and cheaper.

Second, information sharing can help improve allocative efficiency – ensuring that scarce resources are allocated to those who want or need them most. Jensen<sup>17</sup> provides the example of fisherman in Southern India. The fishermen had to pick which port to land their fish at. However, if they all landed their fish at the same port, then the other ports would have no fish, and the port at which they landed their fish would have a glut of fish, forcing the fishermen to throw the fish away.<sup>18</sup> This situation was inefficient both for the fishermen and for the consumers. However when the fishermen gained the use of mobile phones they were able to phone ahead to the ports to see what the market price was and which fisherman had landed their fish where. Jensen found that the greater sharing of information benefited everyone. The fishermen's profits rose by 8% on average whilst consumer prices fell by 4%.

Third, information sharing can allow companies to understand market trends and experience and hence better plan to match supply with demand. This is particularly the case in markets where demand fluctuates significantly, where a market is undergoing significant technological change or where consumer tastes and preferences are rapidly changing. Having information about other firms' experiences and performance on the market may be better than just having your own. The more you can verify your experience and performance, the more likely it is that your plans will be well founded. This is particularly the case if each firm has access to only a portion of the entire information. By pooling their information together, firms may individually be able to make better business and investment plans.<sup>19</sup>

Fourth, information sharing on individual consumers' risks can also be important in reducing the problems of adverse selection (where firms cannot tell good consumers from bad consumers) and moral hazard (where a consumer who is protected from risk may behave differently than if fully exposed to the risk).<sup>20</sup> For example, in the insurance industry, it is important to have a large database of past claimants in

<sup>17</sup> R Jensen, 'The Digital Divide: Information (Technology), Market Performance, and Welfare in the South Indian Fisheries Sector' (2007) 122(3) *The Quarterly Journal of Economics* 879.

<sup>18</sup> The article gives the example of a day in January 1997, when 11 fishermen at Badagara beach ended up throwing away their catches because too many fishermen had arrived at the same port. However, within a radius of just 15 km there were 27 buyers at markets who would have bought their fish.

<sup>19</sup> Dixit showed that uncertainty profoundly affects the way that investment decisions are made, with greater uncertainty generating a value of waiting and hence a reluctance to invest even when market fundamentals are favourable. A Dixit, 'Entry and Exit Decisions under Uncertainty' (1989a) 97(3) *Journal of Political Economy* 620. This has been summarised by Carruth *et al* as '[a] general conclusion is that increased uncertainty, at both aggregate and disaggregate levels, leads to lower investment rates'. A Carruth, A Dickerson and A Henley, 'What Do We Know about Investment under Uncertainty?' (2000) 14(2) *Journal of Economic Surveys* 119.

<sup>20</sup> Padilla and Pagano show that sharing information in these types of industries (e.g. banks or insurance) reduces lock in for customers. AJ Padilla and M Pagano, 'Sharing Default Information as a Borrower Discipline Device' (1999) 44(10) *European Economic Review* 1951.

order to be able to predict claim rates on a particular insurance product. The larger the database, the more accurate the prediction is.<sup>21</sup> This has historically provided the justification for the exchange of claimant rate tables within the Insurance Block Exemption agreement.<sup>22</sup>

Information-sharing about customer risks may also be introduced by competition authorities as a remedy in markets, where preferential access to such information results in an incumbency advantage that prevents, restricts or distorts competition. When introducing such remedies, it is important that the information that is shared is the minimum necessary to overcome the incumbency advantage, both to ensure that the remedy is proportionate and to minimise the risks of collusion or other distortions to the competitive process. One market in which the CC has intervened to address incumbency advantage is Home Credit, where the CC has required lenders to share data on customer credit worthiness via credit reference agencies (see Box B)

#### **Box B - Home credit – Data sharing remedy**

In Home Credit the CC found that an existing home credit lender had a critical advantage in lending to its existing customer base over all other potential lenders. This was its knowledge of its customers' repayment history in relation to loans taken out with them. The CC found that this acted as a barrier to customer switching and as a barrier to entry and expansion. It also served to restrict competition from mainstream lenders. This was one of several features that gave rise to an adverse effect on competition in this market.

As part of its remedy package, the CC required the largest home credit lenders to share their repayment data with other lenders by entering into agreements with at least two credit reference agencies (CRAs).

Fifth, in certain sectors, in recognition of the difficulties of sustaining services, transparency and communication amongst suppliers, including information sharing, may be sanctioned. For example, the EU has granted block exemptions for information exchanges that facilitate the coordination of activities for liner shipping consortia.<sup>23</sup> The exemptions were aimed at allowing firms to capture the benefits from synchronisation, rationalisation and achieving economies of scale.

Sixth, it is worth noting that information sharing may also be necessary in the context of other types of beneficial horizontal agreements, e.g. pro-innovation/procompetitive cooperation agreements on R&D to share technical information on the 'next generation' of products (say mobile phones) in order to enable suppliers to design standard components and enable finished products to interconnect. Another example is information shared for the purpose of standardisation, e.g. sharing information on the patents necessary to achieve a standardisation objective.

The examples above highlight the importance of identifying the benefits that information sharing can create. But, as stated previously, benefits cannot, and should not, lead to blanket justifications. They should

<sup>21</sup> Giannetti *et al* looked at the creation of public and private credit registers across the EU between 1997 and 2007. They found that the creation of these registers reduced concentration and price cost margins, concluding that: 'credit registers facilitate direct entry through a reduction of information asymmetries, which in turn intensifies competition'. C Gianetti, N Jentsch and G Spagnolo, 'Information Sharing and Cross-border Entry in European Banking', DIW Discussion Paper no 980 (2010).

<sup>22</sup> The Insurance Block Exemption allows the joint compilation and distribution of certain information, for example claim statistics. Commission Regulation No 267/2010 of 24 March 2010, On the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector.

<sup>23</sup> Liner Shipping Consortia Block Exemption, Commission Regulation 906/2009.



be properly considered, and such considerations should be embedded in the framework for the assessment of object and effect infringements discussed in Part 2.

#### 4. The Bad: Why might information sharing harm consumers?

The primary way in which information sharing can harm consumers is if it has the effect of facilitating coordination. Specifically, it can play a role in allowing firms to engage in, and sustain, tacit or explicit coordinated behaviour. However, whilst the primary concern is coordination, there are other non-coordinated theories of harm which we discuss—in particular in the context of explaining differences in the legal and economic interpretation of the reductions of uncertainty that result from greater transparency.

##### 4.1 Coordinated theories of harm

Information dissemination and sharing may facilitate coordination for three main reasons:

###### 4.1.1 Information sharing to help firms reach a focal point for coordination

Agreeing prices or quantities is particularly difficult when firms have different products or different underlying costs. Stigler<sup>24</sup> first pointed out that there are an infinite number of different prices which may make up a jointly profit-maximising price structure. This means that, in order to coordinate, firms have to determine which of the many equilibria is most mutually beneficial and sustainable.<sup>25</sup> This plethora of possible equilibria makes coordination without communication much more difficult, as choosing an incorrect equilibrium may trigger a price war or result in coordination at a suboptimal level.<sup>26</sup>

Information sharing can facilitate competitors in reaching a focal point or points for the coordination, whether this be through direct communications or via third-party information.<sup>27</sup> The sharing of future pricing intentions directly between competitors is probably the most useful information in enabling them to reach a focal point, and hence is the most harmful. It is useful to firms because it allows competitors to communicate where they would like to be, without actually having to commit to the price.

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<sup>24</sup> 'A complete profit maximising price structure may have almost finitely numerous price classes: the firms will have to decide upon the number of price classes in the light of the costs and the returns from tailoring prices to the diversity of transactions.' G Stigler, 'A Theory of Oligopoly' (1961) 72(1) *Journal of Political Economy* 44, 45-46.

<sup>25</sup> 'A prime difficulty facing firms lies in choosing among a number of pricing alternatives that lie between the competitive and the monopolistic levels. This multiplicity of outcomes would complicate the coordination problem facing oligopolists – difficult enough when communication is open and free.' FM Scherer and D Ross, *Industrial Market Structure and Economic Performance* (Boston, Houghton Mifflin Company, 3rd edition, 1990), 265.

<sup>26</sup> As Motta states: 'If firms cannot communicate with each other, they can make mistakes, and select a price (or a quantity) which is not jointly optimal for the firms, and might be difficult to change.' M Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004) 141.

<sup>27</sup> As Levenstein and Suslow state: {DISP} 'In almost all cases where collusion is feasible, there are multiple possible collusive equilibria firms will have different rankings among possible equilibria, requiring some form of communication in order to move them toward an efficient equilibrium. If firms are prohibited by antitrust authorities from communicating, they may use focal points to choose among the multiple equilibria.' MC Levenstein and VY Suslow, 'Cartel Bargaining and Monitoring: The Role of Information Sharing' in. *The Pros and Cons of Information Sharing* (Stockholm, Swedish Competition Authority, 2006), 36.

For example, firm A might communicate to its two competitors in the market, B and C, that it intends to increase its price. If firms B and C then make similar communications of pricing intent to A, firm A can be relatively sure that B and C will follow it if it proceeds with the price increase. Note that, by communicating its intention, firm A can determine whether B and C will follow, without having to actually implement the increase. This is important because actually implementing a price increase that no one else follows may result in lower sales and lower profits for firm A. Thus communicating future pricing intentions allows firms to signal to each other and reach a tacit understanding on a higher price without a risk of sales loss if they are not followed.

Sharing information about current or past behaviour may not be as useful as information about future behaviour in identifying focal points. However, information about past behaviour may still generate focal points through two mechanisms. First, when there is a price leader in the market, public announcements of current price information from this price leader may create a focal point around which similar price increases may be tacitly implemented by other firms.<sup>28</sup> Secondly, sharing information about past or current costs or demand may make it easier for firms to come to a tacit understanding on a focal point for coordination. For example, sharing detailed current price information provides firms with a clearer idea of each other's position in the market. This reduces the number of possible focal points on which price coordination may take place and therefore makes it easier to pick a single point.

#### 4.1.2 *Information sharing can promote internal stability of coordination*

Information sharing can be the mechanism that allows firms to monitor adherence to collusion (tacit or explicit), and provide better information on when and how far to punish firms when they deviate. Simply having the ability to punish deviations is not sufficient to sustain coordination. Unless firms can detect deviations from the coordination, any attempt at implementing punishments will be ineffectual, resulting in either the breakdown of coordination or coordination being sustainable only at a price close to the competitive price.<sup>29</sup>

The requirement for firms to be able to monitor each other in a timely and efficient fashion has led economists to predict that coordination is likely to be much more difficult where demand is more volatile. This makes monitoring more difficult because coordinating firms are unable to differentiate changes in their demand due to volatility, or due to deviating firms cutting their price and stealing market share.<sup>30</sup>

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<sup>28</sup> The existence of a price leader cannot be assumed. Being the leader has a cost, as by increasing its price the leader loses market share until its rivals follow. However, in concentrated industries there is often a natural leader. Firms with a dominant position can set a price that best serves its own objectives, taking into account the reaction of rivals. Smaller firms are likely to have an interest in following the larger firm. See Scherer and Ross, *supra* n 27, 248. See also W Bentley Macleod, 'A Theory of Conscious Parallelism' (1985) 27 *European Economic Review* 25; JJ Rotemberg and G Saloner, 'Price Leadership', MIT Working Paper No 388 (1985).

<sup>29</sup> This was first articulated by Stigler, *supra* n 26, 46: 'If the enforcement is weak, however – if price cutting is detected only slowly and incompletely – the conspiracy must recognise its weakness: it must set prices not much above the competitive level so the inducements to price-cutting are small, or it must restrict the conspiracy to areas in which enforcement can be made efficient.'

<sup>30</sup> This very intuitive link between demand volatility and sustainability of collusion was first shown formally in the seminal paper by JE Green and RH Porter, 'Noncooperative Collusion under Imperfect Price Information' (1984) 52 *Econometrica* 87, a result that Porter later built on in RH Porter, 'On the Incidence and Durations of Price Wars' (1985) XXXIII *Journal of Industrial Economics* 415.

Therefore, as the level of volatility increases, the level of prices which can be sustained under coordination, all other things being equal, decreases.<sup>31</sup>

Sharing information may also facilitate the internal stability of coordination through greater precision in punishments.<sup>32</sup> The more wide and indiscriminate punishments have to be (and hence result in punishments to the coordinating firms as well), the less the coordinating firms will want to implement them. This means that when punishments are very unfocused firms will find it harder to coordinate.<sup>33</sup> Highly disaggregated information allows coordinating firms to identify when a firm has deviated – even if the information is anonymised. Knowing the precise identity of the firms provides further information about which firm has deviated. Coupled with narrowly defined punishments, this ability to precisely identify deviations may further facilitate coordination.<sup>34</sup>

Of course, the extent to which sharing information facilitates collusive stability depends on both how difficult coordination is within the market, and how the information changes the situation.<sup>35</sup> In markets where there is a strong likelihood of coordination, even a small increase in transparency from limited information sharing could generate a significant amount of coordination. However in markets with a low likelihood of coordination, the information being shared may address many of the difficulties of coordination. This is particularly pertinent given that the transparency difficulties associated with highly fragmented markets may be solved by information sharing.

#### 4.1.3 *Information sharing to promote external stability of collusion*

Information may also be used to detect new market entrants and coordinate conduct against them. Coordination requires both internal and external stability. If there are a substantial number of firms outside of the agreement these firms could undercut those within the agreement and limit their ability to coordinate.<sup>36</sup> Furthermore entrants will generally wish to enter the market when there are high margins – as one might expect within coordinated markets. Such entry may upset the collusive status quo among the

<sup>31</sup> See S Martin, 'Competition Policy, Collusion, and Tacit Collusion' (2006) 24 *International Journal of Industrial Organization* 1299.

<sup>32</sup> Whist information may generally facilitate coordination it should be noted that L Kaplow and C Shapiro, 'Antitrust' in M Polinsky and S Shavell (eds), *Handbook of Law and Economics*, Vol 2 (Amsterdam, Elsevier, 2007), ch 15, also discuss the possibility that communication between firms may also have the result that deviating firms renegotiate their punishments reducing their duration or magnitude. In this situation communication that allows these renegotiations will make coordination more difficult rather than easier.

<sup>33</sup> See Motta, *supra* n 28, 151.

<sup>34</sup> As Kaplow and Shapiro, *ibid*, state, "punishment[s] might better be coordinated with more explicit communication. Determining the magnitude of the price cut and its duration, perhaps focusing punishment when firms' product lines and regions of operations vary, and other aspects of strategy might be worked out better."

<sup>35</sup> An analogy can be drawn with merger analysis where, in order to assess coordinate effects, economists routinely look at both how difficult coordination in the market is before the merger and how the merger changes the competitive situation. For a discussion of the factors influencing the ability to coordinate see M Ivaldi, B Jullien, P Rey, P Seabright and J Tirole, 'The Economics of Tacit Collusion', report for DG Competition (European Commission, 2003).

<sup>36</sup> For a discussion of external stability in the context of merger coordinated effects see the Review of Merger Assessment Guidelines. A joint publication of the Competition Commission and the Office of Fair Trading. Draft of 14 April 2010, page 41.

existing firms. Information that allows existing firms to identify precisely where this entry occurred and hence coordinate a response can increase the stability of collusion.

Such a concern was expressed within the Commission's decision in UK Tractors. The dissemination of highly disaggregated sales figures allowed the Tractor companies to see exactly the segments where new entrants were coming into the market. This allowed them to target their responses – such as providing discounts - to those segments only.<sup>37</sup>

#### 4.1.4 *The cheap talk critique*

All of the above theories of coordination have been criticised as being vulnerable to the “cheap talk” critique. The argument is that each firm would have an incentive to manipulate the information to meet its own goals. For example when considering whether to share information to allow monitoring, a firm has no incentive to cheat on a tacit agreement and then disclose this fact through the shared information. The firm always has an incentive to disclose information to its rivals which says it is not cheating, regardless of whether it is cheating or not. Knowing this, its rivals who receive the information will discount it as worthless and it becomes simply ‘cheap talk’.<sup>38</sup>

The same applies to information sharing in the context of finding focal prices. As discussed previously, differences in firms' underlying costs result in differences in the optimal price or quantity on which to coordinate. For example, all else being equal, a low-cost firm will prefer a lower price than a high-cost firm. If a firm can influence the focal point by sharing information, the firm will have an incentive to provide whatever information moves the equilibrium closest to its own optimum. Knowing this, a rational firm will ignore any information that is not strictly compatible with the disclosing firm's incentives.

The literature suggests that communications between firms may have little value in facilitating coordination unless the information is verifiable. However, there is also evidence that personal friendship and trust play important roles in sustaining collusion.<sup>39</sup> Economists have postulated that communication between firms can play an important role in creating and sustaining these relationships, thus overcoming the problems of trust.<sup>40</sup> For this reason, even ‘cheap talk’ may pose a danger to reaching and sustaining coordination.

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<sup>37</sup> "If a supplier chooses to become a member of the Exchange, he must reveal his exact retail sales by product and by every small geographic territory with the result that the Exchange then permits the established suppliers with considerable market shares and extensive dealer networks to become aware of the existence of new entry and to instantly detect the market penetration by any such new member. This market information on any new member will permit the established suppliers to defend their acquired positions by placing selective actions designed to contain the new member." Para 46. UK Agricultural Tractor Registration Exchange, Commission Decision, OJ L 068 , 13/03/1992 P. 0019 - 0033

<sup>38</sup> “When is cheap talk about intended actions credible? Intuitively, if the speaker always has an incentive to induce the same behaviour from his opponent, independent of his own intended actions, his cheap talk will not be credible.” S Baliga, and S Morris, ‘Co-ordination, Spillovers, and Cheap Talk’ (2002) 105(2) *Journal of Economic Theory* 450, 466-67.

<sup>39</sup> See M Bigoniy, S-O Fridolfsson, C Le Coq and G Spagnolo, ‘Trust, Salience, and Deterrence: Evidence from an Antitrust Experiment’, SSE/EFI Working Paper Series in Economics and Finance No 696 (2010).

<sup>40</sup> See Levenstein and Suslow, *supra* n 29. See also See J Farrell and M Rabin, ‘Cheap Talk’ (1996) 10 *Journal of Economic Perspectives* 103.

## 4.2 *Non-coordinated theories of harm*

In some cases, the sharing of information may lead to foreclosure of competitors outside the agreement. This may occur if sharing information between a limited number of competitors gives them a significant competitive advantage over rivals.<sup>41</sup>

There are other theories of harm on information sharing besides the coordinated or foreclosure theories. In particular, Kuhn and Vives<sup>42</sup> have written extensively on ‘unilateral’ theories of harm resulting from exchanges of information. This literature looks at whether a reduction in uncertainty will, absent any tacit or explicit coordination between firms, harm consumers. These theories are sometimes termed ‘softening competition’ theories of harm, whereby reductions in uncertainty without any coordination, tacit or otherwise, soften the degree of competition. Clearly, by abstracting away from the main theory of harm – coordination – this strand of economic literature is not, in itself, sufficient to determine when a particular case of information sharing will harm consumers. However, it does provide insight into the question of whether a reduction in uncertainty is, of itself, harmful to competition.

The question of whether reductions in uncertainty are harmful per se is an important question as, at first sight, it is a key area in which the legal and economic literatures appear to diverge. In several prominent cases uncertainty appears to be viewed as an almost necessary condition for competition to function,<sup>43</sup> an opinion also reflected in the legal academic literature.<sup>44</sup> For economists, however, uncertainty has no such status. Indeed, one of the fundamental tenets of the theory of perfect competition is that firms and consumers have perfect information, and in several economic models it is a lack of information that generates distortions in competition.<sup>45</sup>

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<sup>41</sup> This was again argued within the Commission’s decision in UK Tractors: “If a supplier chooses not to become a member of the Exchange, he is disadvantaged by the fact that he does not have available the detailed and accurate market information about other suppliers which is available to members of the Exchange.” Para 45. UK Agricultural Tractor Registration Exchange, Commission Decision, OJ L 068 , 13/03/1992 P. 0019 - 0033

<sup>42</sup> KU Kühn and X Vives, ‘Information Exchanges among Firms and their Impact on Competition’ (Office for Official Publications of the European Community, Luxembourg, 1995), III.

<sup>43</sup> In *Tractors UK* the Court of First Instance appears to see the reduction of uncertainty about competitor’s conduct as the key element in the infringement stating that: ‘An agreement creating an information exchange system which does not concern prices and does not underpin any other anticompetitive arrangement is likely, on a truly competitive market, to lead to the intensification of competition between suppliers, since the fact that a trader takes into account information made available to him in order to adjust his conduct on the market is not likely, having regard to the atomised nature of the supply, to reduce or remove for the other traders any uncertainty about the foreseeable nature of its competitors’ conduct.’ Judgment in Case T-35/92 *John Deere Ltd v Commission* [1994] ECR II-957, para 51. Similarly, in *Fatty Acid’s* the Commission stated: ‘The exchange, therefore, enabled each of the parties to identify more precisely the competitive behaviour of the others more quickly and easily than would have been possible, if at all, in the absence of the agreement. The agreement thus removed an important element of uncertainty on the part of each of them as to the activities of the others.’ Commission Decision of 2 December 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.128 – Fatty Acids) [1987] OJ L003, P 0017–0026, para 37.

<sup>44</sup> See, e.g. A Capobianco, ‘Information Exchange under EC Competition Law’ (2004) 41 *Common Market Law Review* 1247,1252.

<sup>45</sup> For example, in the Milgrom and Roberts signalling model of entry deterrence the low-cost entrant is deterred from entering by the higher cost monopolist using asymmetric information to pretend it is more efficient than it actually is. P Milgrom and J Roberts (1982). ‘Limit Pricing and Entry under Incomplete Information: An Equilibrium Analysis’ (1982) 50(2) *Econometrica* 443.

Unfortunately the only clear conclusion that can be drawn from this softening of competition literature is that reductions in uncertainty cannot be said to always harm, or always benefit, consumers. In certain circumstances disclosure of information can improve consumer welfare, whilst in others it may reduce it.

The legal concern appears not simply to be the information that is exchanged, but the manner in which it is exchanged. A famous quote by Adam Smith seems to be particularly pertinent with respect to this: ‘People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.’<sup>46</sup> Lawyers are highly cautious of any sharing of pricing information,<sup>47</sup> even if it is current prices, if it is derived from direct communications between competitors, and even if that information is also freely available from other sources. Just like Adam Smith, they are highly skeptical of competitors being able to curtail themselves from using the information to jointly determine commercial decisions.

Correspondingly the difference in approach between economists and lawyers appears to arise due to different uses of language. When lawyers and judges talk about uncertainty being necessary for competition, they are talking about it in the context of the specific facts and circumstances of a case – that is, a reduction in uncertainty having come about through direct communications between competitors. Lawyers are concerned to ensure that clear advice can be given to, and understood by, companies not to engage in reductions in uncertainty via private communications with competitors. However, economists think about reductions in uncertainty in the abstract, being content to assume away any possibility of coordination (tacit or explicit) via the communication mechanism. This is where the difference between lawyers and economists lies, however as we will argue in the next section, in reality, this difference is relatively minimal.

## **5. The Ugly: Where should the object/effect distinction be drawn, and how might we assess information sharing that falls under effect?**

So far this paper has set out why information sharing should not be banned outright, but also why firms should not be free to engage in information sharing with impunity. This begs the ugly question that economists hate to answer: on which side of the object/effect fence does information sharing sit? Or rather, given the framework set out in Section B, what types of information sharing does it make most sense to consider as ‘object’ infringements, what type of information sharing does it make most sense to consider as ‘effect’ infringements and what types should not be considered as infringements at all? This question is not a trivial one, either economically or legally: failing to properly understand the benefits of information sharing and wrongly condemning it risk stifling innovation and hampering the development of fast-evolving markets; equally, failing to understand the costs of information sharing, risks not preventing the harmful effects it has on consumers.

Before attempting such a classification, it is worth clarifying exactly what types of information sharing this paper is considering. One can think of information sharing in three different categories. First, there is information sharing that forms part of a hard core cartel. Legally, these are considered as hard-core cartels and hence are not considered within this section. Secondly, there is information sharing that forms part of wider agreements – such as standardisation arrangements. Legally, these are considered in the context of the wider agreement – and hence are again not considered here. Finally, there are stand-alone examples of information sharing that are neither part of a cartel nor a wider agreement. Our discussion of the object and effect pertains to this last category of information.

<sup>46</sup> A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, edited by E Cannan (London, Methuen, 5th edition, 1904), book I, ch X, pt II, 152.

<sup>47</sup> Or indeed any information on which the competitors are competing.

### 5.1 *What types of information sharing should be considered as clearly ‘Object’ infringements?*

The sharing of disaggregated, confidential information on future pricing or quantity intentions between competitors is, as discussed previously, particularly problematic, given its potential for enabling competitors to come to a collusive agreement. The case law and decisional practice clearly states that these are infringements of Article 101 by object.

In the UK, the OFT has investigated several cases regarding the disclosure of future pricing intentions. In *Independent Schools* the OFT held that the exchange of future fees information between independent schools was anticompetitive by ‘object’.<sup>48</sup> In this case, the independent schools were disclosing to each other their intentions regarding future fee changes. In the legal case, there were a number of features relevant to the assessment of the infringement as object. First, the information that was exchanged related to future intentions, and was confidential and not publicly available. Second, it was done on a regular and highly systematic basis, and for a number of years. Finally, the timing of the exchange corresponded with the timing in which school fees for the following year were set.

The OFT has also recently announced the outcome of another case regarding the sharing of information regarding future pricing intentions in the banking sector.<sup>49</sup> The OFT investigated the sharing of confidential, future pricing information by RBS to Barclays which Barclays took into account in determining its own pricing. This case is notable because it involved a one-way disclosure of future pricing intentions, from one party to another. Such one-way disclosures can amount to a concerted practice which has as its ‘object’ the restriction of competition in circumstances where that information is ‘at the very least’ accepted by the recipient (e.g. *Tate and Lyle v Commission*).<sup>50</sup>

Finally, it should be noted that, legally, information sharing can infringe competition law even if there is no direct exchange between competitors. The OFT has also investigated several similar cases in which there were so-called ‘hub-and-spoke’ arrangements regarding the exchange of commercially sensitive information through third parties—for example, from one retailer to another through their supplier. Here, following the English Court of Appeal’s judgment in *Hasbro*<sup>51</sup> and *Replica Kit*,<sup>52</sup> proving the knowledge of the parties and the context of the exchange is crucial. It must be demonstrated to the required standard of proof that where a retailer (A) discloses to their supplier (B) their future pricing intentions, the circumstances of this disclosure are such that A may be taken to have intended that B will/would make use of that information to influence market conditions, or did in fact foresee this, by passing that information on to other retailers (C). B must also be shown to have actually passed that information to C and that they disclosed this in circumstances where C may be taken to have known the circumstances in which the information was disclosed by A to B or that C in fact appreciated that the information was passed to it with A’s concurrence (i.e. to influence market conditions). It must also be demonstrated that C does, in fact, use the information in determining its own future pricing intentions. In these cases, the provision of, receipt of

<sup>48</sup> Decision of the Office of Fair Trading No CA98/05/2006, ‘Exchange of Information on Future Fees by Certain Independent Fee-paying Schools’, 20 November 2006 (Case CE/2890-03).

<sup>49</sup> OFT press release 34/10, ‘RBS Agrees to Pay £28.5 Million Penalty for Disclosing Pricing Information to Competitor’, 30 March 2010.

<sup>50</sup> Court of First Instance Judgement of 12 July 2001, Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co Ltd v Commission of the European Communities* [2001] ECR II-02035.

<sup>51</sup> *Argos Ltd/Littlewoods v Office of Fair Trading* [2006] EWCA CIV 1318, Case Nos 2005/1071 and 1074.

<sup>52</sup> *Umbro Holdings Ltd v Office of Fair Trading* (Judgment on penalty) and *JJB Sports v Office of Fair Trading* [2006] EWCA Civ 1318, Case No 2005/1623.

or passing on of information between competitors through an intermediary in circumstances where it can be taken for one to have intended to influence the market conduct of the other is anticompetitive.

So how does the case law tie in with the economics? The common thread from the cases above is that the frequent exchange of future, disaggregated pricing information carried out in private is classified as an object infringement. Furthermore, even if the exchange is conducted through a third party, the exchange is still classified as an object infringement. From an economic point of view, this classification seems sensible. Even though there might, in some circumstances, be benefits from disclosing future pricing information – e.g. in helping firms arrive at better sales forecasts – the potential for the same information to be used to coordinate and hence harm consumers is considerable. Furthermore, those benefits may be realised through the disclosure of less harmful information – e.g. aggregated forecasts across the industry rather than individual forecasts. This suggests that, on a case-by-case analysis, one would seldom find sharing of future pricing intentions compatible with Article 101. For the same reasons, it seems sensible to classify sharing of information with regard to future intentions of quantities (output, sales) as an object infringement where firms compete on quantities.<sup>53</sup>

Of course, it should be stressed that categorising conduct as an object infringement is not the same as ‘per se illegality’. Any agreement, object or otherwise, may be exempted if it meets the conditions under Article 101(3): that is, a fair share of efficiency gains must be passed on to consumers and must outweigh the restrictive effects of the disclosure; in addition, the restriction should not go beyond what is necessary to achieve the efficiency gains, which can be tested by asking whether there are less restrictive alternatives which achieve the same outcome; and the disclosure must not afford the possibility of substantially eliminating competition.

## **5.2 What types of information sharing are unlikely to fall within Article 101 or, if they do, should be treated as ‘Effect’ infringements?**

At the other extreme, given there has never been a case regarding sharing highly aggregated information pertaining to the past, one may assume that these are unlikely to fall within Article 101 or, if they do, they should be assessed on an effects basis. Indeed, the remedy agreed between the Commission and Tractor manufacturers considered aggregation and the historic nature of the data as key elements in preventing anticompetitive effects.<sup>54</sup> These conditions sit well with the economics. Aggregated information at the industry level is unlikely to be useful for coordination. It is difficult to come to a focal point or monitor an understanding when firms cannot see from the information how their individual competitors are performing. Likewise, information which is significantly historic in nature is also unlikely to be useful for present or future coordination – such historic information is unlikely to provide an indication of what companies will do in the future, and hence unlikely to assist parties to arrive at a focal point. Moreover, historic information is unlikely to be useful for firms effectively to monitor tacit agreements.

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<sup>53</sup> A good example of quantity competition is oil production. Oil-producing countries and companies decide how much to extract and sell. The market then decides the clearing price. In such an industry detailed sharing of information regarding the main strategic variable – quantity of oil produced – is a key element in reaching a coordinated outcome.

<sup>54</sup> The Commission set out two main principles, individual level data may not be exchanged until a period of 12 months between the information and the date it is released. Aggregate market data, which may be less than 12 months old may be exchanged if the data are supplied by at least three dealers belonging to different companies. If there were less than three dealers the data could only be exchanged if it concerned at least 10 tractors (i.e. to ensure that individual level prices could not be determined). Exchange of Information between Tractor and Agricultural Machinery Manufacturers, Annual Report on Competition Policy 1999 p. 156.



Of course, what qualifies as ‘historic’ will depend upon the nature of the market and the competitive interaction within the sector. For example, in markets where contracts are awarded by tender processes, much will depend on the typical duration of contracts and the frequency of contract award processes. If tender processes are run only once every two years, then even information from two years ago may be useful. However, if tender processes are run every week, information from the previous year is highly unlikely to facilitate coordination absent special circumstances. Similarly, sharing of truly non-confidential commercial or non-commercially sensitive information is unlikely to breach competition law.<sup>55</sup>

One last interesting question is whether there should be a safe harbour for information sharing that is highly unlikely to harm competition, similar to the safe harbours for other agreements within the guidelines on horizontal agreements. Currently the Draft Guidelines on Horizontal Agreements do not provide this. However, a safe harbour may give additional legal certainty for information sharing that is highly unlikely to raise competition issues. As a starting point, it is noted that object infringements are by definition likely to cause competitive harm. Given the importance of sending out a strong deterrence signal of these types of infringements, we would advocate restricting the safe harbour to effects-based information infringements.<sup>56</sup>

How might a safe harbour on effects-based information sharing work in practice? Information sharing that covers only a small proportion of the market are unlikely to create competitive harm. Consequently, one possibility may be to base the safe harbour on some threshold of the market covered by the information sharing. It must be acknowledged that deriving a specific threshold for such a safe harbour is always somewhat arbitrary. However, given the level of other safe harbours within the guidelines, 20% may be a sensible starting point to consider. Any such safe harbour would also have to be subject to a cumulative coverage test similar to the cumulative test within the vertical guidelines. This would prevent networks of information sharing that would allow firms to have access to information covering the entire market.<sup>57</sup> In the context of sharing information, 30% may be a sensible starting point to consider for such a cumulative test.

The goal here should be to create legal certainty and allow small companies to share procompetitive information. However, a safe harbour may create unforeseen consequences. For example, a threshold may provide justification for firms to refuse to share important information with smaller competitors, thus restricting their ability to compete. Furthermore, creating a safe harbour for firms – at the smaller end of the market – may suggest by implication that any sharing of information above this threshold is not safe, even if those schemes do not create focal points and risks of collusion. If this leads to firms perceiving that anything not within the safe harbour is harmful, then beneficial exchanges, such as industry-wide collation of aggregated historic information on sales and price trends, may not be appraised on the effects basis it is intended.

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<sup>55</sup> For example, sharing information on upcoming legislation changes is unlikely to breach competition law.

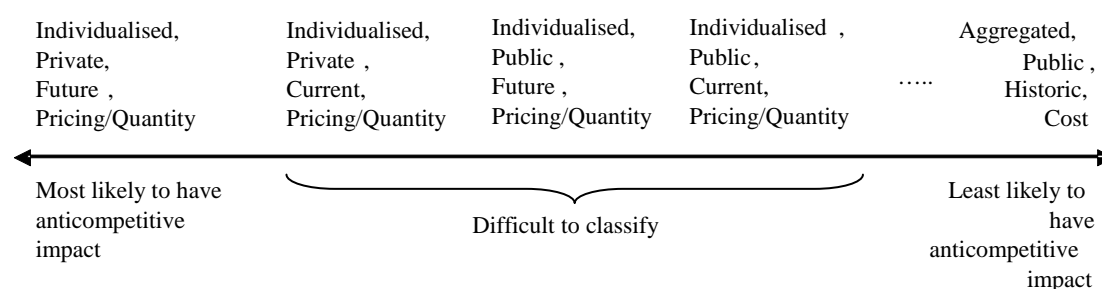
<sup>56</sup> However, we note that, given our discussion is restricted information exchanges that do not form part of a cartel, the *de minimis* notice threshold of 10% is likely to apply to object agreements. Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C368/07, 13–15.

<sup>57</sup> For example suppose there were 10 firms in the market. If Firm 1 shared its information with Firm 2, and separately shared its information with Firms 2, 3, etc. Firm A would have the potential to have information on every firm within the market even though each separate agreement would fall under the safe harbour. If each firm has similar bilateral agreements, then every firm would be able to have access to the full market information even though no single agreement covered more than 20% of the market.

### 5.3 Where exactly should object – Effect be delineated?

Individualised future pricing or quantity intentions shared in private are highly likely to be harmful. These are relatively simple and non-contentious to categorise into object infringements. At the opposite extreme, aggregated past information on non-strategic variables such as cost, which are shared in public, are highly unlikely to be harmful. These are relatively simple and non-contentious to categorise into effect infringements (if, indeed, they fall within Article 101(1) at all). The difficult area of information sharing to categorise lie within the two extremes just set out. These areas are shown in Fig 1 below:

**Fig 1. Truncated Continuum of Likely Effect of Different Information Exchanges**



So, given the framework set out in the first section of the paper, where on such a continuum might the object – effect distinction be drawn? The EU Draft Horizontal Guidelines state that:

*‘Information exchanges between competitors of individualised data regarding intended future prices or quantities should be considered a restriction of competition by object within the meaning of Article 101(1). This also applies to information exchanges on current conduct that reveals intentions on future behaviour and to cases where the combination of different types of data enables the direct deduction of intended future prices or quantities.’<sup>58</sup>*

Thus the Guidelines propose that the distinction between ‘object’ and ‘effect’ infringements should turn on whether the information reveals future pricing/quantity intentions or not (regardless of whether the information is future or current). Such a distinction raises two interesting issues.

First, it may be difficult to define precisely what ‘current information that reveals future intentions’ is. Providing clarity as to exactly what this means is important. If firms or their advisers interpret this too broadly, for example by considering all current pricing information provided to competitors or third parties as object infringements, this is likely to result in the reduction of many of the benefits to consumers discussed previously. For example, price comparison websites may provide significant benefits to consumers through the provision of disaggregated current prices either collected by third parties or provided directly by competitors. Interpreting these as restrictions by object, rather than effect, risks depriving consumers of these benefits (business chilling).

<sup>58</sup>

The Guidelines goes on state that “This is without prejudice to the fact that there may be other types of information exchanges (mainly private individualised exchanges between competitors on prices and market shares) whose aim is to restrict competition on the market, which would normally be considered as restrictive by object. These types of information exchanges run the risk of being investigated and, ultimately, fined as cartels.” Para 68, *supra* n 3. As previously stated this paper does not cover the sharing of information which amount to cartels.

However, too narrow an interpretation of ‘current pricing that reveals future intentions’ may also result in consumer harm through under enforcement. As the Guidelines imply, in some circumstances the sharing of individualised current information on strategic variables may be equivalent to the disclosure of future information. For example, if price changes occur frequently and can be changed with little cost, then information on current prices may play a role in signalling future intentions.<sup>59</sup> Moreover, current information may also be more effective than future information for the monitoring of agreements.

Second, it is not entirely clear whether public sharing of future pricing intentions will be classified as an object infringement. The guidelines state that disclosing future pricing intentions will be considered as infringements by object. However, the sentence starts with the prefix ‘Information exchanges between competitors’, thus implying that only explicit exchanges are caught whilst unilateral public disclosures of future pricing are not treated as object infringements. The case law would seem to support such a narrow interpretation. In *Woodpulp* the GC (then CFI) considered that the system of quarterly price announcements did not constitute an infringement of Article 101 (then 85) in themselves as, at the time of the announcements, each undertaking could not be sure of the future conduct of the others.<sup>60</sup> Clarity on the question of whether public announcements fall under object is hugely important. Whilst public announcements can be used to harm competition, they can also provide significant benefits to customers. For example, manufacturers of electronic goods regularly announce the future prices of their new products.<sup>61</sup> Retailers may announce the prices of products that will be placed in forthcoming sales. Treating all of these as object infringements, rather than effect, risks capturing all of these types of announcements.

One suggestion to address both these issues is to delineate infringements by object and effect on the basis of whether the information is provided in private or in public – that is, freely available to everyone at no cost.<sup>62</sup> Under this suggestion when an individualised sharing of information, be it current or future intentions, is made in private it should be considered as an object infringement. When an individualised sharing information, be it current or future intentions, is made in public, it should be considered an effect infringement. This has the advantage of providing a clear bright line between object and effect infringements that may reduce legal uncertainty.<sup>63</sup> However, there are also significant economic reasons why such a distinction may make sense.

First, the majority of the benefits discussed previously focused on the sharing of information in public, rather than private. This is true with regard to both future and current intentions. As previously discussed, the public dissemination of current pricing intentions allows customers to compare across

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<sup>59</sup> For example, firm A can increase its price and wait for the reaction of firm B. If firm B also increases its price, then firm A can maintain its price. However, if firm B does not follow, firm A can decrease its price back to the original level. If these changes can be undertaken quickly there may be minimal costs for making an increase in price which no other competitor follows – similar to future pricing.

<sup>60</sup> See paragraphs 59 to 65, Judgment of the Court (Fifth Chamber) of 31 March 1993. - *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*. Joined cases C 89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

<sup>61</sup> For example Apple unveiled its latest iPhone, along with its pricing, on 7 June 2010, even though the phone did not become available until 24 June 2010. Press release, ‘Apple Presents iPhone 4’, 7 June 2010.

<sup>62</sup> Public information that is repackaged with additional functionality that, for example, allows a more detailed interrogation of the data and then is sold on to firms would not be considered public under this definition, neither would information placed on a website that is inaccessible to the general public or hidden away from public view.

<sup>63</sup> This is also consistent with a narrow interpretation of the CFI’s finding in *Wood Pulp* as discussed previously.

products, increasing the intensity of competition.<sup>64</sup> Using a public distinction would ensure that price comparison websites are not investigated as object infringements rather than effect infringements. Public dissemination of future intentions notifies customers of changes before they take place. This allows customers to plan their responses in advance.<sup>65</sup> For example, customers may decide to stockpile quantities or defer purchases before changes in prices.

Second, public dissemination may be significantly more costly as signals to achieve focal pricing than private disclosures. Future pricing intentions carry the risk, as discussed previously, that they allow firms to arrive at a focal price without the risk of losing sales as a result of implementing a price increase. To the extent that a public announcement to change price commits the firm to implementing that price, an announcement regarding future prices may actually be more similar to a current price announcement.

This is not to say that public announcements cannot be harmful. Public announcements regarding future intentions may be harmful when they do not have a commitment value or are made contingent on competitors reactions. Public pricing announcements that do not create a commitment to implement the price may be used as a means of signalling pricing intentions between competitors, similar to future pricing intentions. Furthermore, without any commitment value, the customer benefits are much less clear, and are unlikely to meet the criteria of Article 101(3).<sup>66</sup>

Finally, even though public announcement may create harm, the fact that the announcements are made in public mitigates the risk of such harmful disclosures being undetected. Sharing the information in public allows the authority and potential complainants sight of the exchange – significantly increasing the probability of harmful agreements being caught.<sup>67</sup> Furthermore, it reduces the difficulty of gathering evidence of likely effect. Similarly, public ‘contingent’ announcements of what a firm will do subject to the reaction of its competitors are much easier to spot and are more likely to be treated as cartels rather than information sharing. On balance, this suggests that public sharing of information is better suited to be conducted on the basis of an effects analysis rather than an object analysis.

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<sup>64</sup> In addition, if the dissemination of information reduces consumer inertia, it may also change the ability of firms to coordinate. Greater transparency, due to more public price information, may increase the sensitivity of customers to changes in firms’ price—increasing switching. However, the effects of this are ambiguous, depending upon the precise market parameters: increased consumer switching increases the profits from deviating (reducing the incentive to coordinate), but also increases the ability to punish the deviator (increasing the incentive to coordinate). See T Bjorkroth, ‘Exchange of Information and Collusion—Do Consumer Switching Costs Matter?’ (2010) 6 *European Competition Journal* 179. See also I Bos, R Peeters and E Pot, ‘Competition versus Collusion: The Impact of Consumer Inertia’, Maastricht Working Paper RM/10/024, 2010.

<sup>65</sup> This is particularly the case when announcing the pricing of new products – allowing customers to decide whether to continue consuming the old product or buy the new product.

<sup>66</sup> If the efficiency rationale is to indicate to customers what future prices will be, it is unclear how much of a value to consumers they have if they are subject to change, or contingent on a competitors reactions.

<sup>67</sup> One of the economic rationale for having ‘object’ infringements, and the high fines that accompany them, is the general deterrence signal it provides to agreements which may be hard to spot. For example, the optimal fine for a secret cartel needs to be high in order to discourage other secret cartels, specifically because the probability of detecting them is likely to be low (given their secret nature). Given that their detection and prosecution rates are expected to be significantly higher, the optimal fine for exchanges conducted in public may be lower than secret exchanges.

## 6. Conclusion

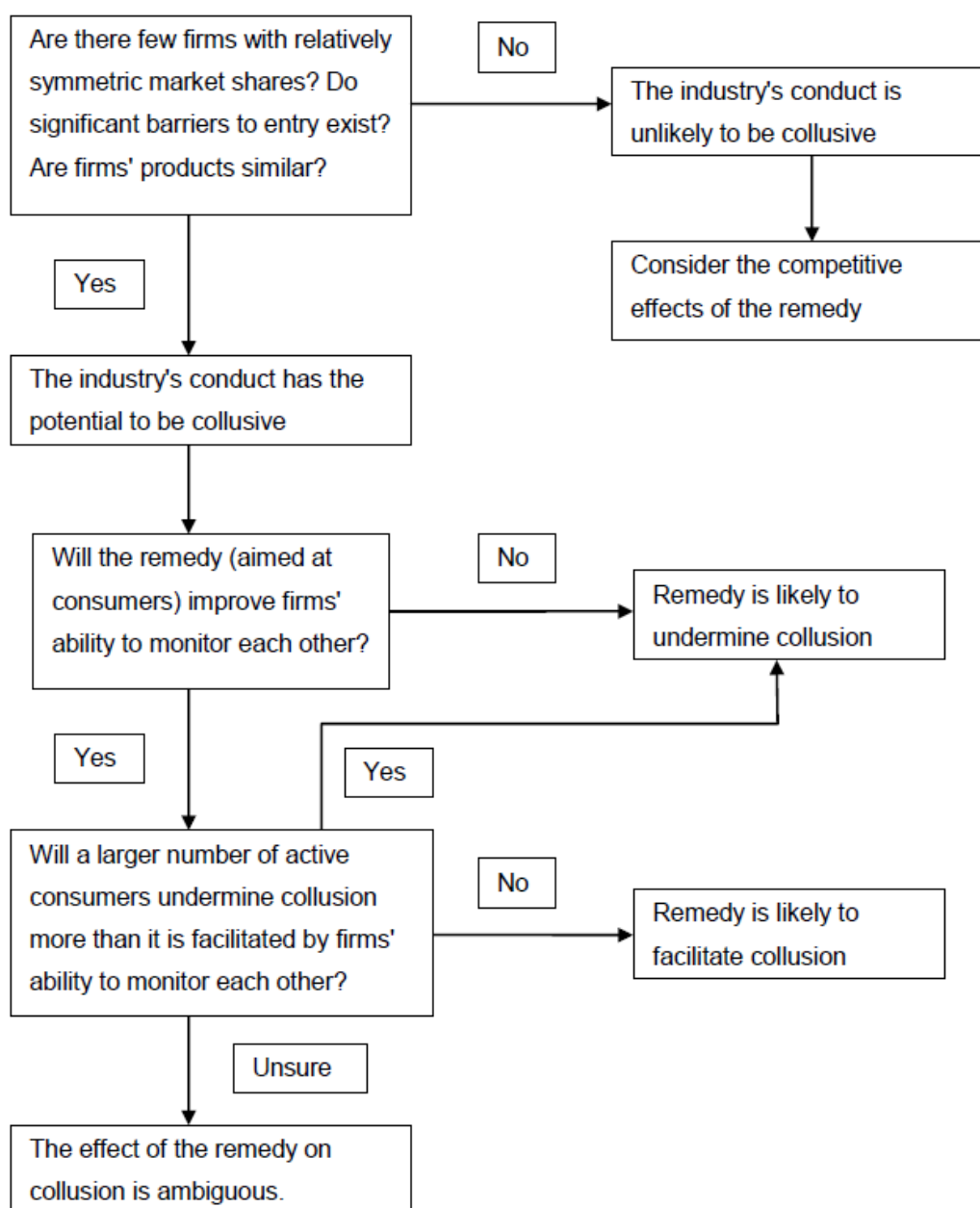
This paper has argued that there are substantial benefits from disseminating or sharing information. Any rule that simply banned information sharing would forego these benefits. However, information sharing between competitors, either directly or indirectly through third parties, generates significant risks to competition from facilitating coordination. A rule that simply permitted all information sharing would allow significant harm to consumers. The conundrum then, is devising rules or guidelines to differentiate between procompetitive and anticompetitive information sharing. The first section of the paper provided a framework in which to address this conundrum.

Using this framework, private exchanges of individualised future, price or quantity information are often likely to harm consumers without providing offsetting benefits. Classifying these as object infringements is relatively non-contentious. At the other extreme, public exchanges of aggregated, historic cost information is highly unlikely to harm consumers. Classifying these as effects infringements, or even as not falling under Article 101(1), is again relatively non-contentious.

However, the types of information sharing that are difficult to classify are: public announcements of individualised future pricing data; and public announcements or private communication of individualised current pricing data. These types of information sharing pose not insignificant risks to competition, but are also likely to generate significant benefits to consumers. Therefore, different people may reasonably classify them in different ways. The EU Guidelines have made the distinction between exchanges of future pricing intentions (or current pricing that reveals future pricing intentions) and other exchanges. This paper suggests that another possible classification may be to use a public/private distinction, where public is defined as available to all at no cost. Under such a distinction, all information sharing in private of individualised, pricing or quantity data would be treated as an object infringement, whilst all information sharing in public of individualised, pricing or quantity data would be treated as an effect infringement.

ANNEX

**Possible framework for assessing whether or not an information remedy is likely to facilitate collusion**



Source: Garrod et al "[Assessing the effectiveness of potential remedies in consumer markets](#)", OFT research paper 994, April 2008

## UNITED STATES

### 1. Introduction

This submission provides an overview of how U.S. antitrust law looks at exchanges of information among competitors.

In modern markets, competitors sometimes need to collaborate in order to achieve legitimate competitive goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs. Such collaborations, which may include information-sharing, are often not only benign, but procompetitive.

Nevertheless, certain information exchanges among competitors may violate Section 1 of the Sherman Act, which prohibits a “contract, combination...or conspiracy” that unreasonably restrains trade.<sup>1</sup> The antitrust concern is that information exchanges may facilitate anticompetitive harm by advancing competing sellers’ ability either to collude or to tacitly coordinate in a manner that lessens competition. Thus, for example, exchanges on price may lead to illegal price coordination. In addition, information exchanges may raise anticompetitive concern by facilitating group behavior of downstream entities against upstream ones. The following text reviews how U.S. courts, and the U.S. Department of Justice Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”) (collectively, “the antitrust agencies”), have applied Section 1 to exchanges of price and other information among competitors.<sup>2</sup> It also describes the designated “safety zones” in which, absent extraordinary circumstances, the antitrust agencies are likely to view information exchanges as legitimate.

### 2. Standard of analysis and potential procompetitive aspects

In the U.S., information exchanges among competitors are examined either under the “rule of reason” or condemned as *per se* violations.<sup>3</sup> Generally, information exchanges are examined under the “rule of reason,” a method of antitrust analysis that distinguishes legitimate information exchanges from illegal ones by balancing the information exchanges’ anticompetitive effects with their potential procompetitive benefits.<sup>4</sup>

U.S. courts and antitrust agencies have long recognized that information sharing schemes can be competitively neutral or even procompetitive. Thus, for example, in *Maple Flooring Mfrs.’ Ass’n v. United States* the court noted that the public interest is served by certain information exchanges that may

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<sup>1</sup> 15 U.S.C. § 1.

<sup>2</sup> Violations of the Sherman Act are also deemed to be violations of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

<sup>3</sup> “Although an agreement to exchange price information is not itself illegal *per se*, proof that competitors have shared information sometimes has served as evidence of a *per se* illegal conspiracy to fix prices.” ABA Section of Antitrust Law, 1 Antitrust Law Developments 93 (6<sup>th</sup> ed. 2007) citing, *inter alia*, *In Re Flat Glass Antitrust Litig.*, 385 F.3d 350, 368—69 (3<sup>rd</sup> Cir. 2004) *cert. denied*, 544 U.S. 948 (2005); *Petroleum Products Antitrust Litigation*, 906 F.2d 432, 445-50 (9<sup>th</sup> Cir. 1990).

<sup>4</sup> See, for example, *Petroleum Products Antitrust Litigation, Id.*

“avoid the waste which inevitably attends the unintelligent conduct of economic enterprise” and that “[c]ompetition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.”<sup>5</sup>

Similarly, the antitrust agencies’ *Antitrust Guidelines for Collaborations Among Competitors*,<sup>6</sup> discussed in greater detail in section IV.B.i below, expressly recognize that the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations. For example, sharing certain technology, know-how, or other intellectual property may be essential to achieve the procompetitive benefits of R&D collaboration.<sup>7</sup>

The antitrust agencies’ advisory opinions and business review letters described later in this paper have similarly recognized certain information exchanges as procompetitive, for example through enhancing efficiency and product quality. See, e.g., the *TriState Health Partners*,<sup>8</sup> *Rx-360*,<sup>9</sup> and *Medical Group Management Association*<sup>10</sup> advisory opinions respectively discussed below in ¶¶ 27, 29, and 30.

### 3. The evidentiary value of information exchanges

Information exchanges can be treated as circumstantial evidence of an unlawful price fixing or market allocation agreement among competitors, and in such a case are analyzed under the *per se* rule as a violation of the antitrust laws. For example, in *In re Petroleum Prods. Antitrust Litigation*,<sup>11</sup> the 9<sup>th</sup> Circuit explained that “[i]nformation exchanges help to establish an antitrust violation only when either (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, or (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of § 1 under a rule of reason analysis.”<sup>12</sup> The court further held that evidence of pricing information exchanges was supportive of a conspiracy inference under Section 1 of the Sherman Act, but not conclusive of such a conspiracy.

In addition to serving as evidence of an unlawful agreement, information exchanges likely to affect prices may, under certain circumstances, be illegal in and of themselves. For example in *United States v. Container Corp. of America*<sup>13</sup> the Supreme Court found “exchange of price information but no agreement to adhere to a price schedule....”<sup>14</sup> It held, nonetheless, that exchanges of information concerning the “most recent price charged or quoted” among sellers of corrugated shipping containers,<sup>15</sup> albeit on an

<sup>5</sup> 268 U.S. 563, 582-83 (1925).

<sup>6</sup> FTC and U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000) (hereinafter, “Collaboration Guidelines” or “Guidelines”), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>7</sup> *Id.*, ¶3.31(b), at p. 15.

<sup>8</sup> See FTC Letter to TriState Health Partners, Inc. of April 13, 2009, at 1-3, available at <http://www.ftc.gov/os/closings/staff/090413tristateaoletter.pdf>.

<sup>9</sup> See FTC Letter to Joanne Lewers, Counsel to Rx-360, of September 15, 2010, at 1-2, available at <http://www.ftc.gov/os/2010/09/100916bloomletter.pdf>.

<sup>10</sup> See FTC Letter to Gerald Niederman, of November 3, 2003, available at <http://www.ftc.gov/bc/adops/mgma031104.pdf>.

<sup>11</sup> 906 F 2d 432, (9th Cir. 1990).

<sup>12</sup> *Id.*, at p. 447.

<sup>13</sup> 393 U.S. 333 (1969).

<sup>14</sup> *Id.*, at p. 334.

<sup>15</sup> *Id.*, at p. 335.



irregular basis, unlawfully stabilized prices. Consequently, the Court concluded that the exchange of price information, involving a highly concentrated industry and a fungible product with inelastic demand, “had an anticompetitive effect in the industry, chilling the vigor of price competition.”<sup>16</sup> It therefore found the exchange to amount to concerted action and thus sufficient to establish a combination or conspiracy in violation of Sherman Act §1.

#### 4. Criteria considered in assessing the legitimacy of information exchanges

Information exchanges may facilitate anticompetitive harm by advancing competitors’ ability to collude. The exchange may carry out an overt agreement, support tacit meetings of the mind, or be unilateral in nature, but all result in anticompetitive effects. Therefore, actual evidence of anticompetitive harm, such as industry-wide price increases as a result of the exchange, would be the strongest factor in finding the exchange illegal. In the absence of such actual anticompetitive effects, various criteria, as discussed below, are considered in assessing the legitimacy of information exchanges, including:<sup>17</sup>

- The nature and quantity of the information (extensive exchange of information regarding pricing, output, major costs, marketing strategies and new product development is more likely to have anticompetitive implications);
- How recent the shared data is (sharing of past data is generally deemed less problematic than sharing current data);
- The parties’ intent in sharing the information (an anticompetitive intent, such as an intent to stabilize prices, is problematic);
- The industry structure (in concentrated industries, an exchange among few firms could be more likely to harm competition);
- Public availability of information (where information is already publicly available, the risk of its exchange between competitors seems low);
- How the exchange is structured and controlled (a direct exchange is more likely to be anticompetitive than an exchange through an intermediary);
- The frequency of exchanges (the more frequent the exchange, the more problematic it may be); and
- Whether the parties adopted safeguards to prevent or limit the participants’ access to each others’ competitively sensitive information.

The following paragraphs describe court cases and antitrust agency guidance and cases that demonstrate how consideration of these criteria plays out in specific cases.

##### 4.1 *Supreme Court cases*

In *American Column & Lumber Co. v. United States*,<sup>18</sup> the Supreme Court examined whether price information exchange concerning hardwood floors must be deemed an “unreasonable restraint on trade” under Section 1 of the Sherman Act. In considering the purpose and likely effect of the information exchange, the Court found it to be unlawful because of the quantity and quality of information shared. It stated that “[g]enuine competitors do not make daily, weekly and monthly reports of the minutest details of

<sup>16</sup> *Id.*, at p. 337.

<sup>17</sup> See also ABA Section of Antitrust Law, 1 Antitrust Law Developments 92-98 (6<sup>th</sup> ed. 2007).

<sup>18</sup> *American Column and Lumber Co. v. United States*, 257 US 377 (1921).

their business to their rivals.” In terms of likely effect, the Court observed that hardwood prices had increased “to an unprecedented extent,” and therefore found the evidence to indicate cartel-like behavior in which the information exchange enabled the American Hardwood Manufacturers’ Association to detect and punish members who deviated from its policy. In light of these findings, the Court found the information exchange to constitute a combination and conspiracy in restraint of interstate commerce that was unlawful under §1 of the Sherman Act.

However, the Court has held that information exchanges that are not likely to lead to anticompetitive effects do not violate §1 of the Sherman Act. In the aforementioned *Maple Flooring* case,<sup>19</sup> the Court concluded that even if the specific information exchange presented an opportunity for an agreement on price or production, the exchange was lawful because no such agreement was actually executed. It based its decision on four decisive facts. First, the data shared were aggregated and historic, *i.e.* involved only past transactions; second, the information exchanged was made publicly available and read by 90-95% of the defendants’ buyers; third, the exchange did not result in actual uniformity in prices; and, finally, the court found the shared data to have “a useful and legitimate purpose in enabling members to quote promptly a delivered price on their product.”<sup>20</sup>

In *United States v. American Linseed Oil Co.*,<sup>21</sup> the Court found the price information exchange program to have the purpose and effect of stabilizing prices, and therefore deemed it unlawful. Conversely, in *Cement Mfrs. Protective Ass’n v. United States*,<sup>22</sup> the Court held that the price uniformity did not result from the information exchange. Instead, the information exchange was aimed at preventing purchasers’ manipulation of the bidding system and therefore did not violate the Sherman Act.

Over time, in evaluating information exchanges, the Court appeared to shift its emphasis from the purpose of the exchange to its likely effect on competitive conditions, and rather than looking only for overt price fixing agreements, also began to assess exchanges that suggest a tacit agreement. In *U.S. v. Container Corp.*,<sup>23</sup> despite finding no agreement on price, the Court held that a direct exchange of pricing information among competitors posed a competitive risk, noting that “price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.”<sup>24</sup> In this case, at the request of a competing company, each corrugated container manufacturer submitted “the most recent price charged or quoted” and, in return, obtained the same information from the requesting company.<sup>25</sup> The Court found that “the inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition.”<sup>26</sup> The fact that the exchanges were of recent price information also played a role in the Court’s analysis.

The Court clarified its previous decisions and provided further guidance for analyzing information exchanges in *U.S. v. U.S. Gypsum Co.*<sup>27</sup> In its decision, the Court observed that exchange of price data and other information among competitors does not invariably lead to anticompetitive effects. The Court

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<sup>19</sup> *Supra* note 5.

<sup>20</sup> *Id.*, at p. 571.

<sup>21</sup> *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923).

<sup>22</sup> *Cement Mfrs. Protective Ass’n v. United States*, 268 U.S. 588 (1925).

<sup>23</sup> *United States v. Container Corp.*, 393 U.S. 333 (1969).

<sup>24</sup> *Id.*, at p. 338.

<sup>25</sup> *Id.*, at p. 335.

<sup>26</sup> *Id.*, at p. 337.

<sup>27</sup> *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978).

distinguished the “gray zone of socially acceptable and economically justifiable business conduct,” from *per se* illegal conduct, noting that the exchange of price information in and of itself, without inquiring into the intent with which it was undertaken, does not necessarily constitute illegal conduct.<sup>28</sup> The Court noted that information exchange practices may, in some cases, foster economic efficiency and confer procompetitive effects. Relevant considerations in determining whether a practice confers procompetitive or anticompetitive effects include the industry structure and the nature of the information exchanged.<sup>29</sup> The Court also stressed that exchange of current price information has the greatest potential of generating anticompetitive effects and, although not *per se* unlawful, has consistently been held to violate the Sherman Act.

## 4.2 Guidance by the antitrust agencies

### 4.2.1 DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors (2000)

In 2000 the antitrust agencies issued joint *Antitrust Guidelines for Collaborations among Competitors*,<sup>30</sup> which apply to information exchanges and other joint conduct in a variety of business contexts.<sup>31</sup> The *Collaboration Guidelines* address, among other things, how the FTC and DOJ evaluate the likelihood that a given collaboration might result in disclosure of competitively sensitive information, appropriate safeguards to reduce antitrust risk from such exchanges, and exchanges that would qualify for safety zones from antitrust liability.

While recognizing the potential procompetitive aspects of information sharing, the *Guidelines* recognize such exchanges can also potentially lead to collusion, and identify three main points to consider in this regard. First, the more competitively sensitive the information, the greater the risk. Sharing of pricing and cost data, information about output levels and production capacities, or business strategies and marketing plans will draw much more antitrust scrutiny than disclosure of less competitively sensitive information.<sup>32</sup> Second, the exchange of current or future sales strategies will cause greater concern than disclosure of historical sales figures.<sup>33</sup> Third, disclosure of firm-specific information is more competitively dangerous than sharing aggregated data, which does not allow competitors to identify individual firms as the source of particular data points.<sup>34</sup> Moreover, the exchange of individual company data (particularly current data on prices or costs, or forward-looking projections of sales or output levels) is usually not required to achieve major efficiencies.

In addition to the nature of the shared information, the likelihood that such information will be shared and used for anticompetitive purposes is also a main concern of the Agencies.<sup>35</sup> Among other factors, the FTC and DOJ consider the nature and purpose of the collaboration, how it is structured and controlled, and

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<sup>28</sup> *Id.*, at p. 441.

<sup>29</sup> *Id.*, at p. 443.

<sup>30</sup> FTC and U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* *supra* note 6.

<sup>31</sup> *Id.*, at pp. 1-2, 15-16, 21.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, at p. 16.

<sup>35</sup> *Id.*, at p. 21.

whether it has adopted safeguards to prevent or limit the participants' access to each others' competitively sensitive information.<sup>36</sup>

- Safety Zones

- *Under the DOJ/FTC Guidelines for Collaborations among Competitors*

Because some competitor collaborations may be procompetitive, the antitrust agencies believe that “safety zones” are useful in order to encourage such activity.<sup>37</sup> Information sharing and various trade association activities also may take place through competitor collaborations, and are therefore a specific type of collaboration. In the aforementioned collaboration Guidelines<sup>38</sup> the antitrust agencies designated safety zones to provide participants in a competitor collaboration with a degree of certainty in situations in which anticompetitive effects are so unlikely that the antitrust agencies presume the arrangements to be lawful without inquiring into particular circumstances. These safety zones are not intended to discourage competitor collaborations that fall outside the safety zones.<sup>39</sup>

*General Competitor Collaborations.* Absent extraordinary circumstances, the antitrust agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected. This safety zone, however, does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied.<sup>40</sup>

*Research and Development Competition Analyzed in terms of Innovation Markets.* Absent extraordinary circumstances, the antitrust agencies do not challenge a competitor collaboration on the basis of effects on competition in an innovation market where three or more independently controlled research efforts in addition to those of the collaboration possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration. This antitrust safety zone does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied.<sup>41</sup>

- *Under the FTC/DOJ Health Care Statements (1996)*

In August 1996, the FTC and the DOJ jointly issued *Statements of Antitrust Enforcement Policy in Health Care*.<sup>42</sup> Of these, Statement No. 5<sup>43</sup> sets out the antitrust agencies' enforcement policy with respect to collective dissemination of health care providers' fee

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*, p. 25.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*, §4.1, p. 25.

<sup>40</sup> *Id.*, §4.2, p. 26.

<sup>41</sup> *Id.*, §4.3, pp. 26-27.

<sup>42</sup> FTC and U.S. Department of Justice, *Statements of Antitrust Enforcement Policy in Health Care (1996)* (hereinafter, “Health Care Statements” or “Statements”), available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf>.

<sup>43</sup> *Id.*, at pp. 43-48.

information to purchasers, and Statement No. 6 outlines their policy with respect to exchanges of price and cost information among competing health care service providers.<sup>44</sup>

With respect to collective provision of fee-related information, Statement No. 5 sets forth an antitrust safety zone in which such provision will generally not be challenged by the antitrust agencies.<sup>45</sup> In order to qualify for this safety zone, the collection of information must: (1) be managed by a third party; (2) contain information based on data that is more than three months old; and (3) contain shared data aggregated from at least five providers, of which no individual provider represents more than 25 percent, and be sufficiently aggregated to prevent identification of prices charged by any individual provider. The sharing of prospective fee-related information falls outside the antitrust safety zone, and will be assessed on a case-by-case basis, including scrutiny of the nature and extent of communications, the rationale for providing the information, and the nature of the market in which it is provided.<sup>46</sup>

*Health Care Statement* No. 6 provides general guidance on the antitrust agencies' enforcement policy in circumstances where competing service providers (hospitals, physician groups, etc.) participate in written surveys of prices for health care services or compensation costs (salaries, wages, or benefits).<sup>47</sup> Specifically, Statement No. 6 acknowledges that such surveys can have significant benefits for health care consumers, providers, and purchasers when conducted with appropriate safeguards against collusion or other reduction of competition.<sup>48</sup> The Statement, therefore, sets forth an antitrust safety zone similar to the one set in Statement No. 5, with the same three conditions mentioned above in ¶ 23 that, when met, lead the antitrust agencies not to challenge the proposed exchange, absent extraordinary circumstances.<sup>49</sup>

With respect to exchanges of price and cost information among competing providers that do not satisfy the safety zone conditions, the antitrust agencies will generally apply a rule of reason analysis. The *Statements* explain that this involves balancing the parties' asserted justifications for the exchange against the enforcement agency's assessment of its likely anticompetitive effects, such as facilitating collusion on salary levels or reducing access to certain specialty services.<sup>50</sup> However, exchanges of future price or employee compensation data are very likely to be considered anticompetitive, and to the extent such exchanges constitute an agreement among competitors on prices for health care services or wages paid to health care employees, will be considered unlawful *per se*.<sup>51</sup>

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<sup>44</sup> *Id.*, at pp. 49-52.

<sup>45</sup> Importantly, the protection of the antitrust safety zone applies "absent extraordinary circumstances," which leaves the agencies some enforcement flexibility when confronted with atypical facts or business arrangements, see *Id.*, at p. 43.

<sup>46</sup> *Id.*, at pp. 46-47

<sup>47</sup> *Id.*, at pp. 49-52. As noted above, the *Statements* also discuss collective activity by providers to furnish pricing data (fees, discounts, reimbursement methods, etc.) to health care purchasers. For most purposes, the same antitrust principles apply to both types of information exchanges. "The principles expressed in the Agencies' statement on provider participation in exchanges of price and cost information are applicable in this context." *Id.* at p. 44.

<sup>48</sup> *Id.*, at p. 49.

<sup>49</sup> *Id.*, at p. 50.

<sup>50</sup> *Id.*, at p. 51.

<sup>51</sup> *Id.*

## 5. Examples of information exchanges viewed as permissible

### 5.1 *FTC advisory opinions*

Potential participants in an information exchange may request an advisory opinion from the Commission or FTC staff that analyzes antitrust ramifications of the proposed exchange, provided that they are subject to the agency's jurisdiction.<sup>52</sup> Most FTC advisory opinions issued in this area to date have involved the health care industry; the agency's Health Care Division has a particular interest in examining the collection, exchange, and provision of information, including price information, among health care providers.<sup>53</sup> The following review highlights a few of the antitrust agencies' advisory opinions and business review letters (a similar procedure available at the DOJ and discussed below in section V.ii) that found specific information exchanges permissible due to the unlikelihood of competitive harm, or the presence of procompetitive advantages that outweigh potential competitive harms.

#### 5.1.1 *TriState Health Partners opinion*

In 2009, the FTC examined a clinical integration program proposed by a physician-hospital organization.<sup>54</sup> The organization had requested an advisory opinion on the legality of its program, which included, among other joint activities, implementation of a web-based health information technology system to help identify "high-risk and high-cost patients," and facilitate the exchange of patients' treatment and medical management information. These information-sharing efforts, in turn, were designed to create opportunities for "aggressive care management," which could improve physician performance and quality of treatment for patients, and bring "significant financial benefits for payers."<sup>55</sup> Given the efficiency justification for the program, the agency viewed the collective conduct as reasonably necessary for the success of the overall program and the achievement of significant procompetitive benefits.<sup>56</sup>

#### 5.1.2 *Greater Rochester Independent Practice Association opinion*

A multi-specialty physician practice association requested an advisory opinion for its 2007 proposed clinical integration program. In addition to joint negotiation of contracts and prices with health plans, the integration program involved extensive sharing of patient information (health histories, prescriptions, test results, courses of treatment, clinical outcomes, etc.) and data on physician practices (*e.g.*, adherence to program standards and use of cost-saving measures).<sup>57</sup> In applying a rule of reason analysis to the

<sup>52</sup> Advisory opinions do not normally opine on the legality of the proposed conduct. Instead, they set forth the enforcement intentions of the agency if the proposed conduct were undertaken, and are issued without prejudice to the agency's right to reconsider the issues involved. See Sections 1.1–1.4 of the Commission's Rules of Practice, 16 C.F.R. §§ 1.1-1.4; see also Guidance From Staff of the Bureau of Competition's Health Care Division on Requesting and Obtaining an Advisory Opinion (May 2010), available at <http://www.ftc.gov/bc/healthcare/industryguide/adv-opinionguidance.pdf>.

<sup>53</sup> For a list of FTC advisory opinions on exchanges of information between healthcare providers see FTC Bureau of Competition HealthCare Division, TOPIC AND YEARLY INDICES OF HEALTH CARE ANTITRUST ADVISORY OPINIONS BY COMMISSION AND STAFF, p. 8, available at <http://www.ftc.gov/bc/adops/indexfin062010.pdf>.

<sup>54</sup> See FTC Letter to TriState Health Partners, Inc. of April 13, 2009, at 1-3, available at <http://www.ftc.gov/os/closings/staff/090413tristateaoletter.pdf>.

<sup>55</sup> *Id.*, at pp. 8-9.

<sup>56</sup> *Id.*, at pp. 14-15, 36-37.

<sup>57</sup> See FTC Letter to Greater Rochester Independent Practice Ass'n, Inc. of September 17, 2007, at pp. 7-9, available at <http://www.ftc.gov/os/closings/staff/070921finalgripamcd.pdf>.

proposed program,<sup>58</sup> the FTC allowed the integration to go forward, based on the likelihood of the program achieving its procompetitive potential, the ancillarity of the joint contracting to furthering such efficiencies, and indications that the physician association would be unlikely to exercise market power or bring about anticompetitive effects in the relevant market.<sup>59</sup>

### 5.1.3 *Rx-360 opinion*

In September 2010, the FTC issued an advisory opinion concerning sharing of information by members of an international consortium of biotechnology and pharmaceutical firms. The consortium, known as Rx-360, had sought the agency's guidance concerning a proposal to implement supplier audit programs.<sup>60</sup> Under these programs, consortium members will be able to share both prior quality and safety audit information and the costs of sponsoring further quality and safety audits of common ingredient suppliers.<sup>61</sup> FTC staff advised Rx-360 that it currently has no intention to recommend to the Commission that it challenge the programs, because staff did not find them to raise any significant antitrust risk.<sup>62</sup> This conclusion was based on a rule of reason analysis, which concluded, based on the information provided, that the audit programs: (1) do not require exchanges of competitively significant information, (2) contain protections to reduce Rx-360 members' ability to use the programs for anticompetitive ends; (3) protect audited firms from concerted misuse of the audit programs; and (4) are intended and likely to promote efficiency, quality, and safety.<sup>63</sup>

### 5.1.4 *Medical Group Management Association opinion*

Medical Group Management Association (MGMA), a professional association representing medical practice administrators, requested an advisory opinion of its 2003 plan to provide its members information comparing the performance and status of their medical group in comparison to its peers.<sup>64</sup> The collected information included insurer payments to each physician, and thus was akin to an exchange of price information among physicians. However, MGMA's proposal prevented disclosure of the underlying payment data to physicians; focused on past or current rather than future payments; published only statistics that combined data from at least 5 respondents, and published the information in an aggregated form that prevented disclosure of the price paid by individual insurers or received by individual physician practices. MGMA also sought to collect and circulate aggregated information about insurers' referral networks, rates of claim rejections and payments times, and physicians' satisfaction with payers' responsiveness to questions or concerns about claims or payments. Nevertheless, MGMA planned to circulate only aggregated performance on any of these data; and neither establish clear benchmarks for what might be deemed acceptable performance, nor evaluate particular payers based on any benchmark. Moreover, MGMA's proposed information exchange appeared likely to encourage payers to compete. Therefore, the Commission staff's advisory opinion did not find substantial anticompetitive concern over MGMA's information exchange proposal.

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<sup>58</sup> See FTC Letter to Greater Rochester IPA, at pp. 10-11.

<sup>59</sup> *Id.* at p. 29.

<sup>60</sup> See FTC Letter to Joanne Lewers, Counsel to Rx-360, of September 15, 2010, at pp. 1-2, available at <http://www.ftc.gov/os/2010/09/100916bloomletter.pdf>.

<sup>61</sup> See FTC Letter to Joanne Lewers, at p. 3.

<sup>62</sup> *Id.* at pp. 6-8.

<sup>63</sup> *Id.*

<sup>64</sup> See FTC Letter to Gerald Niederman, of November 3, 2003, available at <http://www.ftc.gov/bc/adops/mgma031104.pdf>.

## 5.2 *DOJ business review letters*

Persons concerned about the legality under the antitrust laws of proposed business conduct may ask the DOJ for a statement of its current enforcement intentions with respect to that conduct pursuant to the DOJ's Business Review Procedure.<sup>65</sup> The following paragraphs describe two DOJ business review letters concerning proposed information exchanges.

### 5.2.1 *Hospital Value Initiative*

On April 26, 2010, DOJ issued a business review letter stating it saw no reason to object to an information exchange program of Hospital Value Initiative (HVI), a coalition of three organizations: the Pacific Business Group on Health, the California Public Employees' Retirement System, and the California Health Care Coalition. Together these three groups represent group purchasers of health care services, which purchase health care for more than 7 million people in California. HVI proposed to provide data on the relative costs and resource efficiency of more than 300 hospitals in that state. HVI would collect, analyze and distribute aggregated comparative data on the level of reimbursement received, and the resources used, by California hospitals in providing inpatient and outpatient services. DOJ determined that HVI's proposal was not likely to produce anticompetitive effects because the exchange would involve data that was at least 10 months old and the program would not disclose disaggregated data or any hospital's actual service fees. HVI's data exchange program could potentially benefit consumers by increasing the transparency of the relative costs and resource efficiency of hundreds of California hospitals. Moreover, DOJ concluded that the proposed information exchange might reduce health care costs by improving competition among hospitals and facilitating more informed purchasing decisions by group purchasers of health care services.

### 5.2.2 *Trucking Companies*

On April 9, 2007, DOJ announced that it would not oppose a proposal by the National Association of Small Trucking Companies (NASTC) and Bell & Company (Bell) to conduct an operational and financial survey of small- and medium-sized trucking companies. NASTC and Bell planned to share the collected information -- data on general company information, equipment, finances, and employees -- in aggregate form with survey participants and others to provide trucking firms with competitive benchmarks. DOJ concluded that certain safeguards would ensure that the survey did not result in exchanges of competitively sensitive business information. The survey report would be administered by third parties, would contain only aggregated data that is at least three months old, and would be published only if responses to the survey were received from five or more trucking companies. DOJ's business review letter noted that "such surveys can benefit consumers when industry members use information derived from such surveys to gain efficiencies and price their products or services more competitively."

## 6. **Examples of information exchanges viewed as illegal**

The following paragraphs demonstrate cases in which information exchanges were viewed as violating antitrust laws.

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<sup>65</sup> See 28 C.F.R. § 50.6.



## 6.1 Exchanges initiated unilaterally

### 6.1.1 *In re Valassis Communications*

Unilateral attempts by a competitor to exchange sensitive information with rivals, even if unreciprocated, can trigger antitrust enforcement. For example, the *Valassis* matter involved an alleged invitation to collude from one publisher of newspaper advertising inserts to its only rival in that market.<sup>66</sup> The FTC's Complaint alleged that, during an earnings conference call open to the public, the CEO of Valassis announced a new strategy for raising prices of inserts, and that the company's executives knew that its rival, News America, would be monitoring the call.<sup>67</sup> The Complaint also alleged that Valassis intended to facilitate collusion through its announcement and had no legitimate business reason for disclosing its new pricing strategy.<sup>68</sup> According to the FTC, if News America had accepted the invitation from Valassis, higher prices and reduced output of newspaper advertising inserts were likely to result.<sup>69</sup> To resolve these allegations, Valassis entered into a consent order with the agency that prohibits unilateral communications, both public and private, concerning the company's willingness to refrain from competing with rivals or to coordinate pricing with them.<sup>70</sup> The order further prohibits participation by Valassis in any concerted action to allocate markets or customers, or coordinate pricing with competitors.<sup>71</sup>

### 6.1.2 *In re Stone Container Corporation*

In *In re Stone Container Corporation* the FTC challenged a unilateral initiative to reduce output and increase industry prices through a broad scheme that included information exchanges.<sup>72</sup> The FTC Complaint<sup>73</sup> charged that, as part of a devised strategy to invite its competitors to increase prices, Stone Container, the largest U.S. manufacturer of linerboard, conducted a telephone survey of competing U.S. linerboard manufacturers, asking them how much linerboard was available for purchase and at what price. In addition, Stone Container allegedly contacted competitors to inform them of its planned downtime and linerboard purchases, and in the course of these communications, arranged to purchase significant linerboard volumes from its competitors. These communications were entered into outside its ordinary course of business, and their specific intent was to coordinate an industry wide price increase. The methods of communication included private conversations and public statements, including press releases and published interviews. The FTC viewed these acts and practices as an invitation by Stone Container to its competitors to join a coordinated price increase. In agreeing to settle these charges, Stone Container was ordered to cease and desist from these communications and, for a period of five years, to maintain and

<sup>66</sup> In re Valassis Communications, Inc., F.T.C. No. C-4160 (April 19, 2006) (consent order), available at <http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisDecisionandOrder.pdf>.

<sup>67</sup> In re Valassis Communications, Complaint ¶¶ 12-13, available at <http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf>.

<sup>68</sup> Id., ¶ 14.

<sup>69</sup> Id., ¶ 15.

<sup>70</sup> In re Valassis Communications, Decision and Order at II.A.

<sup>71</sup> Id. at II.B.

<sup>72</sup> In re Stone Container Corporation, F.T.C. No. C-3806, all relevant information available at <http://www.ftc.gov/os/caselist/c3806.shtm>.

<sup>73</sup> In re Stone Container Corporation, Complaint 3-7, available at <http://www.ftc.gov/os/1998/06/9510006.cmp.htm>.

make available to FTC staff, upon request, all records of communications with competing linerboard manufacturers.<sup>74</sup>

## 6.2 Exchanges in trade association contexts

Trade associations provide their members and consumers with valuable benefits, such as education, outreach efforts to expand markets, enhancing product compatibility or quality standards, and otherwise helping businesses become more efficient. While the antitrust agencies recognize that trade association activity can be procompetitive or competitively neutral, they remain vigilant for certain types of conduct – especially information sharing – that could facilitate agreements among competitors on prices, output, or other terms of trade. As the FTC recently stated, “it is imperative that trade association meetings not serve as a forum for rivals to disseminate or exchange competitively-sensitive information, particularly where such information is highly detailed, disaggregated, and forward-looking.”<sup>75</sup>

### 6.2.1 *In re Nat’l Ass’n of Music Merchants, Inc.*

In a recent enforcement action involving a trade association of musical instrument manufacturers, distributors, and dealers,<sup>76</sup> the FTC challenged the organization’s role in arranging and encouraging the exchange of competitively sensitive information – particularly retail pricing policies and strategies – at regular meetings and programs it sponsored.<sup>77</sup> In its Complaint against the National Association of Music Merchants (“NAMM”), the FTC alleged that the association conducted numerous such events over a two-year period.<sup>78</sup> The FTC charged that these exchanges of competitively sensitive information, that in many instances served no legitimate business purpose, were anticompetitive because they had the purpose, tendency, and capacity to facilitate collusion and restrain competition unreasonably.<sup>79</sup> To settle these charges, NAMM entered into a consent order that prohibited it from taking part in any information sharing activities among musical instrument manufacturers or dealers that relates to retail pricing and similarly sensitive subjects.<sup>80</sup> The consent order also requires NAMM to refrain from any activity that might facilitate collusive agreements among its members, and to implement an extensive antitrust compliance program.<sup>81</sup>

### 6.2.2 *Wisconsin Chiropractic Association*

In 2000, the FTC obtained a consent order against the Wisconsin Chiropractic Association, (WCA).<sup>82</sup> The anticompetitive practices alleged in the FTC Complaint included training seminars in which detailed

<sup>74</sup> In re Stone Container Corporation, Decision and Order, available at <http://www.ftc.gov/os/1998/06/9510006.do.htm>.

<sup>75</sup> In re Nat’l Ass’n of Music Merchants, Inc., F.T.C. No. C-4255 (March 4, 2009) (analysis to aid public comment), available at <http://www.ftc.gov/os/caselist/0010203/090304nammanal.pdf>.

<sup>76</sup> Id. F.T.C. No. C-4255 (Mar. 4, 2009) (consent order), all materials available at <http://www.ftc.gov/os/caselist/0010203/index.shtm>.

<sup>77</sup> See analysis to aid public comment, supra note 75.

<sup>78</sup> In re Nat’l Ass’n of Music Merchants, Complaint ¶ 5 (April 10, 2009), available at <http://www.ftc.gov/os/caselist/0010203/090410nammcmpt.pdf>.

<sup>79</sup> Id., ¶ 6.

<sup>80</sup> In re Nat’l Ass’n of Music Merchants, Decision and Order at II.A.1. (April 10, 2009), available at <http://www.ftc.gov/os/caselist/0010203/090410nammdo.pdf>.

<sup>81</sup> Id. at II.A.2. and II.B.

<sup>82</sup> In re Wisconsin Chiropractic Association and Russell A. Leonard, F.T.C. No. C-3943 (May 18, 2000) (consent order), the order and all relevant documents available at <http://www.ftc.gov/os/caselist/c3943.shtm>.

data on osteopathic pricing was provided, and chiropractors were encouraged to raise their prices to those levels.<sup>83</sup> In addition, the Complaint states that respondents frequently collected, analyzed, and provided fee surveys to their members containing current charge data for specific chiropractic treatments. Some of the shared data was collected less than a month prior to being shared.<sup>84</sup> The FTC ordered the respondents to cease and desist from initiating, developing, publishing, or circulating any proposed or existing fee survey for any health care goods or services, for a period of two years.<sup>85</sup> An identical order for a period of five years was imposed, unless the respondents implemented safeguards to include: (1) collection, analysis and management of the data by a third party; (2) the fee for surveying to be retained by that third party; (3) any information shared would be more than three months old; and (4) there will be at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data will represent more than 25 percent of that statistic, and any information disseminated will be sufficiently aggregated such that it would not allow identification of the prices charged or compensation paid by any particular provider.

### 6.2.3 Airline Tariff Publishing Company (ATP)

In December 1992, DOJ sued eight of the largest U.S. airlines and the Airline Tariff Publishing Company (ATP) for price fixing and for operating ATP, their jointly-owned fare exchange system, in a way that facilitated collusion, in violation of §1 of the Sherman Act.<sup>86</sup> ATP was a complex information exchange system among airlines that was widely and openly operated to disseminate fare information through computer reservation systems and travel agents. ATP provided both a means for the airlines to disseminate fare information to the public and a means for them to engage in essentially a private dialogue on fares. The defendants designed and operated ATP's computerized fare exchange system in a way that unnecessarily facilitated coordinated interaction among them so that they could (1) communicate more effectively with one another about future fare increases, restrictions, and elimination of discounted fares, (2) establish links between proposed fare changes in one or more city-pair markets and proposed changes in other city-pair markets, (3) monitor each other's changes, including changes in fares not available for sale, and (4) reduce uncertainty about each other's pricing intentions. The ATP case involved "cheap talk"-- communication that does not commit firms to a course of action -- such as announcing a future price increase but leaving open the option to rescind or revise it before it takes effect.<sup>87</sup> If the terms of agreement are complex (*e.g.*, specifying prices in numerous markets) but there is a common desire to reach agreement, cheap talk can help firms reach a collusive equilibrium. ATP collected fare information from the airlines and distributed it daily to all the airlines and to the major computer reservation systems (CRSs) that serve travel agents. This arrangement was an efficient instrument for cheap talk.<sup>88</sup> The case was resolved with a consent decree crafted to ensure that the airline defendants did not continue to use any fare dissemination system in a manner that unnecessarily facilitated price coordination or that enable them to reach specific price-fixing agreements.

<sup>83</sup> See the Complaint, ¶10.A-B, available at <http://www.ftc.gov/os/2000/05/wisconsincomp.htm>

<sup>84</sup> *Id.*, ¶10.D.

<sup>85</sup> In re Wisconsin Chiropractic Association, Decision and Order, at ¶¶II.G-H available at <http://www.ftc.gov/os/2000/05/wisconsin.do.htm>.

<sup>86</sup> United States v. Airline Tariff Publishing Co., 1994-2 Trade Cas. (CCH) ¶70,687 (D.D.C. Aug. 10, 1994); see <http://www.usdoj.gov/atr/cases/dir23.htm>.

<sup>87</sup> Joseph Farrell and Matthew Rabin, "Cheap Talk," 10 *Journal of Economic Perspectives* 103 (Summer 1996).

<sup>88</sup> William Gillespie, "Cheap Talk, Price Announcement, and Collusive Coordination," EAG 95-3, Discussion Paper, Economic Analysis Group, Antitrust Division, U.S. Department of Justice (9/25/95). See also Severin Borenstein, "Rapid Price Communication and Coordination: The Airline Tariff Publishing Case (1994)," Chapter 13 in John E. Kwoka, Jr. and Lawrence J. White (eds.), *The Antitrust Revolution: Economics, Competition, and Policy*, 3rd ed. (1999).

## 7. Information exchanges in premerger negotiations

Certain information exchanges between competitors are necessary and legitimate in the context of negotiating a potential merger or acquisition. The antitrust agencies recognize that merging firms have a legitimate interest in engaging in certain forms of coordination such as due diligence and appropriate transition planning, both of which necessarily involve information exchanges at levels of detail that would not normally occur among independent firms. These forms of coordination and information sharing are assessed to see if they are reasonable and necessary to implement the legitimate objectives of the imminent merger agreement. Where the merging firms are competitors or are in a relationship that affects competitive interactions in the marketplace, however, premerger information exchanges can present issues under Section 1 of the Sherman Act. The exchange can be especially harmful to competition where the merger negotiation falls through and planned merger never materializes.

The antitrust agencies' general approach to information exchanges in premerger negotiations has been that where premerger coordination is reasonably necessary to protect the core transaction, the conduct is assessed under the rule of reason.<sup>89</sup>

## 8. Conclusion

Information exchanges among competitors are not necessarily anticompetitive, and in fact are often procompetitive. In applying Section 1 of the Sherman Act to exchanges of price and other information among competitors, U.S. courts and antitrust agencies follow a rule of reason approach that balances the information exchanges' anticompetitive effects with their potential procompetitive benefits (e.g. efficiency and product quality improvements).

Actual anticompetitive harm resulting from the exchange, such as higher prices or price uniformity, is the strongest reason for challenging an information exchange. In addition, criteria considered in assessing the exchange's potential anticompetitive effects include: the nature and quantity of the information; how recent the shared data is; parties' intent in sharing the information; industry structure; public availability of information; how the exchange is structured and controlled; the frequency of exchanges; and whether the parties involved in the exchange adopted safeguards to prevent or limit the participants' access to each others' competitively sensitive information.

In addition to applying a general rule of reason analysis, antitrust agencies have delineated safety zones in which, absent extraordinary circumstances, they would consider information exchanges competitively benign. In the context of integrative collaborations, the agencies generally do not challenge information exchanges when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected. Furthermore, in health care markets, the agencies generally view the collection and exchange of information as competitively benign where the exchange: (1) is managed by a third party; (2) is based on data that is more than three months old; and (3) contains shared data aggregated from at least five providers, of which no individual provider represents more than 25 percent, and be sufficiently aggregated to prevent identification of prices charged by any individual provider.

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<sup>89</sup> See William Blumenthal, Former FTC General Counsel, THE RHETORIC OF GUN-JUMPING, Remarks Before the Association of Corporate Counsel (New York, November 10, 2005), p. 8, *available at* <http://www.ftc.gov/speeches/blumenthal/20051110gunjumping.pdf>; *United States v. Computer Assoc. Int'l, Inc.*, 2002-2 Trade Cas. (CCH) ¶ 73,883, at 95,250 § V.D (D.D.C. 2002), *available at* <http://www.usdoj.gov/atr/cases/f11000/11083.htm>.

## EUROPEAN UNION

### 1. Introduction

Information exchange is a common feature of competitive markets that generates various types of efficiency gains. It solves problems of information asymmetries, thereby making markets more efficient. Moreover, companies often increase their internal efficiency through benchmarking against each others' best practices. Sharing of information can also help firms to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand etc. Furthermore, information exchanges can directly benefit consumers by reducing their search costs and improving choice. This in turn can reduce consumer "lock in" and lead to intensification of competition. Therefore, competition policy in the complex area of information exchange needs to be particularly balanced in order not to discourage pro-competitive information exchanges.

At the same time, information exchange may lead to restrictive effects on competition. Most importantly<sup>1</sup>, in situations where information exchange enables undertakings to be better aware of market strategies of their competitors (reduces strategic uncertainty in the market) it may facilitate collusion.<sup>2</sup> Since in markets where collusion<sup>3</sup> is feasible there are normally multiple possible collusive equilibria, information exchange can help competitors to collude by eliminating strategic uncertainty as to which equilibrium should be played. To that end, firms can also use information as signals to influence the terms of the collusive agreement. Communication can also help monitoring of deviations from collusion, as well as entry, which is important for ensuring stability of collusion. Communicating between firms can furthermore stabilize collusion by allowing competitors to build trust between each other. Even the so called "cheap talk" can convey useful information if it is disciplined by repeated interaction. Experiments with repeated games indeed demonstrate that communication tends to move prices towards collusive outcomes.

The competitive outcome of information exchange as a facilitating practice depends on the characteristics of the market in which the conduct takes place (such as concentration, transparency, stability, complexity, symmetry etc.), the type of information that is exchanged (the strategic nature of its subject matter, its age, frequency, aggregation etc.), as well as on the mechanism through which information exchange may modify the relevant market environment towards one liable to coordination. The mechanism through which information exchange can facilitate collusion can essentially take two

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<sup>1</sup> The primary concern of this paper, as well as of the Commission's draft guidelines on information exchange, is the potential of information exchanges for facilitating collusion in economic contexts of repeated interactions. Welfare effects in "theories of harm" based on static oligopoly settings would be contingent on many unobservable parameters, such as whether firms compete on price or quantity, on the nature of the uncertainties (whether they are "private" or "common value", and whether they are on demand or supply side), as well as on the shape of the demand curve, etc. Therefore, even though information exchanges in static oligopoly could result in negative effects on consumer welfare, they may not be a good basis for workable antitrust guidelines.

<sup>2</sup> Case C-7/95 P, *John Deere*, [1998] ECR I-3111, paragraph 88.

<sup>3</sup> By collusion this paper understands coordination (i.e., alignment) of companies' competitive behaviour that result in restrictive effects on competition.

different forms. First, information exchange can enable firms to reach a common understanding about the terms of coordination (provide them with the so called "focal point" at which they can collude). Second, it can facilitate stability of collusion by enabling monitoring of deviations and entry.

Information exchange can be found in very different contexts. They may be self-standing<sup>4</sup> (the so called pure information exchanges) or be part of another type of horizontal agreement (e.g., the parties to a production agreement share certain information on costs). The assessment of the latter type of information exchanges would normally be carried out in combination with an assessment of the respective horizontal co-operation agreement. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the explicitly agreed terms. These types of exchanges of information are normally assessed as part of the cartel. Finally, information exchange may be found to have the object of fixing prices or quantities, and in those situations would normally be considered and fined as cartels.

This paper intends to stimulate this roundtable's discussion by reflecting on the subject of information exchange between competitors<sup>5</sup> in light of EU case law and the draft guidelines on horizontal agreements that the Commission has put forward for public consultation.<sup>6</sup> This document should not be read as the Commission's general guidelines on information exchange, as these are currently in the process of preparation.<sup>7</sup>

## 2. Information exchange and the scope of Article 101

Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a decision of an association of undertakings, or a concerted practice. In line with the jurisprudence of the Court of Justice of the European Union, the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.<sup>8</sup> The criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual plan to have been worked out, are to be understood in the light of the concept inherent in the provisions of the Treaty on the Functioning of the European Union on competition, according to which each company must determine independently the policy which it intends to adopt on the internal market and the conditions which it intends to offer to its customers.<sup>9</sup>

This does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, however, strictly preclude any direct or indirect contact

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<sup>4</sup> This paper will focus principally on this first type of information exchanges.

<sup>5</sup> Information sharing between competitors can be direct or indirect. The latter can happen through a common agency (e.g., trade association) or a third party such as a market research organisation, or through the companies' suppliers or retailers. Both direct and indirect information exchanges between competitors can infringe Article 101.

<sup>6</sup> "Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", Brussels, SEC(2010) 528/2

<sup>7</sup> Please send any comments you may have on this paper to Aleksandra Boutin (until recently Aleksandra Ossowska) in the Antitrust and Mergers Policy and Scrutiny Unit of DG Competition (aleksandra.ossowska@ec.europa.eu)

<sup>8</sup> See for example C-8/08, *T-Mobile Netherlands*, ECR I not yet reported, paragraph 26; Joined Cases C-89/85 et al., *Wood Pulp*, [1993] ECR 1307, paragraph 63.

<sup>9</sup> See Case C-7/95 P, *John Deere*, cited in note 1 above, paragraph 86.

between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings, and the volume of the said market.<sup>10</sup> This precludes any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, thereby reducing competitors' independent conduct on the market.<sup>11</sup>

A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice.<sup>12</sup> Such disclosures could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces for all the competitors involved strategic uncertainty as to the future operation of the market and increases the risk of diminution of competition and of collusive behaviour.<sup>13</sup> For example, the mere attendance of a meeting, where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices.<sup>14</sup> When a company receives strategic data from a competitor, it will normally be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.<sup>15</sup>

Depending on the facts underlying the case at hand, the finding of a concerted practice cannot be excluded also in a case which concerns a unilateral genuinely public announcement, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each others' public announcements (e.g., involving readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination.

### 3. Main competition concerns<sup>16</sup>

Conditional on the fact that the presence of an agreement, a concerted practice or a decision of an association of undertakings has been established (as discussed above), the following paragraphs set out the main competition concerns pertaining to information exchanges.

<sup>10</sup> Case C-7/95 P, *John Deere*, cited in note 1 above, paragraph 87.

<sup>11</sup> See Cases 40/73 et al., *Suiker Unie*, [1975] ECR 1663.

<sup>12</sup> See for example Joined Cases T-25/95 et al., *Cimenteries*, [2000] ECR II-491, paragraph 1849: "[...] *the concept of concerted practice does in fact imply the existence of reciprocal contacts [...]. That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it.*"

<sup>13</sup> See Opinion of Advocate General Kokott, Case C-8/08, *T-Mobile Netherlands*, [2009] ECR I not yet reported, paragraph 54.

<sup>14</sup> See Joined Cases T-202/98 etc., *Tate & Lyle v Commission*, [2001] ECR II-2035, paragraph 54.

<sup>15</sup> See Case C-199/92 P, *Hüls*, [1999] ECR I-4287, paragraph 162; Case C-49/92 P, *AnicPartecipazioni*, [1999] ECR I-4125, paragraph 121.

<sup>16</sup> Use of the term "main competition concerns" means that the ensuing description of competition concerns is neither exclusive nor exhaustive.

### 3.1 *Collusive outcome*

By artificially increasing transparency in the market, the exchange of strategic information can facilitate coordination (i.e., alignment) of companies' competitive behaviour and result in restrictive effects on competition. This can occur through different channels:

One way is that through information exchange companies may reach a common understanding on the terms of coordination, which can lead to a collusive outcome on the market. Information exchange can create mutually consistent expectations regarding the uncertainties present in the market. On this basis companies can then reach a common understanding on the terms of coordination of their competitive behaviour, even without an explicit agreement on coordination. Exchange of information about intentions on future conduct is the most likely to enable companies to reach such a common understanding.

Another channel through which information exchange can lead to restrictive effects on competition is by increasing the internal stability of a collusive outcome on the market. In particular, it can do so by enabling the companies involved to monitor deviations. Namely, information exchange can make the market sufficiently transparent to allow the colluding companies to monitor to a sufficient degree whether other companies are deviating from the collusive outcome, and thus to know when to retaliate. Both exchanges of present and past data can constitute such a monitoring mechanism. This can either enable companies to reach a collusive outcome on markets where they were otherwise not able to do so, or it can increase stability of a collusive outcome already present on the market.

Similarly, information exchange can lead to restrictive effects on competition by increasing the external stability of a collusive outcome on the market. Namely, information exchanges that make the market sufficiently transparent can allow colluding companies to monitor where and when other companies are attempting to enter the market, thus allowing the colluding companies to target the new entrant. This may also tie into the anticompetitive foreclosure concerns below. Both exchanges of present and past data can constitute such a monitoring mechanism.

### 3.2 *Anticompetitive<sup>17</sup> foreclosure*

An exclusive exchange of information could lead to anti-competitive foreclosure on the same market where the exchange takes place. This can occur when the exchange of commercially sensitive information places unaffiliated competitors at a significant competitive disadvantage as compared to the companies affiliated within the exchange system. This type of foreclosure is only possible if the information concerned is very strategic for competition and covers a significant part of the relevant market.

It cannot be excluded that information exchange may also lead to anticompetitive foreclosure of third parties in a related market. For instance, by gaining enough market power, parties exchanging information in an upstream market may be able to raise the price of a key component for a market downstream. Thereby, they could raise the costs of their rivals downstream, which could result in anti-competitive foreclosure.

## 4. **Restriction of competition by object**

The legal category of a "restriction of competition by object" in EU competition law is an administrative rule<sup>18</sup> designed to capture market conducts which are the most likely to be harmful to

<sup>17</sup> To be considered as anticompetitive, a foreclosure would need to be likely to result in consumer harm.

<sup>18</sup> *Comment relevant to some submissions to this roundtable:* The variable "public/non public data" does not constitute an optimal "cut-off" for what should constitute a restriction of competition by object. While



competition. A "restriction by object" under EU competition law does not constitute a "per se" prohibition. The parties to such agreements have the possibility (and burden) of proving that any efficiencies stemming from their agreement on balance offset restrictions of competition in magnitude and likelihood.

Therefore, it is information exchanges between competitors of individualised data regarding intended future prices or quantities that should be considered as restrictions of competition by object within the meaning of Article 101(1).<sup>19</sup> Exchanging information on companies' individualised intentions of future conduct regarding prices or quantities<sup>20</sup> is the most likely to lead to a collusive outcome. This is because informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices. Moreover, it is the least likely that this type of information exchange is done for pro-competitive reasons (see the discussion in section 6).<sup>21</sup> In addition, private exchanges between competitors of their individualised intentions on future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities.<sup>22</sup>

This is without prejudice to the settled case-law of the Court of Justice of the European Union, which states that in order to conclude that a given information exchange constitutes a restriction of competition by object, regard must be had to the content of the agreement's provisions, the objectives it seeks to attain, and the economic and legal context of which it forms part.<sup>23</sup> To this end, it needs to be assessed whether

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public exchanges of future information can indeed directly benefit consumers, to assess such efficiencies one needs to determine whether consumers (and what fraction of them) indeed seek the data and at which cost, and how much they can really benefit from the information. On the risks side, increased transparency to consumers may very well either decrease or increase scope for collusion (the pay-offs from deviation are higher as price elasticity of demand is higher, but thereby the likely punishments are also harsher). Depending on the market context, firms may equally well collude through public exchanges of data as by exchanging data in private. However, where public announcements cease to be future intentions and become actual future data, the risks for collusion clearly decrease, and the scope for efficiencies clearly increases. Hence, a "cut off" for the category of a restriction by object where companies make genuinely public announcements based on "future intentions/actual data" appears to be a better policy design (see further discussion in the footnote below).

<sup>19</sup> In specific situations where companies are committed to sell in the future at the prices that they have previously announced to the public (i.e., they can not revise them), such genuinely public announcements of future individualised prices or quantities would not be considered as intentions, and hence would normally not be found to restrict competition by object. This could occur, for example, because of the repeated interactions and the specific type of relationship companies may have with their customers, for instance since it is essential that the customers know exact future prices in advance or because they can already take advanced orders at these prices. In these situations the information exchange would not be an equally costless means for reaching a collusive outcome in the market and would be more likely to be done for precompetitive reasons. However, this does not imply that in general price commitment towards customers is necessarily pro-competitive. To the contrary, it could limit the possibility of deviating from a collusive outcome and hence render it more stable.

<sup>20</sup> Information regarding intended future quantities could for instance include intended future sales, market shares, territories, and sales to particular groups of consumers.

<sup>21</sup> This is without prejudice to the fact that public announcements of intended individualised prices may give rise to efficiencies and that the parties to such exchange would have a possibility to rely on Article 101(3).

<sup>22</sup> Information exchanges that constitute cartels not only infringe Article 101(1), but in addition they are very unlikely to fulfil the conditions of Article 101(3).

<sup>23</sup> See Joined Cases C-501/06 P et al, *GlaxoSmithKline*, [2009] ECR I not yet reported,.., paragraph 58; Case C-209/07, *BIDS*, [2008] ECR I-8637, paragraphs 15 et seqq.

the information exchange concerned, by its very nature, may possibly lead to a restriction of competition.<sup>24</sup> Further guidance with regard to the notion of restrictions of competition by object can be obtained in the General Guidelines.<sup>25</sup>

## 5. Assessment of the restrictive effects on competition

Except for the exchanges which constitute restrictions of competition by object, the likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. The assessment of restrictive effects on competition must compare the likely effects of the information exchange with the competitive situation that would prevail in the absence of the information exchange.<sup>26</sup> For an information exchange to have restrictive effects on competition within the meaning of Article 101(1), it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation. Whether or not an exchange of information will have restrictive effects depends on both the economic conditions on the relevant markets and the characteristics of information exchanged.

Certain market conditions may make coordination easier to reach, sustain internally, or sustain externally.<sup>27</sup> Exchanges of information in such markets may have more restrictive effects compared to markets with different conditions. However, even where market conditions are such that coordination may be difficult to sustain before the exchange, the exchange of information may change the market conditions in a way that coordination becomes possible after the exchange - for example by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. For this reason it is important to assess the restrictive effects of the information exchange in the context of both the initial market conditions, and how the information exchange changes these conditions. This will include an assessment of the specific characteristics of the system concerned in particular, its purpose and the conditions of access to it and participation in it, as well as the type of information exchanged – be that, for example, public or confidential, aggregated or detailed, historical or current –, the periodicity and coverage

<sup>24</sup> Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, p. 97, paragraph 22. Also see for example, Case C-209/07, *BIDS*, [2008] ECR I-8637, paragraph 17.

<sup>25</sup> Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, p. 97.

<sup>26</sup> Case C-7/95 P, *John Deere v Commission*, cited in note 1 above, paragraph 76.

<sup>27</sup> Note that information exchange may restrict competition in a similar way to a merger if it leads to more effective, more stable or more likely coordination in the market; see Case C-413/06 P, *Sony*, [2008] ECR I-4951, paragraph 123, where the European Court of Justice endorsed the criteria established by the General Court in Case T-342/99, *Airtours*, [2002] ECR II-2585, paragraph 62: "*Such tacit coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article 81 EC in order to be able to adopt a common policy on the market. Moreover, having regard to the temptation which may exist for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must therefore be sufficient market transparency for each undertaking concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving. Furthermore, discipline requires that there be some form of credible deterrent mechanism that can come into play if deviation is detected. In addition, the reactions of outsiders, such as current or future competitors, and also, the reactions of customers, should not be such as to jeopardise the results expected from the coordination.*"

of the exchange of information and its importance for the fixing of prices, volumes or conditions of service.<sup>28</sup> The following factors are relevant for this assessment.

### **5.1 Market characteristics**

Companies are more likely to reach a collusive outcome in markets which are sufficiently transparent, concentrated, simple, stable and symmetric. In these types of markets companies can reach a common understanding on the terms of coordination and successfully monitor and punish deviations. However, information exchange can also enable companies to reach a collusive outcome in other market situations where they would not be able to do so in the absence of the information exchange. Information exchange can thereby facilitate a collusive outcome by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. In this context, the competitive outcome of an information exchange depends not only on the initial characteristics of the market in which it takes place (such as concentration, transparency, stability, complexity etc.), but also on how the type of the information exchanged may change those characteristics.<sup>29</sup>

Collusive outcomes are more likely in transparent markets. Transparency can facilitate collusion by enabling companies to reach a common understanding on the terms of coordination, or/and by increasing internal and external stability of collusion. Information exchange can increase transparency and hence limit uncertainties about the strategic variables of competition (e.g., prices, output, demand, costs etc.). The lower the pre-existing level of transparency in the market, the more value an information exchange may have in attaining a collusive outcome. However, an information exchange that contributes little to the transparency in a market is less likely to have appreciable negative effects than an information exchange that significantly increases transparency. Therefore it is the combination of both the pre-existing level of transparency and how the information exchange changes this level that will determine how likely the information will have negative appreciable effects. The pre-existing degree of transparency, *inter alia*, depends on the number of market participants and the nature of transactions, which can range from public transactions to confidential bilateral negotiations between buyers and sellers. When evaluating the change in the level of transparency in the market, the key element is to identify to what extent the available information can be used by companies to determine the actions of their competitors.

Tight oligopolies can facilitate a collusive outcome on the market as it is easier for fewer companies to reach a common understanding on the terms of coordination and to monitor deviations. A collusive outcome is also more likely to be sustainable with fewer companies. With more companies coordinating, the gains from deviating are greater because a larger market share can be gained through undercutting. At the same time, gains from the collusive outcome are smaller because when there are more companies the share of the rents from the collusive outcome declines. Exchanges of information in tight oligopolies are more likely to cause appreciable negative effects on competition than in non tight oligopolies, and they are not likely to cause such negative effects in very fragmented markets. However, by increasing transparency, or modifying the market environment towards one more liable to coordination in another way, information exchange may facilitate coordination and enable monitoring among more companies than would be possible in its absence.

Companies may find it difficult to reach a collusive outcome in a complex market environment. However, to some extent, the use of information exchange may simplify such environments. In a complex market environment more information exchange is normally needed to reach a common understanding on the terms of coordination and to monitor deviations. For example, it is easier to achieve a collusive

<sup>28</sup> Case C-238/05, *Asnef-Equifax*, [2006] ECR I-11125, paragraph 54.

<sup>29</sup> It should be noted that the discussion below is not a complete list of relevant characteristics. There may be other characteristics of the market which are important in the setting of certain information exchanges.

outcome on a price for a single, homogeneous product, than on numerous prices in a market with many differentiated products. It is nonetheless possible that to circumvent the difficulties involved in reaching a collusive outcome on a large number of prices, companies may exchange information to establish simple pricing rules (e.g., pricing points).

Collusive outcomes are more likely where the demand and supply conditions are relatively stable.<sup>30</sup> In an unstable environment it may be difficult for a company to know whether its lost sales are due to an overall low level of demand or due to a competitor offering particularly low prices, and therefore it is difficult to sustain a collusive outcome. In this context, volatile demand, substantial internal growth by some companies in the market, or frequent entry by new companies, may indicate that the current situation is not sufficiently stable for coordination to be likely.<sup>31</sup> Information exchange in certain situations can serve the purpose of increasing stability in the market, and thereby may enable a collusive outcome in the market. Moreover, in markets where innovation is important, coordination may be more difficult since particularly significant innovations may allow one company to gain a major advantage over its rivals. For a collusive outcome to be sustainable, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be capable of jeopardising the results expected from the collusive outcome. In this context, the existence of barriers to entry makes it more likely that a collusive outcome on the market is feasible and sustainable.

A collusive outcome is more likely in symmetric market structures. When companies are homogenous in terms of their costs, demand, market shares, product range, capacities etc., they are more likely to reach a common understanding on the terms of coordination as their incentives are more aligned. However, information exchange may in some situations also allow a collusive outcome to occur in more heterogeneous market structures. Information exchange could make companies aware of their differences and help them to design means to accommodate for their heterogeneity in the context of coordination.

The stability of a collusive outcome also depends on the companies' discounting of future profits. The more companies value the current profits that they could gain from undercutting versus all the future ones that they could gain by the collusive outcome, the more unlikely it is that they will be able to reach a collusive outcome. By the same token, a collusive outcome is more likely among companies that will continue to operate in the same market for a long time as there they will be more committed to coordinate. If a company knows that it will interact with the others for a long time, it will have more incentives to reach the collusive outcome because the stream of future profits from the collusive outcome will be worth more than the short term profit it could have if it deviated, i.e. before the other companies detect the deviation and retaliate.

Overall, for a collusive outcome to be sustainable, the threat of a sufficiently credible and prompt retaliation must be likely. Collusive outcomes are not sustainable in markets in which the consequences of deviation are not sufficiently severe to convince coordinating companies that it is in their best interest to adhere to the terms of coordination. For example, in markets characterised by infrequent, large volume orders, it may be difficult to establish a sufficiently severe deterrent mechanism, since the gain from deviating at the right time may be large, certain and immediate, whereas the losses from being punished small and uncertain, and only materialise after some time. The credibility of the deterrence mechanism also depends on whether the other coordinating companies have an incentive to retaliate, determined by their short term losses from triggering a price war versus their potential long term gain in case they induce a

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<sup>30</sup> See Case T-35/92, *John Deere v Commission*, [1994] ECR II-957, paragraph 78.

<sup>31</sup> See Commission Decision No 92/157/EEC in Case IV/31.370, *UK Agricultural Tractor Registration Exchange*, OJ L68, 13.3.1992, p. 19, paragraph 51 and Case T-35/92, *John Deere v Commission*, cited in note 30 above, paragraph 78. Note that it is not necessary that absolute stability be established or fierce competition excluded.

return to coordination. For example, companies' ability to retaliate may be reinforced if they are also interrelated by vertical commercial relationships which they can use as a threat of punishment for deviations.<sup>32</sup>

## 5.2 *Characteristics of the information exchange*

The exchange of strategic data i.e. data that reduces strategic uncertainty in the market, between competitors is more likely to be caught by Article 101 than exchanges of other types of information. Sharing of strategic data can give rise to restrictive effects on competition because it reduces the parties' decision-making independence by decreasing their incentives to compete. Strategic subject matter can be related to prices (e.g., actual prices, discounts, increases, reductions, or rebates), customer data, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, R&D programs, and results. Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand. However, if companies compete with regard to R&D it is the technology data that may be the most strategic for competition. The strategic usefulness of data also depends on its market coverage, frequency, aggregation, age, as well as the market context in which the exchange occurs (as discussed above).

For an information exchange to be likely to have appreciable restrictive effects on competition, the companies involved in the exchange have to cover a sufficiently large part of the relevant market. Otherwise, the competitors that are not participating in the information exchange could constrain any anticompetitive behaviour of the companies involved. For example, by pricing below the coordinated price level companies unaffiliated within the information exchange system could threaten the external stability of a collusive outcome.

What constitutes "a sufficiently large part of the market" cannot be defined in the abstract and will depend on the specific facts of each case and the type of information exchange in question. However, in the context of the Commission's public consultation several stakeholders have suggested that an information exchange covering not more than 20% of the relevant market is unlikely to lead to restrictive effects on competition, unless there is a network of parallel information exchanges in the relevant market, which exceeds this market share threshold.<sup>33</sup> Where, however, an information exchange takes place in the context of another type of horizontal co-operation agreement and does not go beyond what is necessary for its implementation, market coverage below the market share thresholds set out in the relevant chapter of these guidelines, the Block Exemption Regulation or the De Minimis Notice<sup>34</sup> pertaining to the type of agreement in question will usually not be large enough for the information exchange to give rise to restrictive effects on competition.

1. Exchanges of *genuinely aggregated data*, i.e., where the recognition of individualised company level information is sufficiently difficult, are much less likely to lead to restrictive effects on competition

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<sup>32</sup> For further discussion of assessment of coordinated effects please refer to the relevant sections in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C31, 05.02.2004, p. 5-18

<sup>33</sup> This would normally be without prejudice to the fact that exchanges of information in the context of an R&D agreement, if they do not exceed what is necessary for implementation of the agreement, could avail of the safe harbour of 25% set out in the R&D BER.

<sup>34</sup> What is considered to be a "low combined market share" depends on the type of agreement in question and can be inferred from the "safe harbour" thresholds set out in various chapters of these guidelines and, more generally, from the Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establish the European Community (de minimis), OJ C368, 22.12.2001, p. 13 ("De Minimis Notice").

than exchanges of company level data. 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, it can not be excluded that the exchange of aggregated data may facilitate a collusive outcome, in particular in a very tight and otherwise transparent oligopoly. Namely, members of a tight and stable oligopoly exchanging aggregated data could automatically assume that someone defected from the collusive outcome when noticing a market price below a certain level. This would be enough to trigger a price war. In this case retaliation would not be targeted at the deviating companies, but this would be sufficient to trigger a market wide retaliation. In other words, in order to keep collusion stable, companies may not always need to know who deviated, it is enough to learn that "someone" deviated.

The exchange 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. Moreover, exchanging historic data is unlikely to facilitate monitoring of deviations because the older the data, the less useful it would be for timely detection of deviations and thus as a credible threat of prompt retaliation.<sup>35</sup> There is no predetermined threshold when data becomes historic, i.e. old enough not to pose risks to competition. Whether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of contract renewals (when they are indicative of the frequency of price re-negotiations). For example, data can be considered as historic if it is several times older than the average length of contracts in the industry if they are indicative of price re-negotiations. Moreover, the threshold when data becomes historic also depends on the data's subject matter, aggregation, frequency of the exchange and the characteristics of the relevant market (e.g. its stability and transparency).

Frequent exchanges of information that facilitate both a better common understanding of the market and monitoring of deviations increase the risks of a collusive outcome. In more unstable markets, more frequent exchanges of information may be necessary for facilitating a collusive outcome than in stable markets. For example, in markets with long term contracts (which are indicative of infrequent price re-negotiations) a less frequent exchange of information could be sufficient for reaching a collusive outcome than in markets with short term contracts and frequent price re-negotiations.<sup>36</sup> This also depends on the subject matter, age and aggregation of data.

In general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101.<sup>37</sup> *Genuinely public information* is information that is generally equally easy (i) to access for everyone (in terms of costs of access). For information to be genuinely public, obtaining it should not be more costly for costumers and companies unaffiliated to the exchange system than for the companies exchanging the information. For this reason, competitors would normally not choose to exchange data that they can collect from the market at equal ease, and hence exchanges of genuinely public data are very unlikely. On the contrary, even if the data exchanged between competitors is in what is often referred to as "the public domain", it is not genuinely public if the costs involved in collecting the data deter other

<sup>35</sup> For example, in some past cases the Commission has considered the exchange of data which was more than one year old as historic and as not restrictive of competition within the meaning of Article 101(1), whereas information less than one year old has been considered as recent; Commission Decision No 92/157/EEC in Case IV/31.370, See Commission Decision No 92/157/EEC in Case IV/31.370, *UK Agricultural Tractor Registration Exchange*, OJ L68, 13.3.1992, p. 19, paragraph 50; Commission Decision No 98/4/ECSC in Case IV/36.069, *Wirtschaftsvereinigung Stahl*, OJ L1, 3.1.1998, p. 10, paragraph 17.

<sup>36</sup> Note however that infrequent contracts could decrease the likelihood of a sufficiently prompt retaliation.

<sup>37</sup> Joined Cases T-191/98 et al., *Atlantic Container Line (TACA)*, [2003] ECR II-3275, paragraph 1154. Note that this may not be the case if the exchange underpins a cartel.

companies and customers from doing so.<sup>38</sup> A possibility to gather the information in the market, for example to collect it from customers, does not necessarily mean that such information constitutes market data readily accessible to competitors.<sup>39</sup>

Similarly, an *information exchange is genuinely public* if it makes the exchanged data equally accessible (in terms of costs of access) to all competitors and customers.<sup>40</sup> The fact that information is exchanged in public may decrease the likelihood of a collusive outcome on the market to the extent that non-coordinating companies, potential competitors, as well as costumers maybe able to constrain potential restrictive effect on competition.<sup>41</sup> However, even a genuinely public exchange of information may facilitate a collusive outcome in the market.

As is demonstrated by the above discussion, a competitive assessment of information exchange needs to consider several interrelated and cumulative factors. Overall, frequent exchanges between competitors of recent, individualised strategic data, covering a large part of a tight, transparent, stable, symmetric and non-complex market<sup>42</sup>, are likely to have restrictive effects on competition. Conversely, exchanges of aggregated historic data, especially when related to a less strategic subject matter than prices or quantities (e.g. costs), are unlikely to have a restrictive effect on competition. Moreover, exchanges of information in fragmented, non-transparent, complex, asymmetric and unstable markets are unlikely to have restrictive effects on competition.

In this context, exchanging data that is several times older, or at a frequency that is several times lower, than the average frequency of price renegotiations in a given industry is not likely to lead to restrictive effects on competition. In addition, unless the exchange takes place in a very tight oligopoly, exchanging aggregate data is generally unlikely to create risks for competition. Moreover, in the context of the Commission's public consultation stakeholders have suggested that an information exchanges that covers less than 20% of the relevant market is unlikely to lead to restrictive effects on competition.<sup>43</sup>

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<sup>38</sup> Moreover, the fact the parties to the exchange have previously communicated the data to the public (e.g. through a daily newspaper or their website), does not imply that a subsequent non-public exchange would not infringe Article 101.

<sup>39</sup> See Joined Cases T-202/98 etc., *Tate & Lyle v Commission*, [2001] ECR II-2035, paragraph 60.

<sup>40</sup> This does not preclude that a database be offered at a lower price to customers which themselves have contributed data to it, as by doing so they normally would have also incurred costs.

<sup>41</sup> Assessing barriers to entry and countervailing "buyer power" in the market would be relevant for determining whether outsiders to the information exchange system would be able to jeopardise the outcomes expected from coordination. However, increased transparency to consumers may either decrease or increase scope for a collusive outcome because with increased transparency to consumers, as price elasticity of demand is higher, pay-offs from deviation are higher but retaliation is also harsher.

<sup>42</sup> This also applies to situations where after the information exchange the market becomes transparent, stable and non-complex.

<sup>43</sup> Unless there is a network of parallel information exchanges in the relevant market which exceeds this market share threshold.

## 6 Assessment under Article 101(3)

### 6.1 *Efficiency gains*<sup>44</sup>

Information exchange may lead to significant efficiency gains. Information about competitors' costs can enable companies to become more efficient if they benchmark their performance against the best practices in the industry and design internal incentive schemes accordingly.

Moreover, in certain situations information exchange can help companies allocate production towards high-demand markets (e.g., demand information) or low cost companies (e.g., cost information). The likelihood of these types of efficiencies depends on market characteristics (nature of uncertainties, the strategic variable of competition, etc.). Some forms of information exchanges in this context may allow substantial cost savings where for example they reduce unnecessary inventories, or enable quicker delivery of perishable products to areas with high demand and their reduction in areas with low demand.

Exchange of consumer data between companies in markets with asymmetric information about consumers can also give rise to efficiencies. For instance, keeping track of the past behaviour of customers in terms of accidents or credit default provides an incentive for consumers to limit their risk exposure. It also allows detecting which consumers carry a lower risk and should benefit from lower prices. In this context, information exchange can also reduce consumer lock-in, thereby inducing stronger competition. This is because information is generally specific to a relationship and consumers would otherwise lose the benefit from this information when switching to another company. Examples of such efficiencies are found in the banking and insurance sectors, which are characterised by frequent exchanges of information about consumer defaults and risk characteristics.

Exchanging past and present data related to market shares may in some situations provide benefits to both companies and consumers by allowing companies to announce it as a signal of quality to consumers. In situations of imperfect information about product quality, consumers often use indirect means to gain information on the relative qualities of products such as price and market shares (e.g., consumers use best-selling lists in order to choose their next book). Especially in markets with switching costs or network externalities, announcing market shares provides a strong (credible) indicator of future performance. In this context an information exchange about sales can benefit both companies and consumers.

Information exchange that is genuinely public can also benefit consumers by helping them to make a more informed choice (and reducing their search costs). Consumers are most likely to benefit in this way from public exchanges of current data, which are the most relevant for their purchasing decisions. Similarly, public information exchange about current input prices can lower search costs for companies, which would normally benefit consumers through lower final prices. These types of direct consumer benefits are less likely to be generated by exchanges of future pricing intentions because companies, which announce their pricing intentions, are likely to revise them before consumers actually purchase based on this information. However, to some extent, companies may be disciplined not to change the announced future intentions before implementation for example when they have repeated interactions with consumers.<sup>45</sup> In these situations information exchange may improve customers' planning of expenditures.

As shown above, exchanging present and past data is more likely to generate efficiency gains than exchanging information about future intentions. However, in specific circumstances announcing future

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<sup>44</sup> The discussion of potential efficiency gains from information exchange is neither exclusive nor exhaustive.

<sup>45</sup> However, it should be noted that a price commitment vis-à-vis consumers can actually reduce price competition as it could deter competitors from lowering their price, which may be demonstrated in practices such as price matching or price beating guarantees.



intentions could also give rise to efficiency gains. For example, companies knowing early the winner of an R&D race could avoid duplicating costly efforts and wasting resources that can not be recovered.<sup>46</sup>

## **6.2 *Indispensability***

Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an information exchange do not fulfil the conditions of Article 101(3). For fulfilling the condition of indispensability, the parties will need to prove that the data's subject matter, aggregation, age, confidentiality, frequency, as well as coverage, of the exchange are of the type that carries the lowest risks indispensable for creating the claimed efficiency gains. Moreover, the exchange should not involve information beyond the variables that are relevant for the attainment of the efficiency gains. For instance, for the purpose of benchmarking, an exchange of individualised data would generally not be indispensable because information aggregated in for example some form of industry ranking could also generate the claimed efficiency gains while carrying a lower risk of leading to a collusive outcome. Finally, it is generally unlikely that the sharing of future data is indispensable, especially if it is related to prices and quantities.

Similarly, information exchanges that form part of horizontal co-operation agreements are also more likely to fulfil the conditions of Article 101(3) if they do not go beyond what is indispensable for the implementation of the economic purpose of the agreement (e.g., sharing technology necessary for an R&D agreement or cost data in the context of a production agreement).

## **6.3 *Pass-on to consumers***

Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by an information exchange. The lower is the market power of the parties involved in the information exchange, the more likely it is that the efficiency gains would be passed on to consumers to an extent that outweighs the restrictive effects on competition.

## **6.4 *No elimination of competition***

The criteria of Article 101(3) cannot be met if the companies involved in the information exchange are afforded the possibility of eliminating competition in respect of a substantial part of the products concerned.

## **7. *Conclusions***

The paper proposes a structured analytical framework for competitive assessment of information exchanges. This framework is grounded in the economic theory that increased transparency between oligopolists can facilitate collusion. It can do so through two main mechanisms: by reducing uncertainty as to future behaviour between competitors, thereby providing a focal point for collusion, or by serving as a monitoring device that ensures stability of collusion.

It is evident from the above discussion that information exchange can be found to have likely restrictive effects on competition only in markets which are already quite liable to tacit collusion, or markets that become liable to tacit collusion after the exchange, i.e. markets that are sufficiently concentrated, transparent, symmetric, non-complex and stable. This is consistent with the framework of analysis of coordinated effects in other areas of antitrust or merger enforcement. Moreover, in order to

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<sup>46</sup> Such efficiencies need to be weighed against the potential negative effects of, for example, limiting competition for the market which stimulates innovation.

have likely anticompetitive effects in a given market context, the data exchanged must be sufficiently strategic, i.e. reduce strategic uncertainty in the market to a degree that makes collusion likely. As discussed above, it is predominantly the data's frequency, coverage, subject matter, aggregation and age that determine their strategic usefulness. Recent individualised data on prices and quantities is generally the most strategic, while increased aggregation and age generally reduces strategic usefulness of any data.

In the context of analysis of effects on competition, exchanging data several times older, or at a frequency that is several times lower, than the average frequency of price renegotiations in a given industry, should be safe from the competition policy perspective. Moreover, unless the exchange takes place in a very tight oligopoly, exchanging aggregate data is unlikely to lead to restrictive effects on competition. In addition, in the context of the Commission's public consultation stakeholders have suggested that information exchanges that cover less than 20% of the relevant market are not likely to lead to restrictive effects on competition.<sup>47</sup>

Moreover, unlike when exchanging actual data, by exchanging intentions about their future behaviour in the market competitors can arrive at a coordinated higher price level without incurring the risk of losing market share. These types of exchanges constitute the most efficient mechanism for facilitating collusion, and at the same time, as the discussion above demonstrates, are unlikely to be done for pro-competitive reasons. Unlike actual data, which when announced in public can reduce consumer's search costs or improve their purchasing decisions, information on companies' future intentions are unlikely to benefit consumers as they can generally not rely on them when making their consumption plans. It is for these reasons that exchanges between competitors of individualised future intentions on prices and quantities should be considered as restrictive of competition by object, while all the other exchanges need to be assessed on a case by case basis with a view of determining whether they are likely to result in restrictive effects on competition. This discussion has put forward arguments for why this type of legal framework would be an optimal policy design- one clearly discouraging the most harmful information exchanges while at the same time not disincentivising the pro-competitive ones.

As has been demonstrated by the above discussion, information exchange between competitors is a complex area of competition law enforcement, and hence today's roundtable discussion between the different delegations is of particular importance.

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<sup>47</sup> Unless there is a network of parallel information exchanges in the relevant market which exceeds this market share threshold.

## BULGARIA

### 1. The notion of information exchange under the Bulgarian LPC and CPC's case-law

The core concept of a working, effective competition is based on the understanding that each participant on a relevant market should act independently of its competitors and avoid coordinating its market behavior with that of the other market participants<sup>1</sup>. Thus, effective competition can be achieved in markets where the risks of competition, that is, the uncertainty an undertaking experiences about its competitors' key business decisions in terms of prices, volume of sales, discounts, future market intentions etc., act as an incentive to the market participants to deploy sound and intelligent market strategies. Keeping sensitive market information of each market participant unknown between competitors is therefore a crucial point in maintaining the desired level of market uncertainty that would ensure the competition on a given market is effective. Indeed, the information exchange between competitors enhances the transparency on the market and, hence, can facilitate collusion and coordination of market behavior, depending on how sensitive the exchanged information is.

The above concept of effective competition is laid down in the Bulgarian Law on Protection of Competition (LPC), in its article 15 regarding prohibited agreements and concerted practices as well as in article 101 of the Treaty on the Functioning of the European Union (TFEU) both of which the Bulgarian Commission on Protection of Competition (CPC) is responsible to enforce. Exchange of information between competitors that restricts competition within the meaning of the above rules is also, as shown below, subject to the case-law of the CPC.

In the common course of business, when carrying out their activities on the market, undertakings exchange a considerable amount of information between them. Normally, however, in markets characterized with strong competition, undertakings restrain themselves from making known to their competitors their so called "sensitive commercial information" which they consider and keep as commercial secret. Such information is mainly related to prices – prices to final consumers and distributors, production costs, volume of sales, applied discounts etc. Sensitive could also be non-price related information as marketing strategies, advertizing campaigns, planned sales, future intentions for market positioning of new products, intentions for entering new markets etc. Moreover, sensitive may be actual, future and even past individual market information. Keeping such sensitive commercial information secret is paramount in order to ensure the autonomy of the participants in the market and to guarantee their free economic initiative. Therefore, any disclosure of such sensitive commercial information may eliminate the inherent to the effective competition uncertainty about the behavior of the competitors and, moreover, facilitate collusion between them. In this sense, the LPC/TFEU does not require the disclosure of such information to be intended, or to have for an object, to eliminate the aforementioned risk of competition. Even a non-intentional sharing of this information between competitors could be qualified as having for effect to restrict the competition. Similarly, reciprocity in the exchange, i.e. bi-directional flow of information, is not a requirement in order to qualify it as restricting the competition. Neither is it necessary for the competitors to have exchanged information directly between them. The exchange may well have taken place by the intermediary of, for instance, a trade association to which the competitors are members. Such is the case where a trade association, having organized the collection of data related to the pricing of its

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<sup>1</sup> CPC decision 1150/27.12.2007 – sunflower and cooking oil.

members, publishes a forecast of prices trends (see the CPC decisions on prohibited agreements in the foods sector). It is a constant practice of the Court of Justice of the European Union (CJEU) in this sense, to remind that the exchange between competitors of information which can be used for building a cartel has to be considered as constituting as *per se* prohibited concerted practice within the meaning of article 101 TFEU<sup>2</sup>.

The provision of article 15 LPC and this of article 101 TFEU do not contain a specific prohibition of information exchange that restricts competition and therefore this notion is understood within the general prohibition of anticompetitive collusion between competitors. From a legal point of view, information exchange, as a phenomenon that facilitates collusion between competing firms, can constitute a single infringement of article 15 LPC/101 TFEU or constitute an element of a broader anticompetitive agreement. Technically regarded, when taken as a single infringement, information exchange is a form of a “concerted practice”. On the other hand, any prohibited agreement under the above provisions could not exist without an intense exchange of key commercial information<sup>3</sup>. In the latter sense, information exchange can represent a constituting element of a broader anticompetitive offence, or serve as evidence to the existence of a cartel agreement. Furthermore, it can also be used by participants to a cartel as means to monitor any deviation from the agreement of an undertaking thus facilitating retaliation against it.

Whether the information which is exchanged between competitors is likely to restrict competition on a given market depends of course on the type of information and it has, therefore, to be assessed on a case by case basis. In this respect, exchange of information that can be qualified as sensitive commercial information, that is, information that, when disclosed to competitors, eliminates a considerable amount of the risk of competition and autonomy of the market players, will usually be treated as restricting the competition. It is generally understood that such information, as previously mentioned, is information related to prices, production costs, volumes of sales, market positioning, marketing strategies etc. and any exchange of such between competitors would be regarded as constituting a *per se* infringement to article 15 LPC/101 TFEU even where it has not yet produced its anticompetitive result on the relevant market<sup>4</sup>. In addition, the frequency of the exchanges may be taken into account in order to determine whether and to what extent the competition on the relevant market has been restricted.

## 2. Market structure and exchange of information

It is a constant jurisprudence of the CPC<sup>5</sup>, the European Commission (EC)<sup>6</sup> and the CJEU<sup>7</sup> that the collusion between participants on a given market can occur even in the absence of an agreement or concerted practice in the event where the relevant market is, to a great extent, transparent. High degree of transparency on the market, including price transparency, reduces the incentives and the readiness of the market players to compete and creates conditions for coordination of market reactions. In highly competitive markets characterized by a high level of transparency, any change of the market behavior of one undertaking can result in parallel reaction of the other market players who try to neutralize and compensate the change of market conditions. Such a reaction however is not considered as constituting a concerted practice if it is objectively triggered by the circumstances and structure of the market. Evidently, in such highly transparent markets, the flow of information, including one that could be generally regarded

<sup>2</sup> Case T-2/89 *Petrofina SA v Commission* [1991] ECR II-01087.

<sup>3</sup> CPC decision 1150/2007 – sunflower and cooking oil, prec.; CPC decision 601/2008 – poultry products.

<sup>4</sup> CPC decision 576/15.07.2008 – insurance.

<sup>5</sup> CPC decision 622/22.07.2008.

<sup>6</sup> Cases T-34/1992 and T-35/1992, *Fiatarci UK Ltd. v Commission* [1994] ECR II-347.

<sup>7</sup> Case T-25/1995 *Cementeries CBR SA v Commission* [2000] ECR II-491.

as sensitive, is much less easily restricted. It is therefore necessary in these conditions to analyze whether the disclosure of sensitive information is due to transparency of the market.<sup>8</sup>

Similarly, in oligopolistic markets, the parallelism of behavior is not unusual since the small number of market participants allows competitors to closely and easily monitor any changes of their respective commercial terms and market strategies and, hence, to align their behavior to such changes<sup>9</sup>. According to the case-law of the CJEU<sup>10</sup> and the CPC<sup>11</sup>, the parallelism of market behavior, including price parallelism, cannot, in itself, constitute an evidence of the existence of a concerted practice, or, as it is the case here, of an anticompetitive information exchange, except for the cases where no other plausible explanation of such parallel behavior on the market could be found.

### **3. The role of trade and professional organizations and associations as a factor affecting the intensity of anti-competitive information exchanges**

Anticompetitive coordination of market behavior and collusion of independent undertakings may be achieved or at least facilitated with the intermediary of trade and professional associations and organizations. Such organizations represent particularly comfortable forums for exchanging market information, including information that can be qualified as sensitive from the competition law point of view. On the one hand, the organizations or associations can simply provide good opportunities for competitors to easily and secretly exchange sensitive information in an attempt to reduce the risks of competition. In other cases, the association or the organization itself may, by its activities, facilitate and even organize the collection and disclosure of sensitive market information of its members<sup>12</sup>. The jurisprudence regarding prohibited agreements and concerted practices establishes that the anticompetitive behavior of such organizations and associations may adopt many forms and, more specifically concerning the exchange of sensitive information, those can be exchange of letters, formulation of market guidelines, preparation and publication of market forecasts (prices and sales volume trends for instance) based on actual market data provided by its members<sup>13</sup> etc, open discussions on pricing policies<sup>14</sup> etc. Trade organizations and associations on a national level whose members are undertakings that operate on smaller, regional markets can play an even greater role in facilitating the flow of sensitive market information. Regional market operators do not naturally enter in collusion with operators from a different region. In the latter case, membership in a supra regional trade organization or association can provide such regional market operators with the opportunity to learn sensitive market information from other regional markets and align their market behavior correspondingly. What is more, on markets characterized with big number of smaller undertakings reaching cartel agreements is nearly impossible without the federating role of the respective trade organizations. On such markets, anticompetitive information exchanges are, therefore, even more likely to occur within the trade organizations or associations.

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<sup>8</sup> CPC decision 185/06.07.2005.

<sup>9</sup> CPC decision 141/27.06.2006 г.

<sup>10</sup> Case C-89/85 A. Ahlstrom Oy v Commission [1993] ECR 1307.

<sup>11</sup> CPC decision 170/2008.

<sup>12</sup> CPC decision 601/2008 – Poultry products, prec.; Case 40/73 Suiker Unie v Commission [1975] ECR 1663 и Case C-7/95 P John Deere [1998] ECR 3111.

<sup>13</sup> CPC decision 601/17.07.2008.

<sup>14</sup> CPC decision 1150/2007 – sunflower and cooking oil, prec. – indeed, in this case, the Association took an active part in the process of discussing, announcing and justifying the price of sunflower oil, including through advising its members to increase the price of sunflower oil.

#### 4. When could information exchanges be considered as having pro-competitive effects

Agreements, decisions and concerted practices may always, according to the rule of article 17 LPC and article 101, para. 3 TFEU, benefit from an exemption if it is considered that their pro-competitive effects outweigh those that restrict the competition. Moreover, agreements, decisions and concerted may well fall within the scope of a particular EU or Bulgarian block exemption. Information exchanges between competitors that restrict competition follow the same logic of balancing both positive and negative impacts and may, therefore, if satisfying the criteria set in the aforementioned provisions, be subject to an exemption.

#### 5. Summaries of cases before the CPC

##### 5.1 *Decision No 170/2008*

The proceeding before the CPC for alleged infringement of Art. 9 LPC (repealed)<sup>15</sup> against taxi companies in Sofia and three associations of taxi companies was initiated ex officio following numerous publications in the media for an increase of the price of taxis on the territory of Sofia. The managers of the biggest taxi companies in Sofia and the chairpersons of three associations of taxi companies in a number of comments and interviews in the media pointed out that the prices of the taxis should be increased and gave specific indications of the prices and of the starting date. Following these comments and interviews, the taxi companies in Sofia increased the prices almost simultaneously.

As initial step in the investigation the CPC requested information from the participants in the proceedings, and after the requested information was not submitted, the Commission obtained a court authorization for on-site inspection. During the inspection a number of evidence was collected, incl. electronic and digital data. The alleged companies and associations of undertakings however appealed the initial court authorization, which was repealed by the second instance court. Thus, the evidence collected during the inspections could not be used in the CPC decisions.

The alleged undertakings claimed that they increased their prices entirely due to economic reasons (the increased prices of the fuel, spare parts, the need to follow the market leader) and that there was no coordination of the prices. They confirmed the existence of meetings between the management of the different companies but the topics discussed were said to be the dynamics and the development of the relevant market and proposals for amendments to the corresponding legislative framework. The associations of undertakings insisted that no decisions for the prices were taken during their meetings.

The CPC practice shows that as a general rule the prohibited agreements, decisions and concerted practices are kept secret and the evidentiary documentation is fragmental and scarce. In most of the cases the existence of anticompetitive agreements, practices or decisions could be suspected on the basis of coinciding facts or other evidence, which, if taken together, could be considered evidence for infringement of competition rules, provided that there is no other reasonable explanation.

The concept of concerted practices requires the existence not only of coordination, but also of certain market behavior, which is directly resulting from the concerted practice and has a causal relationship with it. On the other hand if the opposite is not proven by the interested parties, it could be assumed that the undertakings, participating in such coordination and remaining active on the market, actually take into consideration in determining their market behavior the information exchanged with their competitors, even more in the cases where the coordination was done on a regular basis and for a long period of time. Then, such concerted practice is prohibited by the competition law even in the absence of anticompetitive effects on the market.

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<sup>15</sup> General prohibition of decisions, agreements or concerted practices by undertakings or associations of undertakings, having as their object or result restriction, prevention or distortion of competition.

The CPC proved that the management of the two market leaders had taken the decision of the increase of the prices on a same date, even though the actual increase differed with 4 days. In addition, all components forming the price of these two companies became identical. The rest of the taxi companies followed the market leaders in certain period of time. The prices of the taxis after the increase varied only in the range of 1-2 cents.

The Commission on Protection of Competition has developed a constant practice to consider the price parallelism as indirect evidence for a possible existence of price coordination. The stand alone price parallelism however is not sufficient. On the basis of the changes of the prices alone, even though introduced comprehensively and with insignificant fluctuations by all participants in a relevant market within a certain short period of time, it is difficult to prove without any doubt the existence of possible coordination between the market participants. It is even more difficult to prove price coordination in the hypothesis of a “concerted practice” between undertakings, as in these cases the coordination of the behavior is reached without a real agreement.

The current proceeding, without the evidence collected during the on-site inspection, did not found definite evidence in this respect; therefore the CPC decision established no infringement of the Art. 9 LPC (repealed).

## **5.2 Decision 576/2008 – insurance sector**

The legal proceedings before the Commission for Protection of Competition (CPC) for establishing an alleged infringement of Article 9 of the Law on Protection of Competition (LPC) (repealed) by the Association of Bulgarian Insurance Companies (ABIC) and 16 Bulgarian insurance companies were instituted in December 2007 on CPC’s own initiative.

The subject of the legal proceedings was an alleged prohibited agreement between undertakings and/or decision by association of undertakings in relation to a “Memorandum for drafting joint position statements, taking joint actions, creating favourable conditions for the development of activities related to the mandatory signing of Civil Liability Insurance policies by automobile drivers as well as to offering the service under conditions of loyal competition that ensure the protection of interests of the Bulgarian society and the insurance community” (the Memorandum) drawn up and signed by the members of the ABIC.

The CPC held that the investigated case also had an effect on the trade between EU Member States. As a result, in implementing its obligations under Article 3 (1) of Council Regulation (EC) No. 1/2003, the CPC ruled that there were grounds for applying Article 81 of the EC Treaty to that specific case.

The legal proceedings were initiated against the ABIC and several insurance companies, which are members of ABIC and have been licensed to offer “Civil Liability Insurance” in accordance with the Bulgarian legislation.

The investigated Memorandum has been drawn up by the ABIC and contains provisions on:

- setting on the basis of statistical data of an uniform minimum premium for the Civil Liability Insurance, which has to be approved by all members;
- agreeing on maximum levels of the commissions paid to insurance brokers;
- agreeing on an uniform structure of the premium tariff;
- applying an uniform minimum premium for the Civil Liability Insurance;

- non admission of signing an insurance policy at prices below the fixed minimum;
- undertaking a general commitment on the part of insurers to keep the contracts with the brokers in conformity with the fixed maximum levels of the commissions and devising a mechanism for exerting strict mutual control over the conditions under which insurances are taken out.

The Memorandum was signed on 15 December 2008 by 11 of the defendant insurance companies. On a later date, not indicated in the Memorandum, it was signed by other three insurance companies.

Once signed by the insurance companies, the Memorandum was sent to the official e-mail address of the Financial Supervision Commission on 15 December 2008. One of the insurance companies took part in the drawing up of the Memorandum but refused - in letters to the ABIC and the other insurance companies - to enter into such an agreement because of its ostensible anticompetitive nature.

In its capacity as a regulator in the insurance sector the Financial Supervision Commission exercises supervision on insurance companies. In 2006 the FSC established infringements of the Insurance Code (IC) committed by six insurance companies which violated the requirements for setting a minimum insurance premium calculated on the basis of a reasonable actuarial assumption in order to ensure the implementation of all obligations of the insurer. In 2007 the FSC imposed compulsory administrative measures on five of the defendant companies to make them set a minimum premium for the Civil Liability Insurance in accordance with the requirements of the IC.

In their opinion statements most of the defendant undertakings indicated that the findings and guidelines of the FSC had made them take part in the drawing up of the Memorandum and take commitments under it.

In its opinion statement, the FSC pointed out that the setting of a uniform minimum premium for the Civil Liability Insurance could contribute neither to the better protection of the interests of insured persons, nor to the financial stability of the insurance market. In 2006 the provisions for applying a minimum premium for the Civil Liability Insurance were repealed with a view to achieving market liberalization.

The price of the Civil Liability Insurance is a key element of the competition between the undertakings in this sector. The minimum premium and the commissions paid to insurance brokers and agents comprise key elements of the price structure of the insurance product.

To the extent to which the signed Memorandum had as its subject the setting of a minimum premium for the Civil Liability insurance and maximum levels of the commissions paid to insurance brokers, the affected markets were:

- the market of the Civil Liability Insurance and
- the market of intermediary services in offering the Civil Liability Insurance.

Insurance brokers are independent economic operators, different from the insurance companies, and the service they provide has the economic nature of a distinct product with its own characteristics, intended use and prices.

The geographic market defined by the CPC was the national market.



### 5.2.1 *Legal analysis*

The Memorandum is “an agreement between undertakings” because it is an expression of the concurrence of the intentions of independent undertakings and is aimed at coordinating their market conduct. The circumstance that the Memorandum cannot become effective and binding unless signed by all insurance companies does not change these characteristics in any way. Neither can they be eliminated by the fact that the Memorandum is not of obligatory nature for the members of the AICB.

The Memorandum can also be regarded as “a decision by association of undertakings” as it was drawn up by a standing working group at the AICB supporting the activities of the members of the Association and serving as the main forum for exchanging their secrets.

The arrangements with regard to fixing a uniform minimum premium for the Civil Liability Insurance, maximum levels of the commissions paid to insurance brokers, as well as the arrangements for applying a uniform insurance tariff in the context of the mechanism for exerting mutual control over the conditions under which insurances are taken out shall be considered “serious restriction of competition”, the very nature of which causes significant anticompetitive effect even before they have led to an actual anticompetitive result on the market.

The rule for “the unappreciable effect on competition” (*de minimis* rule) is not applicable in case of “serious restriction of competition”.

The requirements for block exemption pursuant to Council Regulation (EC) No. 358/ 2003 of 27 February 2003 with regard to the application of Article 81 (3) of the EC Treaty for certain categories of agreements, decisions and concerted practices in the insurance sector have not been met.

An individual exemption from prohibition pursuant to Article 13 of the LPC and Article 81 (3) of the EC Treaty shall not be applied since the positive effects of the Memorandum do not outweigh its potential anticompetitive effects.

As a result of the investigation under the case, the CPC reached the conclusion that the Memorandum in question should be considered an agreement between undertakings and a decision by association of undertakings aimed at fixing a uniform minimum premium for the Civil Liability Insurance as well as a maximum level of the commissions paid to insurance brokers as a means to fixing a uniform minimum price for the mandatory insurance. The restrictions of competition arising from this document were justified neither by the provisions of the Insurance Code, nor by the guidelines provided by the sector regulator – the Financial Supervision Commission. Besides, these restrictions could not be exempt from the general prohibition due to the fact that neither the conditions for exemption from the prohibition pursuant to Article 13 of the LPC (repealed) and Article 81 (3) of the EC Treaty, nor the requirements pursuant to Council Regulation (EC) No. 358/2003 of 27 February 2003 on applying Article 81 (3) of the EC Treaty to some categories of agreements, decisions or concerted practices in the insurance sector, have been met.

After conducting the cooperation procedure with the EC pursuant to Article 11 (4) of the Council Regulation (EC) No. 1/2003, the CPC adopted Decision No. 576/2008 by which it imposed pecuniary sanctions to the total amount of 2,45 million BGN (about 1,25million EUR) on 14 Bulgarian insurance companies as well as on the Association uniting unites them, for committing an infringement of Article 9 (1) of the LPC (repealed) and Article 81 (1) of the EC Treaty. The CPC did not impose sanctions on two of the defendant companies, by accepting that they did not participate in the infringement since they had explicitly expressed their disagreement with the conduct of their competitors.

With its decision the CPC ruled on the termination of the infringement.

### 5.3 *Decision 1150/2007 – Sunflower and cooking oil*

With its Decision 1150/27.12.2007 the CPC imposed 14 sanctions in the aggregate amount of BGN 1,865,000 to 13 undertakings and 1 association for infringing LPC Art. 9(1) and ordered termination of the infringement.

CPC investigation established that during the period 2005-2007 the sanctioned undertakings had numerous gatherings in the form of Board Meetings of their association, namely the Union of Bulgarian producers of vegetable oils and oil products. That association provided a favorable venue for discussing issues relating to sunflower crops as well as prices and terms of trade applied by its members. The CPC found that at various meetings held in 2006 and 2007, representatives of different companies agreed to fix the purchase price of unharvested sunflower seed. The parties held such meetings during each purchasing campaign and discussed concretely their market behavior.

On the other side, CPC's economic analysis demonstrated that there were two steep increases of sunflower oil prices in Bulgaria during 2007 – in May and August. Certainly, poor crops of sunflower seeds lead to price increases, but normally this should only happen after September. Seen from the collected evidence, the nearly 70% price increase was due to the actual market situation, but most of all to prior collusion among producers.

The Commission held that the companies concerned had directly fixed the purchase prices of sunflower oil seeds and thus predetermined the coordinated fixing of sunflower oil prices. This behavior led to distortion and restriction of efficient market competition. In addition, the companies concerned were exchanging confidential commercial information, which allowed for coordination of their market behavior.

As a first step of the investigation under the case, evidence was collected during an on-site inspection in the premises where the Association performed its activity on the basis of an authorisation issued by Sofia City Court (SCC).

As a result of the search copies of documents and forensic images were seized. With a view to establishing the facts and clarifying the circumstances under the case, the CPC requested opinion statements and additional information from the defendant parties and their competitors in the market of oils and oil products as well as from “System for Agro Market Information – SAMI” OOD, the Customs Agency and the National Institute of Statistics.

The Association took an active part in the process of discussing, announcing and justifying the price of sunflower oil, including through advising its members to increase the price of sunflower oil.

On 29 March, 2006 a meeting of the Managing Board (MB) of the Association took place. The attending members of the MB of the Association adopted a decision whereby all undertakings producing and processing vegetable oil undertook to provide on an annual basis data on the sowing-seeds they have purchased to the Association – quantitative and qualitative indicators of the different sorts of seeds (moisture, oiliness, protein content, losses during storage as a result of the negative influence of biological process on unripe seeds).

On 23 August, 2006 a meeting of the MB of the Association was held. The attending MB members adopted a decision for fixing the purchase price of sunflower seed for the 2006 crop.

On 8 August 2007 a meeting of the MB of the Association was held. The attending MB members adopted a decision for fixing the purchase price of sunflower seed for the 2007 crop.

In its correspondence with its members the Association exchanged sensitive commercial information and provided specific recommendations to its members with respect to their market and pricing conduct. The Association is in possession of detailed information on the production activities and the participants in the sector and has ranked them in terms of capacity.

The defendant Association presented to the Bulgarian Food and Beverage Industry Association a detailed plan for changing the price of sunflower oil through the introduction of “a product fee” (paid to the State Enterprise For Environment Protection Activities’ Management) in which the parameters that form the price of sunflower oil have been indicated.

On 18 August 2005 a meeting of the MB of the Association was held. The attending MB members adopted a decision whereby they agreed not to discuss at the General Meeting of the Association the trade policy of the undertakings producing and processing vegetable oil with respect to the purchase campaign since comments on a broader basis would lead to unfair competition.

The relevant product market was defined by the CPC as the market of sunflower oil production and marketing.

The basic raw material for the production of sunflower oil is the oil-yielding sunflower seed as the costs that the undertakings producing and processing vegetable oil have to pay to purchase the raw material comprises more than 80 % of the cost price of the end product aimed at customers. Taking this circumstance into account, the CPC held that the market of production and marketing of oil-yielding sunflower seed is related to the relevant product market.

The geographic market defined by the CPC was the national market.

The investigated case covers a long period, as the alleged infringements were committed at a time when Article 81 of the EC Treaty could not be applied to the territory of the country. As a result, the CPC adopted that there are no grounds for applying Article 81 of the EC Treaty to the specific case.

As far as the analysed period was concerned, the competitive environment consisted of a comparatively large number of actual participants in the market none of which has the characteristics of a market leader. Most of the undertakings which participate in the relevant market possessed market shares in the range between 3 % and 11 %. As a result, a conclusion was drawn that there were no strategic barriers to entry in the relevant market. Taking into account these facts, the CPC held that all requirements for implementing effective competition on the market had been met. As a result, the CPC drawn the conclusion that if the competition in the relevant market was restricted or infringed by the economic entities participating in the market, this might be due to prohibited coordination or concerting between them rather than to other forms of anticompetitive conduct of the undertakings.

The CPC held that the meetings between the members of the Association were of regular nature, taking into account the fact that such meetings were held in relation to every purchase campaign and at which the attending undertakings discussed, concerted and coordinated their specific market conduct, including their pricing conduct.

On the basis of the established facts, the CPC has reached the conclusion that both the defendant association and the undertakings represented in its MB have implemented measures for coordinating and/or concerting the commercial and pricing market conduct of the undertakings participating in the Association which was aimed at preventing, restricting, or damaging competition. The CPC established the existence of prohibited conduct which, in accordance with the practice of the EC and the Court of Justice of the European Communities, possesses at the same time the characteristics of “a decision by association of undertakings” and of “an agreement between undertakings”.

The main subject of the agreement between undertakings and the decision by association of undertakings was the fixing of the purchase price of sunflower seed. The achieved “direct fixing” of the purchase price of sunflower seed led to “indirect fixing” of the price of sunflower oil, taking into account the fact that oil-yielding sunflower is the main raw material for the production of oil and the costs paid by the undertakings producing oil for the raw material form above 80 % of the cost price of the end product.

The direct fixing of purchase prices of sunflower seed and hence the concerted and planned fixing of the price of the end product –sunflower oil, led to a distortion of the normal environment of the relevant market and the market related to it. Distorted markets eliminate or severely restrict the natural self-regulatory mechanisms of the market that operate as a result of effective competition. This found its expression in sunflower oil price increase that was observed in the end of May 2007 when undertakings producing and processing oil increased the price of sunflower oil regardless of the fact that at that time the raw material from the previous crop was still processed.

The defendant association of undertakings played a key role as an administrator of the agreements reached between the defendant undertakings. It participated actively in the process of discussing, announcing and justifying the price of sunflower oil and advised its members to increase the price of sunflower oil, including through statements in the mass media. The CPC adopted that if the Association had not played such a role, the final anticompetitive effects of the coordinated or concerted conduct of the participating undertakings would not have been possible or would have been harder to achieve.

A considerable amount of sensitive trade information related to the activities of the undertakings producing and processing oil in the country has been collected by and concentrated in the defendant Association of undertakings. This information was provided by the Association members on the strength of a general agreement reached at the meetings of the MB of the Association (e.g. the meeting held on 20 October 2005) and related to all significant aspects of their activities with regard to: crop quantity, purchased quantities of sunflower seed; volume of consumption; import and export of sunflower seed and sunflower oil; trends in the dynamics of the incomes of oil producing undertakings; dynamics in the purchase price of sunflower seed; dynamics in the purchase price of sunflower oil; factors exerting influence on the formation of the purchase prices of sunflower seed and sunflower oil; cost price of the raw material the oil producing undertakings have at their disposal and cost price of the end product they produce; realised profit and loss of the producers of sunflower seed and sunflower oil; the costs of undertakings for the processing oil-yielding sunflower seed and the production of sunflower oil, etc.

As a result of the investigation conducted under the case, the CPC has reached the conclusion that the defendant undertakings producing vegetable oil have committed an infringement of Article 9 (1) of the LPC (repealed) in the form of an agreement between undertakings for direct fixing of the purchase price of oil-yielding sunflower seed and indirect fixing of the purchase price of sunflower oil as well as for taking measures for concerting and coordinating the market conduct of the undertakings when implementing their activities on the relevant market and the market related to it, that are aimed at preventing, restricting, or damaging competition.

The defendant Association of undertakings has committed an infringement under Article 9 (1) of the LPC (repealed) in the form of a decision by association of undertakings for direct fixing of the purchase price of oil-yielding sunflower seed and indirect fixing of the purchase price of sunflower oil as well as for facilitating and administering the coordinated and concerted conduct of its members. The Association created favourable environment for organising meetings between independent competitors at which issues related to undertakings’ specific commercial and pricing conduct on the relevant market were discussed, measures for coordinated market reactions among many of the participants in the relevant market were undertaken, and sensitive trade information on the activities of the members of the Association was exchanged, with the aim of preventing, restricting, or damaging competition.

The CPC adopted Decision No.1150/ 2007 whereby it imposed pecuniary sanctions to the total amount of 1,865 million BGN on 13 Bulgarian undertakings producing vegetable oils and oil products as well as on the Association to which they belong for infringing Article 9 (1) of the LPC (repealed). With its decision the CPC ruled on the termination of the infringement.

#### **5.4 Decision 601/2008 – eggs and poultry**

The procedure before the CPC was initiated based on its own initiative for establishing potential infringement of Art.9 of the Law on Protection of Competition (LPC) (repealed), namely decision of association of undertaking “Bulgarian Poultry Union”, Sofia. Additionally in the course of the procedure 36 Bulgarian undertaking, producing eggs and poultry meat have been constituted as defendants and the subject of the procedure has been supplemented by an investigation on ascertainment of potentially committed infringement under Art.9 of LPC (repealed), covering prohibited agreement and/or concerted practice between undertakings.

The grounds for initiating the procedure were series of publications in the newspapers and other mass media on the abrupt increase of the poultry meat price in July- August of 2007, which revealed the active involvement of the Bulgarian Poultry Union (BPU), represented by its Chairman and by a member of the Managing Board of BPU, owner of one of the largest producers of poultry products in the country.

The proceedings was investigating a possible existence of prohibited agreement and/or concerted practice between undertakings and/or decision of association of undertakings related to the activity, conducted by the defendant undertakings, comprising production and sale of poultry meat and eggs.

The majority of the defendant undertakings are members of the Union, some of them also being members of its managing bodies. All undertakings are active players at the markets of production of poultry meat and/or eggs.

During the conducted on-site inspection, copies of documents, original documents (due to lack of technical capacity to make copies on the spot) and forensic images of 4 computers were seized. Aimed at establishing the facts and clarifying the circumstances under this case CPC requested opinions and additional information to be furnished by the defendant parties and other players on these markets, as well as by “Agro Market Information System” OOD (AMIS), Ministry of Agriculture and Commodities, Customs Agency, and the State Stock Exchange and Commodities Commission.

Three meetings of the egg producers were held in 2002, at which they discussed the actual sale prices and at what prices should they sell the eggs, the need to forecast certain price volumes and declare the projected prices, as well as the need for part of the production to one of the undertakings, in order to keep the prices at certain levels.

On 24.07.2002 an agreement was signed by the representatives of eggs producing undertakings, envisaging setting base price of the produced eggs, as well as considering the sale below this price as unfair competition, while the produced eggs, which could not be placed in the trade store network, to be sold to the processing undertakings.

Two meetings of the egg producers were conducted in 2003, at which they discussed the prices, under which the eggs should be sold rendering an appeal to sell at these prices, as well as breakdown of the volumes of eggs, provided to one of the undertakings and numbers of laying poultry and/or chicken for each undertaking.

Three sessions of the MB were held in 2003, which focused on establishing control over the production of eggs, quota distribution of the numbers and the production, looking for ways of regulating

the volume of the poultry breeding industry; as well as the results of the attempts of the Union to intervene in the chaotically forming price policy. Explanatory Note of the last session was published in “Poultry Breeding” magazine, thus furnishing it to the attention of all undertakings within the branch.

Meeting of the egg producers was held on 28.07.2004. It discussed the quantity and the necessity to supply eggs to one undertaking under jointly agreed schedule, the attendees took a decision to set minimum prices for the different categories of eggs, while the management of the Union to meet with the large producers – non-members of the Union for clarifying the common price policy.

Information, maintained by the union, on the prices of individual egg producers and eggs, provided by certain companies to the buffer serving undertaking, listing quantities and costs was seized by the CPC during the on-site inspections.

Three meetings of the producers of eggs were held in 2005, the last two of them – within the frames of price policy discussions. There the attendees authorized the Union: to gather information on delivery of eggs for processing to one of the undertakings under an agreed schedule, in order to avoid the reduction trend of the gross prices of eggs; the producers were urged to be loyal to one another and not to neglect the decisions of these meetings, as well as disallow the egg prices by categories to fall under certain levels, representing a minimum, below which the companies start generating losses; and authorized the managing Board of the Union to schedule meetings and communicate the decisions of the work meetings to the large producers, non members of the Union. Information on the results of the meetings was published in “Poultry Breeding” magazine.

Two sessions of the Managing Board of the Union were held in 2005, at which decisions were taken to continue the activity of the price policy commission and to organize national meeting on price policy issues.

General meeting of the Union was held, at which the necessity to gather current information on the national market producers, conducting coordination with large producing companies, and monthly collection of information from the companies and its dissemination to all market players.

The Union requested and received information from the companies on the quantities of eggs, provided by each company to one of the undertakings in fulfillment of the decisions, taken at the meetings of the egg producers.

The associating had meetings with similar agendas throughout 2006 and 2007.

In the period 2002 – 2007 the Union prepared annual bulletins on the current number of egg laying hens and growing chicken as well as reference list on the available number of breeding poultry. All these reference lists were in tabular format, stating individual data of each undertaking.

The general meeting of the Union, conducted on 21.02.2007, discussed the MB report on the activity of the Union, which was unanimously adopted by the meeting attendees. It stated that the Union had its role and incurred efforts on formulating price policy, normal for the society, which to guarantee good income levels for the traders and good prices for the consumers, conducting numerous meetings with the eggs and poultry meat producers in order to normalize the price levels and ratios. The measures undertaken to balance the demand and supply were specified, listing among them curtailing the production by applying different methods. The establishment of a commission, assigned the task to monitor the eggs market and inform the companies on the trends as well the publication of all the decisions of the managing board in the “Poultry Breeding” magazine in order to communicate them to all its members were indicated. In discussing the report it was pointed out that the difficulties in collecting data about the companies were great, but in order to keep track of the market needs of eggs and poultry meat, it was necessary to gather

information of the internal market of eggs and poultry meat, fodder and grain. The necessity of knowing the names and companies, serving as leading suppliers, coordinating the efforts with the large producers of eggs and poultry meat, requesting weekly data of these companies and availing of such information to be disseminated to all companies was pointed out.

During its preparation for the general meeting the Union requested and obtained reference information from its members on the produced quantities of poultry meat in 2006.

At a meeting of authorized members of the MB of the Union with media journalists, held in 2007, the attending Chairman of the Union and authorized MB member (also an owner of a large producing company) specified that the coming week of September the price of the frozen chicken would go beyond certain price threshold (stating exact price in NBG) ex-factory and would approach precisely stated store sale price in NBG.

The Commission defined two affected product markets: the poultry meat market and the eggs market. From the viewpoint of supply, several stages, identical in the poultry meat production and eggs production were observed, while after the small chickens were categorized for egg laying or breeding for meat production, the production stages were split in two sub-markets, depending on whether the undertaking produced eggs or chickens for producing poultry meat. From the point of view of the demand, the two product markets are independent. The eggs constitute commodity of prime necessity and regarding their basic nutritive characteristics and taste they have no equivalent substitute. The poultry meat by its nutritive character and taste quality is also considered a unique nutritional product.

The geographic market determined by CPC was national.

In its study CPC analyzed in much detail the movement of gross prices of eggs and poultry, on industry (sector) and company level countrywide. Also comparative analysis was done as to the weekly movement of prices in Bulgaria, compared to those in the member states within the period June – September of 2007.

It was established that in the course of the examined period covering 2002 – September 2007 the gross prices of eggs at sector level registered several sharp drops, followed by significant price increase within a short period of time. During the periods of the sharp price drops the number of the meetings between the undertakings, operating on the egg market, increased. The eggs price increase during the period June – August of 2007 was so drastic, that it exceeded the average European prices.

CPC ascertained that the cross-border trading model was not affected, since the behavior of the parties under this procedure consisted only in arrangements as to the manner of performing activities of Bulgarian undertakings and/or associations of undertakings at the national market, having no impact on their eventual economic activity in other countries, including on the territory of other EC member states. Moreover, the case under investigation covered an extended period of time, while the larger portion of the specific actions was committed in time, when Art.81 of EC Treaty had not taken effect as applicable law on the territory of our country.

In view of these considerations CPC adopted that in this particular case CPC obligation to apply the provisions of Art.81 of EC Treaty was absent, and therefore the investigated case should be analyzed only in the context of the factual circumstances of the general prohibition under Art.9, para.1 of LPC.

In the course of the procedure process the provisions of Art.9, para.1 of LPC (repealed) apply as to the behavior of the defendant Union and undertakings. The provision of Art.9, para.1 of LPC contains general prohibition of agreements between undertakings, decisions of associations of undertakings, as well as concerted practice of two or more undertakings, aimed at or having as a result prevention, restriction or

distortion of competition at the relevant market. Paragraphs 1 through 5 of the same provision contain not exhaustively listed action forms of prohibited behavior, among which setting prices, allocating markets. Pursuant to Art.9, para.2 of LPC the agreements and decisions under para.1 are null and void.

The prohibition is formulated in such a way as to cover any types of agreeing the behavior among undertakings, which may result in restricting the competition among them. Because of this formulation the subjects of the separate types of infringements, defined in Art. 9 of LPC are both the independent undertakings and their associations.

Common element of all prohibited forms of agreement is the presence of anticompetitive aim or result. The general prohibition under Art.9, para.1 of LPC sets the alternative requirement on availability of anticompetitive aim or result of the agreement between undertakings or the decision of an association.

An agreement, which by its nature has the potential to restrict competition, is assumed as aimed at achieving this restriction. Upon establishing that an agreement aims at restricting the competition, there is no need to consider its specific results at the market. Competition restrictions according to the pursued objective are price setting, markets allocation, as well as reduction of the production and increase of the prices. Agreements or decisions of such subject are illegal by themselves, even if they still have not caused real effect on the market.

The concept of “prohibited agreement” is interpreted widely, in order to cover any types of reaching an agreement or arrangement between the parties on their future behavior.

Prohibited agreement per the provisions of Art.9, para.1 of LPC is existent when the undertakings (involved in it) abide by a joint plan, which sets or can set their individual economic behavior by outlining the line of their joint common actions or omissions at the market. Its central element is the statement of coincidence of the will of at least two parties, made in any possible way. This plan may not be shaped in writing; it can be explicitly formulated or implicit by the behavior of the parties; there might be no agreed sanctions or measures as to its enforcement. Besides, it is not necessary for the parties to have developed in advance a detailed comprehensive plan. In order to accept that prohibited agreement is existing, it is sufficient the parties to have expressed their mutual intent to behave in a certain way on the market. Also the agreement may consist of separately taken action, as well as a series of actions or direction in the behavior.

The term “cartel” is used to designate horizontal prohibited agreement and/or concerted practice between two or more undertakings – competitors at the relevant market, oriented to competition restriction be setting prices or price terms of purchase or sale, allocating production or sales quotas or distribution of markets, incl. also for the purpose of manipulating public tenders or competitions or public procurement award procedures.

Per the legal definition in §1, para.4 of the SP of LPC, “Concerted practice” constitutes the coordinated actions or omissions of two or more undertakings.

For the purpose of differentiating the concerted practice from coordination of behavior, reached in cases of prohibited agreement, it is accepted that this is a form of coordination between undertakings, upon which without having concluded duly drafted agreement, they intentionally substitute the intrinsic competition risks with practical cooperation between them. The coordination and cooperation in this case do not require elaboration of an actual plan. Since any economic subject – market operator - must independently define its policy it intends to implement at the market, there should not be any direct or indirect contacts between them, aimed at or resulting in rendering impact on the market behavior of a real



or potential competitor, or disclosing to such competitor the direction of the market behavior, they have decided or intend to undertake.

For this reason concerted practice covers the cases, in which the parties, even if explicitly do not abide by a common plan, setting their actions at the market, intentionally accept or abide by such means and ways of agreeing, which facilitate their market behavior coordination.

The concepts of agreement and concerted practice are flexible and can overlap. It is so, because the anticompetitive behavior can change with time and its mechanisms – respectively adapt to the changes of the environment.

In the cases, when the different infringers have committed series of actions, oriented at reaching an anticompetitive economic objective one infringement, committed during a long period of time is present. The agreement can be changed or its mechanisms adapted to the new circumstances, but it would be artificial to split the behavior, governed by one single goal, into separate infringements. In this case the undertaking can be liable for participating in a cartel even if it has not attended all the meetings, if proven that it knew or should have known that the agreement, in which it participated is part of a common plan, intended to distort the competition and that the plan includes all the constituting elements of the cartel.

“Decision of associations of undertakings” is interpreted as such form of coordinated and/or concerted behavior of independent undertakings, which is dictated or facilitated by a subject, not performing in fact economic activity at the relevant market, yet it unites independent players at the market under the form of branch organizations, setting as its goal to protect their interests, by imposing to them certain line of economic behavior, thus substituting the risk of the effective competition among them by their cooperation.

The decisions of associations of undertakings may have different format – letters, dispositions, instructions, protocols, estimates, recommendation, etc. and it is not mandatory for them to be formulated explicitly as “decisions”. In order to have “decision of association of undertakings”, it is not necessary to cover all members of the association, neither the decision to have resulted in legally binding effect on them. Each action committed, facilitated or imposed by an association of undertakings on its members, which objectively can result in restriction of competition falls under the scope of this form of prohibited behavior.

The infringement committed by the Union expressed itself in the following:

- Establishing conditions and facilitating the coordination between the BPU members by convening working meetings on price policy with set anticompetitive goals, maintaining the overall price policy of the branch by BPU, taking a decision on setting minimum prices, and controlling the sales to the direct consumers;
- Establishing an organization and administering the mechanism on enforcing the agreements and/or concerted practices between the producers – members and non members of BPU by performing control on the fulfillment of the decisions taken and collecting sensitive information from the undertakings;
- Rendering impact on the general price level at the two markets, especially that of the poultry meat, by disseminating specific recommendations, estimates and comments.

The anticompetitive goal is to restrict and/or distort the competition among the BPU members at the poultry meat and eggs markets in Bulgaria through coordinating their price behavior and their behavior, related to the market placement of the relevant products of the undertakings.

The mechanism and evidences of committing the infringement under Art.9, para.1 of LPC on behalf of BPU, established by CPC, are the following:

- The Union has organized meetings among its members with a preliminarily set clearly anticompetitive aim – coordination and agreement of their price behavior at the poultry meat and eggs markets.
- The Union has established Price Policy Commission. Insofar as the exchange of information and the discussions on the enforced prices have no place at all among direct competitors, the very establishment of this commission is already an infringement under Art.9, para.1 of LPC.
- Beyond the frames of this commission the Union provided opportunity and served as forum at the organized price policy sessions, attended by its members, namely actively participating competitor undertakings, which operate on the poultry meat and eggs market for statements, comments and discussion of the prices of poultry meat and eggs. The forum provided by the Union, facilitated and assisted its members in finding an easy way of communication and contributed in achieving absolute transparency in price policy discussion by all members. For the purpose of maintaining this transparency the Union conducted price policy meeting regularly.

This anticompetitive aim was achieved in fact by adopting a number of decisions on issuing “recommendations on setting minimum prices” for the relevant categories of eggs and poultry meat. These decisions defined specific minimum price values of poultry meat, respectively eggs, below which the Union members could not sell the respective product. Evidence on this role of the Union as well as on the fact that the rendered “recommendations” on minimum prices in fact were followed by its members was furnished by the Union itself in its reports.

The Union assisted the establishment of a mechanism to secure and maintain the set minimum prices and production volumes by collecting information from the undertakings.

The steps of the Union representatives were oriented to both markets. At the meetings, held with the eggs producers, they looked for coordination and agreement between the market players on selling eggs to one of the processing undertaking, serving as buffer to the existing excess supply (of eggs to end consumers). A decision was taken, recommending all the undertakings to sign contracts with this company, also requiring provision of schedules with the periods and quantities of delivered eggs. Regarding the poultry meat, the Union conducted a session, which adopted an opinion with recommendations all poultry meat producers to reduce their production by 30-40% and a special commission was set up (having representatives of three organizations) to control its fulfillment.

In order for the “recommendation” to reach all market players, the Union had regularly published them in its magazine “Poultry Breeding”. Parallel to that the Union disseminated letters directly to its members with information on the adopted recommendations.

Usually the role of the market mechanisms in periods of supply, higher than the demand (the so called by the Union excess supply), is to balance them through the prices – the prices of the relevant product go down. By the mechanisms of taking out of the market the “excessive” quantities of eggs and poultry meat, recommended and controlled by the Union, the specific role of this market mechanism is hindered, which aims at keeping the fixed prices, favorable to the Union member producers. In this way the prices are

artificially held at higher levels than the ones, which would have been regulated by the market mechanisms, provided they have not been distorted by the prohibited practices. It directly injures the interests of the consumers of these products – which serves as a key reason behind the prohibition of any type of coordinated behavior among competitors.

Taking account of these reasons, CPC accepted as established that the “Bulgarian Poultry Union” committed infringement of Art.9, para.1 of LPC, expressed in taking and enforcing “prohibited decisions of an association of undertakings” within the period 2002 – September, 2007.

The defendants, constituted under the procedure are undertakings in the context of LPC, performing economic activities on one or both relevant markets, defined by this procedure, namely the national market of poultry meat and the national eggs market.

As for the egg and poultry producing undertakings, the CPC held that the uniform common anticompetitive goal, pursued by the subjects of this infringement, is restriction and/or distortion of competition among them by coordinating their price behavior, by means of/using the following mechanisms:

- Setting minimum prices;
- Coordinating the time, trend (increase) and the amount as to the change of the selling prices,
- Undertaking agreed steps on restricting production and sales oriented to end consumers, aimed at maintenance of the price levels;
- Exchange of sensitive trade information.

In addition to its anticompetitive aim, the infringement caused particular anticompetitive results, revealed in increase of the product sale prices, established in such amounts and periods, not justified by the effect of objective factors. The defendant undertakings, operating at the eggs market, purposefully have undertaken a series of measures on coordination and/or agreement of their price trade behavior on the market, aimed at or resulting in restriction, distortion or prevention of competition.

A large number of meetings on price policy and workshops, discussing ways of market regulation were held. These meetings wrapped up with issuing recommendations on setting minimum prices for the respective egg categories.

Together with setting the minimum prices, the manner of possible regulation of the market in case of accumulated excessive production was outlined. In order to achieve the intended result for these players, namely keeping the set sale prices a decision was taken, recommending to all undertakings operating on this market, irrespective of the fact whether they are members or not of the Poultry Union, to sign contracts with the buffer serving egg-processing undertaking. For the purpose of monitoring this process, the undertakings were asked to provide time schedules for the eggs to be directed to the latter undertaking.

In enforcing this mechanism the representatives of the undertakings discussed it actively. Their statements clearly proved the participants' goal artificially to keep the jointly set minimum prices by joint coordinated control on the volumes of produced eggs. All the attending competitor representatives at the respective session agreed with the speakers. Nobody opposed the proposed line of action, or neglected this common mode of operation. The lack of explicit and public distancing from the discussed actions on coordinating the competitors' market behavior results in ascertainment of committing infringement under LPC on behalf of all competitors, having attended these meetings, not only the once, actively supporting this behavior. The passive representatives of the competitors have at least realized what will be the prospective market behavior of the other players on this market and upon lack of evidence to the contrary,

it is taken for granted that this knowledge has defined their own market behavior. In this manner joint coordination of the competitors' market behavior is accomplished, substituting the principle of free competition among them.

The buffer serving undertaking had a special place in the cartel functioning mechanism at the market of eggs. This undertaking is not eggs producer, but industrial purchaser of eggs, used as raw material in its own production. In this specific capacity it turns into player at the eggs market as purchaser of vital importance and plays significant role in the coordinated mechanism on maintaining uniform trade and price policy of the egg producers from the very beginning.

The defendants - representatives of the competitor undertakings, clearly know that to for effective support of the operation of the cartel it is necessary to gather current information on the prices and production volumes of all members. Therefore they have exchanged among themselves actual sensitive trade information on their prices, quantities of harvested eggs and number of hens and/or broilers in two ways: directly by communicating and discussing it among themselves at the organized meetings and indirectly by furnishing this information to the Union, which subsequently has been distributing it to the undertakings for their information and follow up discussion.

CPC indisputably established that at the meetings, held within the period 2002-2007 the undertakings have regularly discussed among themselves the price issues and the manner of keeping minimum prices, economically beneficial to all market players. In fact they have adopted two quota mechanisms. The first one referred to reducing the number of herds of hens, while the second focused on redirecting quantities of eggs from the retail trade to processing them into egg powder. Depending on the specific market situation they have applied the one or the other, or both in parallel.

No market excess of eggs has been allowed by preliminarily set quotas for redirecting the surplus quantities to the buffer undertaking to be processed as egg powder. The price for redirecting the eggs, as well as the quantities and delivery schedule of each company was agreed in advance.

The infringement of prohibited agreement and/or concerted practice at the eggs and poultry market on the territory of the Republic of Bulgaria was committed during the period 2002 – September 2007.

Based on the conclusions stated above, CPC issued its decision No.601 dated 17.07.2008, by which it ascertained the committed infringements under Art.9, para.1 of LPC (repealed) on behalf of the defendant association “ Bulgarian Poultry Union ”,23 egg producers and 7 poultry producers. The Commission Imposed pecuniary sanctions amounting to a sum total of 293,000 NBG for the infringements committed and ruled on termination of the infringement.

### **5.5 Decision 651/2008 –construction engineers**

The legal proceedings before the Commission for Protection of Competition (CPC) for establishing an alleged infringement of Article 9 of the Law on Protection of Competition (LPC) (repealed) and Article 81 of the EC Treaty committed by the Chamber of Engineers in the Investment Design (the CEID, the Chamber) were instituted in July 2007 on CPC's own initiative.

The legal proceedings were initiated further to an email received by the CPC saying that the CEID had taken actions aimed at restricting competition on the market of design services, and more specifically in the field of urban planning, through adopting a Methodology for setting the amount of remuneration for providing design services (the Methodology).

The subject of the legal proceedings is an alleged prohibited decision by association of undertakings for adopting the Methodology as well as an alleged contradiction of the Methodology with the Law on the

Chambers of Architects and Engineers in the Investment Design (LCAEID) to the extent to which the adoption of such a Methodology has been provided for in the Law.

The legal proceedings were initiated against the Chamber of Engineers in the Investment Design (CEID) which is a national professional organization of the engineers of all specialties exercising the profession “design engineer” in the field of investment design and urban planning. The Chamber is a legal entity established on the strength of the LCAEID.

For the purposes of the investigation the CPC has requested information and opinion statements from the Chamber of Engineers in the Investment Design, information from the Bulgarian Construction Chamber, the Bulgarian Entrepreneur Chamber, the National Construction Federation, the Union of Construction Designers, the Union of Owners, the Chamber of Architects in Bulgaria as well as a written statement from the Minister of Regional Development and Public Works.

The Chambers of Engineers in the Investment Design (CEID) is a national professional organization of engineers operating in the territory of the whole country by its regional colleges. The CEID consists of sections formed by specialties or groups of specialties. The Chamber represents its members and protects their professional interests, draws up a code of conduct of engineers and exerts control over whether it has been adhered to.

Any natural person who holds a diploma for “engineer” obtained from a licensed higher school can be a member of the CEID. The membership in the Chamber is obligatory for engineers who have full designer’s capacity and voluntary for those who have limited designer’s capacity is voluntary, since the latter are subject to registration in the CEID on an annual basis. The Chamber has about 9000 members – 7500 of which are designers of full designer’s capacity.

The provision of services in the field of urban planning and investment design is legally bound to the following requirements: acquired educational degree, professional experience, entry in the register of the designers with limited designer’s capacity, membership in the CEID.

The services in the field of urban planning and investment design are provided in return of remuneration that shall be negotiated on a free basis with the contractor of the service in the form of a written contract. The LCAEID provides that the contracted remuneration shall not be lower than the cost price of the delivered design service, with the exception of designs of prayer homes and homes for people in a disadvantaged position. In negotiating the remuneration, the rules for setting its amount (specified in a Methodology adopted by the CAEID) shall be applied.

The Methodology for setting the amount of the remuneration for provision of design services by engineers working in the field of urban planning and investment design was adopted by the Managing Board (MB) of the CAEID pursuant to Article 6 (7) and Article 20 (5) of the LCAEID at a General Meeting of the CAEID which took place on 16 November 2007. The Methodology became effective on 1 January 2008.

In accordance with Article 29 of the LCAEID the Methodology regulates remuneration on the basis of a written contract with the contractor of the design service. The negotiated amount of the remuneration shall not be lower than the cost price of the delivered design service. The Methodology envisages disciplinary liability as laid down in the LCAEID in case of provision of design services at prices lower than their cost price or in case of signing a contract for provision of design services at prices lower than their cost price.

The Methodology defines the structure of the remuneration as a combination of two elements - cost price and profit as well as an additional element - the calculation of VAT. The profit is negotiated on a free basis as it may not be included in the remuneration.

The Methodology enumerates the types of costs included in the cost price and presents four possible ways of calculating cost price.

The Methodology specifies certain coefficients, percentages and time rates used in calculating the cost price under specific design conditions.

The Methodology also regulates the price of design services in case of implementation of foreign projects. The price is set on the basis of time allocated by different groups of designers as well as on the basis of time rates fixed in accordance with their qualification and the level of responsibility they take. It has been explicitly envisaged that for such type of activity the cost price shall not be lower than 60% of the cost price of the project.

Design engineers provide services in the field of investment design and urban planning which is characterized by a high level of technical complexity and public responsibility. Compared to the ordinary goods and services offered on the market, these are services offered in the area of liberal professions.

In the context of the on-going process of liberalization of liberal professions in the EU, in Bulgaria these professions are still characterized regulated to a large extent either by the state or by the respective branch organizations (self-regulation).

## 5.6 *CPC legal analysis*

The Methodology for setting the amount of the remuneration for providing design services in the field of urban planning and investment design, which is of obligatory nature for all design engineers providing design services in the above mentioned fields, can affect the model of trans-border trade to the extent to which its action might affect the provision of design services in the territory of Bulgaria, the provision of such services in another EU Member State and the implementation of foreign projects in the territory of the country. The presence of a possible effect on the trade between Member States determines the objective applicability of the prohibition under Article 81 of the EC Treaty in this specific case.

The CAEID unites engineers from all specialties exercising the profession “design engineer” in the field of urban planning and investment design. The results of the activity of design engineers in the field of urban planning and investment design are meant for exchange on the market. Therefore, as natural persons carrying out economic activities on the market, design engineers can be regarded as “undertakings”.

The CAEID has all the characteristics of an association of independent undertakings on a professional basis which does not carry out independent economic activity and respectively, does not allocate profit. The LCAEID provides the Chamber with special competences to certify designer’s legal capacity, to register design engineers and design offices, to draw up and adopt acts, to carry out disciplinary proceedings which comprise a part of self-regulation in the field of liberal professions. These competencies, however, cannot change the functions and characteristics of the CAEID as “an association of undertakings”.

As a branch organization representing and protecting the interests of design engineers, the Chamber is in the position to exert considerable influence on the economic conduct of its members. What is more, through a special law the Chamber has been delegated special competence on adopting acts of obligatory nature for design engineers, including the imposition of disciplinary measures in case of non-performance of the decisions adopted by the Managing Board of the Chamber.

The Methodology adopted by the CAEID has as its subject setting the amount of remuneration for providing design services in the field of urban planning and investment design. For the purpose of setting the amount of remuneration, the Methodology introduces price-formation mechanisms based on the cost

price of the design service and the calculation of profit. To the extent to which profit is negotiated on a free basis, specific methods have been envisaged for calculating the cost price, i.e. through specifying certain coefficients, percentages and fixed time rates for providing design services under specific conditions. In compliance with the legal requirement the negotiated remuneration amount shall not go below the cost price of the design service.

Through specifying explicit criteria for calculating the cost price of the service, i.e. through introducing fixed coefficients and percentages for calculating the cost price of activities for which it cannot be calculated on the basis of the envisaged costs, in practice the Methodology introduces a mechanism for price formation of a design service thus determining in an indirect way minimum and fixed prices.

Through fixing the levels of time rate for each category of designers in accordance with the function they perform, the Methodology introduces a mechanism for fixing obligatory minimum prices for providing design services on the territory of the country.

The Methodology determines a fixed coefficient by which the cost price is multiplied in negotiating a design services that will be delivered abroad. Such a coefficient has also been envisaged for authorization of foreign projects the cost price for which cannot be less than 60% of the cost price of the project. In this way, the Methodology introduces a mechanism for fixing obligatory minimum prices of design services that have to be delivered abroad as well as for the implementation of foreign projects on the territory of the country.

The Methodology has been adopted by means of a decision taken by a professional organization that unites economic entities providing design services on the territory of the country and abroad, and is of the nature to restrict the competition on the market of this type of services.

To the extent to which the CPC has established a decision by an association of undertakings aimed at indirect fixing of prices which, as such, shall be considered "serious restriction" to competition, the *de minimis* rule shall not apply to this specific case since the anticompetitive effect of Chamber's conduct can never be inappreciable.

The CPC has established that through adopting the Methodology for setting the amount of the remuneration for provision of design services, the CEIP has infringed the general prohibition of Article 81 of the EC Treaty. The conduct of the CEID has been determined by the legal requirement for adopting the Methodology set in the LCAEID. In this way the national legal framework and more specifically the provision of Article 6 (7) in relation to Article 20 (1) (5) of the LCAEID has facilitated the conduct of the CEID that led to the infringement of Article 81 of the EC Treaty.

The CPC has based its argument on the jurisprudence of the Court of Justice of the European Communities which in a Decision of 9 September, 2003 on Case C-198/2001 issues a preliminary ruling on an inquiry of the Regional Administrative Court in Lazio, Italy, indicating that when an undertaking is involved in an agreement, decision or concerted practice, which contradicts Article 81 of the EC Treaty and *where the conduct of the undertaking is required or facilitated by national legislation which legitimates or reinforces the effects of the conduct*, specifically with regard to the determination of prices or market-sharing arrangements, the national competition Authority which is obliged to watch for the application of Article 81 of the EC Treaty:

- shall not apply the respective act of the national legislation;
- may not impose sanctions on the affected undertakings for their conduct where this conduct is required by the national legislation;

- may impose sanctions on the respective undertakings with respect to their conduct further to a decision for non-applicability of the national legislation and after such a decision has become definite;
- can impose sanctions on the affected undertakings with respect to past conduct, where this conduct was only facilitated or stimulated by the national legislation by taking into account the specific characteristics of the legal framework within which the undertakings were operating.

The development of a mechanism for price-formation falls outside the scope of the obligation imposed on the Chamber by law. The CEID has exceeded the functions entrusted to it and has undertaken a conduct which is prohibited by competition rules. The provision of Article 6 (7) (respectively Article 20 (1) (5)) of the LCAEID imposes the obligation for adopting a Methodology without specifying in detail its content, and without providing any guidelines in this respect. That is the reason why the CPC has adopted that in drawing up the specific content of the Methodology the CEID has acted autonomously and shall bear an individual liability for its conduct.

On the basis of the investigation under the case, the CPD has reached the conclusion that the provisions of Article 6 (7) and respectively Article 20 (1) (5) of the LCAEID shall be considered a national measure that has contributed to committing the infringement of the general prohibition of Article 81 of the EC Treaty whereby a Methodology fixing indirectly the prices of design services was adopted. The quoted piece of national legislation contravenes Community law and more precisely Article 3 and Article 10 of the EC Treaty to the extent to which it restricts the efficiency of community rules in the field of competition. Taking into account the general principle of primacy of community law which imposes on all bodies of the Member States the obligation to take all necessary measures for ensuring the full application of the community law, including the elimination of the national measures that contravene the EC Treaty, the application of Article 6 (7), respectively Article 20 (1) (5) of the LCAEID shall be terminated.

Despite the fact that the anticompetitive conduct of the Chamber has been facilitated by the operative legislation in the field of urban planning and investment design, the CPC has held that the Chamber shall bear individual liability for its conduct because it has gone beyond the requirements of the law and has committed an individual infringement of the general prohibition. In this relation, the CPC has taken into account the fact that the actions of the Chamber have been facilitated by the national legislation as a mitigating circumstance in determining the amount of the pecuniary sanction.

The CPC has established both private and public restriction of competition. On the one hand, it has ruled that Article 6 (7) and respectively Article 20 (1) (5) of the LCAEID runs counter to Article 3 of the EC Treaty and Article 10 of the EC Treaty in relation to Article 81 of the EC Treaty, as a result of which, in accordance with the principle of primacy of community law, the national legislation shall not be applied. On the other hand, the CPC has imposed a pecuniary sanction for individual anti-legal conduct on the defendant association of undertakings which has committed an infringement of the general prohibition under Article 81 of the EC Treaty.

The CPC adopted Decision No. 1150/2007 whereby it established that Article 6 (7) (respectively Article 20 (1) (5)) of the LCAID runs counter to the action of Articles 3 and 10 of the EC Treaty in relation to Article 81 of the EC Treaty, as a result of which in accordance with the principle of primacy of community law, Article 6 (7) of the LCAEID shall not be applied. The CPC imposed a pecuniary sanction to the amount of 30 000 BGN on the CEID for infringing Article 9 (1) of the LPC and Article 81 (1) of the EC Treaty and ruled on the termination of the infringement committed by the CEID.



## INDONESIA

### Introduction

Information can take form of many definitions. It primarily refers to ordered sequence of symbols, but also may refer to more general terms such notions of constraints, communication, control, instructions, knowledge, and patterns. Some people say whoever controls information, will control the world.

This may be relevant because information is a crucial element in economic growth. Information can affect how people think of doing business. Currently, high-quality information becomes expensive to win the competition. High demand for information leads to thriving media industries, such as printing, visual, and internet rapidly growth for recent years. Not surprisingly how the information exchanges take place, sometimes determine the success of entrepreneurs.

#### 1. Price transparency

An ideal competitive environment will consist of many buyers/sellers, no entry barriers, homogenous goods, easy access to technology, and complete information. This shows that transparency will increase competition in the market, even though high transparency will facilitate coordination amongst businesses. In this condition, information is an unqualified good. This suggests that more information, available faster and less expensively, will make markets more transparent, improve consumer choices, help firms make better and cheaper products, and improve competition. Price transparency is also a positive signal to stimulate the economic formation and growth through new entrant in the region. Transparency should be a condition in which businesses have goodwill to promote others and support stability in a region which will be correlated with the certainty of their businesses.

One example where increased information actually reduces welfare comes from the theory of coordinated oligopoly behavior. More information exchange among competitors can facilitate coordination, leading to higher-than-competitive prices. In particular, rapid, costless, and extensive exchange of information among sellers may make it easier for parties that want to coordinate to find a set of prices and outputs on which they can implicitly or explicitly agree. It may also reduces any single firm's incentive to deviate from a coordinated price once that is agreed on, because others may be more likely to detect and respond to that deviation.

Price transparency to consumers, of course, can create fair competition in the market. One interesting example in this context is the transformation process in price transparency in Indonesia's telecommunications industry, especially the cellular services. Several years ago, a price war was happening in the mobile services, along with the increasing number of businesses in the telecommunications market. In the campaign carried out, some provided services at very low prices (even free). However after subscription, the low prices were given to the consumer with some conditions that were sometimes burdensome.

These conditions invite government's attention to better protect consumers. In their ways, government and relevant sectoral associations work together to improve price transparency to consumers through the establishment of a code of conduct on the fair marketing and advertising practices. This includes that any pricing information conveyed through media should cover the actual conditions of sale for the mentioned

goods or services. Through this policy, the unhealthy price war was reduced, and entrepreneurs began to promote fair prices and, of course, with conditions that meet the given price.

## **2. Information exchanges among competitors**

Doyle (1996) in her research on US automakers found that where automakers announced plans for their monthly domestic production projected for thirty years, the firm's announcements affected competitors' later revisions of their own plans and eventual production. The interaction appears to be complementary—large plans or upward revisions cause competitors to revise plans upward and increase production.

This proves that published information might be used by the competitors in determining their counter strategies. Classifying which is public information and which is not will very much depend on competition environment and probably, type of products or services in the market. Therefore, the government tends not to intervene in business activities by limiting the publication of information, but mere to the quality of information. The determination of exchangeable information is left to the business to assure, either individually or through business association.

Information exchange may be pursued in some different ways, such through agreements and announcement of several indicators (price, production, capacity, and other). This information could be used to adjust business conditions in avoiding competition from other dominant business actors. Sometime this is information exchanges arise through certain government regulations in the context of rescuing and maintaining a certain sector.

Currently there is no specific regulation in Indonesia that regulates information exchange among competitors. What we now have is a Law on transparency in public information for state institutions to support good governance in Indonesia (the Law n. 14/2008). Information exchanges amongst business are regulated through sector specific approaches. The type of technical information might differ and very much depending on the compliance of said sector to sound competition policy. For example, in telecommunication sector, the regulator prohibits exchange of price information amongst business to avoid the potential for price fixing activity. Moreover, the regulator also banned dominant telecommunication companies from using sensitive information on competitor activities resulting from interconnection activity or any scientific reasons such information on identity, service demands level, and other information on competitors that might hamper or remove competitors from the market.

Indonesian competition law avoids the existence of possibility for exchanging information between businesses through its articles. For instance:

- The Law prohibited interlocking directorates that might harm competition through conflicted managements (Article 26 of the Law n.5/1999) which provides that: “a person who serves as the director or commissioner of a company is prohibited from concurrently being a director or commissioner at other enterprises if the enterprises are...in the same relevant market; or are closely related to the field and/or type of business; or can jointly control the market share of certain goods and/or services which could cause monopolistic practices and/or unfair business competition.
- In unique way, the Law also prohibited businesses to collude with other parties in obtaining confidential information from the competitors (Article 23 of the Law n.5/1999). This exchange of information is treated as rule of reason infringement due to the need to proof its impact on fair business competition. This article provides that: “Entrepreneurs are prohibited from conspiring

with other parties to obtain commercially confidential information of their competitor's business causing unfair business competition".

### **3. Analysis on information exchange**

When information exchanges initially occur, the competitive impact may not yet be able to be assessed. This is due to the need to analyze the existing market conditions and any developments resulting from the change in terms of quantity, quality, availability, and the fairness of good and service.

KPPU itself will have its own indicators for supervision of the potential of competition breach in certain sector through unfair price changes and scarcity of good and service. The Commission uses the information through survey from the society, businesses, medias, and independent analysis. In analyzing this, the Commission still takes into consideration of the existence of the phenomenon of asymmetric information which might occur on price behavior in relation to a certain sector.

Specifically, in analyzing an information exchange, the Commission will consider several conditions such incentive to exchange information, the objective of information exchange, the character of exchanged information, the actual objective of information, and institution facilitating information exchange. Indonesian competition law will also analyze the impact of the potential for the said exchange for monopolistic practices and unfair business competition. The Commission will not need to prove that firms agreed to share information. Instead, the Commission will use the information to challenge or counter-check the reliability of information revealed during the investigation and examination process to be concluded as evidence.

The Commission's single case on information exchange amongst competitors involved the exchange of information stipulated in a profession contract for an Indonesian famous music group with their music company (Aquarius Musikindo Corp). The information was exchanged by one of the members of the music group (Dewa 19) to another music company, EMI Indonesia Corp. (a regional competitor). The information involved scope and objective, royalty rate, monetary advance, time frame, and penalty; information that should be treated as private and confidential information. The leaked information lead the music group to move to other music company, which potentially harmed their existing company due to fact that this music group is their leading asset. In investigating this case, the Commission gave focus on the nature of exchanged information, impact of exchanged activity to certain business actors, and existence of collusion in obtaining the said information. During its investigation, the Commission assessed the financial loss to the violated business actor of around IDR 4 billion as result of such information exchange.

Price information sometimes related to price signaling, especially with the increase of public access to communication media through internet, printing, and visual. Informing price of products or services to the public surely will benefit the consumer, but in the other side, also might provide price signal to the competitors. The price signaling in Indonesia is often found in oligopolistic industries with a dominant business actor with a greater market share compared with other business actors. For example, the Commission found in a telecommunication case involving several cellular operators that for one of the telecommunication services, the existence of price parallelism was acknowledged. A price change by a dominant business actor tends to be followed by price adjustment by other business actors. One point that differentiated price parallelism and cartel in this context is the existence of agreement among them.

Information exchange is also correlated to cartel behavior in law enforcement, especially on price, territory, production, and marketing of good and service. This is related to the distribution of information to agreed businesses (cartelists). The presence of information exchange is analyzed by the Commission as an early behavioral indicator of cartel activities. The Commission considers that a cartel will easily be formed if the businesses are accustomed to information exchanges and transparency among them. Strong

business associations sometimes act as the media for information exchanges. Production and price data sent periodically to a business association might be used as the means for the cartelists to ensure that the cartel agreement is being followed. An exchange bypassing the association may seem irregular, knowing that their exchanges are meaningless. Cartel violations are subject to a rule of reason analysis under Indonesian competition law and therefore the existence of an unreasonable restraint and or their impact must be proved.

#### **4. Conclusion**

Information exchange can be a means to mutually adjust behavior between businesses and to improve price transparency for consumers so they can have a reasonable price. There are advantages and disadvantages in this exchange. The Commission considers that information exchanges are the first indication to be used that there may be a competition law violation. Items such as documents and witness testimony are still required as evidence to support the evidence of information exchanges before there can be a finding of breach. Information exchange is closely related to cartel behavior, but still within the limits where the impact assessment is required.

Indonesia does not have per se restrictions on information exchange in particular, but the sectoral approach through code of ethics by business associations and rules of sectoral regulators have been used in preventing the exchange of information leading to the violation of competition law. Information provided to the public by dominant firms should attract special attention, because in some circumstances, they are used as market signalization and are followed by a less dominant business independently (at their own initiative).

## LITHUANIA

### 1. General effects of enhanced price transparency

As far as this part according to its title considers general effects of enhanced price transparency, in this 1<sup>st</sup> part of written contribution issues related to price transparency will be discussed. As for enhanced transparency through other kind of information, these issues will be more detailed discussed in the 2<sup>nd</sup> part of this written contribution.

1. *Please describe one or more actual situations in which transparency played a role in the degree of competition in the market. Are there cases in your jurisdiction where changes in the degree of transparency clearly resulted in changes in the existing degree of competition?*

First of all, it must be noted, that following provisions of the Lithuanian Law on Competition, relevant EU legislation (in this case Article 101 of the Treaty on Functioning of the European Union (TFEU), which the Lithuanian Competition Council is also entitled to apply directly), national and EU case-law, any agreements between competitors concerning prices of relevant goods or services are prohibited and constitute *per se* infringement of the competition rules. Thus any agreed actions of the competitors towards prices of their goods or services may be caught by this prohibition as cartel agreement (concerted practice). It is presumed that these agreements have detrimental anti-competitive effects without need to prove them as they restrict competition by object. For this reason, as far as such price agreements (concerted practices) can be considered to be agreements artificially enhancing price transparency between certain competitors, it can be concluded that this kind of price transparency always has a negative influence on the degree of competition.

There is number of cases in practice of the Lithuanian Competition Council, where price transparency was enhanced collusively (e. g. by bid rigging, setting minimum or fixed prices, determining methods of setting prices, etc.) both between individual undertakings and within associations of undertakings. For instance, the price fixing agreements were established between providers of taxi, photography services. Decisions concerning minimal prices and the method of calculating prices for certain services were established within associations of Lithuanian architects and auditors. Associations of event organisers and advertisers have also agreed on the fixed fees of the participation of their members in bids.

On the other hand, different approach must be taken into account considering price transparency in cases of abuse of dominant position. As it is stated in the Lithuanian Law on Competition and in Article 102 of the TFEU, price discrimination is one of the forms of the abuse of dominant position and states an infringement of the competition rules. Thus the Competition Council holds the view that pricing policy (official price lists, transparent discount system, etc.) of a dominant undertaking should be transparent in order to prevent possible price discrimination and consequences related to it (e. g. restriction of competition in downstream markets, etc.).

Taking into account more general approach to the price transparency, excluding above mentioned infringements of the competition rules, price transparency may be enhanced also by other public or private means.

For instance, probably the biggest transparency exists in fuel retail sector, where end customers sometimes even without moving from one place are able to compare prices of different fuel retailers that all (2 or even 3) are situated virtually in the same location. That kind of transparency cannot be dogmatically judged as pro- or anti-competitive. This transparency allows competitors immediately to react to price changes in the market. In case of price decrease this reaction benefits end customers as they get lower prices from all undertakings. However price increases are also immediately followed by competitors, thus disadvantaging customers. In general the same effect could appear and in other fields, where prices of different undertakings may be compared without significant efforts (e. g. in e-commerce sector), especially when there are relevantly not many major participants in the market.

Apart from this direct price transparency, there exist other forms and methods of price transparency, which also may result in pro- or anti-competitive outcome on certain markets. Although the Lithuanian Competition Council cannot provide information about certain factual situations that show direct or indirect price transparency influence on the degree of competition, in Lithuania there are some examples of enhanced price transparency, which in different situations may be described as lessening or increasing competition level.

First of all *ex ante* regulation of certain industries (telecommunications, gas, electricity, heating energy and other various services of public interest) plays an important role in enhancing price transparency. For instance provisions of sector specific state regulation determine requirements for price regulation (e. g. requirement that certain prices (for electricity, water, heating supply) must be approved by sector regulator. In other fields state regulation obliges undertakings that have market power to base their prices on costs, to charge non-discriminatory prices for customers belonging to the same group or to announce their prices publicly. There might be also other kind of restrictions or obligations regarding prices of undertakings operating in regulated sectors. Usually state regulation measures related to pricing of certain goods or services are applied in sectors where undertakings that in certain relevant markets hold significant market power or monopoly position. Thus *ex ante* price regulation is established in order to prevent misuse of market power and to encourage competition in related relevant markets. For this reason it can be sufficiently reasonable concluded that this kind of enhanced price transparency directly promote competition.

On the other hand the Lithuanian Competition Council is aware of other kind of state practice, when government institutions through their legislation enhance price transparency in different relevant markets. For instance despite the fact, that prices of raw milk are not regulated in general by any laws of the Republic of Lithuania the Ministry of Agriculture was used to recommend size of deductions and increments of the basic price depending on the quality of raw milk. Thus elements of the raw milk price were made transparent and all buyers could presume that all of them calculate prices for raw milk similarly. The Competition Council was of opinion that these recommendations restrict price competition in the raw milk market. After suggestion of the Competition Council in 2008 these recommendations were abolished.

Furthermore it is common practice of the Ministry of Agriculture to constantly update and publish aggregated recent and historical price information concerning different agricultural products and raw materials. The Department of Statistics also publishes various statistical information including information regarding prices. It must be mentioned that the Lithuanian Competition Council is concerned about publicly available details of statistical information regarding business activities and its possible harm to competition in relevant markets, but while public information does not indicate data of individual undertakings it may be assumed that general (average) price information by itself does not have direct influence on the degree of competition, especially in non-concentrated markets with large number of competitors.

Of course there are also other systems enhancing price transparency, which are created following private initiatives of undertakings in order to simplify their operations in the market. For instance individually or within associations analysing factors that influence price increases or decreases (state tax policy, patterns of trade in different geographical markets, innovations, etc.), publishing results of market surveys, of means for better communication with customers (specialised internet portals or information systems that are dedicated to customers in order they could make a better choice of goods or services, etc.). Pro- or anti-competitive effects of these initiatives, as it is already mentioned above, if there are no evidence of collusive behaviour of competitors, depend on the structure of the market.

2. *Besides the possibility for consumers to better compare products and services and for the sellers to engage in anti-competitive co-operation, what other pro- or anti-competitive effects might be associated to higher levels of transparency in the market? Please illustrate your remarks with actual situations.*

Besides general pro- and anti-competitive effects of the price transparency mentioned in the question, few more aspects may be discussed. First of all it must be noticed that price transparency when it can be enjoyed by customers usually promotes competition or has other positive effects like over all better knowledge about pricing policies and factors influencing prices, thus lessening information asymmetry between suppliers and their customers.

Meanwhile considering price transparency from the players' in the relevant market point of view, other pro- and anti-competitive effects may be named. Price transparency as part of general market information would benefit potential entrants into the market. Ability to know and to evaluate general information about actual price levels, price structure and other related factors may give valuable knowledge to undertakings that are contemplating on the decision whether to enter the market or not. Moreover in case of new entry this knowledge would help certain undertaking to decide on market entry strategy in order to make entry successful. For instance new entrant may present its new goods or services at lower than actual average market prices, thus it can attract customers from competitors, gain certain market share and instigate competitive response that again would benefit customers.

On the other hand adverse effect may appear if intensives to compete are not very apparent, for instance, because the structure of the market. In this case price transparency may have anti-competitive affect by lessening degree of competition comparing to degree that would have been in absence of price transparency. It can be illustrated by example when one competitor is following other competitor's actions concerning prices. For instance one competitor increases its price from 10 € to 15 €. Following this another competitor increases its prices to similar level, e. g. from 10 € up to 14 € taking into account competitor's price and hoping that with still lower than competitor's price it will retain its customers but will receive more profit. If there were no enhanced price transparency, situation probably would be different, taking into account the fact that the other competitor would not be able to instantly react to competitor's price increase. Thus it would not raise its prices at all or at least it would do it not instantly giving more time for costumers to benefit from lower prices. Furthermore if it would increase its prices, probably this increase would not be identical or similar to competitors increase and in general its prices remain more lower that competitor's, i. e. increase from 10 € to 12 € (not 14 €) for the good of customers. From this simple example it is apparent that in the absence of enhanced price transparency when undertakings compete without precise knowledge about competitors' prices and their changes competition would be more active and giving more benefits to their customers, because at least competitors would not be interested in price increases.

3. *What factors and market characteristics do you take into consideration when assessing if transparency is a competition enhancing factor or not? Please illustrate your remarks with actual situations.*

As it mentioned in the 2<sup>nd</sup> answer of this Part, usually it is considered that transparency, which is dedicated to improve customers' information, is a competition enhancing factor. This is the most important in cases of a dominant undertaking operating on the market. Meanwhile the same cannot be said about transparency that improves competing undertakings' information. That kind of transparency needs closer attention in order to assess its influence on competition conditions in the market.

As factor to be assessed first of all must be mentioned nature of information that is available, i. e. is it aggregated statistical information or is it individualised information indicating operation of certain individual undertaking. This objective indication may serve as a first phase in assessing possible competition concerns regarding transparency. If information represents information of individual undertakings it easier to monitor its behaviour in the relevant market, so it is easier to notice deviations from agreed or concerted behaviour in case of collusion. For this reason transparency of individual information is more suspicious regarding competition concerns than aggregated statistical information that gives general basic information about relevant market.

Another important factor is content of available information. Usually information about prices and production (trade) quantities is essential in monitoring behaviour of individual undertaking. It by itself is sufficient to demonstrate undertaking's operation in the market and even enables to convey other important information concerning costs and demand. Thus transparency regarding information on prices and quantities of individual undertaking is a factor that raises anti-competitive concerns as it can serve as means for monitoring collusive behaviour and noticing deviations from it.

Next factor in assessing transparency is also of objective nature – information relevance in time. This means that depending on the time period, which is covered by certain information, this information may be treated as enhancing anti-competitive effects. Usually historical information (even concerning prices and quantities) does not raise competition concerns because it is simply too old and thus does not reflect current situation of certain undertaking nor lets predict its future behaviour. However information about recent past, actual or future activity gives valuable material evaluating and predicting behaviour in the market of certain undertaking. For instance if actual and recent past information shows undertaking's price decrease and increase of its market share, it is apparent that it started aggressive competition policy. This may serve as a sign to other competitors also to undertake certain actions regarding this change in the market in order to eliminate benefits that were sought by the former undertaking before it succeeds gaining them. Thus initiatives of fierce competition are lessening. This may also serve as monitoring system to prevent from and punish for deviations from collusive behaviour. Meanwhile transparency about future prices or quantities by itself may fall under *per se* prohibition to engage into price fixing agreements or concerted practices.

Furthermore, if transparency of price or other business information is available only to a limited group of undertakings while other participants of the same market cannot access it or are deliberately excluded from this group, suspicion about anti-competitive influence of this limited transparency to the market only strengthens. This is because individual pricing and quantity information exchanges between competitors are likely to be explained only by intention to collude their behaviour on the market. That kind of transparency, especially when only private group of undertakings are able to benefit from it, usually cannot be explained or reasoned by any pro-competitive objective as this transparency is not equally available to all market participants and potential entrants.



If it is established that undertakings enhanced transparency in the market important factor to assess is its ability to distort competition in all relevant market. For this purpose structure of the market must be analysed. It is considered that in the market where exists large number of competitors so the supply of certain goods or services is of atomised, non-concentrated nature, transparency (excluding information about future plans) usually will not have distorting effect and even may promote competition. However in oligopolistic or other concentrated markets where operate relatively small number of major competitors, transparency may have an anti-competitive effect. In this latter case transparency enables them to be aware and with sufficient precision predict competitors' positions and strategies in the market, thus reducing important element of competition – uncertainty about competitors' foreseeable behaviour on the market. Without uncertainty competitors are discouraged from active competition because they are also aware that their competitive actions may be almost instantly noticed and eliminated by other competitors before achieving any goals or benefits that were supposed to be reached by initiating certain competitive actions on the market. Moreover transparency in concentrated market may facilitate coordination as it enables competitors to monitor each other's preventing deviations from collusive behaviour.

In the light of above mentioned factors it can be summarized that the more information lets indicate, monitor and predict individual competitors' operations on the market, the more competition concerns transparency raises. However in each case assessment of the transparency depends on a complex of different factors. Common universal rules, when transparency enhances competition and when it does not and has an adverse effect, cannot be formulated apart from certain factual situation. For sure it can only be emphasised that artificially enhanced transparency through collusive agreements or concerted practices regarding prices, quantities, capacities or other conditions of operation on the market is prohibited and constitutes infringement of competition rules. In all other cases more detailed assessment must be carried out.

## **2. Information exchanges between competitors**

First of all it must be emphasised that the Lithuanian Law on Competition expressly prohibit any agreements, concerted practices and decisions of associations of undertakings concerning direct and indirect price fixing, market sharing, production limiting and other “black-listed” collusions, as it is presumed that they have detrimental effects on competition. Therefore, if any information exchange indicates or by itself constitutes (for instance, exchange of future price lists) that kind of collusion, it is treated not as information exchange as such, but as price fixing, market sharing or other above mentioned agreement, concerted practices or decision of association. This issue must be kept in mind while discussing further questions, because according to Lithuanian competition law other kind of information exchanges (for instance exchange of recent past data about volumes of sales) does not constitute *per se* infringements and different approach must be taken into account as their anti-competitive object or effect needs to be assessed.

### *1. When are information exchanges amongst competitors permissible in your country? In what circumstances an exchange of information between competitors can be pro-competitive?*

In Lithuanian legislation there are no provisions in general prohibiting information exchanges amongst competitors. However there is established general prohibition to enter into agreements or concerted practices that prevent, restrict or distort competition within relevant market. So it can be concluded, that information exchanges among competitors in general are permissible unless they reduce, restrict or distort competition. Main factors taken into account while considering possible anti-competitive effects, as it is mentioned in the answer to the 3<sup>rd</sup> question of Part 1, include nature and content of information exchanged, time period that it covers, availability of such information to other undertakings, structure of the market. From this it also follows that if there is no restriction of competition there is no need to make additional assessment of exchange influence on competition (whether it has pro-competitive effect or has no effect at all), because anyway certain information exchange is permissible.

On the other hand it must be noted that even in cases when it is considered that certain information exchange restricts competition, there is a possibility for certain undertakings, which are engaged in this exchange, to argue by pleading pro-competitive effects of certain information exchange (efficiencies defence). Thus certain information exchange may be individually exempted from general prohibition of anti-competitive agreements. This possibility is provided by the Article 6 of the Lithuanian Law on Competition and Article 101(3) of the TFEU, stating that prohibition of anti-competitive agreements is not applied to agreements that promote technical or economic progress or improve the production or distribution of goods, and thus create conditions for consumers to receive additional benefit (additional conditions must be also applied). That means that if undertakings concerned prove that pro-competitive effect of certain exchange of information outweighs anti-competitive effects, it will not constitute infringement of competition rules.

As an example of pro-competitive information exchanges must be mentioned information exchanges that are permissible by block exemption regulations. For instance the European Commission Regulation (EU) No 276/2010 concerning certain agreements, decisions and concerted practices in insurance sector allows joint compilation and distribution of information necessary for the calculation of the average cost of covering a specified risk in the past between undertakings in insurance sector. Of course there are additional conditions in order certain agreement could fall under this exemption rule, for example – from the information exchanged insurance undertakings cannot be identified, this information is available on reasonable and non-discriminatory terms, etc. Nevertheless it can be concluded that this information exchange generally could be treated as pro-competitive if all conditions are met. Thus undertakings that enter into information exchange agreements that are covered by block exemption regulations rules may feel secure from suspicions of anti-competitive behaviour, because conditions set in these regulations establish presumption of legality of certain information exchange.

2. *If information exchanges restrict competition, will they restrict competition by “effect”? Or will they restrict competition by “object” or constitute a per se infringement?*

Following provisions of the Lithuanian Law on Competition information exchange does not constitute a *per se* infringement, as *per se* infringements that in all cases are considered as restricting competition are expressly listed in the Law on Competition and these are agreements: 1) to directly or indirectly fix prices or other conditions of purchase or sale; 2) to share the product market on a territorial basis, according to groups of buyers or suppliers or in any other way; 3) to fix production or sale volumes for certain goods as well as to restrict technical development or investment; and 4) to apply dissimilar (discriminating) conditions to equivalent transactions with individual undertakings, thereby placing them at a competitive disadvantage. So it is clear, that in general information exchange by itself is not prohibited, unless it forms a part of other *per se* infringements, for instance, it serves as instrument for monitoring, how undertakings follow price fixing, market sharing agreements or other above mentioned collusive practices.

For this reason in other cases for there to be an infringement of competition rules, it is always important to establish that information exchange restricts competition by its object or by its effect. It must be mentioned that this alternative between “object” and “effect” follows from general prohibition of anti-competitive agreements. So as far as information exchange is not separately regulated general rules for its evaluation are applied and its objects or effects must be analysed like in cases of any other anti-competitive agreement. There are no provisions that information exchange should be treated as restricting competition by its object or only by its effect – this evaluation depends from every certain case. Thus if there are evidence which shows competitors intentions to restrict competition, there are no reasons why this information exchange should not be treated as restricting competition by its object. Furthermore, if there is such evidence, further assessment of effects of this exchange (like evaluation of market structure, etc.) may be not necessary.

However, it must be mentioned, that in the absence of evidence of anti-competitive object of certain information exchange, while evaluating, whether certain information exchange restricts competition by its effect, according to relevant factors, such as nature and content of information, structure of the market, etc., usually potential (not factual) anti-competitive effects are taken into account. This is because actual effects of certain information exchange are practically almost impossible to demonstrate, calculate, show and compare degree of competition in the market where information exchange is implemented with the degree that would have been in the absence of exchange. Thus anti-competitive effect of information exchange usually is based on the conclusion, that if information exchange satisfies certain criteria (for instance, in the oligopolistic market information concerning recent and actual data about quantities of certain goods sold by individual undertakings is exchanged periodically), it has appreciable potential anti-competitive effect – it is likely to restrict competition and competition would have been more intensive in the absence of such exchange.

For reason mentioned above in some cases it may appear that evaluation of potential anti-competitive effects of certain information exchange becomes more formal and is limited only to the verifying, whether in certain situation necessary factors exist (such as concentrated market, individualized recent or actual data, etc.). If these factors are established, anti-competitive effect of information exchange generally is “presumed”, thus making an impression that information exchanges are considered to restrict competition by object or even constitute *per se* infringements. Nevertheless this question is rather of theoretical nature than practical as in practice competition rules prohibit all anti-competitive agreements – restricting competition by object, by effect and *per se*.

3. *In order to establish an infringement, is it necessary to prove that firms agreed to share information? Or can the mere fact that they exchanged information be sufficient to establish a competition law violation? Does your competition law apply to mere concerted practice of exchanging information among competitors?*

In Lithuanian law there are no general prohibitions of exchange, publishing or other ways making available certain information, the influence of each exchange on competition must be assessed in the context of general prohibition of anti-competitive agreements or concerted practice. It must be noted that under the Lithuanian Law on Competition all forms of collusion are prohibited, that means that in qualifying infringement of competition rules there is no difference between agreements, concerted practices or decisions by associations of undertakings as far as they all similarly are able to determine collusive behaviour of undertakings. Thus in the case of information exchange same principles of establishing and proving of collusive behaviour must be applied. From this it follows that even if information exchange is implemented only by mere concerted practice but (as it is explained above) this information exchange has anti-competitive object or effect, the Law on Competition is applied to it. For the same reason, the mere fact that undertakings exchanged information is not sufficient to constitute the violation of competition law as the anti-competitive object or effect (actual or potential) of certain exchange must be also proved.

4. *What factors can be used to distinguish in these cases between unilateral actions by firms and coordinated actions that could potentially be subject to a prohibition against unlawful agreements? Is reciprocity required to find that information exchanges are unlawful? Conversely, could it be unlawful if one firm unilaterally makes information available to competitors or the market place, for example information about intended price increases or other future competitive conduct?*

As it explained above, in order to constitute, that information exchange is prohibited by the Lithuanian Law on Competition, first of all the element of collusion must be established. Therefore reciprocity is necessary for there to be relationship between competitors that could be regarded as

agreement or concerted practice. If there is no evidence of reciprocity, there is no agreement and thus there is no violation of competition rules by anti-competitive agreement. So if one undertaking unilaterally makes available its commercial information (by making public announcements or even directly sending this information to its competitors) it is not sufficient for there to be an infringement as far as other competitor does not “respond” to this invitation to collude. Thus in general competitors are not responsible for unilateral actions of one undertaking; otherwise it would be very easy to deal with competitors that do not want to collude simply just by sending them certain information. However competition rules should not interpret and used in that way, as their main purpose to protect competition but not to provide means for unfair competition.

On the other hand it must be noted that, if there is no collusion, there are no other objective reasons why one undertaking should be encouraged to act this way unilaterally and thus take risk of possible negative consequences of disclosing to its competitors information that is usually treated as commercial secret. For this reason, presuming that undertakings are cautious enough and are aware of possible harm of unilateral disclosure of their information, unilateral (at least at first sight) disclosure of information by one undertaking gives a signal and raises suspicion of possible anti-competitive collusion. For instance one undertaking periodically in a newspaper or on its website announces its quarterly activity results (volumes of sales, costs, prices, market share, etc.). By itself this publicity may look unusual but it not enough for there to be a violation of competition rules. However, it gives a signal that this available information is part of “market talk” between competitors and their corresponding answers are also available somewhere, for instance on their websites. Situation like this could be treated as possible violation of competition rules, because it raises doubts whether this “market talk” is just coincidence of unilateral behaviour of several competitors, especially when the nature and content of information is quite similar. Nevertheless absence of adequate respond from competitors does not exclude possibility of collusion, because there might be other mechanisms for agreed proper respond, for instance simply by adopting certain factual behaviour in the market (rising or decreasing own prices). But in this case still the evidence of reciprocal behaviour must be established in order to qualify violation of competition rules.

5. *In your practice, have you developed “safe harbours” that can help the industry to structure information exchanges in a way which does not infringe competition law? Have you published guidelines in this area?*

The Lithuanian Competition Council has not prepared any guidelines or recommendations in respect of permissible information exchanges yet. This is due to the fact that the Competition Council at this time had only few cases where information exchange as such had been qualified as violation of competition rules and only recently after appeal procedures Lithuanian Supreme Administrative Court adopted its decisions, in which different approaches of the Court to the information exchanges are reflected. However the Competition Council always gives its opinion on certain questions regarding information exchanges that are received from undertakings in order to prevent infringements of competition rules. Meanwhile the Competition Council in cases of information exchange always follows legislation and practice of the European Commission and EU case-law in order to ensure that information exchanges amongst competitors are treated similarly at EU and national level.

6. *Under what circumstances, if at all, would your competition authority prohibit information exchanges? If information sharing is not prohibited per se, what factors should be used to decide whether an information sharing practice was unlawful? Would it always be necessary to show that information sharing had anticompetitive effects?*

As it is explained in the answer to the 3<sup>rd</sup> question of Part 1, anti-competitive assessment of information exchanges includes number of factors starting from content of information to market structure. Usually it is considered that anti-competitive effect of information exchange may arise when undertakings

exchange information of confidential nature that lets indicate results of undertaking's operation in the market and with sufficient accuracy predict its future behaviour, for instance, information concerning their recent past or actual volumes of sales, costs, market share, future plans. The more detailed information is, the more anti-competitive concerns its exchange raises. Furthermore, if information exchanged is individual, the exchange of it is more likely to restrict competition, than the exchange of aggregated statistical covering all market in general information. Finally the structure of the market also is one of the key factors deciding whether information exchange is capable to restrict competition in the market. The information exchange in the concentrated market is more likely to restrict competition, that in the market which can be characterised by a large number of competitors where supply of certain goods or services is atomised. It cannot be rejected that the nature of certain goods or services would also be important in assessing information exchange as infringement of competition rules, while it is obvious that the more homogeneous goods the easier it is to monitor and predict operation of the competitor, because there is no need to take into evaluation such competitive element like quality differences between goods of different suppliers.

In general it can be concluded that information exchange restricts competition by removing important element of competition – uncertainty of competitor's actions and therefore prevents or reduces hidden competition. For this reason if certain information exchange is of that kind that it enables competitors to follow each other activities and operation in the market and the structure of the market is such that enables competitors (if needed) to take proper actions in order to eliminate unfavourable changes in the market, this information exchange is liable for restriction of competition.

On the other hand, as it is discussed in the answer to the 2<sup>nd</sup> question of Part 1, if there is clear evidence that information exchange has as its object restriction of competition, the above mentioned factors like market structure are not important and detailed analysis is not needed. However probably only in very rare cases anti-competitive object of the information exchange can be clearly demonstrated, thus assessment of its anti-competitive effects usually is necessary.

7. *More specifically, what role would the following factors play in decisions to prohibit such practices?*

a) *Evidence of pro- or anti-competitive intent and/or effects.*

Evidence of pro- or anti- competitive intent or effect is always important. If there is evidence of anti-competitive intentions what in general can be treated as anti-competitive object of the information exchange, there would be no need for very detailed assessment of other factual circumstances related to information exchange (like analysis of market structure, etc.). In case there is no evidence of anti-competitive object, the determining the anti-competitive effect is necessary for constituting infringement of competition rules. However it must be noted that effect may be either actual or potential. An actual effect is more difficult to prove, because information exchange by its nature does not absolutely eliminate competition but reduces it. Meanwhile potential anti-competitive effect depends on the number of different circumstances and factors, that must be evaluated (structure of the market, nature of the information, specification of goods, etc.) in order to conclude that certain information exchange must be prohibited. If after all anti-competitive effect is established there is still possibility that because of pro-competitive intentions and effects information exchange will not be prohibited as it may be proved that efficiencies resulting from the exchange counterweights anti-competitive effects. However if there is no evidence of efficiency only mere pro-competitive intentions of undertakings concerned do not exempt anti-competitive information exchange from prohibition.

- b) *General market structure and conditions affecting the probability of successful co-ordination (e. g. degree of concentration; height of barriers to entry/expansion/exit; degree of product differentiation; lumpiness in order volumes; etc.).*

Factors related to the nature and structure of the market are very important when anti-competitive effect of information exchange is examined, since restriction of competition is more likely in concentrated oligopolistic markets. Although it must be noted, that not in all cases all mentioned factors must be analysed, because depending on the certain market there may quite obvious that the supply of certain goods or services is concentrated only by few participants on the market and naturally exist relatively high barriers to entry and expand in the market. Thus the most important indicator of possible anti-competitive exchange of information is related to the number and size of major competitors. The more concentrated market is, the more exchange of information is likely to restrict competition. In other cases more detail analysis should be done in order to determine, whether there exist proper conditions for co-ordination, including barriers to entry, product differentiation and other relevant factors.

- c) *Degree to which such practices are widespread in the market.*

The importance of this factor is closely related to the structure of the market. If information exchange practice is widespread in oligopolistic concentrated market what means that it is wide spread among major competitors, this does not deny possible anti-competitive effect of this practice. However if in more fragmented market there are several or many parallel information exchange systems this may indicate that there is no information asymmetry among competitors and still competition between undertakings participating in different exchanges remain. But still to eliminate possibility of anti-competitive effect of this widespread practice overall analysis of it must be done, since instead of eliminating anti-competitive effect it by its extent may eliminate competition.

- d) *Evidence that information exchanges were adopted by agreement of competitors, versus being unilaterally deployed.*

As it is explained in the answer to the 4<sup>th</sup> question of Part 2, the element of reciprocity is necessary to prohibit information exchange as unlawful anti-competitive practice. Therefore unilateral disclosure of information cannot be treated as violation of competition rules, unless it is the result or episode of other anti-competitive agreement or practice.

- e) *Evidence that one or more transparency enhancers are being used to support an anticompetitive agreement.*

If it is established that information exchanged is anti-competitive, evidence of other subject's participation, promotion or other kind of support or assistance to this exchange may be important in considering whether it is also responsible for violation of competition rules.

- f) *Characteristics of the information exchanged, such as its subject matter, level of detail, age and frequency.*

Characteristics of the information exchanged are the key issue that needs to be assessed while deciding whether exchange of certain information is anti-competitive. As it is already mentioned above, if certain information exchange is of that kind that it enables competitors to follow each other activities and operation in the market, the exchange of it is likely to restrict competition. For instance, information that contains sensitive business information usually treated like commercial secrets, other data related to operation and activities in the market (market shares, volumes of sales, costs, etc.) should not be exchanged. Moreover this information should not be exchanged if it represents data that is of recent past or even actual data (one year old, half year old, quarterly, monthly information – depending on the market

different time periods may be described as recent) because it is still important and gives valuable material for assessing and predicting current and future behaviour. It must be also mentioned that continuous periodical and frequent exchange of certain information also gives indications that exchange is anti-competitive as it shows that undertakings concerned are constantly engaged into co-ordination and for a long time, thus more and more losing independence of decisions on their behaviour on the market – one of the key elements of normal competition. However it cannot be excluded that even sole exchange of certain information could also restrict competition, because it could be sufficient to predict competitor's course of conduct for a rather long period of time. Finally, as it is apparent from above, one of the most important characteristics of the information exchanged is its level of aggregation – there would be no competition concerns, if from this information would not be possible to indicate data of individual undertaking.

g) *The public or private nature of the information exchanged.*

Public or private information makes difference in determining whether undertakings concerned should be liable for competition restriction resulting from the made available information. This means that if certain information is or became publicly or even privately (by individual requests) available not by certain actions or decisions of undertakings, but because of the actions or decision of third parties (for instance statistics, market research agencies, government institutions), it cannot be treated as anti-competitive agreement between undertakings concerned. And on the contrary, if this information became available to competitors as a result of their agreement (concerted practise or decision of their association) and it cannot be received from other sources, this may constitute infringement of competition rules.

On the other hand comparing information exchange, where certain information is available to unlimited number of undertakings or other subjects, with exchange which is limited only to the closed group of undertakings participating in the exchange, the latter situation may indicate not only anti-competitive effect of the exchange but also anti-competitive object and intentions of the competitors concerned.

8. *Do you distinguish between the following types of information exchanges? If you do, how do you assess of these different types of information exchanges?*

a) *“Direct” exchanges between competitors and “indirect” exchanges, i. e. exchanges which take place with the intermediation of a third party (e. g. a consultant or trade association)?*

As far as under Lithuanian legislation it is not prohibited to receive information, but there is prohibition to enter into anti-competitive agreements, in case of such agreement there is no difference, whether information “technically” is received directly from competitors or indirectly through a third party. Attendance of the intermediary does not change the fact that competitors have agreed to exchange information. On the other hand the question of intermediary's responsibility for taking part in anti-competitive agreement may arise.

b) *“Horizontal” information exchanges (i. e. between companies on the same level of trade) and “vertical” information exchanges (i. e. between companies on different levels of trade)?*

The Lithuanian Competition Council does not have any practice concerning anti-competitive “vertical” information exchange. Nevertheless it may be assumed that general principles of evaluation of anti-competitive objectives or effects of that kind of agreement should be applied. However in cases like that there would be other factors than in cases of “horizontal” exchanges that would be of major importance while making anti-competitive assessment.

For instance, probably in some cases there would be a question of possible abuse of dominance rather than vertical agreement as such, e. g. if dominant supplier enters into an information exchange agreement

with only one buyer, thus placing in disadvantage other buyers that do not receive and are not able to receive certain information. On the other hand, if supplier discloses its information to its buyers instead of competitors, the question of efficiency and customers' welfare effect arises, which may counterweight any possible anti-competitive effects in the supply market.

- c) *Information exchanges which are set up by companies and information exchanges which are favoured or required by the government or by other public entities?*

In case of information exchanges, which are favoured or required by government or other public entities, it is important to notice that there may be no evidence of undertakings' common will to act together in certain way – in this case to exchange information. For this reason the agreement (concerted practice, decision of association) as such may be absent, thus making impossible the qualification of the exchange of information as an anti-competitive agreement. However if there are no strictly binding rules to exchange certain type of information, the fact that anti-competitive information exchange is favoured or even recommended by government or other public entities does not remove liability from the undertakings involved, but following provisions of the Lithuanian Law on Competition this fact can be assessed as a mitigating circumstance.

- d) *“Private” information exchanges (i. e. among suppliers only) and “public” information exchanges (i. e. among suppliers and buyers)?*

There is no general difference whether the information exchanged among suppliers is also available to buyers, as it does not change the fact that it may restrict competition between suppliers. However this factor may be important deciding whether agreement can be exempted from the prohibition because it creates conditions for consumers to receive additional benefit.

9. *In your jurisdiction, to what degree and under what particular circumstances information exchanges taken as circumstantial evidence of anti-competitive agreement?*

The Lithuanian Law on Competition does not expressly list evidence that can be used to prove anti-competitive agreements, therefore any evidence is considered to be appropriate if it is lawfully collected and it confirms circumstances, on which anti-competitive agreement is assessed is based. For this reason if it is established that between competitors information exchanges were exercised formally there are no obstacles or other additional requirements in order to use this fact as evidence proving anti-competitive agreements either as direct evidence or as additional circumstantial evidence of certain agreement.

10. *How do you assess possible countervailing efficiencies? For example, the parties may argue that information exchanges can bring about productive efficiencies and increase welfare. If the conduct has plausible efficiencies, would that be sufficient to undermine an infringement case or would it be necessary to engage in a broader balancing exercise of restrictive effects and efficiencies?*

General principles of the assessment of possible countervailing efficiencies of certain anti-competitive agreement and conditions to exempt this agreement from prohibition are stated in the Article 6 of the Lithuanian Law on Competition. It stipulates that prohibition of anti-competitive agreements is not applied where the agreement promotes technical or economical progress or improves the production or distribution of goods, and thus creates conditions for consumers to receive additional benefit, also where: 1) the agreement does not impose restrictions on the activity of the parties to the agreement, which are not necessary for the attainment of these objectives; 2) the agreement does not afford the contracting parties the possibility to restrict competition in a large share of the relevant market. In the event of a dispute concerning the compliance of the agreement with these provisions, the burden of proof falls upon the party to the agreement benefiting from this exemption.



Following these provisions assessment of the efficiencies of any agreement is carried out in the same way, i. e. undertakings concerned must submit their evidence that efficiencies effects outweigh anti-competitive effects of certain agreement and meets other conditions set in the provisions of the Law on Competition. It must be noted that these conditions are strict enough, as they require not only proving that agreement is capable to produce efficiencies, but also proving that these efficiencies cannot be produced in the absence of the agreement. If the undertaking succeeds in complying with and proving of the existence of these conditions investigation of the agreement is terminated concluding that this agreement is exempted from general prohibition of anti-competitive agreements. Additionally it must be noted that, as it is mentioned above, for certain groups of agreements more general rules concerning efficiencies there are set in block exemption regulations. It is held that all agreements that satisfy conditions set in the block exemption regulations are considered to satisfy efficiency criteria and additional individual assessment of the agreement according to the general exemption criteria usually is not needed, unless there are grounds to revoke application of the block exemption.

### 3. Cases

The Lithuanian Competition Council in its practice had two cases where anti-competitive agreements were established as mere information exchanges among competitors. Despite the fact that Competition Council treated these information exchanges following the same principles of assessment, there are now two Court's decisions regarding them, which however represent two different approaches towards information exchanges as anti-competitive agreements.

In 2006 the Competition Council adopted decision constituting that during period from 1999 to 2004 six major paper wholesalers in Lithuania by exchanging information about their individual market shares and volume of sales of the separate types of paper on the quarterly basis infringed competition rules that prohibit anti-competitive agreements. This conclusion was made following the analysis of the market structure, nature of the information exchanged and the behaviour of undertakings concerned. It was concluded, that relevant markets in which undertakings operated and concerning which information was exchanged were oligopolistic relatively concentrated markets. It was determined, that during investigation period, there were approximately up to 20-40 undertakings operating in relevant markets, meanwhile six biggest undertakings engaged in the information exchange together held total markets' share of up to 94-97 %. Furthermore it was established that these undertakings after each quarter of the year constantly exchanged (directly or through intermediary market research company) individual data about volumes of sales and market share of the accounting periods. Moreover this information was kept privately and was not available to any other competitor (even if it was asking to admit it to the exchange) or buyers. After considering all these circumstances the Competition Council finally concluded that these information exchanges restricted competition in relevant markets, since they reduced hidden competition thus lessening intensives to compete and thus creating barriers to enter relevant market. After appeal procedure in 2009 the Lithuanian Supreme Administrative Court adopted its decision approving the Competition Council's decision constituting that this information exchange agreement restricted competition and violated competition rules as it had potential anti-competitive effect.

Another case is related to the information exchange in the dairy sector where seven producers of dairy products were exercising exchange of individual information concerning their volumes of purchased raw milk, volumes of produced and sold different types of dairy products. This information also involved even more details, for instance volumes of purchased raw milk according to its quality, volumes of dairy products' sales in Lithuania and foreign countries (EU, third countries), etc. This information was disseminated through their association every month during all period from 2001 until 2007. It must be mentioned that information exchange was based on the reciprocal basis, as even member of the association could receive competitors' data only if it agreed to disclose its own individual data to them. During the information exchange period relevant markets were characterised as concentrated markets as there were

four biggest producers together held markets' share of up to 73-85 %, while the remaining share of the markets concerned was divided by a number of other smaller competitors. In the information exchange took part all major participants of relevant markets, except one undertaking which was not a member of the association. After assessing these findings the Competition Council concluded that these information exchanges restricted competition in relevant markets, since they lessened competition by increasing transparency of their actions in the markets thus deterring from active competition that would have been in the absence of such information exchanges. However after two of the undertakings concerned made an appeal to the court and after in 2009 the Lithuanian Supreme Administrative Court adopted its decision this assessment of anti-competitive information exchange on the part to of appellants was annulled and on this part it was returned to the Competition Council for additional investigation. Main criticism from the Court regarding this Competition Council's decision was related to the absence of evidence of factual restriction of competition, while assessment of potential anti-competitive effect of these exchanges provided in the Competition Council's decision did not convince the Court.

## ROMANIA

### 1. Introduction

Romanian Competition Law no. 21/1996 prohibits any agreements between undertakings or associations of undertakings, any concerted practices, or decisions by the associations which have as an object or as an effect the restriction, prevention or distortion of the competition on the Romanian market or on a part of it.

That means that article 5(1) of the Romanian Competition Law which is similar to art. 101(1) TFUE distinguishes between agreements, concerted practices and decisions by associations which have as their object and those which do not aim at restricting competition, but may nevertheless have restrictive effects on competition.

The main difference between the two types of practices is that in case of the restrictions of competition by object, RCC is not bound to prove any actual harmful economic effects on competition, knowing already that this conduct is leading to an inefficient repartition of the resources, rising in prices and to prejudices for consumers.

An information exchange can only fall under article 5(1) (and article 101(1) of TFUE insofar as it may affect trade between Member States) if it can be shown that it establishes or is part of an agreement, a concerted practice or a decision of an association of undertakings.

Information exchange between competitors can take various forms including exchange of prices charged and discounts, sales information, production costs, output levels, capacities or customer details and information regarding marketing and R&D activities.

Exchange could be of individualised or aggregated information, historic, recent or future information, publically available or private information. Certain types of information raise greater competition concerns than others. In particular, private, frequent communication around individualised, recent past or future information on prices (recommended prices, price levels, price increases, minimum prices etc.), rebates, production plans, sales data exchanged between competitors but not between customers, as well as private communication of future plans are considered potentially problematic and have, in several cases, been looked upon unfavourably by Romanian Competition Council (hereinafter referred to as RCC) as detailed below. Further, information on individual firms' past prices and quantities may allow identification of deviators more effective and targeted punishment.

On the contrary, information exchange on market demand, costs or publically available data are usually considered less problematic. Given the possible efficiency benefits of information exchange, a case of information exchange restricting competition could be brought under article 5(2) of the Romanian Competition Law (and article 101(3) TFUE insofar as it may affect trade between Member States). Accordingly, an agreement or concerted practice between parties in a horizontal relationship is prohibited if it has the effect the restriction of competition in a market, unless the parties to the agreement, concerted practice or decision can prove that any resulting technological, efficiency or other pro-competitive gains outweighs that effect. Therefore, the participating undertakings are given the opportunity to put forth any efficiency justifications for the information exchange.

RCC acknowledges that information exchanges can occur through direct sharing of data between competitors, a common agency (such as trade associations), a third party (e.g. market research agencies) or through publishing such as newspapers or a website.

Therefore, from legal point of view, RCC distinguishes between three situations of communication/information exchanges between competitors: exchanges ancillary to other horizontal agreements (production, standardization, R&D) that are to be assessed in combination with the respective horizontal co-operation agreement and which are unlikely to carry an additional antitrust risk if they are strictly limited to information/contacts necessary to implement the respective contract; exchanges of information as conduct device which makes it easier to sustain tacit (or explicit) collusion that are assessed as part of the respective cartel and “pure” information exchanges such as market information systems which may constitute an infringement in itself.

With regard to the first and third situations described above, RCC has not developed yet any case law on those specific points. However, RCC pays due attention to the recent evolutions at EU level concerning the regulation of information exchange under antitrust rules, namely the *EC's revised draft horizontal guidelines* that provide important clarifications regarding the delineation of an infringement by object and effect of an information exchange scheme and of how to assess the effects of such information sharing.

There have only been two horizontal agreement cases to date, i.e. one in the cement industry and the other in the market for the motor vehicle repair and maintenance service in which RCC dealt with the indirect sharing of data between competitors as part of the evidence of a price-fixing agreement.

Therefore, in both cases detailed below exchange of sensitive commercial information related to future prices and marketing strategies eliminated a considerable amount of the risk of competition and autonomy of the market players and was treated as part of a cartel restricting the competition by object.

In addition, RCC has in its attention cases related to i) possible exchanges of information within business associations for the purpose of lobbying to public authorities on subjects of common interest and ii) possible exchanges of information between undertakings subject to the obligation to collect the waste from the products introduced on the market (the undertakings created joint-ventures to this effect but there were apparently insufficient “black boxes” with respect to the information received by the JV). These cases may come under the third category, as mentioned above, of “pure” exchanges of information.

## **2. Exchange of information as part of a price-fixing agreement on the cement market - Decision of the RCC's Plenum no. 94/2005**

In the cement cartel case, it was found that the three oligopolists used to communicate through the newspapers every price increase. More exactly, the three cement producers on the oligopolistic market used their membership within a trade association, CIROM, to exchange sensitive information that helped them divide markets and maintain symmetry of prices and market share throughout the duration of their cartel agreement. CIROM published a quarterly bulletin comprising sensible and detailed information, including individual statistic data regarding each cement plant turnover, share capital, gross profit, average of employees, gross average wage, labour productivity, volume of investments, fuel and energy consumption per plant, positions of the three companies at international level, volume of production and sales, development of the Romanian cement market (import and export figures).

These data were provided monthly to CIROM by the three companies. The bulletin provided also comparative data regarding the previous periods, in percentages and sums. The three involved undertakings used this information exchange to eliminating the strategic uncertainties on the future competitive conduct to their benefit and to coordinating their conduct more effectively. They agreed on certain artificial levels

of the cement price, and this exchange of information allowed them to maintain a specific price level. The data regarding their turnover allowed them to compare it with the overall turnover and easily deduce the market share for each undertaking, and therefore to obtain and maintain equal market shares by adjusting the prices accordingly.

The parties claimed they are not to blame for this phenomenon, because the CIROM association had already been set up, and its policies had been implemented before their entry on the Romanian cement market. This was obviously not a convincing argument.

Moreover, the existence of continuous and detailed sensitive information exchange between the three undertakings was proved by a holograph note of HOLCIM ROMANIA's country manager in that period containing data regarding the future price increases and the dates when the future prices will be operated. In spite of the fact that it did not bear any signature or date, the holograph note entitled "Price increases" was recognized as pertaining to the general manager of Holcim and stated that *"Lafarge Romania will reduce its discounts and must be followed with full attention"*.

There was also evidence of regular contact and communication between the parties. The undertakings in question used their membership within CIROM as an effective cover for their meetings. The parties were members of the Cement Committee within CIROM. The Committee was made up of the three undertakings in question and CEPROCIM, the National Institute for Research in the cement sector. The working meetings of the Cement Committee took place in turns at the headquarters of each of the three producers. The Committee also organized the "The Open Gates Day", event when each of the three producers invited the other two to pay a visit to one of his plants.

What's peculiar in this case is that despite Bucharest Court of Appeal judgment was favorable to RCC, one of those three companies, namely Carpatcement challenged the Bucharest Court of Appeal's decision before the Supreme Court, which upheld the appeal, annulling thus RCC's decision with respect to the plaintiff.

Moreover, the cement case set forth an apparently ambiguous standard for the use of circumstantial communication evidence in proving cartels in Romania. The Supreme Court judged that the economic evidence (price parallelism further complemented by the exchange of information evidence facilitating cartel activity, structural evidence) corroborated with the communication evidence as detailed above was insufficient to prove the plaintiff's involvement in the price-fixing.

As the European Court of Justice established in its jurisprudence<sup>1</sup>, the concept of concerted practice applies even in situations where only one company discloses confidential information on future conduct and the competitors "accepts" it. So, reciprocity in the exchange of information is not a requirement in order to qualify it as restricting the competition. Neither is it necessary for the competitors to have exchanged information directly between them. As shown above, the exchange may well take place through a trade association to which the competitors are members.

As concerns price parallelism behaviour, the Bucharest Court of Appeal judged that "such behaviour can not be explained otherwise than by the existence of a concerted action between undertakings in so far as the companies were making investments for modernizing their production facilities and at the same time they were able to maintain symmetric their market shares over 4 years".

However, Supreme Court ruled that "conclusive and sufficient evidence on the plaintiff's participation to an agreement, either express or tacit or to a concerted practice of two or more companies should have

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<sup>1</sup> See case T-202/98 Tate and Lyle vs. Commission.

been tremendously necessary for establishing a cartel-type infringement in an oligopoly market where the players have the right to adapt themselves intelligently to the market conditions”.

It actually judged that the weight given to the handwritten note which did not bear any date or signature was not justified. The Supreme Court considered that the note in question was far from proving beyond doubt the participation of the plaintiff in an express or tacit agreement, as the note was not linked to a particular date, or signature and did not indicate that the plaintiff had actually exchanged sensitive price information with its competitors.

Moreover, the Supreme Court judged that there was no proof with respect to the increases in prices excepting that holographic note and that RCC should have taken into consideration the economic justifications determining the price increases (inflation rate, international cement prices, and the seasonal nature of the cement industry). Accordingly, the Supreme Court completely quashed the Competition Council’s decision and the fine imposed as far as it concerned the plaintiff.

Therefore, the High Court of Justice judged this case as typical price parallelism case and consequently applied the high standard of proof set at EU level by *Ahlström Osakeyhtiö*. That judgment established that where the competition authority’s reasoning is based on the supposition that the facts established cannot be explained other than by concerted action between undertakings, it is sufficient for the applicants to prove circumstances which cast the facts established by the European Commission in a different light and thus allow another explanation of the facts to be substituted for the one adopted by the Commission (*Ahlström Osakeyhtiö*, especially at paragraphs 70, 126 and 127).

### **3. Exchange of information as part of a prix-fixing agreement on the market for the motor vehicle repair and maintenance service – RCC’s Decision no. 24/17.06.2010**

More recently, the Romanian Competition Council (RCC) has imposed sanctions on five undertakings for prix-fixing on the market for the motor vehicle repair and maintenance services. In this case, exchange of sensitive commercial information related to future prices and marketing strategies eliminated a considerable amount of the risk of competition and autonomy of the market players and was treated as restricting the competition by object.

The geographic market was defined at a local level taking into account the activities of the involved parties, the regional differences in the tariffs applied, the specificities of the offer and demand and the regional economic development.

The motor vehicle repair and maintenance services co-operated particularly in the way of the exchange of information, which normally would have been a subject of their business secret or that of their partners. Exchange of information took place with respect to both their future business strategy towards their business partners – the insurance companies and the fixing of the labour tariff per hour. Unannounced inspections were conducted in the premises of both the involved undertakings and insurance companies.

An important document detained during the dawn raids that subsequently determined the starting point of the cartel in this case was a holograph note found at the headquarters of one incumbent proving a previous contact of the representatives of this incumbent with a representative of an insurance company. The holograph note contained a brief of this discussion and revealed that the increase of the labour tariff per hour does not depend on the insurance companies but rather on a joint strategy of the vehicle repair and maintenance services active in the respective market of unifying the labour tariff per hour to be disbursed by insurance companies for vehicle damages.

Conduct economic evidence supporting concertation, consisting of documents and emails from the files of the parties clearly showed that they had attended meetings at which the fixing of the labour tariff per hour and their future business strategy towards their business partners were discussed.

Moreover, a draft of note containing the joint position of the five services towards the insurance companies with respect to the intended increase of the labour tariff per hour was as well discovered during the dawn raid. This draft of note made as well reference to the date and the aim of one particular meeting taking place on 30 October, respectively the fixing of the labour tariff per hour. Following a sequence of meetings, each undertaking submitted to the insurance companies a note containing the new labour tariff per hour warning with the cancelation of the contract of cooperation having as object vehicle repairs in the respective services (for which insurance companies owe damages to the owners of damaged vehicles) unless they accepted the new labour tariff per hour.

Actually, it was discovered that all the notes sent by the involved undertakings to the insurance companies had the same form and substance and made reference to the same level of the labour tariff per hour intended to be implemented.

A series of individual negotiations with the insurance companies with respect to the increase of the tariff followed. These negotiations arising from the concerted action of the involved parties lasted on a case-by case basis till February-march 2009 and had as result the increase of the level of the labour tariff per hour paid by the insurance companies. At the same time, the involved undertakings increased and in some cases, aligned their tariffs for both natural and legal persons.

As concerns the structure of the market, RCC found that the cumulated market share of the five undertakings involved in the price-fixing agreement on the relevant market amounted to approx. 84%.

Following the investigation launched by RCC, in February 2009, RCC issued a decision of sanctioning of the five undertakings for their participation in a horizontal agreement having as object the fixing of the labour tariff per hour. The agreement was found to last from October 2008 to February 2009 and that is why the fines applied by RCC cumulated only 252,000 Euro.

This case is also relevant from the perspective that it is for the first time in the RCC's practice when one of the undertakings recognized its participation in the cartel within the investigation process, which was eventually retained as a mitigating circumstance and, in consequence, the fine applied, as percent of its turnover for the previous year, was substantially reduced.





## **RUSSIAN FEDERATION**

Conclusion by competitors of any agreements on information sharing that lead or can lead to consequences given in the parts 1, 2 of the Article 11 (concerted practices) of the Law on Protection of Competition, is considered by the FAS Russia as violation of competition legislation.

In accordance with the part 3 of the Article 11 of the Law on Protection of Competition private persons, commercial and non-commercial organizations are prohibited to coordinate economic activity of economic entities if such coordination leads or can lead to restriction of competition.

With this regard any unilateral public statement of the market participant on price forecasts can be considered by other market players as guiding line for their further activity thus being one of the steps for coordination of economic activity. According to the law such violations fall under administrative liability. However, usual reaction of the FAS Russia on such public statements is warning of that person on inadmissibility of public recommendations to market participants.

For instance, in January 2009 the FAS Russia recommended the DSM Group to refrain from making public price forecasts on medicines. DSM Group earlier published in a number of mass media an article named "Medicines will rise in price on 20%" where its analysts make such forecast for 2009. Due to the fact that DSM Group is a company specializing in marketing and advertizing of the pharmaceutical sector, any of its publications could be perceived by the market participants as a guideline for their price policy and, therefore, can be qualified as violation of competition legislation.

The same happened with regard to public recommendation of the managing director of the Russian Union of Trade Centers on terms for lease relations on the market of trade and entertainment estate renting in the end of 2008.

In order to deter such practices, the "third antimonopoly package of laws" that is being elaborated at the moment envisages amendments to the Article 8 and Article 11 of the Law on Protection of Competition that would stipulate that anti-competitive actions of economic entities are the actions of economic entities on the product market that satisfy an aggregate of conditions, including the one that these actions are known in advance to every economic entity taking part in them due to the public statement of one of the them on execution of such actions. Thus the competition authority would have to prove the fact that these actions were known in advance due to their public announcement.



## SOUTH AFRICA

### 1. Introduction

Information exchange has become a critical issue for the South African Competition Commission over recent years for a number of reasons. First, exchanges of information between competitors have been one element of coordinated conduct in cartel cases that have been investigated and prosecuted. This has generally been related to monitoring and implementation of agreements. Second, South African has a history of state regulation as well as explicitly allowing cartels. This regulation of firm conduct typically involved detailed information exchange. While state support for coordination may have ended, the Commission is finding that the information exchange and coordinated outcomes may well persist. Industry and trade associations typically have a central role. Third, there are cases where price-fixing cartel meetings have ended but the Commission has become aware of ongoing information exchange continuing, dampening competition. Fourth, South African markets are generally quite concentrated with, furthermore, little dynamism in terms of the participants in these markets.

At the outset we wish to emphasise that information exchange issues have not yet been the subject of Competition Tribunal decisions. This submission therefore focuses on how the Competition Commission, which investigates and prosecutes cases of anti-competitive conduct, is approaching the issue. At the core of the Commission's approach are the components of coordinated outcomes, namely competitors reaching agreement or understanding, being able to monitor conduct, and to be able to respond to ('punish') deviations by other firms.

In this regard, while much of the attention internationally regarding information exchange appears to be focused on information regarding pricing, our experience is more to do with information exchange regarding quantities supplied, at a high level of disaggregation in terms of geography and product specifications (such as pack size). Such information may be more competitively sensitive where the competitive process itself means pricing transparency and/or there are well understood pricing points in any case, as there are in many commodity type industries in South Africa. These pricing points may be the ones that were used historically under a cartel and/or government regulation, they may still be posted by industry associations or public entities as benchmarks, there could be a well-established price leader, or they may be the well-understood ceiling monopoly price, and hence the ideal cartel price. In the latter case, the alternative for local buyers to buying from local suppliers is often to import, the 'import parity price' based on an international benchmark price plus freight costs is thus the ceiling cartel price and can be readily monitored by local suppliers. Note, if local firms were relatively uncompetitive this would be the expected price in the absence of coordination, but it still does not mean that local firms should coordinate around such a price benchmark.

Under the circumstances of well understood pricing points, the issue for coordination is to prevent competitive discounting off these prices. Critical to this is being able to monitor market shares, albeit at a disaggregated level where there are non-trivial local transport costs.<sup>1</sup>

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<sup>1</sup> Corbett, C., das Nair, R., Greenberg, J. Grimbeek, S. (2010). 'The Importance of information exchange in dampening competition in industries historically characterised by Regulation – issues from South Africa.'

Our comments here are thus focused on the issues we are facing in our current cases, with a particular emphasis on information exchange of sales data. Before addressing the specific questions we provide an overview of the relevant legal provisions and of the main cases (subject to what is in the public domain). It must be noted that none of these cases have been decided by the Competition Tribunal in terms of the issue of information exchange and most are still under investigation. There are no specific provisions relating to information exchange itself in the South African competition legislation.

### ***1.1 South African legal provisions governing coordination***

The South African does not distinguish between an agreement and a concerted practice regarding prohibited horizontal restrictive practices, explicitly covering them both (section 4(1)). The section has two provisions:

Section 4(1)(a) prohibits agreements between, or concerted practices by, competitors which have the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice or decision can prove that any resulting technological, efficiency or other pro-competitive gain outweighs that effect. Respondents are given the opportunity to put forth any efficiency justifications for the information exchange. There is no fine for a first offence under this section.

Section 4(1)(b) of the Act prohibits agreements between, or concerted practices by, firms that involve the following practices: (i) directly or indirectly fixing a purchase or selling price or any other trading condition; (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or (iii) collusive tendering. Contraventions of this section have a financial penalty to a maximum of 10% of a firm's total turnover in South Africa and exports from South Africa.

The focus of information exchange in South Africa is thus less on proving an agreement or concerted practice (in any event, firms have generally agreed to share the information, including through an industry association) and more on whether the exchange of information, given the other facts of a given case, involves the indirect fixing of prices or the dividing of markets by allocating customers, suppliers, territories (in contravention of 4(1)(b)). Information exchange may also be brought under section 4(1)(a) in which case a full effects based analysis is required.

## **2. Brief overview of cases**

The markets in which information exchange has been involved include those for: fertilizer, milk, steel, petroleum products, cement, milled wheat and maize products. In the case of milk it involved pricing data for procurement by processors of raw milk from farmers. In the case of the other products it is mainly to do with sales/quantity data. In some cases this has been related with agreements on prices, or the basis for pricing, and in others there has been market division.

### ***2.1 Petroleum products***

Detailed information of monthly sales by product, customer grouping (by 12 trade categories such as mines, farmers etc) and region (by more than 400 magisterial districts) was exchanged by the petroleum/oil companies through an industry body, the South African Petroleum Industry Association (SAPIA), including (up to October 2007) identifying each individual producer's data to the others. The data was also sent to the then Department of Minerals and Energy (DME), but in a more aggregated form. Between

October 2007 and January 2009, the data was aggregated over the firms but still disaggregated on other dimensions.

There are well understood and transparent pricing points linked to the regulatory framework. The retail price of petrol is regulated on an import parity basis. While the prices of most other products, including diesel, are not regulated the DME continued to post prices based on import parity calculations for diesel and paraffin and firms can use a similar basis for prices of other products. Firms do discount, such as to large commercial customers. Given the understood pricing points, the concern here is that the highly disaggregated, company-specific exchange of volume data diminished incentives to discount.

## **2.2 Milk**

In a case involving coordination by milk processors referred by the Commission to the Tribunal and still to be heard, the Commission identified information exchange as part of fixing the procurement prices of raw milk from 2002 to 2006. The respondents are all processors, who buy raw milk from farmers and convert it into various products for their customers, the major retailers and wholesalers. A small number of processors account for the vast majority of raw milk purchases and processed product sales. The information exchanges between the processors included numerous discussions on forthcoming price reductions and magnitudes, strategic decisions of individual processors including communications on changes to pricing structures, prices paid by different processors in different regions, individualised information regarding future price movements, and the circulation of scenarios requesting each firm to provide a price for the scenario sketched. Some of the firms individually appointed an independent agricultural economist to collect pricing data which was collated in price comparison reports. Although these reports were compiled for the individual firms, they contained very specific pricing data relating to the factors used in the price determining formulas by the different firms.

The Commission concluded that the respondents had contravened section 4(1)(i)(b) of the Act in that they had engaged in concerted practices that directly or indirectly fixed procurement prices of raw milk.

## **2.3 Milling**

In late 2006 and 2007 the Commission uncovered an array of price fixing conduct, including extensive meetings between competitors, in three main product groupings – bread, wheat flour and milled maize meal. There was also customer allocation in some instances. These were the subject of three separate referrals to the Tribunal (by main product grouping).

It then became evident that there was detailed information exchange on sales volumes and costs continuing through two industry associations with overlapping membership (the Chamber of Milling and the Chamber of Baking). In addition, notwithstanding the ending of the cartel meetings in early 2007, the markets still exhibited outcomes consistent with coordination. The Commission is currently investigating the information exchange as a separate contravention. The investigation is focused at this stage on wheat flour as this is the most concentrated, with just four producers of any significance, and only a subset of these in many regions of the country. By comparison in milled maize meal, there are many smaller producers of significance reflecting the lower scale economies and entry barriers in this activity.

The National Chamber of Milling (NCM) collected data from its members on monthly sales volumes per product, per province, per pack size, per customer category and exports. In addition, it collected information relating to annual production, packaging and distribution costs. These figures are distributed back to its members aggregated over the firms.

## **2.4 Fertilizers**

The main producers in the fertilizer industry agreed to exchange information on monthly forecasts of production, sales and usage by product for the coming 12 months. This occurred through various means including the Nitrogen Balance Committee and the Import Planning Committee. This conduct was referred as part of the Commission's case in the Nutriflo matter, which also includes agreement on import parity based prices, and how they would be determined. The individualised information was circulated to all members and was not made public. Also, data around imported fertiliser product volumes, available shipping capacities and other import logistical costs were shared.

The claimed purpose of the committees was to ensure adequate supplies and to coordinate volumes of imports of various products, including effective organisation of logistics. Information on past market shares by region was collated separately by the industry association.

While one party (Sasol) has admitted the cartel conduct and settled the matter in 2009, the other two companies are still defending the case.

## **2.5 Steel**

Investigations into collusion in the steel industry involve aspects of information exchange via an industry association, South African Iron and Steel Institute (SAISI). Members submitted highly disaggregated monthly information on sales volumes by product type to the trade association, which aggregated across producers. Depending on the product specification there are between one and four local producers. The members also submitted other sensitive information on capacities and their programmes on capital expansion. There appears to be a high degree of transparency in pricing in any event.

In one broad product category, of long steel products such as reinforcing steel bar, one of the producers (Scaw Metals) filed for leniency and admitted to price fixing and the allocation of customers and projects between competitors. This case has been referred to the Tribunal. Investigations continue into other parts of the steel market.

## **2.6 Cement**

The South African cement industry was run as a state-sponsored cartel for a long period until 1996. During the cartel years, all cement firms sold their output through one entity, the Cement Distributors of South Africa (CDSA), which was responsible for all distributions and sales to customers. Following a raid on the cement producers in mid 2009 the largest of the four producers, PPC, applied for leniency. In its application for leniency PPC confirmed the existence of a cartel to divide markets among the four cement producers, allocating market shares in line with those that prevailed prior to 1996. The agreement was implemented through disaggregated sales information each producer submitted to the Cement and Concrete Institute of South Africa (C&CI) through an audit firm appointed by C&CI. The four cement producers are the main members of C&CI. In addition, there was an agreement that PPC would not compete in the Northern Natal market in exchange for Lafarge not competing with PPC in the Botswana market. This investigation is ongoing.

# **3. General effects of enhanced price transparency**

## **3.1 Transparency and degree of competition**

As discussed, transparency has been an important factor in several cartels in which firms have admitted collusive conduct, and is being investigated in others, including as a separate contravention. The understandings and/or agreements between competitors have often been the result of previous government

sanctioned coordinated arrangements and/or of well understood pricing points. The industries are concentrated, with relatively homogenous products. There can be little doubt that the incentive to offer competitive discounts is dampened by the knowledge that other firms will quickly see that they have lost market share and could respond, reducing the returns to the discounting in terms of increased sales.

### **3.2 *Other pro-competitive effects?***

The main benefits put forward by market participants for the types of information exchange being examined by the Commission are to be able to monitor patterns of demand to assist planning of supply. This has been a particular concern for the supply of petroleum products where apparently the information is seen as important for planning of storage facilities and movement of product. Benefits put forth by the oil companies and other users of this information include better planning to ensure security of supply (which is crucial for such strategic products like diesel and petrol), better planning in investing in efficient supply infrastructure (preventing the duplication of investments such as filling stations etc.) and better planning both internally for companies and for the industry as a whole.

However, it is clear that this does not justify the level of disaggregation that was being employed. The Commission has allowed a highly aggregated form of information to be collected once more, while the petroleum producers have also applied for an exemption for collective engagements to ensure security of fuel supply. This application is currently under consideration by the Commission.

Similar arguments have been made in other industries, where firms have pointed to the benefit of information in aiding investment decisions. But, it is not clear why individual firms would not be able to independently undertake an analysis of likely future demand patterns and make investment decisions as part of competitive rivalry.

In addition, the publishing of pricing points has been justified by the government as being to the benefit of customers in providing an indication of the maximum they should be paying for a product such as diesel. And, market participants have argued that common pricing enables adjustment to be facilitated in, for example, construction projects where the timing of the project is uncertain.

Independent users of information have also made a case for the information collection by industry participants and associations. Data such as on cement and fuel sales are used by analysts to pick up growth trends by sector and region within the economy. The value of the data is increased because of the perceived lack of reliability and the time delay in data produced by the institution responsible for official statistics. But, this use does not appear to relate to the level of disaggregation.

### **3.3 *Other anti-competitive effects***

Price or sales transparency may allow for participants unilaterally to continue pursuing strategies to attain the same outcomes as under coordination. In terms of pricing, the critical issue here is between posted prices and secret discounting. While a key function of competitive markets is decentralized pricing to ensure allocative efficiency, with consumers being readily able to search for the best deals this does not mean that suppliers will necessarily see the price offers. Indeed, coordination can often mean agreeing to simplify pricing, while competition yields diversity in the ways in which pricing is done by different firms. A very simple example of this was the common commitment of the steel producers to each price reinforcing steel bar against a single delivered price list, and not have any terms to take transport costs into account.

As noted, the ways in which transparency can dampen competition is particularly an issue in South Africa given the legacy of regulation and state sanctioned cartels, together with well-known pricing points

which companies may continue to use after deregulation if there are high levels of transparency. Transparency in actual prices can also facilitate a leader – follower situation in price determination.

### **3.4 *Factors and market characteristics taken into consideration when assessing if transparency is a competition enhancing factor or not***

The main factors can be viewed as those which a) influence the likelihood of coordination in any case; and, b) those which determine the difference that the information exchange will make (discussed in more detail below).

Typically the conditions under which coordinated conduct is more likely, and will be more stable, include a tight oligopolistic structure, high barriers to entry, inelastic demand, relatively homogenous products and former regulation that established pricing principles. In the current cases dealing with information exchange, these market characteristics have been taken into account. All the cases involve highly concentrated markets with significant entry barriers, and the products are relatively homogenous, with the information exchange generally distinguishing different pack sizes, grades and region of supply.

Other characteristics that the Commission would consider include volatility of demand, ‘lumpiness’ of sales and the excess capacity available to each player. The rationale behind these considerations is in light of their respective impact on collusion where more stable demand and greater excess capacity available could encourage collusion.<sup>2</sup> However, note that demand volatility, such as in cement sales, may be a reason for very detailed information exchange on sales to attain coordinated outcomes.

## **4. Information exchanges between competitors**

### **4.1 *When are information exchanges amongst competitors permissible in your country? In what circumstances can exchange of information between competitors be pro-competitive?***

As stated, there has been no Tribunal precedent set yet for information exchanges between competitors in South Africa. The Commission’s approach in current investigations involving information exchange is generally consistent with international literature on the topic in that characteristics of the market in which information is exchanged are taken into account, as well as how the information exchanged could serve to increase transparency in that market. The history of an industry is also important in that in markets where there has been extensive former state regulation ongoing information exchange at disaggregated levels may serve to allow coordination on prices and volumes to continue even after deregulation.

Most of the Commission’s current investigations involving the sharing of sales data between competitors focus on the concentration in the market and the level of disaggregation of the information. Information which identifies individual firms in tight oligopolies is viewed as particularly problematic. The age of the information shared is also considered, with a focus on immediate/recent past and future data. Indirect communication through advance price notifications may be looked at more closely if there is some mechanism by which the announcing firm can revoke its intended announcement, i.e. the announcement carries no commitment value (‘cheap talk’).

The levels of information exchange which the Commission has allowed with the relevant trade associations and their members differ from case to case and depend largely on:

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<sup>2</sup> Although it is acknowledged that excess capacity could play both ways and the impact on collusion is ambiguous, increasing incentives to cheat as well as the capacity to punish.



- the structure of the market;
- the efficiency justifications of the information exchange and what levels of information are needed to achieve these efficiencies (often far lower than that originally exchanged);
- how the companies and third party users, such as government, use this information.

For example, in discussions with the one industry association, the Commission agreed that competitors could continue their data submissions, but to an independent auditor and that the trade association would then disseminate this information to interested parties in the form of a national, monthly sales figure aggregated across the industry. This information is of a much more aggregated nature than the original data exchanged. The data in question was also an important source of information to customers. This arrangement will be in place until such time that direction is received from the Tribunal.

In interactions with another trade association, the Commission recommended aggregating data from magisterial district to national level, not to report data by trade category, further aggregate reporting by product, and exchange only quarterly instead of monthly data.

**4.2 *If information exchanges restrict competition, will they restrict competition by “effect” or by “object” or constitute a per se infringement?***

As explained, the test in the Act depends on what the information exchange constitutes. If it involves direct or indirect price fixing or dividing markets, which the Commission believes is the case in certain circumstances, then it is a *per se* contravention. This could be the case where there are well understood pricing points such that information exchange on sales amounts to price fixing. Similarly it could amount to dividing markets where it enables careful monitoring of competitors shares, by narrow market categories. Otherwise it may be an infringement under 4(1)(a) if it has the *effect* of lessening competition.

**4.3 *In order to establish an infringement, is it necessary to prove that firms agreed to share information?***

The conduct relates to cooperative or coordinated conduct between firms in a horizontal relationship (whether an agreement or a concerted practice), suggesting that firms at least understand that the information provided is being shared. In practice, the South African information exchange cases are where firms agreed with their competitors, including through trade associations where they are members.

**4.4 *What factors can be used to distinguish in these cases between unilateral actions by firms and coordinated actions that could potentially be subject to a prohibition against unlawful agreements? Is reciprocity required for unlawfulness?***

The cases currently under consideration in South Africa relate to reciprocal information exchange, albeit often through industry associations. This is strongly suggested by the definition of agreement or concerted practice, however, there could be a concerted practice, defined as cooperative or coordinated conduct, which does not require reciprocal information exchange. For example, if one firm has agreed to stay out of a specific market segment, the information need only monitor this firm. Unilateral information exchanges such as public price announcements may also act as ‘signals’, notifying competitors of future intentions of the announcing firm and allowing competitors sufficient time to bring in line their own prices. There may not be reciprocity of this pricing information, but be sharing of sales data (where the sales data is the real problem).

The milk case involved aspects of unilateral information exchange. These usually were unilateral indications of intent and included the communication of intended changes to pricing structure, details of

milk prices to downstream producers, requests to check the competitiveness of pricing strategies, price determination and adjustment mechanisms, requests for information on pricing and future pricing from one producer to a group of their competitors, price changes from one competitor to another. These were not public announcements and some of these exchanges were not reciprocal.

#### **4.5 “Safe harbours” and/or guidelines?**

The Commission has not yet published guidelines on information exchange but has been asked for several advisory opinions. We have looked at the international practice for guidance and are considering our own guidelines, however, this will likely be after more cases have been decided by the Tribunal. The advice given to date emphasises that the effect of information exchange and whether it amounts to a contravention of the prohibition on horizontal restrictive practices depends on the facts of a specific case including the particular nature of the information being exchanged. While we have not specified safe harbours, information exchange has been allowed at a high level of aggregation in some of the industries being investigated, as described above.

#### **4.6 *Circumstances where information exchange may be prohibited***

As discussed, information exchange is likely to fall foul of the Competition Act if it amounts to direct or indirect price fixing or the division of markets between competitors, and/or if it has the effect of substantially preventing or lessening competition. In the current investigations in some instances it may be associated with other conduct, such as agreements to allocate markets or fix prices, being monitored by information exchange, or it may be a contravention in its own right. The specific circumstances will depend on Tribunal precedent.

#### **4.7 *Role of specific factors in decisions to prohibit information exchanges?***

##### *a. evidence of pro- or anti-competitive intent and/or effects*

Evidence of anti-competitive intent will likely strengthen a case, but is not necessary. Nor will evidence of pro-competitive intent mean respondents avoid prosecution if the conduct amounts to a contravention. Indeed, pro-competitive justifications and anti-competitive rationales for information exchange are not mutually exclusive. It is also necessary to assess whether the level of information exchanged was what was required to realise the efficiencies, or whether it went beyond this, with greater disaggregation of the data supporting a suspicion of coordination.

##### *b. general market structure and conditions affecting the probability of successful co-ordination (barriers to entry/expansion/exit; product differentiation; lumpiness in order volumes; etc.)*

As discussed above, these factors are relevant in assessing whether a particular form of information exchange amounts to coordination.

##### *c. degree to which such practices are widespread in the market*

The practices being examined in South Africa are generally undertaken by all market participants of significance, and are in industries and markets which have been regulated and/or with government approved cartels. They are thus widespread as they have often covered several markets in a specific sector or industry such as in agricultural products. The extent of cartel activity being uncovered by the Commission (with more than 100 full applications for leniency from April 2009 to June 2010) emphasizes the extent to which coordination has been part of how firms generally ‘do business’ in South Africa.

- d. *evidence that information exchanges were adopted by agreement with competitors, versus being unilaterally deployed*

The information exchanges being investigated are generally by agreement between competitors, including through industry associations.

- e. *evidence that one or more transparency enhancers are being used to support an anti-competitive agreement*

The presence of other facilitating factors, such as well understood pricing or focal points, further serves to increase transparency and hence the exchange of information against this backdrop is likely to be more problematic. The information exchanges have often included data on costs and capacity expansion plans alongside more frequent sales and production data. The combination of different forms of information exchange, either through the same forum or through different forums, would be looked at by the Commission as a whole. In the Commission's experience, in certain cases parties have met in multiple forums to discuss and exchange competitively sensitive information.

- f. *characteristics of the information exchanged, such as its subject matter, level of detail, age and frequency*

As discussed, these are all key features of the information being exchanged and its competitive effect.

- g. *the public or private nature of the information exchanged*

The information exchange can be public or private and it has often been relatively public in nature as coordination has historically been an accepted practice. Important to the Commission's investigations are whether it occurs by and for competitors. This is true even where the relevant government department or another public entity may be a part of the information exchange. For example, in the case of petroleum products, the data exchanged was shared in a more aggregated format with the Department of Minerals and Energy, and was valued by the Department for various of its functions. And, SAPIA, the trade association through which the information was exchanged, published quarterly demand figures for the main product groups on its website. Both these public information bases were, however, far more aggregated than the individualised, disaggregated information that the companies exchanged between themselves.

#### **4.8 *Distinguishing between different types of information exchanges?***

- a. *"Direct" exchanges between competitors and "indirect" exchanges, i.e. exchanges which take place with the intermediation of a third party (a consultant or a trade association)?*

The current cases being investigated have both direct and indirect information exchanges, and this distinction is not particularly important where the association is composed of a tight knit group of firms, and they may decide to use a third party for the collation and exchange of the information. The use of a third party may ensure that the data is not individualized when shared but the information may still amount to coordination where there are few firms, and it is highly disaggregated on other dimensions (which may mean that in practice there are only two firms of significance selling into a particular identified segment). Information collected and verified by third parties such as auditing firms may strengthen collusion as this may be a mechanism for the colluding parties to verify the accuracy and correctness of the data, given the incentive for cheating that exists in a cartel.

- b. *“Horizontal” information exchanges (between companies on the same level of trade) and “vertical” information exchanges (between companies on different levels of trade)?*

The South African experience so far has mainly been on information exchanges that are horizontal. All the cases cited in this paper are exchanges between competitors, although sometimes at multiple levels. For example, there has been information sharing between largely the same companies in wheat flour and in bread.

- c. *Information exchanges which are set up by companies and information exchanges which are favoured or required by the government or by other public entities?*

In industries of particular strategic significance, such as petrochemicals, government has required the submission of certain data, such as on sales (usually of a more aggregated nature than what is actually exchanged) in order to monitor industry trends for purposes such as ensuring the security of supply. In other cases discussed above, institutions including the Reserve Bank use information for their economic modeling and decisions.

- d. *“Private” information exchanges (i.e. among suppliers only) and “public” information exchanges (i.e. among suppliers and buyers)?*

Public information shared between suppliers and buyers on, for example, pricing is less problematic and what would be expected from the normal workings of competitive markets. But, there is a difference between competitors enabling consumers to compare price and other dimensions of competitive offerings, and the prevention of secret discounts (such as by ensuring they are publicly communicated). Information on sales by customer group are also not what one would expect between suppliers and buyers, and have a lot of value for suppliers seeking to coordinate and dampen competition.

#### **4.9 *Are information exchanges circumstantial evidence of anti-competitive agreement?***

If the information is exchanged by agreement, the issue is whether the information exchange amounts to coordination (directly or indirectly).

#### **4.10 *How do you assess possible countervailing efficiencies? Would efficiencies be sufficient to undermine an infringement case?***

There is no efficiency defence or balancing if it is found that the information exchange amounts to the direct or indirect fixing of prices or dividing of markets. If it is found that the information exchange does not constitute this, but does significantly lessen or prevent competition then this effect must be weighed against efficiency or pro-competitive justifications. An important element in this evaluation would be whether the efficiencies required the level of disaggregation that there has been, as in the case of petroleum products.

## CHINESE TAIPEI

### 1. Introduction

This report addresses the issues related to the effects of enhanced price transparency, the enforcement actions against concerted actions by the Fair Trade Commission (the Commission), the assessment and inferences of information exchanges among competitors, and exceptions for concerted actions. The Commission illustrates information exchanges among competitors by detailing several cases as examples.

### 2. General effects of enhanced price transparency—Relationship between price transparency among competitors and competition

In terms of market structures, competition should drive price to equal marginal cost ( $P=MC$ ) in a perfect competition market therefore leading to transparent pricing. However, in an oligopoly market with a limited number of enterprises, the pricing decision of an individual enterprise may affect that of another. Among competing enterprises there exists interdependence and mutual detection. Pricing decisions in an oligopoly market can be risky. As a result, price transparency is an important issue to competing enterprises in an oligopoly market in respect of their pricing decisions. An initiator's price cut might influence another competing enterprise's pricing decisions and even on whether it will proceed to engage in cut-throat competition.

Comparatively speaking, when one competing enterprise raises the price, the extent of price transparency will likely determine whether a signal is released to its competitors who might decide to follow and enjoy the benefits of a price increase. As a result, the importance of price transparency varies with different market structures and degrees of competition.

The correlation between the price transparency of petroleum products and competition in the petroleum products market is explained below. The liberalization of the petroleum market in Chinese Taipei has been implemented step by step following the promulgation of the Petroleum Administration Act in October 2001. In addition to the incumbent state-owned enterprise, CPC Corporation Taiwan (CPC), Formosa Petrochemical Corporation (FPCC) and ESSO Petroleum Taiwan Inc. (ESSO) also joined the domestic petroleum market. ESSO exited the market in 2004 leaving only two petroleum suppliers, CPC and FPCC, remaining in the domestic petroleum market.

In 2007, Chinese Taipei implemented the "floating price mechanism" under which wholesale prices were clearly disclosed and adjusted each week according to movements of international crude oil prices. The information regarding price adjustments had to be announced online in advance. The floating price mechanism made petroleum prices in the domestic petroleum market fully transparent and allowed the private enterprise, FPCC, not to "openly convey a meeting of minds regarding the price adjustments in advance" but to merely follow the wholesale prices of CPC. Such an approach can facilitate practices whereby the wholesale prices of the two competitors are adjusted within the same range at the same time. Under such a mechanism, price adjustments in the domestic petroleum market became more transparent.

However, such practices may help enterprises to reduce strategic uncertainty in the timing of price adjustments and the extent of price adjustments as well as the degree of competition in the domestic petroleum market.

### **3. The Commission's assessment and inferences of information exchanges among competitors**

#### ***3.1 General issues regarding the Commission's handling of concerted actions***

Article 14 of the Fair Trade Act prohibits enterprises from partaking in concerted actions. The term "concerted action," as defined in Article 7 of the Fair Trade Act, refers to the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading territory with respect to such goods and services, etc., and thereby to restrict each other's business activities. It further qualifies "concerted action" as being limited to a horizontal concerted action at the same production and/or marketing stage which would affect the market function of production, the trade in goods or the supply of and demand for services.

To collect evidence, in addition to "contracts" or "agreements," a mutual understanding can also be reached by "other forms" which would in effect lead to joint actions through "a meeting of minds." The Commission, therefore, takes the approach of performing a substantive review on the handling of concerted actions cases as provided in the Fair Trade Act.

The so-called "any other form of mutual understandings" includes where enterprises, by means of a resolution of a general meeting of a trade association or a board meeting of directors or supervisors and get-together to exchange business operating opinions and reach a non-binding "consensus" or "understanding" employed to restrict future market activities of enterprises. Such a consensus or understanding constitutes a coordinated action.

As it is getting more difficult for the Commission to obtain direct concrete evidence of concerted actions and the Commission has no power to conduct dawn raids, the Commission makes every attempt to obtain circumstantial evidence to substantiate the notion of a "mutual understanding of a cartel." During its investigations, the Commission further makes inferences from its observations of the "inducement, economic benefits, the timing of such similar action, the possibility of substituting different actions, the frequency and the duration of the acts which are deemed harmful to market order, the concentration and concordant degree of the conduct, along with the frequency of meetings among enterprises, contents subject to the information exchange, and contradiction of statements made, etc." Furthermore, such testimony has been made by respondents when they have presented themselves before the Commission. To be sure, the Commission has applied such circumstantial evidence in the past to support its decisions against some accused parties.

#### ***3.2 The Commission's judgment on the unilateral conduct (autonomous conduct) of information exchange or prohibition of coordinated actions against unlawful agreements***

First, where several enterprises engage in coordinated actions in the market, the most common type is that where the timing and extent of the price rises among competitors exhibit high similarity and deviate from the baseline. Secondly, a mutual understanding seems to be the only rational explanation for such coordinated actions. Lastly, the Commission considers all circumstantial evidence to substantiate the existence of a mutual understanding and further makes inferences as to whether the coordinated actions result from a manual manipulation of market competition.

#### ***3.3 Case-by-case analysis***

Information exchange is not addressed directly in Chinese Taipei's Fair Trade Act. To determine whether an act of information exchange among competitors might constitute a concerted action, the Commission makes its decisions on a case-by-case basis. In general, the Commission observes the effect

caused by the information exchange among competitors to infer whether the enterprises engaged in concerted actions through the exchange of information.

As a result of business culture and practices in Chinese Taipei, enterprises tend to organize trade associations of various industries. Generally speaking, the purpose of such trade associations is to promote the development of the industry, encourage the exchange of and collaboration over technology, serve as the communications channel between the government and the industry, and promote goods or services. However, members of such trade associations are often competing enterprises of the same or similar businesses. Trade associations can engage in restricting the activities of enterprises and exchanging competition-sensitive information either through their charters, a resolution of a general meeting of members, a board meeting of directors or supervisors, or by other means. The Commission takes the position that the decision made by a trade association to establish a cartel is sufficient to affect the market functions, even if the scale of the trade association is not large.

Recent cases have found that enterprises in the tour bus, bicycle, tofu, photography, and environmental testing industries had employed trade associations to agree on pricing. Besides, there are no regulations prohibiting meetings among enterprises of the same industry or prohibiting the horizontal exchange of information among enterprises. Previous investigations by the Commission have found that enterprises within the same industry might not only engage in a concerted action by exchanging information through the trade associations, but might also exchange crucial business information by jointly participating in get-togethers.<sup>1</sup>

Where enterprises exchange crucial information, such as that related to pricing, costs of production, or customer data, to mutually convey the business strategy or directly exchange business information, such behaviors are most likely to constitute concerted actions. However, to determine whether such an act constitutes a concerted action, the Commission makes its decisions on a case-by-case basis.

The Commission's guidelines on handling information exchange among competitors are illustrated as follows:

Competing enterprises might also engage in concerted actions that result in the disclosure and exchange of competition sensitive information such as their enterprises' pricing, discounts, costs of production, research information and customer data.<sup>2</sup> The disclosure and exchange of any of this information might provide access for competing enterprises to contact each other and might be used as a means of conspiracy.

As for electronic market places (e-market places), "information sharing agreements" constitute the basic principle for major digital transactions by enterprises in e-commerce. However, an e-market place might be used to enhance the ability of enterprises by means of a meeting of minds to control each other and further cause restraints on competition. To determine whether an "information sharing agreement" could impede the competition, the Commission has specified factors to be considered, including the structure of the market which the e-market place serves, whether information is shared among competitors, whether information shared is sensitive business information regarding competition, the time-effectiveness

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<sup>1</sup> Please refer to the Commission's decisions on cases about enterprises in the industrial paper and drug industries.

<sup>2</sup> The Fair Trade Commission has stipulated the guidelines regarding the "Policy Statement on Telecommunications Enterprises" and "Policy Statements on the Business Practices Cross-Ownership and Joint Provision among 4C Enterprises."

of information, and the possibility of obtaining such information through other means other than an e-market place.<sup>3</sup>

### 3.4 *The Commission's assessment regarding the countervailing efficiency*

Some concerted actions are actually beneficial to the economy as a whole and are in the public interest (the factors to be assessed include the extent of the production costs reduced, the extent of the product quality improved, and the prediction of the variance of product prices and sales amounts, etc.). Therefore, in order to be legal, intended actions must be approved by the Commission. Article 14 of the Fair Trade Act provides several exceptions for firms to be able to engage in concerted actions; for these exceptions to apply, a concerted action must satisfy one of seven types: standardization cartels, rationalization cartels, specialization cartels, export cartels, import cartels, recession cartels, or small and medium sized enterprise cartels.

Article 14 of the Fair Trade Act specifically exempts concerted actions where the intent is to improve operational efficiency or strengthen the competitiveness of small and medium sized enterprises on the condition that these actions are beneficial to the economy as a whole, are in the public interest and have had prior approval. Considering that the number of small and medium sized enterprises accounts for about 98% of all enterprises in Chinese Taipei and that it is necessary to prevent such enterprises from abusing the exemption provisions, two guidelines have been stipulated for the review of applications for exemptions by certain industries. The contents of the guidelines are illustrated as follows:

#### 3.4.1 *Domestic independent gasoline station operators may apply for concerted purchasing of petroleum oil*

In 2005, the Commission stipulated the “Guidelines on Handling Applications for Concerted Purchasing of Petroleum Oil by Domestic Independent Gasoline Station Operators.” Under the premises that current independent gasoline station operators have entered into petroleum supply contract with the petroleum suppliers, the Commission allows independent gasoline stations that account for 5% of the domestic distribution market<sup>4</sup> without belonging to any gas station chains and with a sales amount of under 100 million New Taiwan dollars for the previous year to apply for an exceptional approval of the concerted actions. This new rule is used to ensure that the independent gasoline station operators have the power to negotiate with the upstream suppliers and encourage fair competition in the retail market.

#### 3.4.2 *Small and medium sized enterprises may apply for approval for concerted pricing*

Article 22 of the Enforcement Rules to the Fair Trade Act states that a small or medium-sized business, as referred to in Subparagraph 7, Paragraph 1, Article 14, shall be determined in compliance with the criteria set forth in the Act for the Development of Small and Medium Sized Enterprises. According to this Act, small and medium sized businesses refer to enterprises that have legally completed company registration or business registration in compliance with the requirements of the law and in conformity with the criteria regarding paid-in capital of 80 million New Taiwan Dollars or less for manufacturing industry and sales revenues of 100 million New Taiwan Dollars or less in the previous year for service industry.

To prevent small and medium sized enterprises from abusing the exemption provisions and to serve as a source of reference, the Commission issued the “Guidelines on the Approval of Concerted Pricing among

<sup>3</sup> For more details, please refer to the “Policy Statements on E-Market Places.”

<sup>4</sup> Market share is calculated using the amount of gas stations for the current month announced by the Bureau of Energy, Ministry of Economic Affairs as the standard.



Small or Medium-sized Enterprises.” In conformity with the “principle of transaction stability”<sup>5</sup> or “principle of information transparency,”<sup>6</sup> enterprises may apply to the Commission for approval of concerted pricing only if their concerted pricing activities are beneficial to the overall economy and the public interest. If a concerted pricing activity is used to satisfy the needs of market stability or the purpose of information transparency and is indeed beneficial to the overall economy and public interest, there seems to be no reason to prohibit this particular concerted pricing activity, with the pricing being reasonable and subject to the supervision of a relevant organization representing the trading counterparts of the small and medium sized enterprises or competent authority.

The Commission received one application from the Taiwan Rubber Products Association in 1996 for the joint price fixing of tire repairs<sup>7</sup>. The Commission took into consideration the view that the explosion of tires is only an occasional and accidental occurrence and that the time and location for receiving necessary repairs are not fixed. Aside from this, repair procedures are quite simple, consistent and of low transactional value. In the case at hand, joint price fixing could reduce the transaction costs of inquiry, provide an impetus for product or service providers to compete and could prevent obvious unfair opportunistic behavior when dealing with consumers’ problems or urgency. The Commission found that joint price fixing in this case was beneficial to the economy as a whole and in the public interest and consequently granted its approval.

#### 4. Relevant Cases

##### 4.1 Case 1: Industrial paper supply market

As a result of observing irregular prices patterns in the domestic industrial paper market where prices increased a number of times in the recent period, the Commission initiated an ex-officio investigation. The Commission resolved that the three largest domestic industrial paper suppliers, Cheng Loong Corp., Yuen Foong Yu paper Mfg. Co. Ltd. and Long Chen Paper Co., Ltd., jointly raised industrial paper prices from November 2009 to March 2010 in violation of Article 14 of the Fair Trade Act which prohibits the concerted actions. Administrative fines of NT\$ 5 million, NT\$ 3 million, and NT\$ 2 million were imposed on Cheng Loong Corp., Long Chen Paper Co., Ltd., and Yuen Foong Yu paper Mfg. Co. Ltd., respectively.

After investigation, it was found that the market share of the three industrial paper suppliers in the base paper supply market of the first-class industrial paper reached 90%. From November 2009 to March 2010, the rising of waste paper prices increased costs and industrial paper prices were consequently adjusted. The three largest domestic suppliers, however, consistently raised the list prices of the

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<sup>5</sup> “Principle of transaction stability”: It is determined that the concerted pricing activities will be beneficial to the public interest and the development of the economy due to the facts that, in sporadic commodity or service transactions which are highly similar in nature and which involve small amounts of money, the transaction costs such as costs for inquiries (or negotiations) may be reduced; that competition in efficiency may be enhanced among suppliers of goods or services; and that unfair trading acts may be prevented where the trading counterparts are rushed into transactions and taken advantage of.

<sup>6</sup> “Principle of information transparency”: It is determined that the concerted pricing activities will be beneficial to the public interest and the development of the economy due to the facts that the purpose and effects of concerted pricing in commodity or service transactions are such that they do not affect supply and demand or current international pricing; that there are international market prices as reference; or that the disclosure of such information as the valuation method, valuation base, and relevant parameters, can facilitate the acquisition of trading information, lessen the social costs of transactions, and help create trading opportunities.

<sup>7</sup> Chinese Taipei Fair Trade Commission Decision at its 270th Commissioners’ Meeting on 31 December 1996.

industrial paper. Their acts not only exceeded the price increase ranges that reflected the cost price increase of the waste paper, but also deviated from the trend of the internationally competitive price increase range.

In addition, the methods and speed of raising the prices, and the price increase ranges on this occasion were all different from those implemented in 2007 (i.e. the business habits of the suppliers were different from those in the past). The Commission compared the proportion of the actual purchasing cost of the waste paper and the business operations of one of the suppliers in this price increase period with those of the rest of the suppliers. Results showed that the cost pressures borne by each of the suppliers and the ratio of domestic sales to overseas sales of each supplier were obviously different.

However, the suppliers consistently raised the prices at the same time within the same price increase ranges, and all of them could not give any reasonable explanation to support such adjustments in their industrial paper prices this time. All three suppliers were deemed to have jointly raised the industrial paper prices through consensus, conspiring for improper joint profits, with the intention being nothing other than avoiding price competition.

During the Commission's investigation, all three suppliers admitted that they engaged in frequent get-togethers. The association and frequent interaction of businesses in the same industry is generally against the principle of competition and is not commonly seen in other competitive industries. As a result, it was highly likely that it could be inferred that the said enterprises were exchanging information on pricing or production quantities through private get-togethers. Based on the above-mentioned evidence, the Commission concluded that the three largest industrial paper suppliers were in violation of the prohibited concerted actions set forth in the Fair Trade Act.

#### **4.2 Case 2: Advertised-drug market**

In April 2006, a pharmacy in the Kaohsiung-Pingtung area filed a complaint with the Commission alleging that the Yong Chien Advertised-Drug Association (YCAA) was potentially monopolizing the advertised-drug market in the local area by which restricted the retail prices of drugs advertised by local radio stations. The Commission hence initiated an investigation into the complaint.

After a preliminary investigation, the Commission found that the upstream advertised-drug suppliers in the Kaohsiung-Pingtung area (i.e., pharmaceutical firms and drug dealers which were responsible for pharmaceutical manufacturing, importing and wholesaling) also participated in the regular meeting of the YCAA and paid an annual fee to the YCAA.<sup>8</sup> Those suppliers set up the Advertised-drug Manufacturers Association (AMA) that was jointly involved in restraining the resale prices of pharmaceutical products.

Based on the Commission's investigation involving 53 pharmacies and pharmacists, it was found that all members of the YCAA were drug retail enterprises which had acquired pharmacy licenses or pharmacists' licenses in accordance with the law and engaged in retail sales of drugs in Kaohsiung County, Kaohsiung City and Pingtung County. A Committee of 17 members within the YCAA made up held a meeting once a month to discuss and determine the YCAA's activities and regulations concerning members' rights and obligations. The YCAA held a regular meeting every 2 months to discuss and approve the Committee's decisions. The YCAA collected NT\$30,000 as a security deposit from each of its members to ensure that they complied with the rules and resolutions of the YCAA. Furthermore, the YCAA would punish or force its members to leave the YCAA if they failed to comply with the resolutions.

The Commission also found that at one of the regular meeting of the YCAA in March 2006, amendments to a recommended sales price table were passed. The YCAA then arranged for buyers to

<sup>8</sup> Chinese Taipei Fair Trade Commission at its 895<sup>th</sup> Commissioners' Meeting on 31 December 2008.

purchase pharmaceutical products from its members in order to examine whether its members followed the rules regarding the recommended sales price table. Members would be punished or forced to leave the association if they engaged in price-cutting competition, product resale (i.e., accepted the same business for transferred products or products sold by other branches), or product referral (i.e., when the consumers wanted to purchase Product A, the pharmacy referred him/her to Product B which was the same type of product as Product A, but another brand). The Commission concluded that the YCAA jointly restricted its members from implementing discount promotions and maintained retail prices and that such actions affected the supply and demand functions of the advertised-drug market in the Kaohsiung and Pingtung area. The members of the YCAA had undoubtedly been engaging in concerted actions in violation of Article 14 of the Fair Trade Act.

The AMA is an organization established by the upstream advertised-drug suppliers in the Kaohsiung-Pingtung area who usually exchanged trading information regarding the advertised-drug market and resolved disputes while meeting over meals. In addition, the AMA actively participated in the regular meetings and committee activities of the YCAA and assisted and cooperated with the YCAA to deal with disputes among YCAA members. The AMA also conveyed or executed its resolutions through the YCAA and requested that the members of the YCAA refrain from price competition, product resale and product referral. At the same time, the AMA implemented experimental buying in order to inspect whether the members of the YCAA engaged in price competition and other activities. If members of the YCAA engaged in any of these activities, they would be punished by the AMA through the cutting off of joint supplies or punished by the YCAA through the imposition of fines.

The Commission concluded that members of the AMA engaged in concerted actions that included jointly prohibiting members of the YCAA from engaging in price competition and prohibiting them from recommending that consumers buy other branded products. In addition, such actions affected the supply and demand functions of the advertised-drug market in the Kaohsiung and Pingtung area in violation of Article 14 of the Fair Trade Act. The Commission resolved that administrative fines totaling NT\$ 101.95 million were to be imposed on 53 pharmacies and pharmacists under the YCAA and 16 advertised drug suppliers under the AMA.

### **4.3 Case 3: Land transaction brokerage services market**

The Commission was informed in May 2008 that the Taoyuan County Trade Union of Personnel Engaging in Land Transactions (the Taoyuan County Trade Union of Land Personnel) formulated a reference table for the collection of fees and issued it to its members. The Commission subsequently initiated an ex-officio investigation into this case.

The Commission found that at the 6<sup>th</sup> meeting of the 7<sup>th</sup> board of directors of the Taoyuan County Trade Union of Land Personnel, amendments were passed regarding a reference table for the collection of fees in July 2007. The reference standards for the collection of fees for 13 items were raised respectively by NT\$1,000, and a conversation fee item of NT\$2,000 per hour was also added. Following this, the Taoyuan County Trade Union of Land Personnel published content in the journal of Real Estate Legal Writers Issue No. 227 on August 1, 2007 which stated “the Union has amended the reference table for the collection of fees, and the members can access it in the Union.” Furthermore, the Commission also found that a reference table concerning remuneration stipulated by the Union was hung or displayed on the wall of the business places of some of the members, and that some members collected fees by referring to the fee collection table and then used it in conjunction with negotiating fees with consumers.

As members of the Taoyuan County Trade Union of Land Personnel are agents who help register, transfer, or apply for transcriptions for a land or building, the Trade Union is an organization established in terms of the Labor Union Law. That is, the organization is a union that consists of workers who provide

services independently. The Union itself also provides services. Therefore, a member of such a trade union and the union itself falls under the definition of the term “enterprise” as stipulated by Article 2(iv) of the Fair Trade Act.

As there are numerous types of applications for land and building transaction businesses, and because the details for handling each case differ according to the characteristics of the cases, it is not appropriate for the Trade Union to formulate reference standards for the collection of fees. Furthermore, some members of the Taoyuan County Trade Union of Land Personnel possess the qualifications of Real Estate Attorneys who are the main service providers in the land transaction brokerage services market in Taoyuan County. The members may provide trading opportunities with a favorable price, quality or service. Even though the Trade Union asserted that the reference table pertaining to remuneration was simply in the nature of a recommendation and had no binding force, this argument was found to be untenable.

The Commission concluded that the reference table pertaining to remuneration that was stipulated by the Taoyuan County Trade Union of Land Personnel restricted the price competition in the land transaction brokerage services market and affected the supply and demand functions of the domestic land transaction brokerage services market. The Taoyuan County Trade Union of Land Personnel had undoubtedly engaged in concerted actions which violated Article 14 of the Fair Trade Act. The Commission ordered the Taoyuan County Trade Union of Land Personnel to cease such an unlawful act immediately and imposed an administrative fine of NT\$ 200,000 on it.<sup>9</sup>

## **5. Conclusion**

Due to Chinese Taipei’s business customs and competition culture, horizontally competing enterprises often participate in get-togethers. At such get-togethers they may share their experiences and market conditions and might even talk about sensitive business information, such as pricing with each other. Competition authorities therefore need to enforce competition law and make judgments regarding whether an enterprise intends to disclose or exchange sensitive information to reach a concerted action or whether it is merely sharing its experiences in a unilateral way. Competition authorities also need to determine what kind of information transparency would constitute a mutual understanding of a concerted action. Thus, with a clear standard, the Commission will be able to further disclose the rules to enterprises for them to follow.

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<sup>9</sup> Chinese Taipei Fair Trade Commission at its 877<sup>th</sup> Commissioners’ Meeting on 27 August 2008.

## BIAC

### 1. Introduction

The Business and Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its roundtable on Information Exchanges between Competitors under Competition Law. This submission is especially timely in light of the European Commission’s recent draft horizontal guidelines which contain a lengthy section on information exchanges.

In many instances, information sharing may have procompetitive benefits. Both competition agencies and economists have recognized as much, for example, in the safe harbours provided by the US Department of Justice in business review letters or the block exemption regulations in Europe. However, there are some cases in which information sharing may facilitate coordination in a way that leads to higher prices, reduced innovation or a relaxation of competition.

Like most other practices, with the exception of naked horizontal arrangements without ambiguity as to effect, BIAC believes that information exchanges should be judged under a rule of reason and not subject to *per se* condemnation.

Many business sectors rely on access to information about the competitive environment in which they operate. Some companies have made the collection, analysis and reselling of information on others their principal activity. These companies supply detailed market information consisting of demand, sales figures, market shares, prices, and other data, enabling a purchaser to assess and enhance its own performance. Additionally, some websites offer price comparisons and comparisons of terms based on information provided by suppliers and other sources, allowing consumers to make better-informed decisions.

Despite the frequency with which procompetitive effects arise from information exchanges, competition agencies tend to be skeptical, and may fail to recognize the efficiencies that often arise from such exchanges. In many instances, the agencies’ guidelines provide a negative view of information exchanges, limiting consideration of procompetitive benefits to narrow exceptions, or provide only limited discussion of the issue.

Economists have illustrated the difficulty in distinguishing between information exchanges that may be pro- or anticompetitive with the simple example of two rival fruit merchants, provided in the footnote below.<sup>1</sup> Where transparency leads the merchants to recognize a price gap in the sale of their identical

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<sup>1</sup> Consider two merchants, A and B, in the same street, both selling apples. A has production costs of \$5 per apple. A might sell his apples at \$6 not knowing what B is doing. Now assume A walks down the street to B’s store and realizes B sells his apples at \$8. With this information in hand, A could increase his price to \$7 and still be lower than B. Conversely, A might consider selling his apples at a price of \$9 without knowledge of B’s price. Again, assuming A gains the knowledge of B’s \$8 price, he might lower his price to \$7 to sell more apples. The price for consumers has gone down and competition between A and B has increased due to A obtaining information about his competitor. See Matthew Bennett & Philip Collins, *The Law and Economics of Information Sharing: The Good, the Bad and the Ugly*, 6 EUR. COMPETITION J. 311, 326 (2010).

products, this recognition may lead to either an increase in the price of the lower-priced product or a decrease in the sales price of the higher-priced product. The mere existence of the transparency does not dictate the result.

This simple example demonstrates that an increase in information may lead to disparate results, warranting rule of reason treatment in order to distinguish instances of anticompetitive conduct from beneficial information exchanges

## 2. The concept of information sharing

The term “information sharing” encompasses not only information exchanges as such but also extends to instances of broader information dissemination, such as the unilateral disclosure of information.

Information sharing can be direct or indirect. Direct information sharing takes place when enterprises combine to exchange information among themselves. Indirect information sharing takes place when the exchange occurs through a third party (*e.g.*, market research agency), a common agent (*e.g.* trade associations) or any other common institution which centralizes, compiles and processes information before disseminating it to the participants. Information sharing can also take the form of unilateral disclosure, such as the publication of information on a website or it can occur on a vertical level between a distributor and supplier.

Trade associations are frequently involved in indirect information exchanges. These associations are generally subject to antitrust regulation, since they serve as a platform for gathering and exchanging information amongst companies that often operate in the same industry. Thus, the trade association itself may be liable for an information sharing agreement among its members reached during a meeting of the association, merely for providing a forum for the agreement. The trade association may also be liable for recommendations on information exchange to its members, should those recommendations run afoul of competition laws.

However, one of the roles of a trade association is to keep its members updated on industry-specific issues and developments, and some amount of information sharing is mandated and unlikely to have anticompetitive effects.

Beyond trade associations, indirect information sharing may also occur through other third parties, such as independent market research companies, industry analysts and other consultants. In Europe, the recent *Draft Guidelines on the applicability of Article 101 of the Treaty on the functioning of the European Union to horizontal co-operation agreements* (“draft horizontal guidelines”) generally prohibit such indirect information exchanges.<sup>2</sup>

Another form of information sharing is the publication of data, for instance on a website or through press releases. This type of information sharing is often unilateral.

Beyond the unilateral/bilateral/multilateral distinction, information sharing can be classified as stand-alone or as ancillary to another activity.

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<sup>2</sup> Communication from the Commission, (draft) Guidelines on the applicability of Article 101 of the Treaty on the functioning of the European Union to horizontal co-operation agreements, *available at* [http://ec.europa.eu/competition/consultations/2010\\_horizontals/guidelines\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf).

First, an information exchange may be ancillary to cartel activity subject to *per se* or even criminal treatment (*e.g.*, price fixing or market allocation). In this case, the information exchange is assessed as part of the cartel activity, and not simply as an information exchange.

Second, the information exchange may be ancillary to another horizontal agreement subject to rule of reason treatment (*e.g.*, a production agreement, specialization agreement, research and development agreement or other collaborative venture). In such instances, the information exchanges are assessed under the rule of reason in combination with the relevant horizontal agreement. To the extent the information exchanges and contacts between competitors are limited to those needed to carry out the legitimate objectives of the primary agreement, there are limited independent antitrust implications. This is similar to the situation in which an exchange of information is ancillary to a joint venture, merger, acquisition or other collaboration. In such cases, the main difficulty resides in determining how much information needs to be exchanged to effectuate the collaborative activity.

Third, the agreement may be a “pure” information exchange, the primary function of which lies in the exchange itself.

Under EC competition law, information exchanges are addressed under Article 101 if they establish or are part of an agreement, a concerted practice or a decision of an association of undertakings.<sup>3</sup> That is, even without an express anticompetitive agreement, information exchanges may still be within the ambit of Article 101 if they constitute a concerted practice having the same effect or object as an anticompetitive agreement.

The European Court of Justice has confirmed that it is possible for an anticompetitive practice to result from an information exchange at a single meeting without evidence of an ongoing system,<sup>4</sup> emphasizing that what matters is not so much the number of meetings or instances of exchange of information between competitors as the information exchanged and whether it influenced, or had the capability to influence, their conduct on the market.<sup>5</sup> The Court explained that this conduct could quickly be condemned as a restriction of competition under Article 101 after establishing only a very limited set of facts and without examining its actual or likely harmful effects.

However, if there is no explicit agreement on information exchange, it will have to be assessed whether the exchange qualifies as a concerted practice, as opposed to a unilateral act that does not fall within the scope of concerted activity. That is not to say that where only one undertaking discloses information a reciprocal information exchange may not exist. Indeed, the General Court ruled that an information exchange can be reciprocal and constitute an anticompetitive practice even if only one undertaking discloses information while the other(s) merely accept it, as long as the latter does not expressly refuse the disclosure of information.<sup>6</sup>

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<sup>3</sup> The reference to “concerted practices” makes the European prohibition at least arguably somewhat broader in scope than Section 1 of the Sherman Act (15 U.S.C. § 1).

<sup>4</sup> Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, 2009 E.C.R. I-4529.

<sup>5</sup> The European Court of Justice held that there is a rebuttable presumption that the exchange of information led to actions in the market by the exchange participants. *Id.*

<sup>6</sup> *See, e.g.*, Cases T-25/95, *Cimenteries CBR SA, et al v. Comm’n*, 2000 E.C.R. II-491.

### 3. Pro-competitive effects of information sharing

Information exchanges are often pro-competitive in that they may lead to increased competition (*e.g.*, by reducing or eliminating information asymmetries) or significant efficiency gains (*e.g.*, by allowing benchmarking, more efficient production allocation or an enhanced consumer choice).

The International Bar Association mentions that “well-oriented exchanges of information between competitors contribute to the good functioning of the market” and notes the paucity of guidance regarding information exchanges stating that this may lead national competition authorities to the wrong conclusion that information exchanges are in all cases anticompetitive.<sup>7</sup> Notwithstanding such comments, the competition-enhancing and efficiency-creating effects of information exchanges are often underestimated. In Europe, for example, the new draft horizontal guidelines are silent as to rules regarding permissibility of information sharing and the positive effects of such exchanges are largely ignored.

In the United States, the Federal Trade Commission and Department of Justice issued in April 2000 *Antitrust Guidelines for Collaborations Among Competitors*. These guidelines contain very little discussion of the potential efficiencies of information sharing.<sup>8</sup> And, the more recent Canadian *Competitor Collaboration Guidelines*<sup>9</sup> do not discuss information sharing efficiencies with any specificity, instead referring back to a general discussion of efficiencies.

Nonetheless, in some instances antitrust agencies have recognized the existence of the inherent efficiencies of information exchanges. In Europe, this is done mainly through block exemption regulations<sup>10</sup> while in the United States there are examples seen in the utilization of so-called safe harbours and in agency-issued business review letters.

For instance, the European Commission has adopted an insurance block exemption regulation<sup>11</sup> in which it recognizes that certain information exchanges are necessary to allow insurers to accurately assess risks, thus benefitting consumers and the economy as a whole.<sup>12</sup>

<sup>7</sup> See Int'l Bar Ass'n, Working Group on the Commission's Questionnaire Relating to the Public Consultation on the Functioning of the Current Regime for the Assessment of Horizontal Cooperation Agreements Under EU Antitrust Rules, In Particular, the Specialisation and R&D Block Exemption Regulations and the Horizontal Guidelines 19, available at [http://ec.europa.eu/competition/consultations/2009\\_horizontal\\_agreements/iba\\_en.pdf](http://ec.europa.eu/competition/consultations/2009_horizontal_agreements/iba_en.pdf).

<sup>8</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>9</sup> See Can. Competition Bureau, *Competitor Collaboration Guidelines* (Dec. 23, 2009), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf).

<sup>10</sup> See, *e.g.*, Commission Regulation (EC) 772/2004, Application of Article 81(3) of the Treaty to Categories of Technology Transfer agreements, 2004 O.J. (L 123) 11; Draft Commission Regulation (EU) No .../.. of [...], Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Research and Development Agreements, available at [http://ec.europa.eu/competition/consultations/2010\\_horizontals/draft\\_rd\\_ber\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_horizontals/draft_rd_ber_en.pdf); or Draft Commission Regulation (EU) No .../.. of [...], Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Specialisation Agreements, available at [http://ec.europa.eu/competition/consultations/2010\\_horizontals/draft\\_specialisation\\_ber\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_horizontals/draft_specialisation_ber_en.pdf).

<sup>11</sup> Commission Regulation 267/2010, Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector, 2010 O.J. (L 83) 1.



In the US the Department of Justice (“DOJ”) sometimes provides antitrust “safe harbors” through business review letters (“BRLs”). Recently, DOJ issued one such letter in the context of the health care industry. In that BRL, the DOJ confirmed that it would not challenge a hospital cost information exchange plan encompassing over three hundred hospitals in California. The DOJ acknowledged that this information exchange might reduce health care costs by improving competition among the hospitals and could facilitate more informed purchasing decisions by group purchasers of health care services.<sup>13</sup>

Courts have also found procompetitive benefits to information exchanges. For example, an EC court found that an information exchange system between Spanish credit institutions sharing information on the solvency of borrowers made it easier for lenders to foresee the likelihood of repayments, and led to increased competition among lenders, and lower prices for lender services. Despite being an agreement on information sharing among competitors, the procompetitive industry-wide benefits were sufficient to obviate any competition issues.

It may be helpful to consider the variety of efficiency gains that may be garnered through information exchanges. First, one of the most obvious efficiency gain seen in information exchanges is increased transparency. This may be especially crucial in industries where interconnection or standards play an important role. In such a context, information sharing may be necessary to share important technical information, enabling the design of standard compatible components allowing products to interconnect. Sharing information on the patents necessary to achieve a standard, for instance, may be important to achieve standardization and permit the introduction of innovation based on the standard.

Another example of the efficiency gains inherent in information exchanges may be seen in the European electricity market. Here, transparency is so important to the market that the European Commission (DG Energy) has requested that the European Group for Electricity and Gas (“ERGEG”) prepare Comitology Guidelines on Fundamental Electricity Transparency. The following quote is instructive:

*A prerequisite for a market to function properly is to have all the relevant information available to all market participants, including potential and prospective market entrants.*

*. . . Insufficient transparency can have adverse effects on market competition and price formation as not all the market actors have access to the same information and an unlevel playing field is created.*

*Fundamental data transparency refers to the availability of information on the relevant aspects affecting the electricity market through its impact on the behaviour of market actors (TSOs, generators, users and traders) and thus on price formation and electricity trade taking place.*

*. . . Publication of fundamental data is seen as a first step and pre-condition to the creation of a competitive and efficient European electricity market.*

*. . . A lack of harmonisation in both the type of information that is available and the format in which it is published can make it impossible for market participants to develop a coherent and accurate view of electricity market fundamentals.<sup>14</sup>*

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<sup>12</sup> To a certain extent, information exchanges are important for the insurance sector because large amounts of data are required in order for companies to assess the costs of covering risks. Access to the data is also crucial to facilitate the entry of new or foreign market players.

<sup>13</sup> See Press Release, U.S. Dep’t of Justice, (Apr. 26, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/258016.pdf](http://www.justice.gov/atr/public/press_releases/2010/258016.pdf).

<sup>14</sup> ERGEG Draft Comitology Guidelines on Fundamental Electricity Transparency, Initial Impact Assessment, Ref: E10-ENM-05-01, 3-9 (Sept. 8, 2010), available at <http://www.energy-regulators.eu/portal/page/>

Second, information sharing also allows for a better consumer choice. Information on market shares can be used as a signal of quality or as a strong indicator of future performance in markets where information is imperfect. Moreover, providing consumers with more information can help them make sound purchasing decisions and well-reasoned choices based on increased knowledge. Consumers who are well-informed and confident in their choices can become a decisive factor in promoting vigorous competition among competitors.

Third, information sharing may lead to increased efficiency in production allocation. Sharing information may assist in allocating production towards markets where demand is high or towards companies with lower costs. Conversely, information sharing can help ensure that scarce resources are allocated to those who want or need them most.<sup>15</sup> Information exchanges can also serve to reduce inventory costs or enable quicker delivery of perishable goods to areas where demand is high.

Fourth, information sharing allows for a better understanding of market trends which in turn leads to a better match of supply and demand. This is especially true in markets where demand fluctuates significantly, in markets with rapidly changing or evolving technologies, or in markets where consumer taste and preferences evolve rapidly.

Fifth, information sharing, particularly of cost information, permits companies to benchmark their performance against industry best practices. This can promote innovation and enhance efficiency. For example, by comparing business processes and/or performance against best practices within a sector, or across sectors, companies may be able to develop improvements in quality or may adopt specific practices enabling better, faster and cheaper production.

Finally, the sharing of information may contribute to the reduction of adverse selection (in industries where there is a benefit to a firm's distinction between low risk and high risk consumers) and moral hazard (when consumers behave differently if protected from a risk than if fully exposed to it). For example, certain transparency regarding consumers may help to expose past behaviour regarding accident levels or credit defaults. Consumers then have a higher incentive to limit their exposure to such incidents. This both incentivizes good behaviour and enables the identification of low risk consumers who can benefit from lower prices.

#### **4. Assessing the compatibility of information exchanges with antitrust rules**

The exchange of information between competitors often falls into a gray area of antitrust law. The question is how to draw the line between where legitimate information gathering ends and where anticompetitive collusion begins.

Typically, information sharing presents four main categories of competition concerns. The first three are coordinated theories of harm that entail a collusive outcome while the fourth is a non-coordinated theory of harm which may result in foreclosure of rivals.

First, antitrust agencies may be concerned that the exchange of information may provide a focal point for coordination leading to a collusive outcome. It is true that it is more difficult for competitors to reach

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[portal/EER\\_HOME/EER\\_CONSULT/OPEN%20PUBLIC%20CONSULTATIONS/Comitology%20Guideline%20Electricity%20Transparency/CD/E10-ENM-05-01\\_FEDT%20IIA\\_8-Sept-2010.pdf](portal/EER_HOME/EER_CONSULT/OPEN%20PUBLIC%20CONSULTATIONS/Comitology%20Guideline%20Electricity%20Transparency/CD/E10-ENM-05-01_FEDT%20IIA_8-Sept-2010.pdf).

<sup>15</sup> For instance, if several fishing boats are at sea and have the option of selling their catch in two ports but do not communicate with each other, there is a risk that all boats will end up trying to sell their catch in a single port while the other port is unserved. However, if the boats were allowed to communicate with one another, this might allow them to meet the demand of the inhabitants of both ports, and perhaps sell more fish collectively. See Bennett & Collins, *supra* note 1.

agreement on prices in markets where companies have different products or underlying costs. Sharing information may allow companies to reach a common understanding on the terms of coordination by reducing uncertainties as to other actors' future conduct. This is most likely to arise when the information concerned relates to intended future conduct (although, arguably, information on current conduct may reveal intentions on future behaviour). Communicating future pricing intentions allows "signaling" and may enable competitors to reach a tacit understanding on a higher price. As to current information, advance public announcements by a price leader in the market may allow for the creation of a focal point around which other companies might implement similar price increases.

Second, information sharing may make it easier for monitoring of adherence to coordinated competitive activity, and to punish deviating firms. Information exchange does not, of course, account for demand volatility or other factors that may provide the appearance of deviation from an agreed-upon plan, which can have a destabilizing effect on coordination.

Third, information sharing may promote the external stability of coordination by allowing firms to detect the presence of other firms attempting to enter the market. This enables companies to coordinate against, and target, new entrants, thereby increasing the external stability of the coordination.

Finally, antitrust agencies may also be concerned that information sharing might lead to anticompetitive foreclosure. This may occur when information is shared among only certain competitors in a given market. Those firms outside the information exchange could be at a significant competitive disadvantage. Both the nature of the information and the manner in which it is shared are significant to this analysis.

As noted above, there is an important distinction between so-called *per se* illegal information exchanges (also called "restrictions by object" or "naked restraints") and information exchanges that require a case-by-case analysis under the rule of reason, or restrictions by effect. In the presence of a *per se* infringement, there is no need for a complainant or agency to demonstrate anticompetitive effects, and, therefore, the burden of proving that the information exchange does not violate antitrust rules falls on the parties participating in the exchange.

Information sharing among competitors of individualized data concerning future intentions in terms of prices or quantities (*inter alia*, future sales, market shares, territories or customer lists) is generally considered to be illegal *per se*. The same applies to information containing details of current conduct that reveals intentions as to future conduct.

In the *T-Mobile Netherlands* case,<sup>16</sup> the European Court of Justice held that an exchange of information between competitors is deemed to have an anticompetitive object if the exchange is merely capable of removing uncertainties concerning the intended conduct of the participating undertakings. However, the new draft horizontal guidelines may be an attempt to narrow the scope of this statement by providing that only certain types of information should be considered restrictions by object. This would include information regarding intentions on future conduct or information on current conduct revealing intentions on future behaviour.<sup>17</sup>

Accordingly, the sharing of information relating to current conduct that reveals intentions on future behaviour or the combination of data enabling the deduction of intentions regarding future prices or

<sup>16</sup> *T-Mobile Netherlands*, *supra* note 4.

<sup>17</sup> BIAC submits, however, that the European draft horizontal guidelines can be improved upon, in particular by providing additional guidance on the criteria the European Commission considers most relevant for identifying objectionable unilateral information disclosures.

quantities are also considered to be have as object the restricting competition. There is very little guidance as to when current market data may reveal intentions on future conduct. Moreover, considering cases where companies combine data to deduce future industry developments as illegal *per se* may be inappropriate given the risk of “false positive” errors; that is, undue punishment of businesses possessing efficiency-enhancing market intelligence systems.<sup>18</sup>

Not all agreements have the object of restricting or reducing competition, but may have the ancillary effect of doing so. Thus, the sharing of information may result in an unintended change in market conditions such that coordination becomes possible. In such instances, the effects of the information sharing will be compared to the likely effects that would prevail absent the information exchange and changes to the market will be considered in light of the initial market conditions.

Typically, whether or not information sharing will be considered as anticompetitive will depend on an analysis in light of a number of factors which may include (i) the percentage of the market involved, (ii) the particular market characteristics (*e.g.*, concentration, existence of barriers to entry, transparency, stability, etc.) and (iii) the nature of the information exchanged.<sup>19</sup>

First, the analysis will focus on the percentage of the market involved in the agreement. If the companies involved in the information sharing do not cover a sufficiently large portion of the relevant market, then competitors will be able to constrain their behaviour and stifle the potentially anticompetitive effects of their conduct.

Second, assuming that the firms involved in the exchange have a sufficient market share, the particular characteristics of the market may be important. As noted above, sharing information may increase transparency, thereby reducing uncertainties in the market. Therefore, the value of information sharing for coordination will be highest where pre-information exchange transparency is lowest.

Other important market characteristics include market structure (for example, oligopolistic markets (in particular those with homogenous products) can facilitate coordination between the exchanging parties whereas collusion is less likely in fragmented markets where the information is less useful given increased uncertainty). Moreover, coordination is also more likely in markets where demand and supply are characterized by relative stability rather than volatile markets. Moreover, where the structure of the market is symmetric, coordination is similarly more likely. However, information sharing has the potential of rendering companies aware of their differences and of helping them address these differences within the coordination.

Finally, one of the more important factors for consideration is the nature of the information exchanged. In carrying out the analysis of the information exchanged, antitrust agencies will consider the following elements:

#### **4.1 *Commercially sensitive information versus technical information***

The commercially sensitive or strategically useful nature of exchanged information may factor strongly in drawing a line between exchanges that are potentially anticompetitive and those that are neutral from an antitrust perspective. Commercially sensitive information is capable of restricting competition by decreasing both the participants’ independence when making decisions as well as their incentive to

<sup>18</sup> Hans-Georg Kamann & Peter Gey, *Regulating Info Exchange Under EU Antitrust Rules*, LAW 360, July 09, 2010, available at <http://www.law360.com/articles/179920>.

<sup>19</sup> See, *e.g.*, EC Draft Horizontal Guidelines, *supra* note 2; or Canadian Competitor Collaboration Guidelines, *supra* note 9.

compete. Practitioners usually view, information regarding prices and quantities as being most sensitive, followed by information relating to costs and demand.

It should be noted that commercially sensitive information is somewhat different from technical information. The latter does not enable a company to understand the strategy of a competitor revealing the information. For example, in an exchange of information regarding infrastructure sharing and roaming in the mobile phone industry, technical information might include the location and antenna height of sites, site configuration parameters to allow roaming and information relating to the space made available. This information would not necessarily have antitrust implications.

#### **4.2 Public information v non-public information**

The exchange of public information is generally not problematic from an antitrust perspective absent collateral communication between or among the companies. The difficulty resides in defining the contours of public information. Until recently, the relevant threshold seemed to be that information needed to be in the public domain to be considered public. The recent draft horizontal guidelines have, however, introduced a new distinction or threshold, at least in Europe.

The draft horizontal guidelines provide that only “genuinely” public information is outside the prohibition in Article 101 of the Treaty. “Genuinely” is defined as equally easy or costless to access for everyone. The European Commission suggests that the costs of obtaining/collecting information in the public domain may be prohibitive to the extent that they discourage other companies or buyers from seeking the information so that it is no longer considered public.<sup>20</sup> However, the definition of information which is not “genuinely public” seems to be so broad that it risks to cover in practice any kind of information. It would be inappropriate that the guidelines discourage any business activity aimed at reducing transaction costs and making information more effectively available to undertakings, since these activities may contribute to a more efficient operation of markets and do not necessarily entail restriction of competition.<sup>21</sup>

#### **4.3 Public exchange of information v non-public exchange of information**

Information exchanged in public and available to all competitors and buyers is less likely to raise competition concerns, since use of the materials would be generally available. Conversely, exchanges of information that are limited to a number of participants and are non-public increase the likelihood of detrimental effects.

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<sup>20</sup> *Supra* note 2, ¶ 82, at 22.

<sup>21</sup> Moreover, it is worth pointing out that the Court decision cited by the Commission (Joined Case T-202/98 etc., *Tate & Lyle v. Commission*, 2001 E.C.R. II-2035) does not appear to provide a distinction between data that is genuinely or not genuinely public but rather clarifies that information discussed in a meeting cannot be considered public tout court simply because it was the subject of preliminary, individual and standard information provided to the customers of the single manufacturer. The Court, therefore, limits itself to stating that the price information in question is not public, but it does not introduce the distinction envisaged in the consultation document.

At national level, the Italian Administrative Court rejected both the prospect of unlawfulness “per se” of the information exchange and the grounds of the distinction between public data and data in the public domain (TAR Lazio, Judgement n. 6088 of the 8th of August 2005, *San Paolo IMI Wealth Management – San Paolo IMI S.P.A. and others/AGCM*).

#### 4.4 *Aggregated information v individualized information*

The level of aggregation of data will also be considered by antitrust authorities when assessing the legality of information exchanges. The potential harmfulness of the exchange of information will depend on whether or not it becomes possible to identify competitively sensitive data and otherwise confidential data. The ability to identify such data is proportionate to the level of aggregation or individualization of the data: the more individualized the data, the greater the possibility of identifying confidential and commercially sensitive information.

It follows that antitrust agencies will typically consider aggregate information as less likely to lead to restrictions on competition than more individualized data.<sup>22</sup> One of the reasons for this resides in the fact that where information is individualized, it becomes easier to identify a deviating firm or new entrant, thereby allowing for increased protection of the coordination. However, there is very little, if any, guidance as to what level of aggregation the information should meet to allow for a permissible exchange of information.

#### 4.5 *Current information v historical information*

The age of the information exchanged is also a factor considered in the assessment of the compatibility of the exchange with antitrust rules. Given that the exchange of historic data is unlikely to provide indications as to intentions on future conduct of companies or a common understanding of the market, it is typically considered unlikely that such exchanges would lead to a collusive effect. Whether certain data are “historic,” however, can vary significantly with the nature of the market.

#### 4.6 *Frequency of exchange of information*

Finally, antitrust agencies may also consider the frequency of the exchanges of information. The more frequent the exchanges, the higher the likelihood that the participating companies gained a common understanding of the market, allowing for better forecasting of competitive behaviours as well as monitoring of potential deviations or new entrants. However, in markets characterized by long terms contracts, less frequent (or even isolated) exchanges of information may lead to coordination. As noted, the timeliness of the information is also important. Sharing information regularly usually implies that the most recent information is being shared.

Finally, as mentioned above, information sharing may occur also in the context of joint ventures or similar aggregations. In such cases, whether a full-function joint venture, merger, acquisition or other form of concentration, the exchange of information necessary to carry out the venture will normally be assessed under the antitrust rules applying to mergers rather than horizontal agreements. However, horizontal cooperation rules may nevertheless remain applicable in terms of assessing cooperative links between the shareholders of the joint venture, and between the shareholders and the joint venture. Similarly, information exchanged prior to closing may also be assessed from the horizontal cooperation perspective and may even be considered “gun-jumping.”<sup>23</sup>

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<sup>22</sup> Nonetheless, even the exchange of aggregate information may be considered anticompetitive, for example in oligopolistic markets.

<sup>23</sup> William Blumenthal, “The Rhetoric of Gun-Jumping,” Remarks before the Association of Corporate Counsel (Nov. 10, 2005), available at <http://www.ftc.gov/speeches/blumenthal/20051110gunjumping.pdf>; and Background Materials on Premerger Coordination (Nov. 10, 2005), available at <http://www.ftc.gov/speeches/blumenthal/20051110bgdgunjumping.pdf>.

## 5. Concluding remarks

While certain information exchanges may have anticompetitive effects, in many cases the exchange generates procompetitive efficiencies. However, these efficiencies are frequently overlooked.

The guidance provided by various antitrust authorities suggests that information exchanges are too often considered anticompetitive, and, in some instances, subjected to unwarranted *per se* treatment. BIAAC believes that information exchanges that take place outside of the context of a cartel should be analyzed under a rule of reason approach, obviating the risk of Type 1 condemnations and potential loss of efficiencies which result from overly hasty *per se* condemnation. In many instances, information exchanges are essential to the functioning of the market itself and lead to increased competition among market participants.

In many cases, information sharing is ancillary to another practice (cartel activity, another type of horizontal agreement or a legitimate venture). There are relatively few cases in which information exchanges should be analyzed as a stand alone practice rather than as part of a broader agreement. In light of the broader venture in which these exchanges occur, the risk of anticompetitive condemnation is reduced even further.





**NOTE BY PROF. ALBERTO HEIMLER**

**The legal significance of economic evidence in antitrust cases: some comments based on the Italian experience**

**1. Introduction**

Antitrust rules are written in general terms so that they can be effectively applied to the circumstances of specific cases. This flexibility in enforcement maximizes the probability that the behavior that is being prohibited actually restricts competition. In this respect there are no substantial differences between common law or civil law jurisdictions. It is widely understood also in civil law jurisdictions that very general legal provisions to be adapted to the circumstances of a given case minimize errors, reducing both false positives and false negatives.

The weakness of this approach is that general legal provisions reduce legal certainty, since what is allowed and what is prohibited is difficult to appreciate *ex-ante*. Indeed in order to maximize legal certainty, the best is the adoption of mechanical rules that reduce, if not eliminate, the margin of appreciation on the part of the enforcer. When rules eliminate any possible uncertainty, everyone knows *ex-ante* what the law prohibits and acts accordingly, taking into consideration the severity of the sanction and the probability of being caught. However the adoption of mechanical rules comes with a cost: it does not allow the specific circumstances of a case to play much role in enforcement. In order to share the benefits of mechanical rules, but at the same time maintain the necessary flexibility, antitrust decision making has developed truncated criteria, where a conduct (exactly specified) is prohibited unless convincing elements of facts demonstrate that it is actually pro-competitive and is therefore allowed.

In this process economic analysis has played a very important role, providing the lenses by which to interpret the rules and decide on a case by case basis whether a given conduct is actually anticompetitive. This is why the first chapters of all modern textbook of antitrust law contain an analysis of the economic analysis toolkit needed in antitrust enforcement. The Italian Authority has been an early follower of the economic approach in European antitrust enforcement, applying a substantive test to vertical restraints already in 1994<sup>1</sup>.

As Werden (2009) argues, competition policy “relies very heavily on the partial equilibrium analysis pioneered by Alfred Marshall”<sup>2</sup>. More precisely the point of reference of the economics of antitrust is the Nash equilibrium<sup>3</sup>, defined as a strategy combination such that no firm has an incentive to change a strategy it is currently using given that no other firm changes its strategy. With the only exception of the

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<sup>1</sup> See case *San Paolo/La Fondiaria/Milano Assicurazioni*, 11 February 1994, 1776, published in *Bollettino* 6/7 1994.

<sup>2</sup> See Werden, G. (2009), *Essays on Consumer Welfare and Competition Policy*, in [www.ssrn.com](http://www.ssrn.com).

<sup>3</sup> First developed in Nash, Jr., John F. (1950). *Non-cooperative games*, Ph.D. thesis, Mathematics Department, Princeton University.

atomistic perfectly competitive market, where every player is a price taker, the equilibrium in all markets is based on the strategic interaction of firms and on the concept of Nash equilibrium.

While the Nash model is a very powerful tool of analysis, it does not tell us how in practice the Nash equilibrium is reached. How can an oligopolist know what is its rivals best response to any specific action? This is a question to be asked before taking any enforcement decision and the answer to that question will shed some light on the way a given market operates. This is particularly necessary for agreements between competitors, short of a fully fledged cartel. For example, an agreement to share information on existing or historic prices may be instrumental to achieve a Nash equilibrium. This possibility cannot be ruled out. I will argue along these lines in the second section of this paper, showing that a better use of economic analysis would have put into question a number of prohibition decisions on information exchanges by the European Commission, by the Italian and other national competition Authorities. In the case of Italy, the Commission's practice of prohibiting exchanges of information by object led the Italian Authority to do the same. In such cases, the possibility that better information on prices may indeed increase, not reduce competition, leads me to conclude that exchanges of information should not be prohibited as such. They can of course be prohibited, but only as part of a thorough analysis aimed at proving an anticompetitive concerted practice.

Economic analysis is also the point of reference of the effect based approach in the identification of abusive conduct. As the Commission writes in its recent Guidance on article 82<sup>4</sup>, "(I)n applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between firms", implying that what matters is market outcomes, not the form of a given conduct or the protection of competitors. In the third section of the paper I will show that the Italian Authority has carefully used the tools of economic analysis in predatory pricing cases, anticipating similar developments in the EU.

Finally, the 2004 change of the merger test in Europe has been justified by the necessity of blocking mergers in differentiated product oligopolies where harm would originate from unilateral conduct. I will argue instead that the change in the test, contrary to what was expected, may prove useful to overcome the rigidity of the accepted standard in collective dominance cases, opening the way to a more economic based approach with respect to coordinated effects. Particularly so at the national level. Italy, which has not changed its merger test so far, should do so, in order to be better able to address coordinated effects in merger control. This will be developed in section four.

## **2. Facilitating practices in horizontal agreements: exchange of information in insurance services**

In the European Union, although in principle every agreement can be analyzed under article 81, paragraph 3, in practice there is no possibility of exemption for hard core cartels and the proof of the existence of a hard core cartel is limited to the fact that the agreement was made and that it could be anticompetitive. There is no defense possible, not even the fact that the agreement was not put in place or that it did not produce anticompetitive effects. As a result, in the case of hard-core restrictions, much of the economic evidence is not needed because it is not necessary to prove that prices are higher than they would have been without the agreement or that they are unreasonable. The absence of effects could only be taken into account as a mitigating factor in the calculation of fines.

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<sup>4</sup> European Commission (2008), *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, Paragraph 5.

Prohibitions by object in the European terminology simplify procedures and provide clear guidance to business. However prohibitions by object cannot be too broad since they might risk to prohibit otherwise pro-competitive conduct. In particular the prohibitions by object should not apply to agreements that, for example, would enable potentially pro-competitive integration of the companies' activities, create new products or distribution methods, or enhance the information available for an effective rivalry.

Cartel cases are difficult to detect given that they are secret. However their organizational structure can be very complex, the reason being that price-fixing cartels are not easy to operate. One must convince all competitors in an industry to raise their price above their competitive level and keep it there for a sufficient period of time without cheating. Cartel members must also agree to restrict quantities, to allocate customers or territories. If important firms are absent it is difficult to maintain a cartel. Attempts to get everybody on board may make the cartel known to outsiders. A cartel can also function with not all members of an industry participating, but the competitive fringe has to have some constraints in its ability to compete, such as for example some capacity limitation. It is also difficult to agree on prices if costs differ among cartel members or if products among competitors differ.

Indeed, cartels are inherently unstable because cartel members tend to cheat by selling more at the given price or by secretly reducing prices. As a consequence for a cartel to function it is almost always necessary to police the cartel, by punishing deviants. This punishing activity can be one of the best evidence for the existence of a cartel.

Conscious parallelism achieves the same outcome of a cartel without any contact among competitors. In conscious parallelism uniformity arises not from an agreement, but from each firm taking into consideration possible reactions by competitors in a "repeated game setting". For example nobody would reduce prices if every price reduction would be matched by competitors so as to provide losses to everybody without even the first mover to gain. In such circumstances price uniformity cannot be the proof that a cartel is operating. In effect where there are few competitors, homogeneous products, high barriers to entry, low rates of innovation and high market transparency, the non-cooperative oligopolistic outcomes are more likely to emerge. In those circumstances firms realize that it is not profitable for them to actively compete against each other. In such markets the collusionary equilibrium may be sustainable without any explicit agreement.

The problem is that under an economic perspective there is no difference between a cartel and conscious parallelism. The difference is only legal since what the law prohibits is an agreement, not an outcome. There are good reasons for this. The major one is that when a violation is found (or even anticipating one), firms need to know how to conform to it. In the case of a decision against a cartel firms know that they should no longer agree on prices or output. In principle this should lead to greater competition (and lower prices) because the whole organizational structure of the cartel can no longer remain in place. Sometimes a collusionary equilibrium is sustained by an agreement that, short of a full cartel, restricts the set of characteristics on which firms compete. In such cases prohibiting such facilitating practice, should restore competition.

On the other hand prohibiting an outcome is impossible, since no law can impose on rivals an obligation to compete. Furthermore, a collusive equilibrium is indistinguishable from a non collusive one and a legal provision simply based on outcomes would be unenforceable.

Very often a meeting of the minds is made easier by, for example, information exchanges, product standardization, most favored customers (I will provide you the best conditions I give to my customers) and price protection clauses (I want the opportunity to match any offer by competitors). These actions do not directly restrain competition, but they make it easier for the industry to reach a collusionary equilibrium. These facilitating practices represent the evidence that an equilibrium is collusive. The point I

would like to discuss is what is the required burden of proof with respect to exchanges of information on historic or existing prices. It is a practice on which economic theory does not provide a clear indication whether it should be prohibited or not. I would like to start with a brief description of what these facilitating practices are and the purpose they serve. I will then discuss the Italian car insurance case.

## **2.1 *Facilitating practices***

Facilitating practices fall into two major categories: practices that make it easier to collude and practices that make it more difficult to cheat.

### **2.1.1 *Practices that make it easier to collude***

The sharing of detailed (not aggregated) information among producers of substitute products may make it easier to reach an agreement on price increases or output restrictions. For example, post-transaction price verification may reduce uncertainty among conspirators that an agreement is being respected; the same function can be served by costs and customer information compiled by trade associations, while announcements of future price increases may represent a more direct instrument of coordination. Exchange of information is not always anti-competitive however. For example if information on future prices is made available to customers, it may sharpen competition, making demand much more sensitive to prices. Furthermore, firms may compete more efficiently when they are informed about other participants pricing and strategies.

Agreements restricting advertisement can also make it easier to collude. Advertisement makes consumers aware of the existence of a product or describes some of its characteristics. Advertisement is not only directed towards new consumers, but is directed to all consumers. As a consequence of advertisement, firms compete for customers, even customers of competitors, making collusion less likely. Furthermore advertisement can help new entry.

Other practices, such as agreements that all suppliers will price their product on a delivered basis (absorbing freight costs) or agreements that all products will be sold in a standardized form can also make it easier to reach a consensus on an anticompetitive outcome.

### **2.1.2 *Practices that make it more difficult to cheat***

Information exchanges on detailed transactions and on a frequent basis make it easier to detect possible deviants. Also most favored customers and price protection clauses can help to identify a cheater and therefore if widespread in a concentrated market may serve as self policing enforcement mechanism.

## **2.2 *The Italian car liability insurance case***<sup>5</sup>

The proceeding was undertaken in 1999 against 39 insurance companies, authorised to carry out insurance activity in the automobile sector, as well as RC-Log, a company specialized in providing data and consulting services on insurance markets.

Before the proceeding started the Italian car insurance market had undergone significant liberalization as a result of the implementation of EEC Directive 92/49 (Decree n. 175 of 17 March 1995). In Italy the entering into force of the directive was accompanied by the elimination of price controls in car liability insurance markets. Furthermore, Block Exemption Regulation n. 3932/92 concerning the application of

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<sup>5</sup> See Procedure I377 *RC Auto*, Decision n. 8546 of 28/07/2000, available on <http://www.agmc.it>, “Tutela della concorrenza”, “Procedimenti”, “Art. 2 – Intesa”, “2000”, “RC Auto”.

Article 81, paragraph 3 of the Treaty to certain categories of agreements, decisions and concerted practices in the field of insurance allowed an exchange of information among insurers only to the extent possible for the assessment of pure risk.

As a result of the EC driven liberalization, prices for car insurance did not decline in Italy as expected. To the contrary, according to the data gathered by the Authority, in the five-and-a half year period following liberalisation, a twofold increase was recorded in the average price of car insurance. Such a sharp increase in insurance prices was specific only to Italy and did not occur in other EU countries.

In 1998, in the car insurance sector there were about 100 companies, the majority of these having a market share of less than 2%. The larger companies that participated in the exchange of information program had quite stable market shares.

The car liability market had the following characteristics which, according to the Authority, may have increased the probability of collusion:

- the presence of a group of dominating enterprises and a fringe of smaller competitors;
- a stable demand;
- a market demand elasticity close to zero, due to the legal obligation to have car liability insurance;
- the existence of a number of association agreements.

Evidence gathered in the course of the proceedings showed the existence of a pervasive and extensive exchange of information among most companies regarding all aspects of the insurance business, that is tariffs, discounts, accident costs and reimbursements, etc. The exchange of information was based on the principle of reciprocity, so that each company sent to RC Log, an information service provider, its own data in order to receive similar information from all (major) competitors. In order for the mechanism to operate effectively the companies had direct and indirect contacts to define the line of collaboration and, in some cases, to select the companies to be admitted to the exchange.

The exchange of information was carried out through a company, RC Log, that also sold these collected information on the market for a (modest) fee. RC Log organized also special “observatories”, in which insurance companies participated. The observatories active in the car insurance business were the following (within the parenthesis is indicated the year of their institution): Observatory Multicompagnia (1985); Observatory Multiskeme (1988); Observatory Multigamma (1996); OLI Observatory (1994); ARD Observatory (1997).

The information exchanged through these observatories was quite substantial. For example, through OLI, insurance companies knew, with a one month delay, the rates charged by their competitors distinguished by size of car, risk and location. The ARD observatory provided information on the prices of insurance products other than car liability insurance. The Multicompagnia observatory provided information on delinquency rates and on accidents (quantity, amount and time to reimbursement) of each of the member companies. Through Multiskene the undertakings acquired information concerning the feasible development of the insurance market. The Multigamma observatory offered the possibility of identifying the characteristics of each of the insurance products surveyed and of comparing them in a sort of price quality analysis.

Block exemption Regulation N. 3932/92 identifies stringent conditions on the type of information that can be exchanged by companies operating in the market and provides that only the aggregate exchange of information for purposes of statistical elaboration is exempted (and thus allowed); whereas “concerted

practices on final premiums – that is to say, the premiums actually charged to policyholders, comprising a charge to cover administrative, commercial and other costs, plus a charge for security or profit margins – are not exempted” (recital n. 6 of Regulation EC N. 3932/92). The exchange of information carried out by these car insurance could not be exempted. In the decision, the Authority acknowledged that the information services provided by RC Log had gone much beyond what was necessary for the assessment of risks.

According to the relevant EU practice and case law cited in the Authority's decision: “the difference between a legal exchange of information and an illegal one corresponds (...) to that between a strictly statistical information system (...) and a system of reciprocal communication of market data in a manner to permit the identification of each undertaking” (EC Commission, Seventh Report on Competition Policy (1978). Such an exchange of information is contrary to competition rules, since, “considering its periodical and systematic nature, the behaviour of competitors is even more predictable, for a certain undertaking, reducing or cancelling completely the degree of uncertainty in the functioning of the market, that in the absence of such exchange of information would have existed” (See. EC Court of First Instance, Case T-34/92, Fiatagri U.K. Ltd. And New Holland Ford Ltd./Commission “Agricultural Tractors”, case, 27 October 1994, in Racc. 1994, p. 905, point 91. See also, the European Commission’s press release of 20 September 1999, with which it approves the new modified system of information exchange between producers of tractors and agricultural machinery.)

According to the Authority, the facts under examination presented all the characteristics attributed by Community case law to an exchange of information restrictive of competition: a) the undertakings participating in the information exchange were, as a rule, immediately identifiable; b) the exchange involved particularly sensitive data, as it regarded variables such as tariffs, discounts, methods of assumption, contract conditions, amounts received, accidents, forecasts of market growth and management costs; c) the data exchanged among the undertakings were current data, since the information was collected on a monthly basis.

According to the Authority such an exchange of information is prohibited by object since it has the potential to allow undertakings to rapidly co-ordinate, with shared and thus notably reduced information costs, on a collusive equilibrium, even in the absence of an explicit price agreement. Moreover, according to the Authority, for an exchange of information to be restrictive of competition, it is not necessary that the market be defined as oligopolistic. The need to resort to a collusive co-ordination, in the form of an agreement which has as its object the exchange of price information, is indeed much more effective in a sector with a large number of competitors, for absent an explicit agreement, the undertakings’ ability to collude generally depends on the availability of detailed information on the commercial behaviour of each competitor. For this reason, the cost of acquiring such information represents a crucial condition for the successful creation and maintenance of a collusive setting on the market. The cost of independently acquiring information on a competitor’s strategy grows exponentially with the growth of the number of firms operating in the market. In such circumstances, an agreement among undertakings to share and thereby significantly reduce the cost of acquiring the information, creates the conditions necessary for a collusive equilibrium. It must also be taken into consideration that once each undertaking is informed in a detailed and timely fashion of its competitors pricing strategies, such an equilibrium can be easily achieved, even in the absence of an explicit and specific co-ordination among companies.

In view of the foregoing, the Authority concluded that in a non-oligopolistic market, such as the car insurance market, the exchange of information was essential to achieving a collusive equilibrium and therefore prohibited it as a restrictive agreement. Overall fines amounted to about EUR 350 million.

The Council of State confirmed the Authority's decision without introducing any additional qualification on the specific circumstances when exchanges of information are prohibited.

### 2.3 *A brief critical analysis of the car liability decision*

In principle the precondition for a facilitating practice to be prohibited is that there is parallel behavior in the market. Otherwise it is not clear what the practice is facilitating, if anything. As this description of the case has underlined, the Authority collected evidence only on aggregate price variations and did not give much consideration, if any, to the fact that the variation of individual prices between insurance companies was substantial<sup>6</sup>.

Economic analysis has shown that a cartel is sustainable if the number of competitors is small. Louis Philips<sup>7</sup> had identified the number 5 as the threshold in the number of rivals above which a cartel could no longer be sustainable. In the car liability insurance case there were more than 100 competitors in the Italian market, enhancing substantially the incentives to cheat. Addressing this issue, one of commissioners of the Authority at that time, Michele Grillo, wrote a paper in order to prove that an exchange of information would make sustainable a cartel in a market with an infinite number of players. However that paper does not consider explicitly the fact that the car insurance market is homogeneous, that any player could (absent switching costs) conquer the whole market with a small price reduction and that there is no punishment mechanism in place<sup>8</sup>.

Furthermore, the exchange of information in the car insurance case was about existing prices, not future prices. In such instances the exchange of information more than being an instrument for enhancing coordination for the future, may enhance the possibility of identifying cheaters of a cartel. Indeed there is some wording about this in the Authority's decision. However there is no evidence that there was price coordination to begin with, implying that there was no cheater to identify. Furthermore, the information provided by RC Log was public, but it would have required a big effort (and a very big cost) for all companies to individually gather it.

In its decision, the Authority shows that RC-Log organized working groups of industry participants that held meetings where some discussions of future prices did take place. Although not a very important part of the Authority's decision, these contacts among competitors could have given some weight to the hypothesis that the information exchange was actually an excuse for competitors to meet in order to discuss future (individual) prices. However the Council of State did not take that view and ignored these meetings. According to the Council of State, an exchange of information is prohibited when it is demonstrated that potentially it may have negative effects on competition, a very loose standard indeed. Effects are irrelevant and also what "potential" means is not defined<sup>9</sup>. The qualification that an exchange of information on existing/historical prices is a violation of the law only if it is accompanied by some discussion of future prices did not make it in the Council of State judgement.

The problem with this sort of approach is that it cannot take into consideration the fact that an exchange of information on existing prices, in an environment where final prices differ quite substantially, could have been important for insurance companies, especially to smaller new entrants, to better compete with major players. Indeed Rc-Log services were available for a fee to everybody. As Carlton, Gertner and

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<sup>6</sup> Evidence collected at the time of the investigation through the web service "Seisicuro.it" showed that the price differences between competing insurance companies on a car insurance policy customized to an individual customer were quite substantial and in the order of plus or minus 30%.

<sup>7</sup> See Philips, Louis (1995), *Competition Policy: A Game-Theoretic Perspective*, Cambridge: Cambridge University Press.

<sup>8</sup> Grillo, M. e Colombo, L. (2006) *Collusion when the Number of Firms is Large*, mimeo, Università Cattolica del Sacro Cuore. Milano.

<sup>9</sup> See Judgement of the Council of State n. 2199/2002 paragraph 7.4.3, page 112-3.

Rosenfeld (1997) argue<sup>10</sup>, “the appropriate legal standard to judge the flow of information among competitors is the rule of reason”.

The negative position based on a per-se presumption that the Italian Authority and Council of State took on information exchanges is not isolated. The European Commission in the 1992 UK Agricultural Tractor Registration exchange case had argued the same, although the number of players in the tractor market was much smaller. It is interesting to note that also in the UK Agricultural Tractor Registration exchange case it was considered unnecessary for the Commission to provide evidence of price coordination or even price convergence. Like in the Italian car insurance case, oligopolistic coordination was presumed (high concentrations, high barriers to entry, stagnant demand). However the legal substance of the case was very different: the exchange of information on tractors was notified to the Commission in order to receive an 81, paragraph 3, exemption (and the Commission did not grant the exemption arguing that the exchange of information was not indispensable, a standard often criticized since the counterfactual is not specified). Furthermore, there were no fines in that case.

More similar to the Italian car insurance case, the Norwegian Authority denounced the AC Nielsen practice of providing detailed data on prices charged by competing supermarkets, again with no indication of price convergence. In the Norwegian case the number of players was four, very much in line with the Philips number. The Norwegian Authority suggested that “(T)he information exchange makes the market more transparent for the chains, so that they can react quickly to price changes by their competitors. This reduces the uncertainty in the market, and that contributes to suppressing competition among the grocery chains”<sup>11</sup> How general this statement is we do not know. AC Nielsen decided to amend the practice without the Authority having to open a proceeding.

What is interesting in all these case is that the information exchanged was public. What AC Nielsen and RC-Log did was to increase the efficiency of data collection. By itself it does not seem a violation of competition rules. Because of the positive role that exchanges of information may play in the identification of a Nash equilibrium, exchanges of information should be part of a substantive assessment that includes parallel behavior in the market.

### 3. Predatory pricing<sup>12</sup>

Predatory pricing is the practice of a dominant firm selling its products at prices so low as to drive competitors out of a market, prevent new entry, and successfully monopolize the market. Economists today (and many competition officials) typically approach allegations of predatory pricing with a degree of skepticism. This reflects a widespread view, that predatory strategies are costly to implement and uncertain in the pay-offs that they yield. In particular, predatory price-cutting and/or capacity expansions are unlikely to be profit-maximizing strategies for the firms involved in the absence of barriers that prevent subsequent entry (or re-entry) of competitors when the alleged predator(s) eventually seeks to raise its prices above competitive levels as it must do eventually if its losses from the period of predation are to be worth the cost.

<sup>10</sup> See Carlton, D., Gertner, R., Rosenfeld, A. (1997), “Communication among competitors: Game theory and antitrust”, *George Mason Law Review*, 5: 423-40.

<sup>11</sup> See Norwegian competition Authority press release at <http://www.konkurransetilsynet.no/en/news/archive/Cease-detailed-information-exchange-among-grocery-chains/>.

<sup>12</sup> This section draws on a number of papers I have written on the topic: Anderson, R. and Heimler (2007), “Abuse of dominant position: enforcement issues and approaches for developing countries”, In Dhall, Vinod (Ed.) *Competition Law Today*, Oxford University Press: 59-92 and Heimler, A (2008), “Abuse of Dominance: how far is the EU from the US?”, *Economia delle scelte pubbliche*.



The assessment of alleged predatory conduct increasingly emphasizes the identification of barriers to re-entry and the consequent feasibility of "recoupment", the reason being that sometimes predatory pricing is a profitable strategy, even for a dominant firm. For example, pricing below avoidable costs may be profitable in the case of network externality or in the case of profitable after market sales. This is the reason why in many jurisdictions, for example, in the United States<sup>13</sup>, a proof of recoupment is always required. Under this approach, predation is condemned not because it results in lower prices now or because it leads to the elimination of competitors, but because it is likely to lead to reduced output and higher prices in the future and, therefore, ultimately harm consumers.

This approach, although not explicitly, is given some weight also in the European Community case law. Although explicit proof of recoupment is not required in the EC, in its judgment in *Tetra Pak II v. Commission*<sup>14</sup> the European Court of Justice noted that "in the circumstances of the present case," it was not necessary to prove recoupment. By explicitly stating that recoupment did not need to be proven in the specific circumstances of the case, the *Tetra Pak II* judgment implies that recoupment may need to be proven in other cases (*id.* at para. 44). And the specific circumstances of the case were that Tetra held a 90% share in the market for aseptic cartons, while a 78% share in the overall carton market, a share seven times higher than that of the closest competitor and the predatory strategy was very likely to eliminate competitors from the market.

What is really questionable in the EC case law is the insistence on intent for proving predation. In *Tetra Pak II* the European Court of Justice confirms the *Akzo* approach where

*"First prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown"* (*id.* at para. 41).

The problem with an intent standard is that intent may be very difficult to prove and, should a proof be found for example some statements to that effect in an internal memorandum, it may be an over inclusive standard, since it is the normal functioning of competition that has the very normal objective of eliminating or at least weakening competitors.

While in *TetraPak II* the European Court of Justice suggested that proving recoupment was not necessary in the specific circumstances of the case, raising some hope that otherwise a proof would have been needed, there is an additional judgment, the Court of First Instance recently confirmed the approach, however with a different interpretation of what the specific circumstances were. In *Wanadoo*<sup>15</sup> all elements for proving predation and mentioned in *Tetra Pak II* are confirmed: prices below average variable costs are always prohibited; prices above average variable costs and below average total costs are prohibited when there is a proof of the intention to eliminate a competitor. However the circumstances of the case are quite different than those of *Tetra Pak II*: the market where *Wanadoo* was found dominant is the French market for high speed internet access for residential customers, a market growing very fast, that was very new in 2001 when the predatory strategy was identified and that was characterized by (supposedly) substantial economies of scale and of density. This is a fundamental difference with respect to *Tetra Pak* (and *Akzo*) that should have led the Commission and the CFI to consider explicitly the possibility of recoupment. On

<sup>13</sup> See the leading US decision on this matter, *Brooke Group Ltd. v. Brown and Williamson Tobacco Corp.*, 509 U.S. 209, 113 S. Ct. 2578 (1993).

<sup>14</sup> Case C-333/94 P, *Tetra Pak International SA v. Commission*, 1996 E.C.R. I-5951.

<sup>15</sup> *France Télécom v Commission*, CFI, January 30 2007.

the other hand the CFI dismisses the argument that pricing below average variable cost had an objective justification very quickly, suggesting on the contrary that

*“(A)an undertaking which charges predatory prices may enjoy economies of scale and learning effects on account of increased production precisely because of such pricing. The economies of scale and learning effects cannot therefore exempt that undertaking from liability under Article 82 EC” (para 217),*

a statement that seems to rely to an upside down logic where predation leads to economies of scale, instead of more correctly the opposite, i.e. that low prices allows economies of scale to be exploited and anticipate future lower prices.

The CFI judgement has been recently confirmed by the Court that held:

*“It is by applying precisely the reasoning followed by the Court of Justice in Tetra Pak v Commission .... that the Court of First Instance held ... that the Commission had good grounds for finding that the pricing practice concerned was eliminatory inasmuch as the prices charged by WIN were, as in Tetra Pak v Commission, below average variable costs and that, concerning total costs, the Commission had also to provide evidence that the pricing practice adopted by WIN formed part of a plan to ‘pre-empt’ the market. In those circumstances, it must be held that the judgment under appeal sets out sufficiently clearly the reasons which led the Court of First Instance to find that the circumstances giving rise to the present case, in particular the relationship between the level of prices applied by WIN and the average variable costs and average total costs borne by WIN, were analogous to those in Tetra Pak v Commission, and to find, accordingly, that proof of recoupment of losses does not constitute a necessary precondition to a finding of predatory pricing.”<sup>16</sup>.*

The European Court of Justice position in Wanadoo is not fully in line with that of the Commission which in its recent unilateral conduct guidance paper suggested on the issue of recoupment that (paragraphs 70 and 71)<sup>17</sup>: “(G)generally speaking, consumers are likely to be harmed if the dominant undertaking can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place, that is to say, if the undertaking is likely to be in a position to benefit from the sacrifice. This does not mean that the Commission will only intervene if the dominant undertaking would be likely to be able to increase its prices above the level persisting in the market before the conduct. It is sufficient, for instance, that the conduct would be likely to prevent or delay a decline in prices that would otherwise have occurred. Identifying consumer harm is not a mechanical calculation of profits and losses, and proof of overall profits is not required. Likely consumer harm may be demonstrated by assessing the likely foreclosure effect of the conduct, combined with consideration of other factors, such as entry barriers. In this context, the Commission will also consider possibilities of re-entry.” What this means is that the Commission suggests that in case of predation the decision should show, not necessarily quantitatively, the benefits the dominant firm will receive from the successful exclusion of competitors determined by the predatory strategy.

This has been the approach the Italian Authority had adopted already in 2002.

<sup>16</sup> Judgement of the European Court of Justice 2 April 2009 In Case C-202/07 P, France Télécom SA v Commission of the European Communities.

<sup>17</sup> European Commission (2009), *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, [http://ec.europa.eu/competition/antitrust/art82/guidance\\_en.pdf](http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf).

**3.1 *The Caronte Diano Tourist Ferry Boat-Caronte Shipping –Navigazione generale Italiana decision***<sup>18</sup>

In April 2002 the Authority concluded an investigation concerning the abusive predatory pricing conduct that the companies Caronte Shipping and Tourist Ferry Boat had allegedly engaged into for the transport of motor vehicles across the strait of Messina, with the aim of excluding Diano, a new entrant in the market.

The investigation was opened following a complaint by Diano that as soon as it started operating its service for the transport of motor vehicles and passengers on the Messina-Reggio Calabria route, Tourist and Caronte also began to operate on the same route through their subsidiary Navigazione Generale Italiana (hereinafter NGI), with prices that were half those charged on the shorter route linking Messina to Villa San Giovanni.

The two routes Messina-Villa San Giovanni and Messina-Reggio Calabria were considered to be two segments of a single market in which there was a high degree of substitutability on the demand side between the services offered, consisting primarily in the transport of commercial vehicles and commuters with their cars across the strait of Messina.

The Tourist-Caronte group was found to hold a dominant position in the relevant market for ferry services across the strait of Messina, with a 79% market share in 2000. Most sales were generated by services provided on the route between Messina and Villa San Giovanni, where Tourist-Caronte had a share of around 82% and the other carrier, the State Railways, the remainder. On the Messina-Reggio Calabria route the group operated through its subsidiary NGI, holding a share of 47%. Tourist-Caronte was the only company operating on both routes.

In August 1998 the company Diano started operating a ferry service across the strait of Messina on the Messina-Reggio Calabria route (considered by the Authority to be in the same relevant market than the Messina- Villa San Giovanni route), which at the time was not served by any other operator. The new service was intended to provide an alternative, especially for commercial vehicles and commuters living in Reggio Calabria. Two months later the Tourist-Caronte group introduced a similar service through its subsidiary NGI, charging prices significantly lower than those it charged on the Messina-Villa San Giovanni route. The Authority in its investigation assessed the predatory nature of the prices charged on the Messina-Reggio Calabria route in the light of the notion of short and long-term incremental costs, i.e. the costs borne by an undertaking for the production of additional goods and services. Analysis of the evidence gathered in the investigation showed that the dominant operator's revenues from the ferry service on the Messina-Reggio Calabria route had not been sufficient in 1999 or 2000 to cover average incremental costs.

The Authority also proved that recoupment was very probable. In particular, the Authority argued that, once the group had driven out or marginalized the new competitor and established a reputation as an aggressive incumbent, it would be able to maintain its market power and recover the losses it had incurred on the Messina-Reggio Calabria route. In other words, the strategy aimed at excluding Diano would help the dominant operator build up its reputation as an aggressive incumbent in the longer term so as to discourage entry by new competitors.

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<sup>18</sup> See Procedure A267 - *Caronte Diano Tourist Ferry Boat-Caronte Shipping –Navigazione generale Italiana*, Decision n. 10650 of 17/04/2002, available on <http://www.agmc.it>, then “Tutela della concorrenza”, “Procedimenti”, “Art. 3 – Abuso di posizione dominante”, “2002”, t“*Caronte Diano Tourist Ferry Boat-Caronte Shipping –Navigazione generale Italiana*”.

Lastly, the exclusionary strategy pursued by the Tourist-Caronte group was confirmed by the fact that when NGI began serving the Messina-Reggio Calabria route its sailing times systematically coincided with those of Diano and that when the latter changed its schedule, NGI changed its sailing times too, so as to make them coincide with or precede by a few minutes those of its competitor.

The abusive behaviour of the Tourist-Caronte group was preventing the development of both effective and potential competition in the market for ferry services across the Strait of Messina. In view of the seriousness and duration of the violation, the Authority imposed a fine of 4.5% of the revenues earned by Tourist, Caronte and NGI from ferrying motor vehicles across the Strait, amounting to about EUR 2,3 million.

#### 4. Merger control and the substantive impediment of competition test<sup>19</sup>

Under the 1989 EEC merger regulation, a merger was prohibited when it led to the creation and strengthening of a dominant position such that effective competition was impeded in the common market. After a very long debate (and the annulment by the CFI of three prohibition decisions by the Commission<sup>20</sup>), in 2004 the regulation was revised and a new substantive test was introduced. Now a merger is prohibited when it would “significantly impede effective competition (SIEC) in the common market, in particular as a result of the creation or strengthening of a dominant position”. The change was considered necessary<sup>21</sup> to address mergers in differentiated market oligopolies where, it was argued, a merger may lead to a restriction of competition short of dominance.

In the course of the debate that led to the change of the test I defended dominance, on the notion that a judge is better able to understand a common sense concept like dominance, than to undergo the sophisticated economic analysis required to prove a substantial impediment to competition<sup>22</sup>. Furthermore I argued that dominance has proved to be a very flexible concept and that the new test would add very little flexibility if at all. These arguments continue to remain valid today, especially after the experience of these years when, to my knowledge, no use has ever been made of the significant impediment of effective competition test in differentiated product oligopolies<sup>23</sup>. In particular, with respect to anticompetitive unilateral conduct, the significant impediment of effective competition test adds very little to the dominance test (in terms of reducing the risk of false negatives), but it may increase substantially the risk of false positives, especially if the new test is imported in national legislation as well.

<sup>19</sup> This section draws on the conclusion of a recent paper: Heimler, A. (2008), “Was the change of the test for merger control in Europe justified? An assessment (four years after the introduction of SIEC)”, *European Competition Journal*.

<sup>20</sup> Judgment of the Court of First Instance, June 6 2002, case T-342/99, *Airtours plc vs Commission of the European Communities*, in European Court reports 2002 Page II-02585; Judgment of the Court of First Instance, 22 October 2002, case T-77/02, *Schneider Electric SA v Commission of the European Communities*, European Court reports 2002 Page II-04201; Judgment of the Court of First Instance, 25 October 2002, case T-5/02, *Tetra Laval vs Commission of the European Communities*, in European Court reports 2002 page II-04381.

<sup>21</sup> John Fingleton and Dermot Nolan (2003), in “Mind the gap: Reforming the EU merger regulation”, published in Italian in *Mercato, Concorrenza e Regole* under the title “Mind the gap. La riforma del regolamento comunitario sulle concentrazioni,” in *Mercato Concorrenza Regole*, pp. 309-336, write: “A core concern is that the dominance test, a central part of the Merger Regulation since its inception, does not adequately encompass all competition concerns, creating a potential “gap” with regard to non-collusive oligopoly mergers”.

<sup>22</sup> See Alberto Heimler (2003), “Per le fusioni non servono nuovi test. Basta la posizione dominante “, *Mercato, concorrenza e regole*, 3.

<sup>23</sup> I refer to SIEC interchangeably as SLC.

Contrary to what I argued in 2003 when I thought that the characterization of joint dominance in Europe was the same as coordinated effects in the US, the change in the test can indeed bring some needed flexibility in the treatment of coordinated effects, stiffened today by the tight checklist proposed by the CFI in the *Airtours/First Choice* judgement.

#### 4.1 *A brief history of collective dominance in merger control*

Even though the 1989 Merger Regulation did not refer to collective dominance and indeed in the discussion that led to its approval collective dominance was explicitly ruled out, the extension of single to collective dominance started almost immediately after the entering into force of the Regulation. The first case was *Nestlé-Perrier* in 1992, but only with the 1993 *Kali und Saltz* decision the issue was brought in front of the Court<sup>24</sup>. In March 1998 the European Court of Justice annulled the Commission's decision on *Kali und Saltz* arguing that oligopolistic dominance was not adequately established, in this way, however, eliminating all possible doubts that the merger regulation could be applied to cases of oligopolistic dominance. The Court came back to the notion of collective dominance in the 1999 *Gencor/Lonrho* judgement where it established that collective dominance may also exist without structural links<sup>25</sup>.

Finally, the Court of First Instances (CFI), annulling the 1999 *Airtours/First Choice* decision of the Commission, defined in 2002 a checklist for proving the existence of joint dominance, the European translation of US coordinated effects. There has to be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members behave. Furthermore there has to be enough deterrence so as to make the situation of tacit coordination sustainable over time. The Commission has to prove that any aggressive behavior by any member of the dominant oligopoly would not be profitable because of the reaction of the others. The Commission must also establish that the foreseeable reaction of current and future competitors, as well as that of consumers, would not jeopardise the results expected from the common policy.

What the CFI asks the Commission is to show that the merger would lead to firms adopting "a common policy" and presenting themselves in the market "as a single entity", an outcome very similar to collusion. As Posner (2001)<sup>26</sup> suggests however, it is hard enough to prove collusion; it is even harder to prove future collusion. This is probably why the CFI checklist is very difficult, if not impossible, to satisfy.

What coordinated effects mean in US case law seems to be less structured and, for example, the acquisition of a maverick falls squarely under coordinated effects. Indeed the US horizontal guidelines<sup>27</sup> suggest that "the terms of coordination may be imperfect and incomplete--inasmuch as they omit some market participants, omit some dimensions of competition, omit some customers, yield elevated prices short of monopoly levels, or lapse into episodic price wars--and still result in significant competitive harm".

The significant impediment of competition (SIEC) test in Europe, eliminating the need to show that the collective dominant firms would act in the market as a single entity as it was the case with a dominance test, may contribute to the adoption of a more flexible approach on coordinated effects. A very welcome result that was not part of the discussion that led to the introduction of SIEC.

<sup>24</sup> Commission decision, 22 July 1992, case *Nestlé/Perrier*, in Official Journal L 356/1, 5 December 1992; Commission decision, 13 June 2000, case *Kali und Salz GmbH*, in Official Journal L 44/39, 15 February 2001.

<sup>25</sup> Judgment of the Court of First Instance, 25 March 1999, case T-102/96, *Gencor Ltd v Commission of the European Communities*, in European Court reports 1999 Page II-00753.

<sup>26</sup> Richard A. Posner (2001), *Antitrust Law* (2d Ed.), University of Chicago Press.

<sup>27</sup> See United States Department of Justice and Federal Trade Commission (1997), *Horizontal merger guidelines*.

Unfortunately the new merger regulation does not allow the new test to be used for collective dominance. To do so it would be necessary to eliminate Recital n. 25 of Regulation n 139/2004 which explicitly reads:

“The notion of *significant impediment to effective competition* in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned”.

At the EC level it would be a very welcome development that recital 25 be eliminated. Especially because if national jurisdictions would also adopt SIEC, and some already did, these interpretative constraints would not affect domestic developments, creating some relevant inconsistencies in the treatment of coordinated effects in Europe that might undermine the possibility of vertical and horizontal case allocation.

Once recital 25 is eliminated, Italy should also adopt SIEC. Until that time it is not necessary.

## 5. Conclusions

I have argued in this paper that evidence needs to be interpreted carefully before drawing a conclusion that a given conduct actually restricts competition. We do not know much on the strategic interaction of firms and in particular on the way a Nash equilibrium is reached. Many competition authorities, and the Italian Authority in particular, have considered the sharing of historic data on prices as a per se offense, irrespective of the fact that it is accompanied by discussions on future price developments. Historic retail price data are publicly known, but very costly to gather. Information sharing strongly reduces the cost of information gathering. It should be prohibited when there is ample evidence that it is a facilitating practice in a cartel. This evidence was clearly lacking in the 2000 car liability insurance case where the Council of State does not associate the prohibition on the sharing of information on historic prices on the actual price variation of identical insurance products and to the fact that the organization of an “exchange of information service” might have been the occasion for rivals to meet and discuss future market developments. Furthermore, parallel behavior is presumed from aggregate data, not from an analysis of individual firm prices. Had there been evidence of parallel behavior on prices, than the exchange of information could have provided some evidence that its aim was to identify cheaters, a difficult task in an industry with around 100 participants.

In this respect the UK Tractor case from which this case law started is less controversial. Firms of all UK Tractor originated in a notification to receive an 81, paragraph 3, exemption. Furthermore the number of industry participants was 5, a number much more credible for a hypothesis of collusion. Finally the Commission did not identify the exchange of information as prohibited per se, although it used the most controversial item of 81, paragraph 3, the lack of indispensability. This is a very seldom used provision that has been often criticized for not clarifying which counterfactual to use, apparently a less restrictive agreement, rather than no agreement at all.

Recoupment possibilities in predatory pricing case have been ruled out by the European Court of Justice in the recent Wanadoo case, in a case where recoupment could indeed have played a role, given the early stages of development of the industry at the time the predatory pricing strategy took place. The Italian Authority practice is more in line with the recent Guidance by the Commission on the application of article 82, suggesting that recoupment originate from the expectation that “market power after the predatory conduct comes to an end (to) be greater than it would have been had the undertaking not engaged in that conduct in the first place, that is to say, if the undertaking is likely to be in a position to benefit from the sacrifice”. The Authority did not engage in a quantification of expected losses and profits and argued

instead that the predatory strategy would help the dominant operator build up its reputation as an aggressive incumbent in the longer term so as to discourage entry by new competitors. The proof of recoupment had a qualitative nature, without becoming less effective.

Finally the recent change in the legal test for merger control did not lead to a more effective enforcement against mergers in differentiated oligopolies. Since the new Regulation was put in place no decision filled the box of oligopolies in differentiated products. To this day it remained empty! Contrary to the discussions that led to its adoption, the change in the test could have allowed greater flexibility in the analysis of mergers characterized by coordinated behavior. Recital 25 of the new regulation allows the test only for non-coordinated behavior. The recital does not constrain member States, should they adopt SIEC. Domestic developments could therefore lead to relevant inconsistencies, undermining the possibility of vertical (between the Commission and member States) and horizontal (between member States) case allocation. In any case, for allowing a more flexible approach in the evaluation of coordinated effects in merger control, once Recital 25 is eliminated, Italy should also adopt a SIEC test.





## NOTE BY PROF. KAI-UWE KUHN

**Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results****1. Introduction**

The treatment of information exchange continues to be a controversial issue in competition policy despite the fact that there has been precious little new insight from the economic literature over the last 15 years. However, we have seen recently an attempt to take the economic literature more seriously in the formulation of policies on information exchange in policy practice. This is particularly evident in the information exchange section of the new European guidelines on horizontal agreements.

However, this attempt has left many a policy maker baffled. It seems that almost under any circumstances information exchange could be good or bad. How can one formulate policy when almost anything can happen? Invariably there are writers (many on the side of advising firms) who will see this as a reason for lenient policies with a presumption that the information exchanges we observe are probably efficiency enhancing unless proven otherwise. Just as predictably others (predominantly on the side of antitrust agencies) stress the fact that almost any information exchange has the theoretical potential to facilitate explicitly or tacitly collusive behavior and should therefore be treated with suspicion. But both sides effectively agree that almost anything should come under close scrutiny in order to avoid “type I” and “type II” errors - with the possible caveat that the caseload for the agencies should be kept manageable.

In this paper I will argue that this extreme “rule of reason” approach is misguided and cannot correspond to an optimal policy design towards information exchange agreements. Although talking about “type I” and “type II” errors sounds very scientific, this approach implicitly assumes that optimal policy will seek to achieve the maximal ex-post identification of harm from any information exchange agreement. The implicit policy goal appears to be to fine firms if and only if their behavior has had anticompetitive effects. But the policy goal should be to *prevent* behavior that is harmful to competition in the first place without the policy inducing excessive social costs in preventing desirable information exchanges to arise. I show in this paper that this goal is not necessarily achieved even if ex-post every anti-competitive information exchange agreement can be detected. In fact, an extreme rule of reason approach can be very counterproductive. In contrast, I will show that some per-se style rules are very important to give strong incentives for compliance to competition policy rules on information exchange. While the advantages of per-se prohibition for incentives will be fairly obvious, the more important point of the paper is that pre-se legality of certain practices is just as, if not more, important than per-se prohibitions to generate strong incentive properties of the policies. Clearly stated safe harbor rules will therefore be of critical importance for a sound competition policy regime towards information exchange.

In section 2, I develop the main arguments about the efficiency effects of information exchange and the major reasons why they may have anticompetitive effects. In light of this analysis I will then develop the theory of optimal policy design in Section 3. I show that even perfect ex-post identification of anticompetitive effects will not necessarily generate good incentives effects from policy. The direct conclusion of this analysis that an analysis of type I and type II errors in detection cannot be of central

importance in policy design. I then identify what is necessary for an optimal competition policy rule to have good incentive effects. Instead of an analysis of type I and type II errors of detection, I suggest that an analysis of opportunity costs of avoidance for activities that can come under antitrust scrutiny. I explain why safe Harbor rules will generate helpful selection effects that will mean that only firms with strong efficiency reasons for certain information exchange activities will choose information exchanges that will be scrutinized. In the rest of the paper I apply this framework to the design of competition policy by showing how it can be applied to specific types of information exchange.

Section 4 discusses Per-se rules (or restrictions of competition by object in the EU framework). I show that per-se rules are mainly appropriate for information exchanges that can have the effect of coordinating future behavior. I discuss that there are both private and public types of communication that should fall under such a per-se prohibition. On the other hand I discuss that coordinating communication about investments or entry behavior should not come under per-se rule because the scope for collusion is much smaller and there are potential efficiency effects.

Section 5 looks at the opposite end of the spectrum and identifies information exchanges that should fall under a safe harbor rule. In particular, any type of agreement that regularly will be chosen for efficiency enhancing reasons and where criteria identifying the behavior as anticompetitive cannot be specified ex-ante should fall under a safe harbor rule. We find that there are many types of information exchanges that are often scrutinized that should not be challenged.

Section 6 develops a procedure to assess information exchanges that fall into the grey zone between the per-se prohibition and the safe harbor rule. We require that for a successful challenge there should be a clear theory why information exchange of the type observed would facilitate collusion in the particular market in question. Furthermore, the competition authority would have to demonstrate that the marginal impact of the information exchange agreement on the ability of rivals to monitor each others' actions would be substantial. Third, there should be a relatively generous efficiency defense. Any well specified efficiency reason that cannot be achieved with a scheme that has lesser potential impact on monitoring should be accepted as a defense.

We close the general discussion in Section 7 by showing that information exchange on variables that facilitate monitoring are cannot be used as a "plus-factor" in "parallel pricing plus" standard for finding collusive conduct in a market. Section 8 concludes.

## **2. The Economic Effects of Information Exchange**

### **2.1. *The Efficiency Gains from Better Information***

Information about the market is critical for the performance of competitive markets. Market information allows firms to learn which products are successful and which are not. It allows firms to find out whether its production processes are efficient relative to those of competitors or could be improved upon. And improved predictions about future demand developments are important to stimulate investments which typically are delayed when there is large demand uncertainty. Generally improving information will be good because it speeds up the response of firms to new developments in the market and this will typically have pro-competitive effects.

Often information of this type reaches firms through organized information exchange agreements in the form of statistical programs run by industry associations. These collect the information from members to provide better estimates of demand than individual firms could and allow firms to assess whether they are on the technological frontier in terms of their cost levels when compared to the industry. Note that such procedures generate much better information than each member would have by itself at minimally higher

costs. The reason is that information is an (excludable) public good so that passing it on to other users has no additional costs. If it is beneficial to society that firms face less uncertainty in markets, then information exchanges have the potential for very high social benefits. Antitrust policy on information exchanges therefore immediately raises justified concerns that highly beneficial and pro-competitive activities could be chilled by excessive intervention that is based on a general suspicion of information exchanges. A cautious approach to intervention is therefore warranted.

This does not mean that the gains from information exchanges are always large. There appears to be an empirical regularity in some of the experimental evidence on human behavior that we often acquire information for which we have no obvious immediate use. Conversely, we often hide information for which it is not obvious at all that it could be used against us. Similarly, information exchange may take specific forms for reasons that have little to do with the use of the information. For example, it will typically be much easier for a trade association to send out a spreadsheet with highly disaggregated data than to go through the effort of editing the data so that only aggregate numbers are shared. For this reason it is almost impossible to draw conclusions from the type of information shared to the intended use of the information by the parties involved in the information exchange. In the absence of competition policy rules on information exchanges there is therefore little reason to expect firms in competitive markets to avoid the types of information exchanges that would raise red flags for competition authorities. Competition policy intervention based on any rule will therefore suppress some behaviors that would be perfectly innocent and used in competitive markets.

## 2.2. *Market Power and Information Exchange*

In settings with market power it is, of course, possible that the acquisition of information through an information exchange can serve to facilitate the exercise of market power, which may (and may not) come to the detriment of consumers.<sup>1</sup> This has been documented by a large and now well established literature on information exchange in oligopoly models that was among others surveyed in Kühn and Vives (1995). This literature generates a bewildering set of contradictory results because the welfare effects depend on the strategic variable of the firms, the curvature of demand, whether uncertainty is of “private” or “common value” type, and whether uncertainty is on the demand or supply side. These outcomes depend on variables that must be considered entirely unobservable not just for competition authorities but also for the optimistic empirical researcher. There is therefore no point in developing policy rules that address the effects uncovered in this literature. Even the most extreme rule of reason approach in which we look at every single case would lead to the result that we could not distinguish between a case in which the exchange of information is good and one where it would be bad. In more formal terms: in order to assess type I and type II errors we would have to be sure that we knew something about the structure of uncertainty affecting demand and costs in the minds of the firms. That seems a hopeless endeavor.

There is a further reason why intervention against information exchange in settings with market power appears questionable. Whenever information exchange is welfare (or consumer surplus) reducing in information exchange models, the private acquisition of information would typically be welfare (or consumer surplus) reducing as well. By the same argument that we would restrict *information exchange between firms* we should also restrict *unilateral information acquisition* by a firm with some market power.

For these reasons the literature on information exchange in static oligopoly models cannot provide any basis for policy rules on information exchange. The primary concern of the economic literature about

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<sup>1</sup> In markets with quantity setting an increase in information on demand will lead to stronger adjustment of quantities to the realization of demand. This enhances both rent extraction by the firm with market power and consumer surplus.

information exchange is therefore in its potential for facilitating explicit or implicit collusion. I will therefore concentrate my discussion of competition policy concerns on this issue.

### 2.3. *Information Exchange and Collusion*

In the absence of enforceable contracts collusion – whether of the explicit or tacit variety - faces two fundamental problems: punishment for cheating and coordination on a collusive norm.

First, any deviation from what is understood to be the collusive norm has to be “punished” in the sense that firms’ policies must become more aggressive after what is considered a deviation and must be more cooperative after what is considered compliance with the collusive norm. If there is no such contingent response from competitors, short run incentives to increase market share will lead to deviation from any collusive norm. What is then critical is that deviation from the norm is detected so that punishment can be triggered. If it is very hard to figure out whether low profits were a result of ‘cheating’ by a rival or low demand, the contingent response to cheating cannot effectively be triggered and collusive outcomes become unlikely. In this context information exchange about market conditions or past behavior of rivals can facilitate monitoring of compliance in the past and ensure efficient triggering of the punishment mechanism.

The second problem for any collusive behavior is to establish a collusive norm and a common understanding of the punishment mechanism. There are many ways to interact in the market and many ways to collude. In formal game theoretic terms there are many, many equilibria to collusion games and coordinating on a specific one is a very hard task. But we do not have to take these theoretical models literally for this to be a valid point. It is simply the case that without a broad common understanding of what the collusive norm is and what to expect in form of punishment behavior in the future collusion – whether tacit or explicit cannot exist. There is ample evidence from the empirical literature (see Levenstein and Suslow, Genesove and Mullin) that this problem of coordination is a fundamental one even for explicit cartels.

It should be noted that the type of information exchange that can lead to coordination is always what economists call “cheap talk”. The idea that cheap talk does not matter has long been dismissed by the experimental literature. The idea that cheap talk communication about planned future conduct can be essential to achieving cooperation in coordination games has in the last decade been strongly supported by experimental work on coordination games (see Van Huyck et al., Cooper, Forsythe, deJong etc.). In fact we have learned that the more specific the communication is targeted at coordination, the better the outcomes achieved (see Brandts and Cooper various). Recent experimental work on collusion models by Cooper and Kühn (2010) suggests that coordination not just on the collusive price but also on the punishments may be very important to systematically sustain collusive outcomes.<sup>2</sup>

Both communication with a monitoring function and communication with a coordination function are referred to as “information exchange” in the current policy literature. They are, however, fundamentally different in the sense that the first is about monitoring past behavior, while the second is about facilitating the coordination of future plans. I have in previous publications written about this difference as “communication about past data” and “communication on future conduct”. Since this has sometimes led to misunderstandings, I will here use labels that focus more directly on the *function* of the communication itself: “information exchange with a monitoring effect” and “information exchange with a coordinating

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<sup>2</sup> This paper has also provided further evidence to previous literature in other settings (see Charness and Dufwenberg, ...) that cheap talk might not be cheap in the sense that individuals may care about what is said and that beyond a simple coordination function communication as social interaction can facilitate cooperation.

effect". I will discuss in the rest of this paper that these two types of information exchange require fundamentally different treatment in competition policy.

### **3. The Design of Optimal Policy Towards Information Exchange**

#### **3.1. *The Incentive Effects of an Optimal Policy***

The goal of an optimal policy is not that every offender gets punished or that it reliably leads to the detection of harmful behavior by firms. Once the behavior has occurred society has already suffered the inefficiency. Punishments or fines by themselves will not restore the efficient outcome. What economists would like to see in place are policies that generate the right incentive effects for firm to avoid socially harmful behavior and continue socially beneficial behaviors. When designing a set of rules for the treatment of information exchange it is therefore essential create rules that have desirable incentive effects.

I will now explain with a stylized example why such rules are not necessarily rules that will lead to the detection of every harmful act. I will show that even in a world of unlimited resources on the side of competition authorities a case by case approach that perfectly distinguishes every harmful act from every innocent act (i.e. an extreme form of the rule of reason) cannot be optimal. To see the point consider a specific type of information exchange which could be good or bad. Further suppose that in 5% of the cases we know that additional information can show that the information exchange is bad in those specific cases and in 95% of the cases we know that there is no anticompetitive effect. Let us also assume that we are very good at our analysis so that we find harm if and only if there has been harm. Hence there are no type I or type II errors.

I claim that this is still not a good policy if we cannot specify ex-ante what additional information would lead us to a finding of harm. Firms are notoriously bad in understanding what raises concerns in the eyes of competition authorities. If the competition authority itself cannot specify what characteristic of the market would make the information exchange agreement anticompetitive, the firm does not have the information that would allow it to avoid the information exchange in case that it is anticompetitive. The policy would therefore have no incentive effect even though it minimized type I and type II errors and perfectly detected cases of concern.

I think this issue of incentive effects has been widely overlooked in the recent discussions about competition policy rules towards information exchange. For example in the draft guidelines on horizontal co-operation agreements of the European Commission it is suggested in several parts that the Commission may infer that an information agreement on aggregate data is anticompetitive. For example it is suggested that in an oligopoly with 3 firms with joint market share of 80% and stable demand the exchange of aggregate cost information could lead to collusion and therefore could be blocked. Either this means that in highly concentrated markets like this one aggregate information exchange on cost data is not allowed, or it means that it is unclear, which additional factor would make the exchange anticompetitive. The incentive effects of such an unclear rule are either that in markets with high concentration firms will not exchange benchmarking cost information – one of the activities with potentially the highest efficiency effects. Or such firms will still exchange such information. Thus the decision would not be conditioned on the factors that make the exchange anticompetitive. It appears to me that this formulation of the guidelines was more geared towards catching every possible anticompetitive effect ex-post rather than looking at what is relevant: the ex-ante incentive effect.

The first general insight of this discussion is: If we cannot deter it we should not prosecute it. The second general insight is that a focus on type I and type II errors leads us astray because it takes an ex-post perspective focusing on the assessment of behavior. An optimal policy takes an ex-ante perspective: We

need to focus on what type of behavior the policy can deter and what the potential cost of this deterrence effect is in terms of desired behavior that is avoided.

### **3.2. *The Importance of the Costs of Avoidance***

If we cannot fully specify ex-ante what type of information would in an investigation discriminate between anticompetitive information exchanges and innocent exchanges, we will necessarily deter innocent behavior. Suppose we had a presumption that information exchanges on highly disaggregated information was illegal (except for some very convincing efficiencies in special circumstances). If the main innocent reason for an exchange of disaggregated data is that it was a bit more work to eliminate disaggregated data from a spreadsheet, then the cost of such a rule to the firms is minimal. While we might have many innocent cases of disaggregated information exchanges in the absence of such a rule, the rule would dramatically change behavior without inducing serious social costs. In the few cases in which it is important to prevent collusive conduct through improved individual monitoring it would nevertheless have a large beneficial effect for maintaining competition in the market.

The types of rules we should look for are ones where the avoidance of the type of information exchange scheme has small costs because the available alternatives have almost the same value for the firms, but where the dangers that the information can facilitate collusive behavior are particularly large.

### **3.3. *Safe Harbor Conditions are Important for Strong Incentive Effects of the Policy***

Let us continue with the above example of an information exchange scheme on costs. The reason a policy to restrict disaggregated exchanges may have good incentive effects is if there is an alternative available that has similar benefits but is much less likely to become an antitrust liability.

Suppose, for example, that a disaggregated information exchange would always be challenged if detected, but that there was a perception that an aggregate exchange also had a high likelihood of being challenged. There is then less of an incentive to avoid the disaggregated scheme because the reduction in antitrust liability coming from adopting the aggregated scheme would be much smaller than if the aggregated scheme were part of a safe Harbor condition. The good property of a safe harbor condition is that it completely eliminates antitrust liability for the firm. It offers a safe strategy. Any deviation from such a safe strategy will require careful consideration by the firms why exactly an information exchange regime that goes beyond the safe Harbor is necessary to obtain tangible benefits. This means that either firms will be able to specify very clear efficiency benefits that they could not obtain otherwise or the disaggregation is part of an anticompetitive scheme (as is often the case in explicit cartels). In other words, a safe Harbor condition increases the opportunity cost of choosing an information exchange system that has characteristics that are of concern to competition authorities. As a result the ex-post discrimination between innocent and objectionable schemes gets easier.

Note that a safe Harbor condition is not just important in order to limit the work load of the competition authorities. It is an important part of the overall incentive properties of an optimal policy.

### **3.4. *Summary***

A policy towards information exchange will only have real effects if it is clear to a firm which schemes to avoid when. Otherwise the policy can have no incentive effects and therefore cannot have any social benefits. Good policy rules will target information exchanges that have substantial impact on either coordination or monitoring while imposing low avoidance costs. Safe Harbor provisions increase the power of incentives leading to more reliable selection leaving only those firms to be scrutinized who either have large efficiency benefits from the problematic information exchange regime or have questionable

reasons for adopting the scheme. In the rest of the paper I discuss how these principles can be applied to create systematic and transparent set rules for dealing with information exchange in competition policy.

#### **4. The Usefulness of “Per-se Rules” or “Restrictions by Object”**

I will treat in this discussion the concept of “per-se rules” and “restrictions by object” (as used in the EU) as equivalent. While exemptions can be granted for restrictions by object in EU law, the burden of proof is so high that effectively there will not be a great difference between these concepts in practice. The question then becomes what kind of information exchanges should be candidates to fall under per-se prohibitions. For this discussion it is important to refer back to the distinction between information exchanges with a coordination effect and information exchanges with a monitoring effect.

Information exchanges with a monitoring effect are of much less concern for competition policy. The reason is that even in very transparent markets collusive conduct is far from automatic. In the absence of explicit collusion it remains difficult to coordinate behavior and conflicts of interest between different firms are pervasive. It is in fact surprising how often empirical studies that look for tacitly collusive behavior find fairly competitive conduct in markets that are considered quite transparent (Masuzek, 1999, Slade’s work on coordinated effects in beer mergers). We have no good evidence that suggest that tacit collusion is pervasive in highly transparent. In fact, evidence from explicit cartels often shows how fraught with difficulty it is to get different firms to agree on common conduct. Experimental evidence on the Cournot model (where we have a large sample of experiments) suggests that while tacit collusion occurs with 2 firms but not with more (see Huck, Normann, and Oechsler 2004).

This situation is dramatically different for information exchanges with a coordination effect, i.e. when firms can talk about future conduct. The experimental evidence on simple coordination games suggests a dramatic move towards the best coordinated equilibrium. Experimental work on collusion models (Davis and Holt, 1992; Cooper and Kühn 2010) has uncovered large short run effect of coordinating communication and large persistent long run effects when communication is rich (see Cooper and Kühn). When communication does not achieve coordination collusion does not work well. This suggests that communication that can lead to coordination is of much more concern to competition policy. Furthermore, communication that is targeted at coordination can also be much more easily distinguished from communication for efficiency purposes. It is therefore the main candidate for per-se policies.

##### **4.1. *Private Exchanges of Planned Price Setting***

The case of private exchanges of planned price setting is probably the least controversial to bring under a per-se rule. Indeed, from an economist’s perspective it is basically what we mean with explicit collusion. But in legal terms it may be useful to categorize them as illegal information exchanges because there may not be explicit agreements on behavior involved. However, it should be clear that any private exchange of plans on pricing between competitors has large anticompetitive potential. Furthermore it is hard to think of any efficiency reason that would make such an exchange efficiency enhancing. This is then a prime candidate for a per-se rule because the per-se rule generates the largest incentive effect but generates almost no costs.

The main issue in this case is whether the idea that avoidance costs are small is valid. Could there be important information benefits from communicating future prices? An interesting case in this context is the 1998 Banana case (Case COMP/39.188 — Bananas). In this case Banana producers agreed on “quotation prices”, which they communicated to banana ripeners. However contracts with the banana ripeners did not depend on these price quotations but on long run contracts. Ripeners in turn, after receiving this information, would start negotiating with a key retailing chain. The negotiated price would then become the price at which all other contracts settled. An economic reason whether collusive or innocent for the

“quotations prices” is hard to recognize for an economist. One might come up with an efficiency story in which the “quotation price” summarized information about banana supply that would be available at Northern European ports. Let us assume that this were the true reason for agreement on “quotations prices” would this be a reason to reject a per-se rule on talking about future prices? I think the answer is a clear “no”. There are simple alternatives available to communicate the state of the market, as, for example, the expected total quantity of bananas available that week and next. The relevant information about the market can be communicated without having to communicate privately about prices. The avoidance costs to the firms (and the ripeners) are therefore very low if the efficiency story were true. A clear per-se rule can therefore avoid any antitrust liability by the companies without much of a substantial cost in efficiency.

#### **4.2. *Private Exchanges of Production Plans***

While a lot of antitrust discussion on information exchange focuses on exchange of pricing intentions, coordination in production can actually be much more effective in achieving collusive outcomes. Quantities are often easier to monitor, especially in markets in which individualized price bargaining is common so that it is difficult to assess whether a specific price conforms to a collusive norm or not.

The question is again whether the exchange of production plans can contain information that is important to firms beyond a coordination purpose. For example, would it be more credible or understandable to communicate expectations about future demand through communications about planned production. Why would statement: “We expect demand to grow by x%” not be enough? Or does the production information summarize both demand and cost expectations at the same time, which would otherwise be hard to communicate? Doyle and Snyder (1999) seem to suggest such an interpretation of such information exchange schemes. But that argument could then also be made for exchanges of intended prices. On the other hand there are many industries in which demand forecast for the industry are published by the industry association. It seems that such forecasts should in principle be sufficient for decision making in an industry. I therefore tend to think that communication about production plans should be treated in the same way as communication about planned prices.

#### **4.3. *Communication about Investment Plans***

However, it is also important to stress that not everything that is communication about future conduct should come under a per-se prohibition. Investments and market entry belong into this category. First, investment decisions are much more long run decisions with much greater irreversibility. Coordination in investment behavior (or entry) is generally seen as unlikely by economists and there are results in the literature that irreversibility in investment dramatically undermines the scope for collusion (see Kühn 2008). The concern that such information exchange can lead to coordinated behavior is therefore much lower.

At the same time there are many more potential efficiency effects. Investment plans generally need to be communicated to the financial markets under disclosure rules. Announcements of investment to competitors (at the stage that they become irreversible) enhance pre-emption incentives, which is likely to accelerate investments in markets. And such announcements can also avoid duplication of investments.

At the same time investment and entry can be subject to coordination benefits (rather than costs). The case of South Indian Fisheries discussed by Jensen (2007) is a case in point in which entry into different local markets has a coordination benefit by avoiding excess supply in one market and insufficient supply in another.

This shows that in case of investment and entry decisions the collusion is much less of a concern while avoidance costs can be quite large. This is therefore a bad candidate for a per-se rule. It therefore



follows that generally private communication about short run intended market behavior should probably fall under a per-se rule while communication about long run and irreversible intended decisions should not.

#### **4.4. *The Distinction between Private vs. Public Exchanges***

While it is correct to say that public announcements about pricing plans have the potential to be much less problematic, one does have to make very careful distinctions. These communications are less problematic if consumers can benefit from them by conditioning their purchase behavior on announced price changes. If a firm simply announces “We, company x, will raise our prices by 5% on July 1<sup>st</sup>”, this is not obviously a coordinating type of communication. There are easily benefits to customers from advance notice of price developments in the market. There is therefore no good reason to include such public announcements in a per-se prohibition. The coordinating effect of such an announcement is questionable and the avoidance cost is potentially high.

But there may be other public communications that have an obvious coordination function and should be considered per-se illegal. For example, suppose the CEO of a firm makes the following public statement at a news conference: “We believe that a price increase of 5% next year is realistic if the industry behaves more responsibly”. This is a statement that is about the behavior of the industry as a whole and how it should behave. There is no reason for a CEO to talk publicly about what the pricing behavior of other firms should be. Note that a rule that says that a CEO should not talk publicly about what competitors should do or what the “industry” should do would be the type of rule that would have strong incentive effects because it is clearly interpretable by firms. It is also hard to see why avoiding such statements would ever lead to inefficiencies.

To see this note that the CEO could still communicate his or her prediction for the market as in: “We believe that under current market developments we will be able to achieve a price increase of 5% next year”. Note that statements of this type could theoretically still be used to coordinate behavior, but it is much more difficult because it is harder to signal the coordinating intent. At the same time there is no rule that could distinguish circumstances under which the latter statement would have anticompetitive effects and when it would be primarily important for reporting to the financial markets. The mere possibility that the statement could have a coordinating effect is therefore not a reason to investigate the firm in the case of the above statement.

#### **4.5. *Can Exchanges on Past Data be Coordinating?***

It has sometimes been suggested (including in the draft guidelines on horizontal cooperation agreements) that information exchange on, for example, cost data could create a focal point for collusion and thus be coordinating. This would then be an information exchange that would generate significant concern. Fortunately, this argument appears to be highly speculative and lacks any base in empirical fact. While it is not a logical impossibility that firms might spontaneously understand from an exchange of cost information what collusive price to coordinate on, it appears highly implausible. There is no empirical data with which one could hope to verify or falsify this claim. However, we do know from experimental work that coordination generally requires fairly specific suggestions to be successful. This does not appear to be the case here.

Even if we did consider this claim to be plausible there remains a fundamental problem for considering it for policy. A policy rule presumably would have to specify that: “information exchange on costs is illegal if it can serve to create a focal point for coordinated behavior”. The obvious question for a firm is: “When is that the case?” It appears that the only answer that could be given to that is: “We can’t say that at a general level, we would have to look at the specific case”. Such a policy rule will therefore have no incentive effect and therefore irrelevant for improving the competitive conditions in markets.

## 5. Safe Harbors

As we have discussed safe harbors do not just limit the case load of competition authorities and give firms greater legal certainty, they also improve the incentive properties of the competition rules by creating low risk options for antitrust compliance. What kind of information exchanges should then be subject to safe harbor provisions? We will discuss this issue purely for information exchanges with monitoring function.

First, any type of information exchange for which we cannot specify circumstances under which the information exchange would be prohibited should not come under scrutiny. The reason is that it is highly inefficient to review cases when the policy cannot have an incentive effect on ex-ante behavior. Second, we should put information exchange schemes with low impact on the ability to monitor compliance with coordinated conduct and high expected efficiency benefits in this category.

### 5.1. *Sporadic Information Exchanges*

In many specific information exchange cases evidence is used where an individual has obtained specific information about the behavior in a competing firm. This is then taken as evidence for a disaggregated information exchange, which is considered of significant concern. Such arguments ignore the theoretical basis for concerns about information exchange as a monitoring instrument. What is critical for monitoring to work is not just that a firm systematically monitors another firm's behavior. It must also know that it is systematically monitored by the other firm. In sporadic information exchange these conditions are typically not given. This means that often a firm does not know that it may trigger punishment because it does not know that it was monitored. Similarly, monitoring in a single instance cannot really support a persistent collusive scheme. Evidence that monitoring is sporadic indicates that no systematic monitoring is in place and therefore coordinated conduct *less* likely.

### 5.2. *Information Exchange on Delivery Data*

There are many industries in which contracting takes place once or twice a year while delivery takes place more often. What is important for monitoring a collusive scheme are the conditions of the contract, not of the delivery. In order to see whether a firm has deviated from an explicit or implicit collusive agreement the information necessary is whether sales were higher than they should or price was lower. This means that total quantity over the contract term or the contract price are the relevant data to monitor. Once that data is available, high degrees of disaggregation of delivery data reveals no additional information that would be valuable for monitoring behavior in contract negotiations, which is the relevant issue for collusion.

Kühn and Caffarra (2006) illustrate this issue in the context of the market for jet fuel. In this market contracts are bid for on a yearly basis. Only monitoring of the yearly contract conditions are therefore relevant for monitoring in a collusive scheme. At the same time there was a very highly disaggregated scheme of information exchange of delivery data. This exchange on delivery was conducted within the joint ventures for storage of jet fuel. Since storage is at most airports a natural monopoly jet fuel providers jointly store and can draw on the stock. Monitoring of deliveries then becomes important because otherwise one firm could free ride on the stocks in the fuel tank provided by competitors. There is therefore a compelling reason for generating detailed information about short run deliveries. However, the disaggregation cannot possibly have an effect on collusion in contract bidding. This is an example that only information exchange on variables that are relevant for monitoring competitive behavior should ever be considered as potentially anticompetitive conduct.

### 5.3. *Cost Data*

Deviation from a collusive price or quantity by one firm will generally be reflected in low sales by another firm. The monitoring problem arises because the firm does not know whether the loss in sale (or lower price) was the result of a demand shock or a deviation of the other firm. In order to detect such deviations the firm will either need better information about the state of demand or information about the competitor's sales or price. Note that cost information about the competitor is not necessary in any way to detect deviations from cooperative behavior. The exchange of cost data is therefore generally irrelevant for monitoring the behavior of rivals.

The main way how cost information can help in collusion is by allowing firms to allocate market share according to costs in order to lower the incentives to deviate from collusion. While theoretically feasible, these are complicated arrangements that more often than not fail in explicit cartels. It is therefore highly implausible that there is a large danger of generating significantly more collusive conduct from an information exchange regime on costs. However, at the same time the gain from having disaggregated data on costs relative to some statistic (like lowest cost that would allow cost benchmarking) appears to be equally low. But aggregating cost data would make market share allocation based cost differences impossible making collusive conduct more difficult. Given the low avoidance costs it therefore makes sense to have presumption that information exchange on cost data disaggregated by firm should be considered anticompetitive. However, there is no argument from collusion theory that would justify limiting the exchange of cost data that is aggregated across firms (whatever the degree of aggregation over time is). There is therefore no basis to assume that there is a danger for competition from such information exchanges. The potential benefits from the exchange of cost information through strategies like benchmarking are at the same time particularly high. This is thus a clear case for a safe harbor rule.

### 5.4. *Swap Trades among Competitors*

In many homogeneous goods industries with significant transport costs and relatively centralized production facilities, firms with different production locations often engage in swap trades. These trades allow firm A to serve customers near firm B's production site with product from that site while firm B can serve customers near A's production site from A's production. Such swaps and other trades of this kind have large efficiency advantages because they eliminate transport costs that otherwise would have to be incurred.

Such arrangements often will also be pro-competitive. The reason is that contracts with customers are usually long term (say for a year). After contracts are agreed on, firms can then decide whether to engage in swap trades. If such trades were not possible, producer B would face higher marginal cost the producer A for customers located close to producer B. Such increased marginal cost would reduce competition for that customer. However, if producer A can anticipate that after the contract has been agreed on, he can obtain the product from producer B, the effective marginal cost is reduced by the transport cost. Producer A will thus compete much more effectively for customers close to producer B.

Despite of these efficiency enhancing and pro-competitive effects of product swaps between competitors such arrangements are regularly suspected of being anticompetitive information exchange agreements (see Italian Jet Fuel case as an example). In these cases product swap arrangements are interpreted as exchanges of disaggregated cost information. The logic is that by anticipating that the competitor will serve the customer from a swap agreement a firm will know the effective marginal cost of the competitor when competing for a specific customer. As we have discussed for information exchanges on cost, anticompetitive effects are particularly unlikely. There are even more unlikely in such cases because the effective information exchange only occurs on a small proportion of the contracts over which firms are in competition. At the same time the efficiency gains from such swaps are particularly large. That

combination of small competition risk and high avoidance cost for such arrangements should in itself exclude intervention by antitrust authorities.

However, again there is the temptation to actually review such cases in order to find those where the information effect of the swap might have had an anticompetitive effect. In this case we must again ask the question what incentive effects such a policy would have. Since no one is apparently able to specify special circumstances in which the information exchange effect of swaps might be found to be anti-competitive it is impossible for firms to avoid these arrangements only when they are anticompetitive. So either the policy has no incentive effects or it deters a (potentially vast) number of efficient arrangements. Product swaps should therefore be firmly in a safe harbor category.

### **5.5. *Sufficiently Aggregated Exchanges on Demand and Production Data***

Demand data is information about current or past realizations of demand (usually measured by looking at production) as well as demand forecasts for the future. Such demand data is of great importance for long run decisions on investment, but also for short run adjustments of firm strategy to market changes or internal incentive schemes that benchmark on market performance. There are a great many potential efficiencies from exchanges of such data and they are routinely included in the statistical programs of trade associations.

It is, of course, the case that any reduction in demand uncertainty will somewhat improve the monitoring of rival actions. The exchange of demand information will do so to some extent and therefore could have anticompetitive effects. However, to the extent that it does not lead to very precise information, as is the case with demand forecasts, the danger to competition is much lower than if information about actions (like prices or sales) is directly exchanged.

The important question from a policy perspective is whether we can identify circumstances ex-ante for which we would expect the likelihood of anticompetitive effects to be so high that we would want to give firms incentives to avoid such exchanges. This is generally seen to be the case with highly disaggregated exchanges. The reason that we believe this to be the case is not that a case by case analysis for disaggregated exchanges is likely to generate some additional information that allows us to discriminate between anticompetitive and efficiency enhancing schemes. However, we know that highly disaggregated exchanges are routinely adopted at the beginning of cartels – often in violation of the industry association information exchange rules (see Kühn and Vives 1995 for a discussion). We also know that the likelihood of efficiency benefits are much lower. Investment plans require the knowledge of current and expected demand, but not of a breakdown by competitor. Manager incentive schemes that benchmark on changes in market share or performance relative to the market do not require disaggregation by firm. In fact, this generates additional uncertainty that an optimal incentive scheme should avoid. There are similar arguments why some intertemporal aggregation would not greatly reduce the efficiency benefits of this type of information exchanges.

More importantly, we have absolutely no evidence that exchanges of yearly demand and production data, aggregated over the whole industry (which I will call “highly aggregated demand and production data”), have any material impact on the ability to tacitly or explicitly collude. We also have no criteria that would tell us what type information we would have to find for an ex-post analysis to reveal that such information exchange has anticompetitive effects. Hence, for highly aggregated data ex-post scrutiny will have no ex-ante incentive effect. It could generally make firms avoid all such exchanges, but that can hardly be an attractive outcome given that this is essential data for any firm planning to operate in the market. Given this analysis, there is no question that such data exchanges should come under a broad safe harbor clause.

It should be noted that some safe harbor clauses similar to the one suggested here appear in the draft European Commission guidelines. However, they always refer to historical data that is multiple times as old as the typical contract length in the market. In an example the draft refers to quarterly price setting and three year old data. The reason given is that relatively old data is not important for monitoring. The problem with this reasoning is that such old data is also commercially irrelevant and irrelevant for any of the potential efficiency reasons that firms might use data. Creating safe harbor provisions that are never commercially relevant is simply not very helpful. It also stems from a misconception of optimal policy rules because that is based on the application of Type I vs. Type II error logic. In this logic a scheme should only be in a safe harbor if the probability that anticompetitive effects arise is very low. In contrast, what matters for market outcomes is whether the rule can avoid the anticompetitive use of exchanges that in many cases would have efficiency benefits. This is not the case for most aggregated exchanges. Indeed, even information about prices, aggregated over firms and at a frequency of no higher than a year should probably not be scrutinized for exactly the same reason.

### **5.6. *Public vs. Private Information***

Could one build safe harbor rules for information exchanges with monitoring effect on the basis of the distinction between public and private information? I believe that in this area some distinctions are made that are irrelevant to the issue of information exchange and some distinctions are overlooked that are highly relevant.

First, it is sometimes argued that information exchange among firms should be regarded as irrelevant if the information is publicly available from third parties. If all firms have access to the data anyway, why should the information exchange matter? A closer look at the underlying collusion theory reveals the problem with this type of reasoning. What is important about monitoring as a condition for maintaining collusion is not just that a firm monitors the behavior of the competitors but also that the firms know that their behavior is monitored? If there was no agreement on what information was evaluated by all firms, the publicly available information could not have a monitoring effect. This means that just the fact that monitoring information is publicly available does not eliminate the concern about the scheme.

Second, it is often argued that firms making their information publicly available will reduce the concern about anticompetitive effects. This may be true in the sense that consumers may want to react to price announcements by changing the decisions of purchase timing. Financial markets often rely on announcements of the firms about demand and price developments. This is information that is valuable beyond any coordination or monitoring role that could be achieved purely through private exchange. However, there are also some arguments that are more dubious. For example, it has been suggested that making the information public will increase competition with firms outside the exchange or make customers react in ways that limit market power. This is a claim that has little basis in economic theory. If an information exchange increases competition then it increases it among the exchanging firms already and it remains unclear why such a scheme would be adopted in the first place. As Kühn and Vives (1995) have observed, even private information exchanges can help firms that are not part of the change to increase their profits. They discuss that an information exchange may either increase or decrease incentives for entry.

For all these reasons, distinctions between public and non-public data as well as between public and non-public information exchanges are not useful as a broad organizing principle for policy rules.

## **6. A Procedure for Evaluating Exchanges Falling under a Rule of Reason Approach**

As a result of the previous discussion it becomes clear that the area of intensified scrutiny should be on information exchanges that lead to fairly high degrees of disaggregation of data across individual firms,

over time, or in geographic space. By creating a broad safe haven range of agreements we would expect to see such exchanges only when they are either anticompetitive or when the efficiency gains of disaggregating information are particularly high. We therefore have a much greater hope of identifying ex-post whether we are in one or the other category.

But note that the main additional information we have to discriminate between schemes in this case is the fact that it is much harder to find efficiency reasons for disaggregated information exchanges that could not be replicated with higher degrees of aggregation. For example, for highly aggregated data in the previous sense it was easy to see many efficiency reasons and it was known that firms routinely use such data for entirely innocent purposes. There is no hope to discriminate between schemes on the basis of the claimed efficiency effects. Because this is different for aggregate schemes it makes sense to scrutinize these.

However, since the main discriminating information we have, comes from the efficiency claims, this suggests a presumption that disaggregated information exchanges are anticompetitive unless convincing efficiencies are claimed. Such an approach could still lead to over-enforcement because one might even intervene in cases in which the ex-ante likelihood of collusive conduct is small and the marginal impact of the information exchange agreement may be small as well. Intervention, especially when combined with fines, should take into account that it is not worthwhile spending effort on cases with small likely impact on market behavior.

For this reason I would suggest a three step approach to the scrutiny of information exchanges that do not fall under the per-se rule or the safe harbor rule:

1. A clearly specified theory of how information exchange would lead to monitoring or coordination effects in this specific market. If there are market characteristics (like strong asymmetries between firms, highly fragmented markets) that make coordinated behavior unlikely the case should end.
2. An analysis of the marginal impact of the information exchange on monitoring or the scope for coordination in the market. If the marginal impact appears small, the case should be closed. However, if in step 1 and 2 the case is not close there should be a presumption that the information exchange is anticompetitive.
3. An efficiency defense should be considered. If the claimed efficiency can be obtained with a higher degree of aggregation, the information exchanges scheme should then be considered illegal. However, if the degree of disaggregation of information is necessary to achieve the efficiency effect the agreement should generally be cleared.

This scheme appears very lenient in its assessment of claimed efficiencies that cannot be replicated with aggregate data. The reason for this procedure is simple. A quantitative evaluation of the size of the efficiency effects is basically impossible. Evaluating the size of efficiencies in mergers is already a very hard task and we generally hope to get reasonable back of the envelope estimates from engineering figures. There is no reasonable hope for obtaining this kind of assessment for information exchanges. I certainly cannot imagine any empirical economic approach that could identify such an effect from data available in a real case. The idea that one could furthermore require that such efficiencies would have to be passed through sufficiently to the customer in order to be considered is light years removed from reality.

The question to address is: What are we attempting to do with our competition rule. We are trying to distinguish between information exchange schemes that have efficiency benefits and those that most likely will lead to anticompetitive effects. We want to convince firms to only consider highly disaggregated

schemes if they can make a very convincing case that they regard the efficiency effects as important and have a plausible enough story that their efficiency effect cannot be replicated in a different manner. That is hard to do for firms and therefore a very costly signal. However, we know that costly signals are effective instruments to distinguish between firms. At that point it is not a trade-off between pro-competitive and anti-competitive effects of an exchange. When a firm has passed the hurdle of showing that disaggregation was necessary for the efficiency to be obtained then it is highly unlikely that the scheme is aimed at coordinated conduct. It should therefore be allowed.

## **7. Is Information Exchange a Substitute for Hard Evidence on Collusion?**

In the previous section I have discussed the assessment of information exchanges with potential monitoring effect as isolated agreements between firms. But often these agreements will be analyzed in a broader investigation of industries when there is no hard evidence for a cartel, but competition authorities are suspicious about market behavior. Can an observation of information exchange affect the inference one can draw from otherwise inconclusive data?

One style of argument (represented by the Italian Jet Fuel case as argued in Caffarra and Kühn 2006) is to consider information exchanges plus factors in a “parallel pricing plus” standard (or generally parallel behavior plus). But can the presence of information exchange ever allow for the conclusion that the parallel behavior observed is more likely to come from collusion than from competition? The answer is: No! Information exchanges will make behavior more highly correlated and may as a result lead to lower market share volatility than in a market without information exchange – even when there is a very competitive environment. Neither parallel prices nor information exchanges make collusive behavior more likely by themselves and just cumulating the two has no impact on that conclusion.

What would be suspicious (as Kühn and Vives 1995 have pointed out), is when firms start disaggregating data much more finely around a point in time in which prices dramatically increase. This is a typical pattern that occurs at the start of a cartel, i.e. a concerted increase in prices is associated with a greater effort to monitor the behavior of rivals. But this is not the same as observing price parallelism and a disaggregated information exchange agreement. The timing of changes in both pricing *and* information exchange policies is what makes the behavior much more suspicious.

## **8. Conclusions**

In this paper I have focused on the problem of competition policy design for the treatment of information exchanges. I have argued that a crucial aspect of any competition policy rule is the degree to which it gives incentives to firms to avoid anticompetitive exchanges and maintain efficiency enhancing ones. I have argued that a policy that cannot specify ex-ante what the grounds for intervention would be, has no serious incentive effects and is therefore not useful for policy.

These considerations generate much simpler rules than have been considered in the recent discussion. They do justify fairly broad per-se rules against coordinating communication that should always be about future behavior. However, at the same time it suggests that the vast majority of information exchanges should fall under a broad safe harbor rule. All types of exchanges that have traditionally been part of standard trade association statistical programs have the property that one would not be able to tell ex-ante when they would be abused for anticompetitive purposes. Ex-post intervention is therefore not appropriate. This analysis also reveals an overlooked rationale to the traditional distinction between the exchange of aggregated and disaggregated data. While for the former it is hard to specify conditions under which anticompetitive effects are likely, for the latter it is hard to come up with generally applicable efficiency reasons. Because of a safe harbor for aggregate exchanges, only firms with substantial efficiency benefits

from disaggregate information (that are discernable in ex-post scrutiny) will choose to exchange disaggregate information.

Recent discussions about the reform of rules for information exchanges in competition policy have attempted to integrate theory much more closely into the policy design. Unfortunately, this has led to a focus on possibility results. However, and economic analysis that considers the incentive effects of policies can help guide a much clearer approach to policy design that cuts through the bewildering jungle of possibilities. Such an approach reminds us that the policy is not about catching offenders but giving incentives to firms to avoid actions that might lead to anticompetitive results in the first place.



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**NOTE BY PROFESSOR JORGE PADILLA\*:**

**The elusive challenge of assessing information sharing among competitors under the competition laws**

*That was a little bit more information than I needed to know.  
(Pulp Fiction, 1994, spoken by Uma Thurman)*

**1. Introduction**

The competitive assessment of information sharing among competitors is one of the more complex issues, if not the most difficult issue, in competition economics and law.

As is well-known information exchanges can be pro-competitive or anti-competitive, and they often make no difference at all. A strand of the economics literature has identified circumstances when information sharing among competitors may facilitate the efficient functioning of markets and enhance competition.<sup>1</sup> Another strand has found that the exchange of commercially sensitive information may under certain circumstances facilitate tacit collusion and thus harm consumers.<sup>2</sup> Other contributions have discussed the impact of those exchanges of information on the strength of competition absent any tacit or explicit co-ordination. They have found that those exchanges may relax or strengthen competition depending on the nature of the uncertainty that they contribute to reduce (demand uncertainty or uncertainty over costs) and the mode of competition (prices or quantities).<sup>3</sup> Finally, a fourth strand of the literature has discussed whether a mere exchange of information involving no commitment to adopt any particular course of action can have a real effect on competition.<sup>4</sup> Some authors conclude that “cheap talk” cannot condition the behaviour of rational, profit-maximising agents, while others maintain the exact opposite conclusion, and an impartial reading of suggests that it all depends.

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<sup>1</sup> See, for example, R. Jensen, “The Digital Provide: Information (Technology), Market Performance, and Welfare in the South Indian Fisheries Sector”, *The Quarterly Journal of Economics*, 2007; and J. Padilla and M Pagano, “Sharing Default Information as a Borrower Discipline Device”, *European Economic Review*, 1999.

<sup>2</sup> See among others M. Ivaldi, B. Jullien, P. Rey, P. Seabright and J. Tirole, “The Economics of Tacit Collusion”, report for DG Competition, European Commission, 2003; and M. Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, 2004.

<sup>3</sup> See K-U. Kühn and X. Vives, “Information Exchanges among Firms and their Impact on Competition”, Office for Official Publications of the European Community, Luxembourg, 1995.

<sup>4</sup> See J. Farrell and M. Rabin, “Cheap Talk”, *Journal of Economic Perspectives*, 1996 and references therein.

This multiplicity of approaches would pose no significant problem if the various strands of the literature provided clear-cut “identification” results. Unfortunately, this is not the case. All that we have at this stage is a large number of “possibility” results. For example, we are told that the exchange of future intentions *may* facilitate tacit collusion by helping competitors reach a focal point for co-ordination. Yet the literature does not tell us under which precise circumstances such an exchange of information will allow competitors to identify a focal point and co-ordinate in practice. To make things even more complicated, the economics literature also finds that the exchange of future intentions *may* enhance competition,<sup>5</sup> but once again it fails to provide the tools – i.e., the identification results – needed to distinguish between pro-competitive and anti-competitive exchanges of future intentions.

Because of these limitations, the competitive assessment of information sharing among competitors is bound to cause significant type I and type II errors. Information exchanges that are pro-competitive or can have no effect on competition may be found to be anti-competitive (a type I error), while exchanges that are anti-competitive may be left unchallenged (a type II error).<sup>6</sup>

The relative frequency and cost of those two types of error will be influenced by the nature and character of the legal rules that are used to assess the exchanges of information among competitors. A *per se* illegality rule – i.e., a rule that condemns all exchanges of information among competitors – will cause many type I errors and no type II error. The opposite is true for a *per se* legality rule that leaves all information exchanges unchallenged; such a rule would lead to many type II errors but no type I error. Given the lack of identification results in the economics literature, a case-by-case approach (or set of rules), which determine the pro- or anti-competitive character of an information exchange on the basis of the nature of the information exchange and the characteristics of the market or markets where the firms sharing information compete, will likely cause both types of error. The likelihood of each type of error will depend on the precise rules used to identify anti-competitive exchanges.

While a legal rule (or set of rules) may lead to fewer type I and/or type II errors, no rule will be able to eliminate all errors. In fact, any attempt to reduce one type of error will tend to make the other type more likely. A pragmatic rulemaker will therefore focus on designing rules that minimise the expected cost of error. The rule or rules she selects must be easy to understand and internalise by firms, and should be enforceable at a reasonable cost.

Because information exchanges among competitors may have both pro-competitive and anti-competitive effects, it would seem that the right approach would consist in assessing them on a case-by-case basis under the so called “rule of reason”. However, as noted by Matthew Bennett and Philip Collins in an excellent paper that provides an exhaustive overview of the law and economics of information sharing,<sup>7</sup> a case-by-case analysis places a high burden on (a) firms, who may not be in a position to perform the complex economic analysis required, and (b) on competition authorities and private claimants in bringing cases. Therefore, a case-by-case approach risks chilling pro-competitive exchanges of information (thus causing too many type I errors) while, at the same time, may lead to insufficient deterrence of anticompetitive behaviour (i.e., too many type II errors).

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<sup>5</sup> See section 4 below for an example.

<sup>6</sup> The application of the error-cost framework to the design of antitrust rules was pioneered by F. H. Easterbrook, “The Limits of Antitrust”, *Texas Law Review*, 1984. For a more recent discussion of its relevance, see D. S. Evans and J. Padilla, “Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach”, *University of Chicago Law Review*, 2005.

<sup>7</sup> M. Bennett and P. Collins, “The Law and Economics of Information Sharing”, *European Competition Journal*, 2010.

This is why, as explained by Bennett *et al.*,<sup>8</sup> it may make economic sense to restrict the scope of the rule of reason. In particular, it may be reasonable to attribute a presumption of illegality to exchanges of information which are very likely to have an anti-competitive effect and highly unlikely to have an objective justification or pro-competitive motivation.<sup>9</sup> In other words, it may be appropriate that an information exchange be presumed illegal if its condemnation is unlikely to cause costly type I errors, while under-enforcement will likely cause costly type II errors.

In a thought-provoking contribution, Professor Kai-Uwe Kühn concluded that (a) private discussions of future output prices or production plans and (b) individualised information exchanges about past prices and quantities were both likely to cause significant anticompetitive effects but unlikely to give rise to any efficiencies.<sup>10</sup> From an error-cost perspective, following Bennett *et al.*, those information exchanges would therefore be candidates for a presumption of illegality.

In this paper I examine whether it is indeed justified to restrict the scope of the rule of reason when assessing the competitive character of an information sharing scheme by identifying a category of information exchanges that are presumed illegal. In addition, I consider whether (a) any private discussion of future output prices or production plans and (b) any individualised information exchange about past prices and quantities should be presumed illegal or whether these exchanges should also be analysed under the rule of reason on a case-by-case basis.

This is not just an academic enquiry. In Europe, certain exchanges of information – those that are regarded as restrictions by object – are indeed presumed to be illegal within the meaning of Article 101(1) TFEU. Such exchanges are considered illegal unless that presumption can be rebutted due to the particular circumstances of the case, or it can be shown that they meet the conditions for exemption under Article 101(3) TFEU. Furthermore, the European Commission's *Draft Guidelines on horizontal co-operation agreements* state that an information exchange among competitors constitutes an infringement by object if (1) it is part of a cartel, (2) it involves the sharing of individualised data on future commercial behaviour, and (3) it involves the sharing of individualised data on current conduct that reveals intentions on future behaviour.<sup>11</sup> Conditions (1) – (3) are not cumulative; each of them is a sufficient condition for object infringement. Conditions (2) and (3) in the *Draft Guidelines* are related to Professor Kühn's condition (a), except that they treat private and public exchanges of information as equally problematic from a competition viewpoint.

The remainder of the paper is organised as follows. In Section 2, I discuss whether any private discussion of future output prices or production plans should be presumed anti-competitive and thus contrary to the competition laws. Likewise, in section 3, I assess whether any individualised information exchange about past prices and quantities should be presumed anti-competitive and thus illegal. In section 4, I deal with the more general issue of whether it is indeed justified to restrict the scope of the rule of reason by identifying a category of information exchanges that are presumed illegal. I base my conclusions in sections 2 to 4 on a careful reading of the economics literature, as well as on the application of the error-cost framework. Section 5 concludes with some practical policy recommendations.

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<sup>8</sup> See, M. Bennett, A. Fletcher, E. Giovannetti and D. Stallibrass, "Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy", in B. E. Hawk (ed.), *International Antitrust Law & Policy: Fordham Competition Law 2009*, New York, Juris Publishing, 2010.

<sup>9</sup> See Kai-Uwe Kühn, "Fighting collusion by regulating communication between firms", *Economic Policy*, 2001.

<sup>10</sup> *Id.*, at page 196.

<sup>11</sup> European Commission, *Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, Brussels, SEC(2010) 528/2.

## 2. Should all private exchanges of future information be presumed anti-competitive?

I do not agree with the proposition that any exchange of information on future behaviour, be it private or public, should be regarded as automatically harmful. On the contrary, I believe that a rule that treats those exchanges of information as presumptively illegal is likely to cause costly type I errors by deterring efficient exchanges of future information. Such a rule would create a bias against practices that are not more likely to cause anti-competitive effects and/or less likely to give rise to efficiencies than other practices that would be treated more leniently.

My opinion is based on the following arguments.

### 2.1 *Potential anti-competitive harm*

Sharing information on future behaviour will not cause any harm if the affected market does not otherwise exhibit characteristics which make it amenable to collusion. The increase in market transparency may facilitate reaching a focal point and may also facilitate monitoring compliance with the tacitly co-ordinated outcome, but it does not guarantee in itself that such an outcome is internally and externally stable.

Consider, for example, a market where future market supply is predetermined by the time the information is exchanged.<sup>12</sup> In that case sharing future price intentions cannot produce anti-competitive effects. And if a practice cannot have an anti-competitive effect, then it is illogical to consider it a restriction by object.<sup>13</sup>

Whether the sharing of individualised information on future intentions is likely to be anti-competitive also depends on its market coverage. Note that in an industry where many firms compete, bilateral information exchanges, whether they refer to current or future information, are unlikely to pose a competitive threat. This is because a collusive outcome requires a high degree of co-ordination from the major firms in the market, which may not be achievable using bilateral agreements.

As noted by William Baumol,

*In every technology exchange program of which I am aware, the negotiation and supervision of the arrangements are strictly bilateral. [...] Such a "pairwise" mode of operation seems unlikely to permit the degree of co-ordination that is necessary for effectiveness in fixing prices or in agreeing to hold down R&D outlays.<sup>14</sup>*

The nature and the amount of the information exchange also matters. Suppose firms compete on many dimensions. It is well known, for example, banks compete in the deposit market by setting interest rates and a large number of commission rates. They also compete on many non-price dimensions, such as the

<sup>12</sup> As in the Kerala fishing industry investigated by Robert Jensen (see note 1) and discussed below.

<sup>13</sup> Of course, this raises the question of why would firms share their future pricing or quantity intentions if they cannot change the market price. The answer is that in the presence of demand uncertainty that may facilitate allocating production among different locations more efficiently (like in the Kerala example below) and increasing the efficiency of the market clearing process in markets, such as those involving perishable goods, where time is of the essence.

<sup>14</sup> W. Baumol, "When is Inter-firm Coordination Beneficial? The Case of Innovation", *International Journal of Industrial Organization*, 2001.

number of branches or the breadth and quality of their ATM networks.<sup>15</sup> Any attempt to co-ordinate on a few of those competition dimensions by sharing information on future intentions and behaviour would be meaningless. Suppose banks exchanged future information on a subset of all commission rates charged to customers, such an agreement could not be sustained unless they also co-ordinated the other dimensions on which they compete. Otherwise, banks would undercut each other by competing aggressively along all other price and non-price dimensions.

## 2.2 *Pro-competitive effects*

Exchanging information on future behaviour may have significant pro-competitive effects. Robert Jensen has shown using micro-level survey data that the adoption of mobile phones by fishermen and wholesalers the Indian state of Kerala had a positive impact on both consumer and producer welfare.<sup>16</sup> Fishermen used the new information technologies to co-ordinate among themselves and allocate the ports at which they would transport their cargos. This allowed them to engage in optimal arbitrage, which led to a dramatic reduction in price dispersion and the complete elimination of waste.

The example of the Kerala fishermen is not the exception that confirms the rule. In the case of R&D, uncertainty about which features customers want may cause firms to under-invest in profitable projects or to engage in redundant and wasteful investments. Both of these outcomes are bad for consumer welfare. If the exchange of information about future R&D plans increases the probability of investment success – for example by making clear which areas are redundant – this will be good for consumers. If it also increases the probability that firms invest in the same area and so provide competing products, then, so long as the information does not increase the probability of co-ordination on prices, this will tend to increase competition rather than reduce it.

Consider a typical information industry where customers have a strong desire to avoid becoming locked-in and exploited.<sup>17</sup> Customers can be reluctant to purchase from a firm if it is the only firm producing that information product (e.g., software, hardware, telecommunications equipment, etc.) or if that product cannot interoperate with others. Competing suppliers will have an incentive to exchange their future R&D plans to ensure that their new products can mix and match. If that communication were limited by law, the innovation process would be thwarted and, to the extent that interoperability is made more difficult or imperfect, customers may have to pay higher prices over time.

In fact, competing suppliers may have an incentive to go beyond sharing their future R&D plans in order to respond to their customers' lock-in concerns. For example, they may engage in joint R&D investments in order to ensure that customers are not locked into a single source for a product. This may help jump starting a market that otherwise would not have developed.<sup>18</sup>

Let me offer yet another example of a non-binding communication of future intentions that is welfare enhancing. Competitors relying on a standardised technology may find themselves trapped in an obsolete an inferior standard even when there is a better technology available and they are all unanimous in their preference for the new technology. Joseph Farrell and Garth Saloner have shown that this form of “excess

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<sup>15</sup> C. Matutes and J. Padilla, “Shared ATM Networks and Banking Competition”, *European Economic Review*, 1994.

<sup>16</sup> Jensen, note 1.

<sup>17</sup> See C. Shapiro and H. Varian, *Information Rules*, Harvard Business Press, 1998, chapter 6.

<sup>18</sup> See J. Farrell and N. Gallini, “Second-Sourcing as a Commitment: Monopoly Incentives to Attract Competition”, *Quarterly Journal of Economics*, 1988.

inertia” can be eliminated if competitors communicate their preferences and intentions.<sup>19</sup> In this case, sharing information about future intentions solves a welfare-reducing co-ordination problem.

### 2.3 *Private v. public information*

Should we treat public exchanges of private information about future intentions as presumptively anti-competitive? I agree with Bennett and Collins that public announcements are easier to detect and prosecute and, therefore, that the risk of under-enforcement (i.e., the likelihood of type II errors) is smaller for these kind of announcements.<sup>20</sup> However, while this may indeed justify a more lenient treatment for information that is exchanged in public, I do not believe it justifies treating all private exchanges of information as presumptively anti-competitive while all public exchanges of information are analysed on a case-by-case basis.

*First*, I fail to see why sharing information in private is necessarily more likely to have an anti-competitive effect than sharing information in public. To see why, consider the following two scenarios.

The first scenario concerns a private exchange of volume information between two competitors in a market where those two firms compete with many other firms, firms are highly asymmetric, the market is contestable, and the demand side of the market is highly concentrated. The second scenario concerns a public exchange of current price information between all market competitors. The information is exchanged frequently and cannot be obtained outside the information exchange. The market is characterised by high barriers to entry and the demand side is highly fragmented.

It seems clear that the information exchanged in the first scenario is unlikely to cause anti-competitive effects, whereas the exchange of information in second scenario can likely facilitate collusion. There is thus no reason to treat the first information exchange more harshly than the second, even when the communication of future intentions in the first scenario is private while it is public in the second.

More generally, sharing private information that by its own nature is unlikely to help firms to reach a focal point or monitor an agreement in a market which is not amenable to collusion should not be given a more strict treatment than a public exchange of information which has the potential to facilitate collusion in a market where collusion is likely.

*Second*, I also fail to see why sharing information in private is necessarily less likely to give rise to efficiencies than sharing information in public. In fact, many of the examples of pro-competitive information exchanges in section 2.2 concern private exchanges of information. Fishermen in Kerala exchange information about the prices prevailing in the different ports where they could land their cargo among themselves. They did not make that information freely available to everyone at no cost. And, as noted by Baumol, R&D co-operation often takes place through bilateral exchanges of information.<sup>21</sup>

### 3. **Should all exchanges of individualised past information be presumed anti-competitive?**

I also disagree with the proposition that any exchange of individualised past information should be regarded as automatically anti-competitive and assessed under a presumption of illegality. On the one hand, I do not believe that all exchange of individualised past information can by their very nature cause

<sup>19</sup> See J. Farrell and G. Saloner, “Standardization, Compatibility and Innovation”, *Rand Journal of Economics*, 1985.

<sup>20</sup> Bennett and Collins, note 7, page 335.

<sup>21</sup> Baumol, note 14.



anti-competitive harm. On the other, there are examples of pro-competitive exchanges of individualised past information on prices and quantities.

### **3.1 *Potential anti-competitive harm***

While it is correct to say that sharing information about past commercial behaviour may facilitate co-ordination by increasing market transparency, whether an exchange is likely to facilitate collusion depends on the characteristics of the markets in question. For an information exchange to give rise to tacit collusion concerns, the market covered by the exchange must be amenable to co-ordination in the first place, or made it so as a result of the information exchange. The economics literature has identified that markets which are concentrated, stable and symmetric, and which involve homogeneous products are amenable to co-ordination.<sup>22</sup> Exchanges of individualised, non-public, commercially sensitive information may cause anti-competitive effects in those markets, but not in others.

Whether the exchange of past information facilitates co-ordination also depends on the nature of the exchange. An information exchange can only facilitate collusion if it makes a meaningful difference to the level of transparency in the market. This in turn will depend on market characteristics and on whether (a) the information exchanged is not public (sharing public information is unlikely to have a material impact on competition), and (b) the exchange of information takes place frequently (otherwise the information exchange would not allow firms to monitor potential deviations of the collusive outcome effectively).

### **3.2 *Pro-competitive effects***

Exchanges of individualised past commercially sensitive information may have significant pro-competitive effects. For example, the exchange of information on borrowers' past performance (e.g., debt exposure and credit history) among competing banks increases efficiency. Suppose each bank communicates to its competitors the identity of its past and current customers as well as their credit histories. This allows its competitors to determine its market share and the terms and conditions offered to its customers, and as a result anticipate the terms and conditions that it will offer to potential borrowers in the future. Competing banks will be able to adjust their own offerings accordingly. They may also be able to punish banks which increased their market shares by competing aggressively in the lending market.

Yet this practice is most often considered to be pro-competitive. If banks have an informational monopoly about their clients, borrowers may curtail their effort level for fear of being exploited via high interest rates in the future. Banks correct this incentive problem by committing to share private information with their competitors. By revealing the identity of its good customers, banks commit to compete more aggressively for them, which lowers future interest rates and future profits of banks and increases their customers' return to effort. But, provided banks retain an initial informational advantage, their current profits are raised by the borrowers' higher effort. This trade-off determines the banks' willingness to share information. Padilla and Pagano show that when banks choose to exchange information, effort levels are increased, interest rates fall, and both banks and borrowers are better off.<sup>23</sup>

## **4. *Should certain exchanges of information be treated as presumptively illegal?***

In the previous two sections I have considered whether any private discussion of future commercial intentions and any individualised information exchange about past commercially sensitive information

<sup>22</sup> See Ivaldi et al., note 2.

<sup>23</sup> See T. Jappelli and M. Pagano, "Information Sharing in Credit Markets", *Journal of Finance*, 1993; and J. Padilla and M. Pagano, "Endogenous communication among lenders and entrepreneurial incentives", *Review of Financial Studies*, 1997.

should be presumed illegal or whether, instead, these exchanges should also be analysed under the rule of reason on a case-by-case basis. I have concluded that there is no justification for a presumption of anti-competitive harm in either case.

The analysis of the previous sections raises a more general question, is there any category of information exchange that should be treated as presumptively illegal? In my opinion, such a presumption should be strictly restricted to information exchanges that are part of a cartel. An information exchange that helps companies to co-ordinate their commercial behaviours explicitly is bound to produce anti-competitive effects and can hardly produce pro-competitive effects. That is why most lawyers and economists agree that cartels should be treated not just as presumptively anti-competitive but as *per se* illegal.<sup>24</sup>

I would not extend that presumption of illegality to any other category of information exchange. This is for two reasons: once substantive reason and one practical reason. The substantive reason is that my reading of the existing theoretical and empirical literature on information sharing among competitors suggests that there are no other exchanges that by their very nature are highly likely to have an anti-competitive effect and highly unlikely to have a pro-competitive motivation.

The practical reason requires some explanation. A practice that is presumed to be anti-competitive can be condemned without having to produce any evidence of likely anti-competitive harm. This would not be problem at all if rebutting that presumption – either by showing that it could not have an anti-competitive effect or that it was on balance pro-competitive – were practically possible. In that case, the presumption of illegality would serve the purpose of minimising error costs as well as the cost of administrating and enforcing the competition laws. And yet if there were an exchange that fell in the rebuttable presumption category but was not anti-competitive, the firms affiliated with the exchange would be able to rebut the presumption of illegality.

Unfortunately my own experience in Europe suggests that while rebutting the presumption of anti-competitive harm is possible as a matter of law, in practice it is no more than a theoretical possibility (see section 4.1 below). Likewise, while an infringement by object can be exempted on efficiency grounds, in practice that is a daunting task (see section 4.2 below).<sup>25</sup> As a result, those exchanges of information that for their very nature are characterised as presumptively illegal (i.e., object restrictions) turn out to be *per se* illegal *de facto*, which risks chilling welfare-enhancing communication among competitors.

#### **4.1 Rebutting the presumption of harm is practically impossible**

The presumption of anti-competitive harm that is attributed to an exchange of information that fits the characteristics of an object infringement in the European Union is in principle rebuttable as a matter of law.<sup>26</sup> However, I do not see how this would be possible in practice. The firms affiliated to an exchange fitting into the object category would have to demonstrate that given the particular circumstances of their case their exchange of information does not “have the potential of restricting competition”.<sup>27</sup> This is an

<sup>24</sup> See K. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution*, Cambridge University Press, 2003, chapter 4.

<sup>25</sup> See M. Bennett and J. Padilla, “Article 81 Revisited: Deciphering EC Antitrust Goals and Rules” in X. Vives (ed.), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome*, Oxford University Press, 2009, chapter 3.

<sup>26</sup> Bennett and Collins, note 7, page 314.

<sup>27</sup> Object infringements “have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101](1) to demonstrate any actual effects on the market”, Draft Guidelines, note 11, §23.

impossible task, given that the European Commission presumes that any communication that constitutes an object infringement is bound to affect their conduct in the market and, hence, has the potential to restrict competition.<sup>28</sup>

In order to rebut this presumption, and according with the European Commission's own decisions, it is not sufficient to demonstrate that the agreement had a pro-competitive rationale, because "collusive arrangements can be restrictive by object even if they also pursued legitimate objectives".<sup>29</sup> In addition, it is not sufficient "for the parties to simply claim that the information was not useful for them or that the conduct was public or that there was simply no implementation".<sup>30</sup> Nor is it sufficient to show that the exchange had no anti-competitive effect, because

*it is a settled case-law that concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object. Once it is established, as it is in this case, that the concerted practice had an anti-competitive object, it is not necessary to appraise effects of such a practice.*<sup>31</sup>

In other words, in order to rebut the presumption of anti-competitive harm that is attributed to an exchange of information with the characteristics of an object infringement, it is not sufficient to demonstrate that the sharing of information pursued a legitimate goal, or that it could not have had an anti-competitive effect on the market, or that it did not have an anti-competitive effect.

Instead, one must demonstrate that the information exchanged was not taken into account, directly or indirectly, by the firms that share it. More precisely, the firms in the exchange must adduce compelling evidence that the sharing of information did not have any influence "whatsoever" on their conduct on the market.<sup>32</sup> But this cannot be the right test because firms may exchange information that affects their conduct in a way that proves welfare enhancing. The only way to show no impact on conduct would be to demonstrate that the information exchange was no more than a divertimento among dilettante employees.

#### **4.2 The scope for an efficiency defence is extremely limited**

In Europe, an object infringement can be exempted if it meets *all* of the conditions of Article 101(3) of the TFEU.<sup>33</sup> Under these conditions the practice which is considered an object infringement must: (1) contribute to improving the production or distribution of products or to promoting technical or economic progress, (2) allow consumers a fair share of the resulting benefit, and must not (3) impose restrictions which are not indispensable to the attainment of the above objectives, and (4) afford the possibility of eliminating competition in respect of a substantial part of the products in question.

Let me consider each of these conditions in turn.

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<sup>28</sup> See *Case COMP/39188 – Bananas, 15-X-2008*, §233. I advised one of the importers of bananas fined by the Commission in this case. My opinions in this paper do not reflect the views of my client. The case is pending before the General Court.

<sup>29</sup> *Id.*, §235.

<sup>30</sup> *Id.*, §234.

<sup>31</sup> *Id.*, §236.

<sup>32</sup> *Id.*, §234.

<sup>33</sup> Article 101(3) Guidelines, note 33, §20.

- **Efficiency gains.** The first condition requires that the firms affiliated to the exchange demonstrate that the information exchange leads to significant efficiency gains. For example, it may allow companies to increase efficiency by benchmarking performance and adopting yardstick compensation schemes;<sup>34</sup> shifting production to high-demand markets;<sup>35</sup> or reducing costly information asymmetries (such as for example by sharing information about customers' credit history).<sup>36</sup> Exchanging market share information can provide important signals on quality and future performance.<sup>37</sup> Public information exchanges may also reduce consumer search costs.<sup>38</sup> Finally, early announcement of winners in patent races may avoid wasting on R&D.<sup>39</sup> The claimed efficiencies would have to be clearly specified and documented. It is the responsibility of the firms sharing information to calculate the value of the alleged efficiencies and describe in detail how that amount has been computed. The parties must also explain how and when each claimed efficiency would be achieved. They must also establish a clear link between the efficiencies claimed and the information exchanged.
- **Fair share to consumers.** Consumers must receive a fair share of the efficiencies generated by the restrictive agreement under. Those efficiencies must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition.
- **Indispensability.** To be exempted under Article 101(3), the restrictive agreement must be "reasonably necessary" in order to achieve the claimed efficiencies. The standard of reasonableness appears to be quite high: efficiencies must be specific and there should be no other economically practical and less restrictive means of achieving the efficiencies. However, businesses are not required to consider hypothetical alternatives. The claimed efficiencies will only be disregarded when it is reasonably clear that there are realistic and attainable alternatives. At that point the parties need only explain and demonstrate why those seemingly realistic and significantly less restrictive alternatives would be significantly less efficient.
- **No elimination of competition.** The fourth and final limb of Article 101(3) requires that the exchange does not result in the elimination of competition in respect of a substantial part of the products concerned. The Commission explains that in its assessment of this condition it will take into account the degree of competition on the market.

So, in order to exempt an information exchange that is found to restrict competition by object, the firms affiliated to the exchange would first have to identify and document the pro-competitive effects of the exchange and demonstrate that they are significant. While that is not easy, it is justified. The problem is that the Commission has a wide margin of discretion when assessing the complex analyses needed to value the efficiencies resulting from the information sharing agreement, and that margin of discretion is sometimes used to reject the evidence presented by the parties seeking an exemption without a very rigorous analysis.

The parties to the exchange would then have to demonstrate that the alleged efficiencies more than offset the harm to consumers resulting from the restriction of competition. Since the Commission does not

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<sup>34</sup> Draft Guidelines, note 11, §88.

<sup>35</sup> Id., §89.

<sup>36</sup> Id., §90.

<sup>37</sup> Id., §91.

<sup>38</sup> Id., §92.

<sup>39</sup> Id., §93.

need to demonstrate, let alone quantify, the anti-competitive harm caused by an object infringement, this condition requires that the parties calculate that harm – a calculation that will likely be disputed by the Commission – and show that is small relative to the benefits to consumers stemming from the exchange of information. I trust the reader will understand that this second step is not easy and may even prove impossible.

Thirdly, the parties would have to demonstrate that the alleged efficiencies cannot be obtained by other means. But this condition will be difficult to meet if the Commission takes the position, as it did in *Bananas*, that certain exchanges of information “well beyond what could be justified or indispensable to attain any possible pro-competitive objective”.<sup>40</sup> That viewpoint implies that any exchange of information that is characterised as an object infringement would fail the indispensability condition in Article 101(3).

Finally, the parties would have to show that the information exchange would not eliminate competition in respect of a substantial part of the products concerned. But how could they do that if any exchange that is characterised as an object infringement is *de facto* treated it as akin to a cartel? This is precisely what the Commission did in *Bananas*.<sup>41</sup> The exchange of information was regarded as an infringement by object and was said to amount to price fixing. The Commission then added that no price fixing arrangement could meet the fourth limb of Article 101(3). This line of argument suggests that no exchange of information that is characterised as an object infringement would meet the fourth condition of Article 101(3).

One could however argue that *Bananas* is special because it concerns exchanges of future *price* intentions. If so, that should be clarified. Otherwise, the fourth condition in Article 101(3) will prove an insurmountable obstacle for any exchange of information that is regarded as an object infringement – i.e., presumed to be anti-competitive

## 5. Conclusions

In this paper I have considered whether (i) any private discussion of future commercial intentions and (ii) any individualised information exchange about past commercially sensitive information should be presumed illegal or whether, instead, these exchanges should also be analysed under the rule of reason on a case-by-case basis. I have concluded that there is no justification for a presumption of anti-competitive harm in either case.

I have also examined the more general question of whether it is indeed justified to define a category of information exchanges that are presumed illegal. In my opinion, a presumption of illegality should be restricted to information exchanges that are part of a cartel. This is for two reasons. *First*, my reading of the economics literature on information sharing among competitors suggests that there is no other category of exchanges that by their very nature are highly likely to have an anti-competitive effect and highly unlikely to have a pro-competitive motivation. *Second*, my own experience suggests that there is no way to rebut a presumption of illegality in practice. Whereas a rebuttable presumption of illegality could be defended on error-cost terms, there is no justification in my opinion for a non-rebuttable presumption or, in plain terms, for a *per se* legality rule.

These general considerations have some practical policy implications. Most importantly, I believe that unless a presumption of illegality can be rebutted in practice, either by showing that it could not have an anti-competitive effect or that it was on balance pro-competitive, all exchanges of information among competitors other than those which are part of a cartel should be analysed under the rule of reason on a case-

<sup>40</sup> See *Case COMP/39188 – Bananas*, note 12, §342.

<sup>41</sup> *Id.*

by-case basis (i.e., as potential restrictions of competition by effect). This should be the case whether the information is current or future, public and private, aggregate or individualised

I understand that dealing with each and every information exchange on a case-by-case basis is costly and may cause some type II errors. But in my opinion the alternative to the rule of reason in information sharing cases cannot be to treat certain exchanges of information as *de facto* infringements or *per se* illegal. Any presumption of illegality must be rebuttable in practice because otherwise we risk chilling efficient information exchanges.

In particular, the firms affiliated with the exchange should be able to persuade authorities and courts that sharing individualised information, be it for example information about future intentions, should not be regarded an infringement of the competition laws (1) when market conditions make it impossible that such information exchange can have an anti-competitive effect (e.g., because supply is pre-determined), or (2) when it can be shown that the exchange has had no anti-competitive impact after a long period of activity.

In addition, and perhaps most importantly, the firms in the exchange must be able to defend the pro-competitive nature of their information sharing in practice. Competition authorities must ensure that any information exchange (other than those that are part of a hardcore cartel) can be justified on efficiency grounds. Therefore they should engage with the firms affiliated to the exchange to evaluate their assessment of the efficiencies resulting from the exchange, and collaborate with them in determining whether those efficiencies are sufficiently significant to allay any concerns about the effect of information sharing on consumer welfare. No welfare-enhancing information sharing scheme should be prohibited because of theoretical objections on indispensability, or by the refusal to balance its pro-competitive and anti-competitive effects under the excuse that no efficiency can justify a reduction, albeit small and uncertain, in rivalry.

If none of this happens competition authorities and courts may find themselves prohibiting exchanges of information like the Kerala information exchange (see section 2.2 above), which was as a private exchange of future commercial intentions – the sort of exchange that is often seen as necessarily anti-competitive – but which lowered average prices and reduced the dispersion of prices, and made consumers better off.

## SUMMARY OF DISCUSSION

The Chair opened the roundtable on information exchanges between competitors under competition law and introduced the three experts who were invited to give presentations: Prof. Kai-Uwe Kühn, professor of economics at the University of Michigan, Jorge Padilla, Chief Executive Officer of LECG Europe and John Kallaugher, partner at Latham & Watkins in Brussels and London.

The Chair noted that the discussion would cover four general topics:

- the role of transparency in competition and its potential anticompetitive dimensions;
- the various approaches to assessing information exchanges under competition law in different jurisdictions;
- the usefulness of safe harbours, which exist or are under consideration in some jurisdictions;
- the analytical framework employed by competition authorities when assessing the effects of information exchanges.

The Chair then invited Prof. Kühn to give his introductory presentation.

Prof. Kühn began by noting that his initial presentation would focus on the economic effects of information exchange and the various theories of harm while issues of policy design would be discussed later. This presentation would cover four issues:

- efficiency effects of information exchanges;
- market power and information exchanges;
- information exchange and collusion;
- information exchange, entry and foreclosure.

Prof. Kühn stressed that in competitive markets, information is generally beneficial because it can enhance allocative and productive efficiency. Also, information about product popularity enables producers to appropriately adjust products to consumer preferences. Furthermore, reduced uncertainty about future demand developments can result in faster investment responses in the market. These examples illustrate the benefits that information exchange can produce. Prof. Kühn noted that while sometimes information exchange may appear anticompetitive, its effects may be innocuous since not all information exchanged is important or useful. For example, people like to acquire information even if they have no use for it, they do not always act rationally on information they receive or they resort to sending more information than needed for the sake of convenience.

Information exchange can be potentially problematic in the context of market power due to its two main effects on welfare: (i) the output adjustment effect and (ii) the preference for variety effect. Coupled together, these may produce a range of different effects, some of which reduce welfare

whilst others increase it. The effect depends on a variety of factors such as the curvature of demand. Prof. Kühn stressed that due to this wide range of effects it would be very difficult to craft an implementable policy that could be based on observable and identifiable data.

With respect to information exchange and collusion, Prof. Kühn explained the game theoretical background of collusion, which shows that in order to achieve collusive equilibrium there must be (i) coordination of behaviour and (ii) monitoring to allow punishment in case of deviations. It is important to distinguish the two when assessing the potential of an information exchange to result in collusive outcomes.

Coordination can be achieved through communications about future actions, or “cheap talk” as such communications are called in economic literature. The potential for coordination depends on the nature of the information communicated; however, research, however, has shown that even unbinding talk may be used in establishing coordination. Finally, not all information has a coordinating function: statements about current costs or one firm’s forecast of demand for its products are much harder to use for coordination purposes than information about future prices or statements about the desired conduct of all competitors.

Regarding the type of information exchange that can be used for monitoring purposes, Prof. Kühn highlighted exchanges on the quantities sold as potentially extremely problematic. These allow for very precise monitoring and easy discovery of cheating, which is exactly what is required in order to sustain collusion. A very important aspect when assessing whether an information exchange can be used for monitoring is the level of aggregation of the information. The exchange of disaggregated information has great anticompetitive potential, because it enables firms to make punishment more effective by targeting individual “cheaters” to the cartel agreement. Moreover, empirical research has shown the frequent occurrence of disaggregated information exchanges in cartels and their importance in sustaining the latter.

As a last point, Prof. Kühn discussed information exchange, entry and foreclosure. In his view, information exchange among competitors does not necessarily limit new entry. Economic models have not been conclusive in this respect but in any case, foreclosure potential should not be considered as one of the great harms of information exchange.

The Chair thanked Prof. Kühn for his presentation and asked whether there were any comments.

The delegation from South Africa pointed towards the distinction between the exchange of information on price and that on quantity for the purposes of monitoring adherence to an anticompetitive agreement. Firms have a short-term incentive to grasp as large a market share as possible, and therefore monitoring on the basis of information related to quantity is more important than price information. Information on price is less indicative of cheating as it does not capture discounts, rebates or changes in quality. An exchange of information on quantity (market share) may therefore be potentially more harmful than exchange on price information.

Prof. Kühn responded that in his view treating one form of information exchange as more harmful than another is not necessarily true or needed. In general, agreements on quantities are easier to monitor and information on quantities may be even more relevant in cases of tacit collusion. However, agreements on prices are often easier to reach and in those cases monitoring of price information is particularly important.

The Chair then turned to the delegation from Denmark, whose submission emphasized the potential to enhance competition through transparency yet also mentioned a case in the ready mixed



concrete market where exchange of information led to harmful results. The delegation was invited to comment on this case and on the risks and benefits of transparency.

The delegation from Denmark noted that the majority of cases on information exchange in Denmark concerned restrictions by object and that the competition authority has limited experience in assessing actual effects and balancing of efficiencies.

There has been one case in the textile services market where a cost index for the whole industry was calculated and distributed by the Danish Textile Services Association. While the practise as such was found to enhance efficiency as it regulated price increases in long-term contracts, thus making contracting more efficient, the active involvement of the Association could lead to uniformity of prices and restriction of competition. Therefore, the practice was allowed to continue by an independent institute, instead of the Association.

As to the balancing of efficiencies and risks of information exchange, the delegation from Denmark noted that, as described in the literature, these depend on a variety of factors, such as the structure of the market and whether transparency is increased on both the supply and demand sides or the supply side only. Enhanced transparency on the supply side, whilst capable of bringing about increased efficiency, is generally seen as potentially more problematic due to its ability to support tacit or express collusion. This risk is illustrated by the Danish experience in the ready-mixed concrete market. The producers in this very concentrated market were required to submit prices to the competition authority which would publish them in order to improve customer information and market transparency. A year after the establishment of this scheme prices rose by 10-20%, which lead the authority to abandon the initiative. This case highlights the importance of the concentration level in a market in determining whether increased transparency is pro or anti-competitive.

The delegation from Denmark concluded by noting its reluctance to encourage increased transparency in business-to-business markets as opposed to business-to-consumer markets. Business-to-business markets tend to be more concentrated on the supply side, and the customers - due to lesser incentives for price negotiations - may be able to place the burden of a possible price increase onto final consumers. On the other hand, in business-to-consumer markets, increased price transparency is likely to increase competition through the elimination of search costs, in particular in markets where the supply side is not concentrated.

The Chair asked whether prices for ready mixed concrete returned to their previous level following the abandonment of the scheme.

The delegation from Denmark responded that while it does not have sufficient information, problematic issues in the Danish construction sector may indicate that the price decrease was not significant.

The Chair remarked that even though information exchange on prices may be in theory less problematic due to harder detection of cheating on an agreement, this may not necessarily be the case with commodity-like products such as ready mixed concrete. He then turned to the delegation from Belgium to discuss its contribution, which highlights the benefits of greater transparency in business-to-consumer markets such as mobile internet access, energy and food distribution and packaging.

The delegation from Belgium confirmed the benefits associated to increased transparency in the markets mentioned, with a particular emphasis on mobile internet access and energy sectors, in which market shares began to shift following the establishment of information exchange schemes. Belgium also confirmed that in its experience increased transparency did not result in market foreclosure. The

delegation highlighted the significant role of complainants and parliamentary questions in these areas when information exchange schemes are not properly applied.

The Chair then invited the delegation from Japan to comment on the guidance role of the Japanese Fair Trade Commission (JFTC) with respect to information exchanges mentioned in its contribution.

The delegation from Japan stressed the equal importance of strict *ex post* enforcement on the one hand and *ex ante* guidance and increased predictability for businesses on the other. The JFTC has published various guidance documents to clarify its enforcement policies and examples of activities that would be judged legal or illegal. In addition, businesses and trade associations may approach the JFTC with their conduct proposals in order to obtain guidance as to their legality. Furthermore, major consultation cases are published annually. These three policy tools, publication of guidelines, provision of prior consultation services, and publication of past cases enhance predictability, legal certainty and reduce potential chilling effects.

The Chair noted that publishing guidelines is an interesting approach, which may be further discussed in the latter part of the roundtable in the context of different policy approaches to information exchange. The Chair then asked the delegation from Australia about the petrol case discussed in its contribution. In this case, the Australian Competition and Consumer Commission (ACCC) established as illegal an exchange of future prices. Following an appeal, however, the verdict was overturned due to the lack of evidence concerning an agreement.

The delegation from Australia explained that under national law, the ACCC can only deal with exchange of information in the context of an agreement, which, among other requirements, shows “commitment”. It went on to describe two different cases in the petrol sector (*Apco*<sup>1</sup> and *Leahy*<sup>2</sup>) and a case in the electricity meter sector (*Email*<sup>3</sup>), all discussed in the written contribution. These cases were handled under *per se* price fixing rules and overturned (or partially overturned), on appeal. Issues common to all of these cases included whether there was any commitment by the parties to the information exchange and whether the subsequent price increases were a result of that information exchange. In the *Email* case, the court found that while the price exchange facilitated price leadership, there was no evidence of a commitment and the exchange only made the price leadership operate more smoothly. In the *Apco* case, the court found a correlation between the telephone calls between petrol stations and the subsequent price increases, as well as a commitment on the part of all but one petrol station, with respect to which the ACCC decision was overturned. On the other hand, in the *Leahy* case, despite having found some correlation between the phone calls and price increases, the court held that the requisite commitment was lacking and that the price increases were more likely to have been following prices in other areas.

In the view of the delegation from Australia these cases show that there is risk of under-deterrence in the current situation where courts in Australia require the showing of commitment for an information exchange to be illegal, notwithstanding its purpose or effects. There has been a debate in recent years on how to ameliorate this risk, which led to the most recent proposal to amend the Competition Act by adding an offence of concerted practice, similar to that found in the European Union.

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<sup>1</sup> Apco Service Stations Pty Ltd v ACCC [2005] FCAFC 161.

<sup>2</sup> ACCC v Leahy Petroleum [2007] FCA 794.

<sup>3</sup> TPC v Email Ltd & Ors [1980] FCA 86; ATPR 40-172.

The Chair noted that the need to establish the existence of an agreement is a problem highlighted in several contributions. Even in jurisdictions where a tacit agreement would be a violation, such as in France, the question remains as to how to define a tacit agreement as a result of information exchange. Before allowing the panelists to comment, the Chair asked the delegation from Canada to explain the seemingly contradictory approach set out in its contribution: on the one hand, parallel conduct with awareness of its impact on competitors is not illegal; on the other hand, in order to establish that there is a case of violation it is not necessary to prove that parties agreed on information exchange to facilitate an illegal agreement.

The delegation from Canada explained that in Canada an agreement must be shown in order to establish a civil or criminal violation. An agreement as a “meeting of minds” can be established either through direct evidence of intent or inferred from circumstantial evidence. An agreement cannot be inferred from conscious parallelism alone and the showing of additional, so-called plus factors, is required. These include actions for which the most obvious explanation is the existence of an agreement: for example, secret meetings, enforcement activities or the simultaneous adoption of facilitating practices that make coordination possible without the need for any direct communication. These include information exchange practices such as pre-announced price changes, most favoured nation clauses, media release clauses and public statements. An anti-competitive agreement may theoretically be inferred from the exchange of information so competitively sensitive that there can be no other reasonable explanation for its disclosure than an illegal agreement. However, building a case upon it without any of the plus factors would be difficult.

The Chair then invited the panellists to describe what a tacit agreement is from a competition standpoint.

Prof. Kühn said that in his view there is no satisfactory way of inferring a tacit agreement, notwithstanding the utilization of various additional factors. There are good efficiency reasons why firms should not discuss prices privately, and thus in the interest of predictability, it may be useful to employ a concept of *per se* illegality for such exchanges, be it called concerted practice or otherwise. The benefit of such a rule would be the increased predictability for businesses, allowing them to avoid problematic conduct at low cost.

Prof. Kühn advocated an economics rather than form based approach. The main effect of rules is to allow firms to discern their content and to avoid problematic behaviour at low cost. The goal of enforcement, for example with respect to combating collusion, is not to have a lot of enforcement but to prevent anticompetitive behaviour in the first place. The goal is similar with information exchange. Prof. Kühn stressed his view that *per se* rules are useful and provide the right incentives for firms that are limited to explicitly anticompetitive conduct with little redeeming benefits that can be avoided at low cost.

In Mr. Padilla’s view the issue of how to define a tacit anti-competitive agreement on information exchange can be looked at on the basis of four cumulative conditions necessary for its establishment:

- first, whether there is an alternative, explanation for the information exchange that cannot be rebutted, which is equally or more pro-competitive;
- second, whether the information exchange in the particular economic context could have an impact;

- third, whether the type of information exchange is likely to produce anticompetitive effects, (e.g. disaggregated information);
- fourth, whether the information exchange had an actual effect on the behaviour of the competitors.

If any one of these conditions is not fulfilled, there should be no concern from a competition point of view.

Mr. Kallaugher noted that from a legal perspective an agreement in the sense of a meeting of minds can be established either through direct evidence or inferred on the basis of circumstantial evidence. This is an important distinction in that the inference of an agreement from circumstantial evidence comes very close to the economic concept of a tacit agreement outlined by Mr. Padilla.

Prof. Kühn added that in his view the existence of an agreement, express or tacit, is not decisive. The objective is to prevent an environment of certain harmful interactions between firms, and the question of whether there is an agreement is not necessarily helpful for determining what the best rule for doing so is.

The Chair then invited the delegation from Germany to discuss the Castle Round<sup>4</sup> case, in particular the elements that led to the finding of a violation, and whether there have been cases in Germany where information exchange had pro-efficiency benefits.

The Castle Round case, the delegation from Germany explained, involved a highly comprehensive and detailed system of information exchange among the producers of luxury cosmetics. The producers exchanged individualized sales information broken down by product groups, information about planned sales increases, publicity expenditures and the introduction of new products, as well as information on their policies *vis-à-vis* retailers. This exchange of detailed and sensitive data was found to have constituted a hard-core violation.

With regards to the approach to information exchange in Germany, the Bundeskartellamt published its first guidance in 1977 and the topic has been revisited regularly. It is specifically acknowledged that information exchanges can have pro-competitive as well as anticompetitive effects and that they must therefore be assessed on a case-by-case basis. There are clear principles that businesses may follow in order to ensure the legality of an information exchange scheme:

- price information must be assembled by a neutral market expert and be distributed to producers in an aggregated format;
- there must be a sufficient number of participating producers to ensure the impossibility of their identification from the aggregated data;
- notifications sent to an information exchange system have to accurately reflect the actual market situation;
- prices should be published in ranges or as median or average prices.

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<sup>4</sup> See *Bundeskartellamt*, press release dated 10 July, 2008 (available at [http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008\\_07\\_10.php](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008_07_10.php)). Full decision not published.

These principles have been endorsed by the courts in an information exchange case in the ready-mixed concrete market. The latest source of guidance on information exchange in Germany can be found in the Bundeskartellamt's interim report on the sector inquiry in the milk market, published at the end of 2009.

The Chair asked the delegation from Chile to describe its efforts to promote competition by increasing transparency.

The delegation from Chile began by noting that these efforts occurred in the context of remedies ordered by the Competition Tribunal and they dealt with information already available to the market and not with information exchanged between firms. In all cases, information exchange schemes were set up to improve the effects of fragmented demand on the one side and concentrated or monopoly supply on the other. The first case involved a monopoly firm in the credit/debit transaction processing market. The second dealt with a monopsony-like situation in the milk market where the objective was to increase information available to farmers about conditions offered by milk processing plants. These systems have worked very well and there is no indication of coordinated activity as a result. The last case related to the retail pharmaceutical market where the objective of the information scheme was to balance the buying power of retail pharmacy chains with that of the independent pharmacies. As a general point, the delegation from Chile stressed that it applies a case-by-case approach when balancing the effects of an information exchange.

The Chair outlined the program for the second half of the roundtable, which dealt with the interaction between economic and legal approaches to information exchange. Initial presentations would be given by Prof. Kühn who would address policy design issues and Mr. Kallaugher who would discuss the legal background surrounding information exchange.

Prof. Kühn began his presentation by emphasizing the fact that the goal of competition policy is to provide incentives for *ex ante* compliance rather than punishing offenders. Clear and predictable rules, which give firms information about the legality of planned behaviour, are crucial in this respect. Policy design should be concerned with designing rules that provide the right incentives for efficiency enhancing conduct. Rules set up in such a way that a firm has to rely on ex-post assessment of the legality of its actions do not provide it with sufficient information to decide what conduct to adopt. Such rules may have similar effects as a *per se* prohibition because a firm may decide not to respond to them, even if their application would have been pro-competitive. In Prof. Kühn's opinion, the basic rule is that conduct that cannot be deterred should not be prosecuted.

Another important aspect in policy design is the cost of avoidance. No policy can fully eliminate ex-ante uncertainty about whether an information exchange enhances or lessens efficiency. Inevitably, some good exchanges will be deterred under any policy. However, in order to avoid deterring highly beneficial exchanges, legal rules should provide strong incentives in order not to engage in conduct with small avoidance costs. Optimal policy should therefore target exchanges with a high impact on the ability to collude and low avoidance costs.

Safe harbours also play an important role in crafting policy responses to information exchange. They provide the proper incentives for firms and facilitate the carrying out of a rule of reason analysis with respect to behaviour outside of their scope, because that will be either behaviour which has great efficiencies that lead the firms to act outside of a safe harbour or involve conduct that is anticompetitive.

As to *per se* rules, Prof. Kühn pointed out their usefulness in the context of coordinating talks such as private discussions about prices or public exchanges about what all competitors should do.

There are rarely efficiency increasing benefits to these types of exchanges while avoidance costs are generally low. For example, in the Bananas<sup>5</sup> case dealt with by the European Commission, in which following the arrival of banana shipments in EU ports producers were communicating on a weekly basis what their quotation prices - which were different from actual transaction prices - should be. Potential benefits of such an exchange are hard to discern. If the aim was to anticipate demand based on prices, the producers could have informed each other on the quantity of bananas being shipped while they were still at sea. In Prof. Kühn's experience, there is often a less harmful alternative to privately exchanging information on pricing plans. An exception are communications about investment plans where there is a large social benefit of coordination and a much lower danger of collusion due to the great incentives to deviate in the case of irreversible investment. Therefore communications about investment plans should not be covered by a *per se* prohibition.

Prof. Kühn further noted that while the difference between private and public exchanges is often emphasized, public communication (for example to the firms' customers), can have just as many coordinating effects as private communications about pricing intentions. To distinguish between genuine communications to customers or investors and public exchanges that have coordinating effects is nearly impossible and this needs to be taken into account when designing policy.

The types of practices that could be covered by safe harbours are, in Prof. Kühn's opinion, the following:

- Sporadic information exchanges: in order to have an effect, exchanges need to be systematic and must raise the participants' expectations of monitoring;
- Exchange of information on delivery data: information exchange is relative to data with respect to which contracting takes place. For example, in the case of yearly contracts, exchange of information on weekly deliveries does not reveal the initial yearly contracting data;
- Cost information exchanged within product swap agreements (limited to the achievement of these contracts): swap trades are potentially highly efficient, for example in cases where two firms, each producing in one area but competing in both, swap products with each other in order to save transport costs;
- Sufficiently aggregated information (for example information that is generated yearly and aggregated across the industry).

As a last point Prof. Kühn focused on the fact that information exchange is often taken as a plus factor in parallel pricing situations in order to prove collusion. Information exchange makes parallel pricing more likely. However, in Prof. Kühn's view neither parallel pricing nor information exchange make collusion more likely, even when they occur simultaneously. Therefore, he argued for the elimination of information exchange from the list of plus factors used to prove tacit collusion in situations of pricing parallelism. On the other hand, exchange of disaggregated information should almost always be viewed with suspicion. Empirical research shows that there is a strong correlation between disaggregated exchanges and price increases. Generally, there are alternatives to disaggregated exchanges that allow firms to achieve the desired efficiencies, thereby making their presence an indication of a potential competition problem.

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<sup>5</sup> Case COMP/39.188 *Bananas*

The Chair thanked Prof. Kühn for his very interesting contribution, in particular with regards to his discussion of safe harbours that are based on the nature of the information exchanged rather than the commonly used market shares, as well as his suggestion concerning parallel pricing and information exchange, which may oppose some of the enforcement practices that are employed in certain jurisdictions. He then invited Mr. Kallaugher to give his presentation.

Mr. Kallaugher began his presentation by stressing that while there are various legal approaches to information exchange across different jurisdictions, there is a common recognition - as the discussion shows - that information exchange can be either harmful or efficiency enhancing. Creating legal systems that can discern good from bad exchanges in a way that provides for legal certainty is difficult. Across jurisdictions there are roughly two ways of structuring legal rules with respect to information exchanges that determine both the legality assessment and the policy options available. These differences are particularly important with respect to practices encompassing cross-border dimensions.

First, there are the so-called agreement jurisdictions, which require the proof of an agreement, express or tacit, in order to prosecute an exchange of information. Generally, in agreement jurisdictions there are three possible types of cases involving exchange of information:

- information exchange which is part of a broader price fixing or market sharing cartel and can serve as circumstantial evidence of its existence. In this respect, disaggregated exchanges and the context in which the information is exchanged may both serve as indicators;
- information exchange as a part of a broader efficiency enhancing agreement (*e.g.* joint venture) which generally should not be problematic;
- pure information exchange agreements, often initiated at the behest of trade associations (for example the UK Tractor case in the EU).<sup>6</sup> Whether the information is disaggregated or not plays a role in certain jurisdictions. However, in general, these are cases that are difficult to subsume under an agreement to fix prices or allocate market shares;

Second, are the so-called concerted practice jurisdictions in which it is not necessary to prove an agreement and in which any exchange of information on its own may potentially be unlawful, subject to a case-by-case assessment. Concerted practice is a very broad category encompassing conduct intended to enhance cooperation among competitors by reducing uncertainty regarding present or future behaviour.

Differences between agreement and concerted practice jurisdictions are also important when considering presumptions (safe harbours on the one hand and *per se* prohibitions on the other). Their introduction in agreement jurisdictions is difficult because of the broader general framework of analysis structured along the *per se* rule of reason lines. Information exchange as part of a hard-core cartel is *per se* unlawful. In joint venture and other efficiency enhancing cooperation agreements, rule of reason analysis applies. Rule of reason also applies in cases of agreements on exchange of information and that is where the economic presumptions of the kind discussed by Prof. Kühn and others could be used to structure the analysis in a way similar to the “quick look” doctrine in the United States. However, presumptions of this kind can serve as neither *per se* prohibitions nor safe harbours.

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<sup>6</sup> UK Agricultural Tractor Registration Exchange, Commission Decision, OJ L 068 , 13/03/1992 P. 0019 – 0033.

In concerted practice jurisdictions, information exchange is nearly always presumptively unlawful, given that any communications that can be interpreted as reducing uncertainty as to present or future behaviour among competitors can be considered a concerted practice. In this context, the draft EU horizontal cooperation guidelines distinguish between two types of exchanges depending on the content of the information communicated. For example, exchange of information on future prices constitutes a restriction by object whereas exchange of other types of information is treated as a restriction by effect. In Mr. Kallaugher's view this is a sound policy approach. However, it may create problems in legal application due to the very broad definition of restriction by object set out in recent case law of the Court of Justice of the European Union (*T-Mobile*<sup>7</sup>), which covers any situation where the counter-factual would be intensified rivalry by participants. This is a very different concept from the *per se* prohibition category in the US. Nevertheless, the possible negative effects of such a broad interpretation of restriction by object may be countered by the application of Article 101(3) TFEU in the EU context or similar provisions in other jurisdictions.

In conclusion Mr. Kallaugher stressed the need for a differentiated approach to different kinds of violations. The categorization of certain exchanges as restrictions by object is useful in deterring them. However, they should not be treated in the same way as hard-core price fixing or market-sharing cartels when it comes to fining. In general, the optimal approach to the sanctioning of information exchange violations must certainly be considered in the context of the broader goal of deterrence in competition policy.

The Chair thanked Mr. Kallaugher for his contribution and turned to the delegation from Korea with a question concerning the rationale behind not treating information exchange in itself as a violation as discussed in its contribution.

The delegation from Korea explained that under Korean law information exchange by itself is lawful as long as it does not entail an agreement on prices, trade terms or other restrictive practices. In this sense, information exchange can be used as circumstantial evidence of the existence of an agreement. The rationale behind this approach is that there are many potential efficiencies generated by an information exchange and an ex-ante categorization of it as unlawful could stymie them. Nevertheless, this approach does not prevent the Korean Fair Trade Commission (KFTC) from prosecuting clearly harmful information exchange cases. The Korean delegation pointed towards two cases described in its contribution, the first of which deals with an information exchange among flour producers which were found to have constituted an anticompetitive agreement because of the nature of the information shared, the intent of the parties and the structure of the market. In the second case - focusing on the liquid petroleum market, information exchange was found to have been part of a broader price fixing violation. This case study was related to a situation of parallel pricing combined with information exchange. The factors that led to unveiling this breach of the law were the frequency of contact and the exchange of information between competitors, as well as parallel pricing, the structure of the market and the participants' unreasonably high profits.

The Chair then invited the delegation from Israel to explain its approach to information exchanges and to comment on a case in the banking sector in which the Competition Authority found a fine balance between the benefits and negative effects of information exchange schemes.

The delegation from Israel began by describing the 2009 *Banks*<sup>8</sup> case. In this event, five of the largest banks exchanged information on fees charged for bank services to households and small

<sup>7</sup> Case C-8/08, *T-Mobile Netherlands*, ECR I, not yet reported.

<sup>8</sup> *Bank Hapoalim Ltd., Leumi Bank Ltd., Israel Discount Bank Ltd., Mizrahi Bank Ltd. and the First International Bank of Israel Ltd* (Determination of Restrictive Arrangement) 2009 *Antitrust* 5001411.



businesses. This was found to have violated the prohibition by object of arrangements concerning price, profit, market allocation, output or quality. Although an impact assessment was not made compulsory under the law, it showed the potential negative effects of the exchange (including reduced uncertainty regarding fees charged to customers, decreased incentives to inform customers, as well as lessened incentives for consumers to search for alternative banks.

With regards to the general approach to information exchange, Israeli law differentiates between arrangements that by their very nature must seek approval from the competition authority and other arrangements that may need to seek approval according to specific circumstances, such as market characteristics. Information exchanges between competitors may fall within either category or both.

The Chair turned to the delegation from Mexico, whose contribution discussed a provision in Mexican law the deals expressly with information exchanges and asked the delegation to explain its application in practice.

The delegation from Mexico explained that information exchanges are assessed on a case-by-case basis and where they are found to have the aim or effect of fixing rates, or manipulating the purchase or sales prices among competitors, they are considered *per se* violations. The factors used in assessing the legality of an information exchange are principally its nature and scope. Generally, the Federal Competition Commission (CFC) will closely scrutinize exchanges of sensitive commercial information, such as quantities produced and sold, prices and future price increases, discounts and others.

So far, the CFC has not published any guidelines on information exchanges; the law, however, provides for a consultation procedure through which firms can approach the CFC to seek ex-ante guidance. Currently, the CFC is in the process of preparing guidelines on efficiency enhancing collaborations between competitors (e.g. joint ventures, standard setting, cross-licensing, *etc.*), which will also deal with exchanges of information in those contexts.

The Chair noted the different approaches mentioned by the various delegations. Some of the contributions discussed the issue of safe harbours, one of which was the United Kingdom (UK). The Chair invited the delegation from the UK to present its views on this subject.

The delegation from the UK began by explaining that the contribution does not as such propose safe harbours but mentions them as one possible way of dealing with information sharing arrangements that are highly unlikely to harm competition and that are assessed under effects-based analysis. Information exchanges can have various forms and in this context safe harbours may present possible drawbacks. For example, safe harbours based on an individual firm's market share could be used by larger firms to deny pro-competitive information to smaller competitors. Also, the existence of a safe harbour may lead some firms to believe that any exchange outside of the safe harbour is unlawful, which would be an undesirable consequence. To conclude, the delegation from the UK noted that these are only some of the issues that are being considered in the ongoing debate on how best to approach information exchanges.

Prof. Kühn disputed the argument that firms could consider that any conduct outside of a safe harbour is unlawful. It would simply be looked at under a rule of reason type analysis. Even where the exchange of aggregated information would fall within a safe harbour, firms that have large efficiencies from the exchange of disaggregated data would not be deterred from doing so, despite such conduct falling outside of the safe harbour. Such behaviour should then be carefully examined and allowed only if the efficiencies are realistically plausible. Prof. Kühn stressed that the problem is

not so much that of safe harbours *per se*, but rather that of how the rule of reason analysis is structured and carried out.

The Chair turned to the delegation from the European Union, which referred in its contribution to the public consultation on the guidelines on horizontal co-operation agreements. He asked to what extent the proposals will be amended following the consultation and whether, under EU rules, exchanges with the participation of a third party that collects data and resells it back to the competitors would be assessed differently from exchanges directly among competitors.

The delegation from the EU explained that, following the careful evaluation of the responses received in the public consultation, the European Commission (EC) continues the requisite internal consultations on the draft guidelines. There may still be changes in the process and therefore it is too early to discuss how the final text will appear, although some individual issues could be highlighted. For example, the EC is considering a safe harbour of a 20% market share, which is seen as a threshold below which exchanges are unlikely to lead to restrictive effects. The guidelines will also include more discussion on issues such as:

- when an information exchange outside of an agreement could be considered a violation;
- when exchanges of strategic data that reduce uncertainty among competitors could amount to a violation (in line with the case law of the Court of Justice);
- when unilateral announcements of strategic information could amount to a violation because they could be part of a strategy for coordination, especially if followed by strategic responses by other competitors;
- that information exchanges restrictive by object cover communication of future intentions and not of actual data that can be revised;
- that communications on irreversible investment or entry plans would rarely be anti-competitive.

Regarding the question of indirect versus direct exchanges of information, the EU delegation did not see a reason for carrying out different analyses or creating of safe harbours. The factors used for competitive assessment, the market context and the impact of the exchange, are the same with regards to both indirect and direct exchanges.

The Chair asked the EU delegation its views on the suggestion made by Prof. Kühn that exchanges of information on costs are mostly innocuous.

The delegation from the EU explained that in certain market structures communications on the totality of the competitors' variable costs could be used to facilitate collusion given that they reduce uncertainty regarding one strategic variable. Although this may be less common than with exchanges of information on prices and quantities, it is nonetheless not to be excluded. Therefore in this case providing for a safe harbour would not be justified.

Prof. Kühn responded by claiming that exchanges of cost information have a negligible potential for monitoring purposes and therefore cannot be usefully employed for collusion. The lack of a general safe harbour for cost information exchanges is ultimately not problematic. However, it may be good to consider providing a safe harbour for aggregated cost information exchanges used for benchmarking purposes because these have a great efficiency-enhancing potential.

The Chair turned to Mr. Padilla to present his views on what should be the optimal analytical framework for the analysis of information exchanges and whether private and public exchanges should be handled differently.

At the outset of his presentation, Mr. Padilla highlighted the difficulties in approaching information exchanges due to their vast array of possible forms and impacts as well as to the inconclusiveness of economic theory on this issue. Yet the topic is very timely and has to be dealt with, given that with increased anti-cartel enforcement, firms have resorted to more subtle and covert methods of coordination (as opposed to the blatant cartel agreements encountered in the past). Competition authorities therefore need to develop appropriate responses to identify when an information exchange is used for collusive purposes.

As to whether all information exchanges should be assessed under the rule of reason, Mr. Padilla stated that economic literature - both theoretical and empirical - does offer sufficient insight to suggest otherwise. Information exchange can have pro and anti-competitive effects and it is difficult to assess *ex-ante* which of those is more likely. Therefore, *per se* prohibitions are not suitable.

At the same time, there are instances where the scope of the rule of reason analysis can be limited by presumptions in the interest of legal certainty and proper incentives. When devising presumptions, in particular presumptions of illegality, it is important to think not only of the likelihood of Type I or Type II errors but also of the costs of such errors. Rebuttable presumptions of illegality should, in Mr. Padilla's view, be established not only if a Type II error in the assessment of an information exchange is much more likely than a Type I error, but also if the cost of a Type II error greatly outweighs that of a Type I error.

There are two ways of structuring a presumption based on the nature of the information exchange and the structure of the market, either as a rebuttable presumption of legality or illegality. The former is more widely employed by jurisdictions although economic theory and empirical research would also support the latter. If a rebuttable presumption of illegality is employed, it is critical that it is devised in such a way that it can actually be rebutted, either by presenting efficiency justifications or showing a lack of anticompetitive effects.

As to *per se* prohibitions, Mr. Padilla noted that although he is in general against such rules, he could see the merit in their establishment due to their incentive effects discussed earlier by Prof. Kühn. Yet they should be introduced only after a careful balancing of the beneficial effects of *ex ante* incentives with the cost of possible Type I errors that they would necessarily involve.

As a last point, Mr. Padilla noted that like Prof. Kühn he sees no need to differentiate between private and public exchanges of information because what matters is the purpose of the exchange, *i.e.* monitoring and coordination. Similarly, he agreed with the EU delegation that indirect and direct information exchanges do not require different methods of assessment.

The Chair thanked Mr. Padilla for his presentation and invited the delegation from the Netherlands to describe its approach to information exchanges and comment on the bicycle case discussed in its contribution where information exchange was found to have been legal due to the public character of the information communicated.

The delegation from the Netherlands explained that there are no *per se* prohibitions with respect to information exchanges in the Netherlands. Reliance is placed in case-by-case analysis assisted by the categorization of practices into "white", "black" and "grey" areas developed in published guidelines. White area cases cover, for example, exchanges of historical or aggregated information.

An example of a case falling into the grey area is the bicycle case, which was considered as legal due to the fact that all information collated within the system was public *ab inito* and the register was made accessible to all competitors, hence it did not create any barriers to entry. Exchanges between competitors of information concerning future market behaviour will generally fall into the black area.

The Chair then turned to France to share its experience with the *Palaces Parisiens*<sup>9</sup> case, involving an anticompetitive information sharing agreement. The Chair asked whether that information was public or private and how the French competition authority determined that the practice was in fact anticompetitive.

The delegation from France responded by explaining that in its view a complete ban on information exchange could prevent beneficial and pro-competitive gains in efficiency. Instead, one should look at the actual or potential effects in each case, with a particular focus on prices. The delegation agrees with the EC that even though it may be difficult, companies must be given a chance to justify their information exchange policies by demonstrating concrete gains in efficiency.

The *Palaces Parisiens* case occurred at the end of 2005 and involved the six most luxurious palace hotels in Paris. The investigation revealed that the hotels were regularly exchanging information on occupancy rates, average rate per rented room and average earnings per available room. This was critical because the rates at these hotels vary depending on a number of market factors. Each week, the directors of the six palaces exchanged this information. Instead of denying the nature of the information shared, the parties argued that rather than forming an oligopoly, they were merely six companies in a much larger market of luxury hotels. What was notable in this case was the way in which the aggregated information exchanged allowed for the monitoring of the performance of each competitor hotel, which in turn allowed the hotels to adjust their commercial strategy and preserve an existing collusive equilibrium.

The delegation then addressed Mr. Padilla's point about the exchange of information being a relatively old practice. Even though the practice had been in place for a century, what made the *Palaces Parisiens* case interesting was the period of examination, 1999-2002. After September 11, 2001, the demand for luxury hotels in Paris declined drastically. In response, the six palaces reduced their rates all by the same proportion, proof that even though the information exchanged was aggregated and limited to three pieces of data, it was targeted enough to avoid any deviation from the collusive model that had been in place for years.

Thus, whether the information is public or private is irrelevant since even though one could call each hotel to find out their room rates, it was the other pieces of information that defined the marketing plan and commercial policy of each hotel. Moreover, while the hotels claimed that the information shared was not strategic, they demanded that it remained confidential and classified as trade secrets. This confirmed that the exchange was anticompetitive. In addition the strategic and regularly updated nature of the information enabled the palaces to eliminate uncertainty among the members of the oligopoly and support the collusive equilibrium in the industry.

The Chair invited the UK delegation to present its suggestion in its contribution that the classification of exchange of information by object or by effect could be based on whether or not the information exchanged between the parties is private or public.

The UK delegation explained that this tentative proposition is based on an intention to establish a clear line between harmful and efficiency increasing information exchanges. Although both Prof.

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<sup>9</sup> Decision 05-D-64 of 25 November 2005 relative to practices used in the Paris luxury hotels market.

Kühn and Mr. Padilla view public and private exchanges as indistinguishable, the UK delegation pointed out that most of the benefits of information sharing for consumers arise from the fact that the information shared is public rather than private. Moreover, when the information is public it can be more easily monitored by competition agencies and complainants.

The Chair then turned to the topic of aggregated versus disaggregated information and asked the Finnish delegation to discuss what level of aggregation is required in Finland in order to steer clear of a potential enforcement action.

The delegation from Finland described the test developed for determining at which level information can be deconstructed to extract data that can be used for monitoring purposes. As to the level of aggregation, the delegation agreed with Prof. Kühn that aggregation is sufficient when no individualized price information can be inferred.

The Chair invited the delegation from Turkey to discuss the Automotive Distributors' Association<sup>10</sup> case presented in its contribution and to explain whether the level of aggregation played a role in finding the exchange lawful.

The delegation from Turkey first described how the Turkish competition authority analyzes information exchanges on a case by case basis, taking into account both the nature of the information exchanged and the structure of the market. In the Automotive Distributors' Association case, the Association maintained a website with aggregated information about sales, market shares and imports of new automobiles in Turkey. The analysis involved a large number of factors relating to the structure of the market but the aggregate nature of the information exchanged certainly played an important role in the final assessment. The Turkish delegation also pointed to a case in the same market, dealt with in 2009.<sup>11</sup> In this case, periodical exchanges of information on sales and current recommended prices via email and forecast sales in association meetings were found lawful. This was the case despite the absence of aggregation and the fact that the information on prices was also published on the participants' websites and the communications of forecast sales served to assess the state of the market rather than to promote a collusive purpose.

The Chair then turned to the topic of government intervention and information exchange. The delegation from Poland was invited to discuss a case in the cement industry,<sup>12</sup> which involved the sharing of very commercially sensitive data through an association and to comment on the fact that although all producers were punished, the association was not.

The delegation from Poland first noted that there was no issue of government intervention in the cement industry case apart from a possible behavioural legacy of central planning under communism before 1990. However, this was not taken into account since the case was decided in 2009. The association mentioned in the case was under the complete control of its members, who were fined, and the most harmful exchanges actually occurred outside of the association. It was concluded that the association was a mere tool in the hands of its members, used only for collusive purposes and was therefore not fined.

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<sup>10</sup> *Automotive Distributors' Association* decision (dated 15.4.2004 and numbered 04-26/287-65).

<sup>11</sup> *Automotive Distributors' Association/Automotive Manufacturers Association* decision (dated 9.9.2009 and numbered 09-41/998-255).

<sup>12</sup> Decision, ref. nr DOK-7/2009.

The Chair then turned to the last topic of the roundtable: the publication of guidelines in the area of information exchange. Mr. Kallaugher was invited to give an initial presentation on the practical considerations, industry specificities and other factors that should be taken into account.

Before going into the practical considerations, Mr. Kallaugher discussed some of the points mentioned earlier in the discussion. First, concerning private and public exchanges he pointed towards the role of trade journalism, which had not been discussed thus far. Public utterances to the press by executives made with the intention to facilitate coordination should certainly be sanctioned. However, it would be undesirable to encroach on the freedom of expression by prohibiting companies from talking to the press. The second point dealt with the consideration of the Type I and Type II errors brought up by Prof. Kühn and Mr. Padilla. Mr. Kallaugher emphasized that these must be assessed not on a case-by-case or industry-wide basis but at the level of the whole jurisdiction to appropriately reflect the balance between costs and the benefits of deterrence. Third, Mr. Kallaugher addressed the issue of safe harbours. In his opinion, these serve an important purpose in eliminating the costs of determining the legality of a practice for a firm, which are essentially transaction costs.

With regards to the practical considerations, Mr. Kallaugher focused on the human side of information exchanges. Bright line black letter rules are attractive for competition authorities as well as firms in that they lower enforcement costs and increase legal certainty. However, the theoretical focus on the negative repercussions and benefits of an information exchange may obscure the context in which the rules must be enforced and individuals must comply with the law. Individuals know that they should not agree on prices, and that price fixing is prohibited. However, due to the many grey areas, information exchange presents a much more difficult problem for people to know what they are permitted to discuss. It is therefore difficult to ensure complete compliance.

Some problems in information exchange may be industry specific. There are industries where frequent contacts between competitors are normal and necessary, for example in the airline, construction or technology industries. It is inevitable that in the course of these otherwise legitimate and efficiency enhancing contacts people may venture into discussions they should not be having. This may not necessarily be because they have collusive intent but merely because people have a natural tendency to demonstrate they know certain information. Good, efficiency enhancing talk can happen alongside bad talk and having drastic rules may discourage all talk. On the other hand, there are industries where competitor contacts are rare and unnecessary, such as in commodity production, branded consumer products or retail distribution. There may be a case for having a *per se* prohibition on exchanges of present and future prices in such industries, where contact with competitors is exceptional. Also, it should be taken into account that in some industries or regions most people involved may know each other and communicate on a regular basis for entirely legitimate reasons.

Mr. Kallaugher emphasized that while these factors should be considered in any guidelines, the manner in which these are taken into account in enforcement practice is important. Therefore conduct with so many grey areas that cannot be completely deterred should not be sanctioned as severely as hard-core price fixing cartels. Also, discussions may take place at different levels, but the potential for the greatest harm grows in proportion to the position in the company of the individuals involved.

The Chair turned to the delegation from Spain, which discussed in its contribution a report about the agri-food sector and the role of transparency in enhancing its functioning.

The delegation from Spain commented that in recent years there has been a significant increase in anticompetitive practices prosecuted in the agri-food sector. Therefore, in June 2010 the Spanish competition authority published a report on competition in the food industry, which presents a number of transparency enhancing measures aimed at leveling the playing field between large and small firms

when it comes to the access to information. The report acknowledges that increased transparency may not only have efficiency enhancing effects but may also lead to collusion. To prevent this negative outcome the report emphasizes the need for high aggregation of the shared information, the collection of information by designated third parties and its publication by public bodies.

The Chair then asked the US delegation to describe the Antitrust Guidelines for Collaborations among Competitors, which apply to information exchanges.

The delegation from the US began by thanking the Chair and the Committee for an interesting and useful discussion. Although there is not a strong consensus among the roundtable participants, there were some common themes. Firstly, the notion that information exchange between competitors is not inherently problematic and can even be pro-competitive. Focus must be on the purpose and effect of the exchange as well as the nature of the information shared, the time to which pricing information relates and the structure of the market involved. Secondly, another important consideration is the aggregation of data. For example, in the US there is a safe harbour for aggregated data exchanges in the health market.

Regarding general safe harbours, the guidelines set out a 20% market share threshold, which applies not only to information exchanges but to other horizontal collaborations as well (such as joint ventures). There is a specific safe harbour in the health care sector, which actually shields exchanges of the most sensitive information (for example, fees charged by providers for their services). However, there are strict conditions for the applicability of the safe harbour provisions: the information must be (i) managed by a third party, (ii) at least three years old, and (iii) from at least five different sources and none of those sources can represent more than 25% of the final metrics.

According to the US delegation, safe harbours that cover exchanges unlikely to be problematic are valuable in that they increase legal certainty, minimize deterrent effects on pro-competitive exchanges and allow authorities to focus resources on the truly problematic cases. With regards to the potential of safe harbours to create perceptions on the part of firms that any exchanges outside their borders are anticompetitive, the US antitrust agencies have instruments allowing for *ex-ante* consultations on planned behaviour, which could be utilized in this respect.

The legality of an information exchange also depends on whether it is part of a larger agreement that falls into one of those criminal categories prohibited under the Sherman Act (price fixing, bid rigging or allocating markets). As a practical matter, demonstrating to a jury that several parties merely agreed to share information would not be sufficient. More often, information exchange is an additional charge to the more obvious illegal activity.

For aggregated data exchanges Chair invited BIAC to comment on the issues discussed.

BIAC began by highlighting the efficiency benefits of information exchange, which were acknowledged in the course of the discussion, and which are discussed in depth in its contribution. It went on to note that in its view information exchanges should not be seen as stand-alone offences but assessed only in the context of other conduct and their effects. There is a case for *per se* rules with respect to hard-core cartel violations but other conduct involving an information exchange should be judged by rule of reason. Moreover, *per se* rules, although providing greater certainty, can have significant unintended consequences. With respect to safe harbours, BIAC expressed its concern over their potential chilling effects on pro-competitive exchanges that would fall outside their scope. This is a problem that would need to be addressed, for example by issuing guidelines that would set out the types of information exchange that are likely to be more problematic.

The Chair moved on to the delegation of the Czech Republic, whose contribution calls for a more harmonized approach to information exchanges.

The Czech delegation stressed the benefits of the new EU guidelines on horizontal co-operation agreements, which will bring clarity and focus to this difficult issue. Although the guidelines do not cover all possible situations and problems discussed in the course of this roundtable, they are structured along very sound foundations and will be very useful in the practice of the Czech competition authority.

The Chair then invited the three experts to make their closing remarks on the issue of information exchanges based on the discussion in the roundtable.

Prof. Kühn reemphasized that likely efficiencies of an information exchange should be deferred to under a rule of reason analysis, unless they are completely implausible or unreasonable. He agreed with Mr. Padilla that it is nearly impossible for a competition authority to carry out a traditional efficiency analysis in this context. However, he stressed that a possible approach is to question whether the information exchange in the form in which it is carried out is necessary and proportionate to the attainment of the claimed efficiencies.

Mr. Padilla began by expressing his belief in the usefulness of guidelines, which strengthen, even in the absence of safe harbours or *per se* rules, legal certainty through discussion on how a rule of reason analysis would be applied. He then emphasized that there are good reasons for the creation of presumptions of illegality for types of behaviour that is very likely to result in competition problems. These, however, have to be carefully crafted in order not to capture efficiency enhancing exchanges and Mr. Padilla expressed scepticism as to whether they can be based on the nature of the information exchanged. Finally, he suggested that competition authorities should publish occasionally clearance decisions, with the analysis of why a particular exchange was judged pro-competitive. This would increase legal certainty and also add to the enforcer's credibility.

Mr. Kallaugher noted that whilst most of the economic thinking behind information exchange is over 25-years-old, this roundtable and the contribution of both Mr. Padilla and Prof. Kühn to the economic theory of information exchange have been very important. This is an area where it is critical to have legal rules that soundly reflect economic insights and this discussion was very productive in helping to achieve that goal.

The Chair closed the discussion and thanked the panelists and all the participants for an interesting and thought-provoking roundtable.



## COMPTE RENDU DE LA DISCUSSION

Le Président ouvre la séance et présente les trois experts qui ont été invités à présenter un exposé : M. Kai-Uwe Kühn, professeur d'économie à l'université du Michigan, M. Jorge Padilla, directeur général de LECG Europe et M. John Kallaugher, associé au sein du cabinet Latham & Watkins à Bruxelles et à Londres.

Il précise que les débats porteront sur quatre thèmes généraux :

- le rôle joué par la transparence en matière de concurrence et ses éventuels aspects anticoncurrentiels ;
- les approches retenues pour apprécier les échanges d'informations en droit de la concurrence suivant les pays ;
- l'intérêt des zones de sécurité, zones qui existent où que l'on envisage d'instaurer dans certains États ;
- le cadre d'analyse utilisé par les autorités de la concurrence lorsqu'elles évaluent les effets d'un échange d'informations.

Le Président invite ensuite M. Kühn à présenter son exposé introductif.

M. Kühn commence par relever qu'il s'intéressera tout d'abord, dans sa présentation, aux conséquences économiques des échanges d'informations et aux différentes théories du préjudice. La question de la conception des politiques de concurrence sera abordée ultérieurement. Cette présentation portera sur les quatre sujets suivants :

- les effets des échanges d'informations en termes d'efficience ;
- le pouvoir de marché et les échanges d'informations ;
- les échanges d'informations et la collusion ;
- les échanges d'informations, l'entrée sur le marché et le verrouillage des marchés ;

M. Kühn souligne que sur un marché concurrentiel, la circulation des informations est en générale bénéfique car elle peut améliorer l'efficience allocative et productive. De plus, les informations relatives au succès des produits permettent aux fabricants d'adapter leur offre aux préférences des consommateurs. Enfin, l'atténuation des incertitudes entourant l'évolution de la demande peut accélérer la prise de décisions d'investissement en réponse à la situation sur le marché. Ces exemples illustrent les avantages possibles des échanges d'informations. M. Kühn relève que, même si certains échanges d'informations peuvent paraître anticoncurrentiels, ils peuvent ne pas avoir d'effets néfastes, car les informations ne sont pas toutes utiles ou importantes. Ainsi, les gens aiment recueillir des renseignements même si ceux-ci n'ont pour eux aucun intérêt. De plus, ils n'agissent pas toujours rationnellement lorsqu'ils reçoivent des informations et envoient souvent, par commodité, plus de renseignements qu'il n'est nécessaire.

S'agissant du pouvoir de marché, les échanges d'informations peuvent s'avérer problématiques en raison de leurs deux principales incidences sur le bien-être des consommateurs, soit l'effet d'adaptation de la production et l'effet de préférence pour la diversité. Pris ensemble, ces deux effets peuvent avoir des conséquences très différentes, dont certaines ont une influence négative sur le bien-être et d'autres une influence positive. Ces conséquences dépendent de plusieurs facteurs, notamment de la courbe de demande. M. Kühn souligne qu'en raison de la diversité des effets possibles, il est très difficile d'élaborer une politique de concurrence réaliste qui s'appuierait sur des données observables et identifiables.

Pour ce qui est du rapport entre les échanges d'informations et la collusion, il présente cette dernière sous l'angle de la théorie des jeux, ce qui fait apparaître que pour parvenir à un équilibre collusif, il doit y avoir : i) une coordination des comportements ; ii) une surveillance pour pouvoir sanctionner les éventuels écarts. Il convient de distinguer ces deux caractéristiques lorsque l'on cherche à déterminer si un échange d'informations conduit à une collusion.

La coordination peut être obtenue en communiquant des renseignements sur les activités futures : c'est ce que les publications économiques qualifient de *cheap talk*. La propension de ces échanges à entraîner une coordination dépend de la nature des informations transmises. Toutefois, des recherches ont montré que même des discussions informelles pouvaient être utilisées pour mettre sur pied une coordination. Enfin, certaines informations n'ont aucun rôle coordinateur : des déclarations sur les coûts actuels ou sur les prévisions de demande pour les produits d'une entreprise sont beaucoup plus difficiles à utiliser à des fins de coordination que des renseignements sur les futurs prix ou des déclarations relatives au comportement que l'on souhaite voir adopter par tous les concurrents.

Pour ce qui est des types d'échanges d'informations qui peuvent être utilisés à des fins de surveillance, M. Kühn insiste sur le fait que les échanges portant sur les quantités vendues peuvent s'avérer particulièrement épineux. Grâce à ces échanges, on peut effectuer une surveillance très précise et démasquer facilement les tricheurs, deux conditions nécessaires pour pérenniser une collusion. Lorsque l'on cherche à déterminer si un échange d'informations peut servir à effectuer une surveillance, il convient de s'intéresser particulièrement au degré d'agrégation des données. Un échange d'informations précises peut avoir des effets anticoncurrentiels importants, car il permet aux entreprises de rendre la sanction plus efficace en s'attaquant individuellement aux sociétés qui ne respectent pas l'entente conclue. En outre, des travaux économétriques ont montré que les ententes donnaient souvent lieu à des échanges d'informations précises et que celles-ci contribuaient à leur pérennité.

En dernier lieu, M. Kühn aborde la question du rapport entre les échanges d'informations, l'entrée sur le marché et le verrouillage des marchés. Selon lui, les échanges d'informations entre concurrents ne constituent pas systématiquement un frein à l'arrivée de nouveaux entrants. À cet égard, les modèles économiques ne se sont pas avérés très probants, mais en tout état de cause, le verrouillage du marché ne fait pas partie des risques importants qui découlent des échanges d'informations.

Le Président remercie M. Kühn pour son exposé et demande aux participants s'ils ont des observations à formuler.

La délégation de l'Afrique du Sud souligne la différence qui existe entre les échanges d'informations portant sur les prix et ceux qui concernent les quantités dans l'optique de contrôler le respect d'un accord anticoncurrentiel. À court terme, les entreprises ont intérêt à conquérir la plus grande part de marché possible et par conséquent, la surveillance est plus efficace lorsqu'elle s'appuie sur des informations portant sur les quantités que lorsque les informations concernent les prix. Les

informations relatives aux prix permettent moins facilement de détecter les tricheries, car elles ne prennent pas en compte les remises commerciales ou les changements en termes de qualité. Un échange d'informations portant sur les quantités (parts de marché) peut par conséquent s'avérer plus néfaste qu'un échange concernant les prix.

M. Kühn répond que, selon lui, estimer qu'un type d'échange d'informations est plus préjudiciable qu'un autre n'est ni nécessairement vrai ni forcément utile. En général, les accords portant sur les quantités sont plus faciles à contrôler et les informations relatives aux quantités peuvent même être plus pertinentes en cas de collusion tacite. Cependant, les accords sur les prix sont souvent plus faciles à conclure et, pour ce type d'accord, la surveillance des prix prend toute son importance.

Le Président s'adresse ensuite à la délégation du Danemark, dont la contribution insiste sur les possibilités de renforcer la concurrence grâce à la transparence et, dans le même temps, cite un exemple où des échanges d'informations sur le marché du béton prêt à l'emploi ont eu des effets néfastes. Il invite cette délégation à s'exprimer sur cette affaire et à exposer les avantages et les risques relevant de la transparence.

La délégation du Danemark fait remarquer que dans son pays, la majorité des affaires d'échange d'informations concernent des restrictions par objet et que l'autorité de la concurrence n'a guère d'expérience pour ce qui est de l'appréciation des effets réels et des gains ou pertes d'efficience.

Dans une affaire concernant le marché des services textiles, l'association danoise des services textiles calculait et diffusait un indice des coûts portant sur l'ensemble du secteur. Même si l'on est arrivé à la conclusion que cette pratique en tant que telle améliorerait l'efficience dans la mesure où elle régularisait l'augmentation des prix appliqués dans les contrats à long terme, ce qui rendait ces contrats plus efficaces, la participation active de l'association pouvait conduire à une uniformisation des prix et à un affaiblissement de la concurrence. Par conséquent, on a continué à autoriser cette pratique, mais c'est dorénavant un organisme indépendant qui s'en charge et non l'association en question.

Pour ce qui est de l'équilibre entre les gains d'efficience et les risques que présentent les échanges d'informations, la délégation du Danemark fait observer que, comme l'indiquent les travaux publiés sur ces questions, cet équilibre dépend de plusieurs facteurs, notamment de la structure du marché et du fait que la transparence soit accrue du côté de l'offre et de la demande, ou seulement du côté de l'offre. Une meilleure transparence du côté de l'offre, même si elle peut augmenter l'efficience, est en général perçue comme plus problématique car elle favorise une collusion tacite ou expresse. L'expérience danoise sur le marché du béton prêt à l'emploi illustre ce risque. Sur ce marché très concentré, les producteurs étaient tenus de communiquer leurs prix à l'autorité de la concurrence, laquelle les publiait afin que les consommateurs disposent de plus d'informations et que la transparence soit renforcée. Un an après l'instauration de ce système, les prix ont augmenté dans une fourchette comprise entre 10 % et 20 %, ce qui a conduit l'autorité de la concurrence à abandonner ce dispositif. Cette affaire montre le rôle que joue le degré de concentration sur un marché lorsque l'on cherche à déterminer si une meilleure transparence favorise ou restreint la concurrence.

La délégation du Danemark conclut en indiquant qu'elle ne souhaite pas encourager l'accroissement de la transparence sur les marchés interentreprises, par opposition aux marchés grand public. Les marchés interentreprises sont en général plus concentrés du côté de l'offre et les clients — qui sont moins incités à négocier les prix — peuvent répercuter une éventuelle augmentation des prix sur le consommateur final. En revanche, sur les marchés grand public, une meilleure transparence sur

les prix peut se traduire par un renforcement de la concurrence grâce à la disparition des coûts liés à la recherche des prix, surtout sur les marchés où l'offre n'est pas concentrée.

Le Président demande si les prix du béton prêt à l'emploi sont revenus à leur niveau antérieur lorsque le système qui avait été mis en place a été abandonné.

La délégation du Danemark répond que, même si elle ne dispose pas d'informations suffisantes sur ce point, les problèmes auxquels est confronté le secteur de la construction au Danemark laissent supposer que la baisse de prix n'a pas été très sensible.

Le Président remarque que, même si les échanges d'informations portant sur les prix posent en théorie moins de problèmes car il est dans ces situations plus difficile de démasquer les entreprises qui ne respectent pas un accord, ce n'est pas nécessairement le cas pour les produits qui s'apparentent à des matières premières comme le béton prêt à l'emploi. Il invite ensuite la délégation de la Belgique à présenter le document qu'elle a soumis, document qui met l'accent sur les avantages qu'apporte une plus grande transparence sur les marchés grand public comme l'accès à l'Internet mobile, l'énergie, et la distribution et l'emballage alimentaires.

La délégation de la Belgique confirme les bienfaits d'une transparence accrue sur les marchés précités, surtout dans les secteurs de l'accès à l'Internet mobile et de l'énergie, dans lesquels les parts de marché ont commencé à évoluer après que des mécanismes d'échange d'informations eurent été instaurés. La Belgique confirme également que, selon son expérience, le renforcement de la transparence ne s'est pas traduit par un verrouillage du marché. La délégation souligne le rôle important joué par les actions en justice et les questions parlementaires dans les domaines où les mécanismes d'échange d'informations ne fonctionnent pas correctement.

Le Président invite alors la délégation du Japon à présenter le rôle consultatif de la Japan Fair Trade Commission (JFTC) pour ce qui est des échanges d'informations mentionnés dans le document qu'elle a soumis.

La délégation du Japon insiste sur l'égale importance entre, d'une part, le strict respect des règles édictées et, d'autre part, la définition d'orientations préalables et une meilleure prévisibilité pour les entreprises. La JFTC a publié plusieurs documents d'orientation afin d'apporter des précisions sur sa politique d'application de la réglementation et de donner des exemples de pratiques qui seraient jugées licites ou illicites. De plus, les entreprises et les organisations professionnelles peuvent s'adresser à la JFTC en leur présentant des pratiques envisagées afin d'obtenir un avis quant à leur licéité. Chaque année, les consultations les plus importantes sont publiées. Ces trois instruments (la publication de lignes directrices, la mise à disposition de services de consultation *ex ante*, et la publication de dossiers antérieurs) améliorent la prévisibilité ainsi que la sécurité juridique, et limite les éventuels effets dissuasifs de la réglementation.

Le Président note que la publication de lignes directrices constitue une démarche intéressante, démarche qui pourra faire l'objet d'échanges plus approfondis lorsque seront évoquées les différentes stratégies en matière d'échanges d'informations. Il demande ensuite à la de l'Australie d'évoquer l'affaire survenue dans le secteur pétrolier qui est mentionnée dans sa contribution. Dans cette affaire, la Commission australienne de la concurrence et de la consommation (ACCC) a établi qu'un échange d'informations portant sur les prix futurs était illicite. Cependant, en appel, cette décision a été annulée, car il n'y avait pas suffisamment d'éléments pour prouver qu'il y avait eu accord.

La délégation de l'Australie explique que la loi n'autorise l'ACCC à s'intéresser aux questions d'échanges d'informations que dans le cadre d'un accord, lequel suppose, entre autres, un

« engagement ». Elle poursuit en présentant deux affaires différentes qui ont eu lieu dans le secteur pétrolier (*Apco*<sup>1</sup> et *Leahy*<sup>2</sup>) et une affaire qui concernait le secteur des compteurs électriques (*Email*<sup>3</sup>). Ces trois dossiers sont mentionnés dans la contribution écrite remise par la délégation. Les décisions ont été prises sur le fondement de règles *per se* relatives aux ententes sur les prix et ont été annulées (ou partiellement annulées) en appel. Parmi les points communs à ces trois affaires, il y avait la question de savoir si les parties s'étaient engagées à échanger des informations et si la hausse de prix qui a suivi était une conséquence de l'échange d'informations. Dans le dossier *Email*, le tribunal a conclu que même si les échanges d'informations sur les prix rendaient le leadership sur les prix plus facile à atteindre, il n'existait aucune preuve d'engagement et que l'échange ne contribuait qu'à rendre le système plus souple. Dans l'affaire *Apco*, le tribunal a établi une corrélation entre les appels téléphoniques entre stations-service et les hausses de prix qui s'ensuivirent et a estimé qu'il y avait engagement de la part de toutes les stations sauf une, pour laquelle la décision de l'ACCC a été annulée. En revanche, dans l'affaire *Leahy*, même s'il existait une corrélation entre les appels téléphoniques et l'augmentation des prix, le tribunal a jugé qu'il n'y avait pas d'engagement et que les hausses de prix avaient probablement suivi les augmentations constatées dans d'autres régions.

Selon la délégation de l'Australie, comme ces exemples montrent que les tribunaux exigent qu'il y ait engagement pour qu'un échange d'informations soit jugé illicite quels que soient son objectif ou ses effets, le cadre juridique actuel n'est peut-être pas assez dissuasif. Ces dernières années, les moyens d'améliorer la législation ont suscité un débat, ce qui a conduit le gouvernement à proposer une réforme de la loi sur la concurrence qui prévoit d'instituer un délit de pratiques concertées similaire à celui qui existe en droit européen.

Le Président relève que la nécessité d'établir l'existence d'un accord est un problème qui a été signalé par plusieurs contributions. Même dans des pays comme la France où un accord tacite constitue un délit se pose la question de savoir comment définir un accord tacite qui résulterait d'un échange d'informations. Avant de permettre aux intervenants d'exposer leur point de vue, le Président demande à la délégation du Canada d'expliquer la contradiction apparente qui se dégage de sa contribution : d'un côté, il n'est pas illicite d'adopter un comportement parallèle en étant conscient de son influence sur les concurrents, et de l'autre, il n'est pas nécessaire de prouver que les protagonistes se sont mis d'accord pour échanger des informations en vue de faciliter l'application d'un accord illégal pour que le délit soit constitué.

La délégation du Canada explique que dans ce pays, il faut prouver qu'un accord a été conclu pour établir la matérialité d'un délit civil ou pénal. On peut démontrer l'existence d'un accord sous forme de « rencontre des volontés » soit en apportant des preuves directes de l'intention délictueuse, soit en s'appuyant sur des preuves indirectes. L'existence d'un parallélisme délibéré des comportements n'est pas suffisante pour prouver qu'il y a eu accord, il faut également présenter des preuves supplémentaires. Parmi celles-ci, on peut citer des initiatives dont la raison la plus probable est l'existence d'un accord, par exemple des réunions secrètes ou des activités visant à faire respecter une entente. Il peut également s'agir de l'adoption simultanée de pratiques de facilitation qui permettent aux entreprises de se coordonner sans avoir à communiquer directement entre elles. Ces pratiques peuvent se traduire par une annonce préalable des changements de prix, des clauses de la nation la plus favorisée, des clauses relatives à la communication publique et des déclarations officielles. Théoriquement, il est possible d'établir qu'il y a eu accord anticoncurrentiel lorsque des informations très sensibles en matière de concurrence ont été échangées et que la seule explication possible à cet échange est qu'il existe un accord

<sup>1</sup> Apco Service Stations Pty Ltd v ACCC [2005] FCAFC 161.

<sup>2</sup> ACCC v Leahy Petroleum [2007] FCA 794.

<sup>3</sup> TPC v Email Ltd & Ors [1980] FCA 86 ; ATPR 40-172.

illicite. Toutefois, il serait difficile de monter un dossier d'accusation en l'absence de preuves supplémentaires.

Le Président invite alors les intervenants à expliquer ce qu'est un accord tacite du point de vue de la concurrence.

M. Kühn note que, selon lui, il n'existe pas de moyen satisfaisant permettant de conclure à l'existence d'un accord tacite, même en ayant recours à des preuves supplémentaires. En termes d'efficience, les entreprises ont de bonnes raisons de ne pas discuter des prix en privé. Par conséquent, par souci de prévisibilité, il pourrait être utile de considérer que de tels échanges sont illégaux en eux-mêmes, qu'on les appelle ou non pratiques concertées. L'avantage d'une telle règle serait d'améliorer la prévisibilité pour les entreprises, ce qui leur permettrait d'éviter les comportements risqués à faible coût.

M. Kühn plaide pour une approche qui soit plus économique que formaliste. La réglementation permet essentiellement aux entreprises de distinguer le fond de la forme et d'éviter les comportements problématiques à faible coût. L'objectif de la loi, par exemple en matière de lutte contre les collusions, n'est pas de multiplier les contrôles mais de prévenir les comportements anticoncurrentiels. Pour les échanges d'informations, l'objectif est le même. M. Kühn souligne que, selon lui, les règles *per se* sont utiles et constituent une bonne mesure d'incitation pour les entreprises qui se contentent de pratiques anticoncurrentielles dont les bénéfices sont limités et qui peuvent être éradiquées à faible coût.

Selon M. Padilla, pour qu'il y ait accord anticoncurrentiel tacite au travers d'un échange d'informations, les quatre conditions suivantes doivent être réunies :

- l'échange d'informations n'a aucun effet bénéfique indiscutable en termes de concurrence ;
- il peut avoir un impact dans le contexte économique considéré ;
- le type d'échange d'informations risque d'engendrer des effets anticoncurrentiels (s'il s'agit d'informations détaillées, par exemple) ;
- l'échange d'informations a eu un effet réel sur le comportement des concurrents.

Si l'une quelconque de ces conditions n'est pas remplie, l'échange d'informations ne pose pas de problème de concurrence.

M. Kallaughner ajoute que, d'un point de vue juridique, on peut établir qu'il y a eu accord au sens d'une rencontre des volontés soit grâce à des preuves directes, soit en s'appuyant sur des preuves indirectes. Cette distinction est importante car la démarche qui consiste à se servir de preuves indirectes est très proche de la notion économique d'accord tacite présentée par M. Padilla.

M. Kühn indique que, selon lui, l'existence d'un accord, express ou tacite, n'est pas déterminante. L'objectif est d'empêcher l'apparition de relations néfastes pour la concurrence entre les entreprises et la notion d'accord n'est pas nécessairement utile si l'on cherche à établir les règles à mettre en place pour atteindre cet objectif.

Le Président invite alors la délégation de l'Allemagne à évoquer l'affaire des *Réunions secrètes*<sup>4</sup>, et notamment les éléments qui ont permis de conclure à l'existence d'une infraction, et à indiquer si, dans ce pays, dans certaines affaires, les échanges d'informations ont eu des effets proconcurrentiels.

Dans l'affaire des *Réunions secrètes*, explique la délégation de l'Allemagne, les fabricants de cosmétiques de luxe avaient mis en place un système d'échange d'informations très étendu et très détaillé. Ces fabricants échangeaient des informations ventilées par groupes de produits sur les ventes réalisées par chaque entreprise, des informations sur les augmentations des ventes prévues, sur les dépenses de publicité, sur la mise sur le marché de nouveaux produits ainsi que sur leur stratégie vis-à-vis des détaillants. L'autorité de la concurrence allemande a jugé que cet échange de données détaillées et sensibles constituait une violation caractérisée des règles de concurrence.

En matière d'échanges d'informations, le Bundeskartellamt a publié son premier document d'orientation en 1977 et le sujet a été régulièrement réexaminé depuis. Il reconnaît explicitement que de tels échanges peuvent aussi bien être bénéfiques que néfastes pour la concurrence et qu'ils doivent donc être étudiés au cas par cas. Afin de s'assurer de la licéité d'un système d'échange d'informations, les entreprises peuvent appliquer les principes suivants :

- les informations portant sur les prix doivent être collectées par un spécialiste du secteur qui soit neutre et doivent être diffusées aux fabricants sous une forme agrégée ;
- les fabricants qui participent au dispositif doivent être suffisamment nombreux afin qu'il soit impossible d'identifier les données correspondant à chacune des entreprises au sein des données agrégées ;
- les chiffres qui alimentent le système d'échange d'informations doivent refléter fidèlement la situation du marché ;
- les prix doivent être publiés sous forme de fourchette ou de prix médian ou moyen.

Ces principes ont été entérinés par les tribunaux dans une affaire d'échange d'informations sur le marché du béton prêt à l'emploi. En Allemagne, le document le plus récent où figurent des orientations en matière d'échanges d'informations est le rapport d'étape du Bundeskartellamt relatif à l'enquête sectorielle sur le marché du lait, rapport publié fin 2009.

Le Président demande à la délégation du Chili de présenter les actions que son pays a engagées pour favoriser la concurrence en améliorant la transparence.

La délégation du Chili souligne tout d'abord que ces actions ont été lancées dans le cadre de mesures ordonnées par le Tribunal de la concurrence et concernaient des informations dont le marché avait déjà connaissance et non des échanges d'informations entre sociétés. Dans toutes les affaires en question, des mécanismes d'échange d'informations ont été mis en place afin d'atténuer les effets d'une demande fragmentée, d'une part, et d'une offre concentrée ou monopolistique d'autre part. La première affaire concernait une entreprise en situation de monopole sur le marché du traitement des opérations de crédit et de débit. Dans la deuxième affaire, il s'agissait d'une situation comparable à un monopsonne sur le marché du lait et l'objectif était d'accroître la quantité d'informations dont les éleveurs disposaient quant aux conditions proposées par les laiteries. Les mécanismes mis en place

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<sup>4</sup> Voir le communiqué de presse du *Bundeskartellamt* daté du 10 juillet 2008 (disponible sur [http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008\\_07\\_10.php](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008_07_10.php) en anglais). Le texte complet de la décision est inédit.

fonctionnent parfaitement et rien ne montre qu'ils ont incité les entreprises à se coordonner. La dernière affaire concernait le marché de détail des médicaments et l'objectif du mécanisme d'échange d'informations était de maintenir un équilibre entre la puissance d'achat des chaînes de pharmacie et celle des pharmacies indépendantes. D'une manière générale, la délégation du Chili souligne qu'elle adopte une démarche au cas par cas lorsqu'elle cherche à contrebalancer les effets d'un échange d'informations.

Le Président expose le programme de la deuxième partie de la table ronde, à savoir les rapports entre les points de vue économiques et juridiques en matière d'échanges d'informations. Les présentations introductives seront effectuées par M. Kühn, qui abordera les questions de conception des politiques de concurrence et par M. Kallaugher, qui s'intéressera au cadre juridique des échanges d'informations.

M. Kühn commence son exposé en soulignant que l'objectif d'une politique de concurrence est d'inciter les entreprises à respecter la réglementation et non de sanctionner les contrevenants. À cet égard, il est essentiel de disposer de règles claires et prévisibles qui fournissent des informations quant à la licéité d'un comportement envisagé. Ces règles doivent inciter les entreprises à adopter des pratiques qui améliorent l'efficacité économique. Des normes conçues de telle manière qu'une entreprise doive s'en remettre à une appréciation *a posteriori* de la licéité de ses activités ne fournissent pas suffisamment d'éléments pour décider de la conduite à suivre. De telles règles peuvent avoir un effet similaire à une interdiction *per se* car une société peut décider de ne pas en tirer parti, même si leur application aurait été bénéfique à la concurrence. Selon M. Kühn, la règle de base, c'est qu'une pratique que l'on ne peut empêcher ne doit pas faire l'objet de poursuites.

Un autre aspect important de la conception des politiques de concurrence est le coût des stratégies de contournement. Aucune politique publique ne peut complètement faire disparaître à priori les incertitudes quant au fait de savoir si un échange d'informations améliore ou compromet l'efficacité. Toute politique de concurrence dissuade inévitablement les entreprises de procéder à des échanges d'informations utiles. Cependant, afin de ne pas décourager les entreprises d'échanges très bénéfiques, la législation doit être très dissuasive en matière de pratiques pour lesquelles la stratégie de contournement est peu coûteuse. Pour être optimale, la politique de concurrence doit donc se concentrer sur les échanges qui sont les plus susceptibles d'entraîner une collusion et pour lesquelles les tactiques de contournement sont peu onéreuses.

Les zones de sécurité jouent également un rôle important dans l'élaboration de la réglementation des échanges d'informations. Elles constituent une mesure incitative *ad hoc* pour les entreprises et permettent plus facilement de mener une analyse fondée sur la règle de raison pour les comportements qui ne rentrent pas dans leur cadre, car soit la société a agi en dehors de la zone de sécurité en raison des gains d'efficacité importants qu'elle comptait en retirer, soit il s'agit d'une pratique anticoncurrentielle.

Pour ce qui est des règles *per se*, M. Kühn insiste sur leur intérêt dans le cadre des discussions visant à coordonner les pratiques commerciales, notamment des entretiens privés portant sur les prix ou des échanges publics permettant aux concurrents de se concerter. Ces types d'échanges sont rarement bénéfiques en termes d'efficacité alors que les stratégies de contournement sont en général peu coûteuses. Ainsi, dans l'affaire des *Bananes*<sup>5</sup> instruite par la Commission européenne, après l'arrivée de cargaisons de bananes dans les ports européens, les producteurs échangeaient des informations de manière hebdomadaire afin de définir les prix d'offres, lesquels étaient différents des prix de transaction réels. Il est difficile de voir quels sont les bénéfices potentiels de tels échanges. Si

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<sup>5</sup> Affaire COMP/39.188 *Bananes*



l'objectif était de prévoir la demande future grâce aux prix, les producteurs auraient pu échanger des informations concernant la quantité de bananes transportées lorsque les navires étaient toujours en mer. D'après l'expérience de M. Kühn, il existe toujours une solution moins dommageable pour la concurrence que des échanges d'informations en privé portant sur les prix envisagés. Les communications qui concernent les projets d'investissement constituent une exception. En effet, dans ce contexte, la coordination présente un grand avantage social et les risques de collusion sont beaucoup plus faibles car les entreprises n'adoptent pas toutes la même ligne en cas d'investissements irréversibles. Par conséquent, les échanges portant sur les projets d'investissement ne devraient pas faire l'objet d'une interdiction *per se*.

M. Kühn relève en outre que, même si on souligne souvent la différence qui existe entre les échanges publics et les échanges privés, les communications publiques (par exemple, celles qui sont adressées aux clients de l'entreprise) peuvent avoir autant d'effets en termes de coordination que des communications privées relatives aux prix envisagés. Or, il est presque impossible de distinguer les informations qu'il est normal de communiquer aux clients ou aux investisseurs des échanges publics qui permettent aux entreprises de se coordonner. C'est un élément à prendre en compte lorsque l'on élabore une politique de la concurrence.

Selon M. Kühn, les types de pratiques qui pourraient rentrer dans le cadre des zones de sécurité sont les suivants :

- les échanges d'informations sporadiques : pour avoir un effet, les échanges doivent être systématiques et doivent améliorer les perspectives de surveillance de ceux qui y participent ;
- les échanges d'informations portant sur les données de livraison : les échanges concernent les données relatives à des contrats en cours. Ainsi, dans le cas de contrats annuels, les échanges d'informations sur les livraisons hebdomadaires ne permettent pas de connaître les conditions contractuelles initiales ;
- Les informations relatives aux coûts communiquées dans le cadre de contrats d'échanges de produits (limitées à l'exécution de ces accords) : les accords d'échange peuvent s'avérer particulièrement bénéfiques en termes d'efficacité, par exemple lorsque deux entreprises, qui produisent chacune dans une région différente mais sont en concurrence dans les deux régions s'échangent des produits afin d'éviter des coûts de transport ;
- Les informations qui sont suffisamment agrégées (par exemple, les informations qui sont compilées annuellement et agrégées sur l'ensemble d'un secteur d'activité).

En dernier lieu, M. Kühn attire l'attention sur le fait que les échanges d'informations servent souvent de preuve supplémentaire dans les affaires de parallélisme des prix afin d'établir qu'il y a eu collusion. Les échanges d'informations rendent le parallélisme des prix plus probable. Néanmoins, de l'avis de M. Kühn, ni le parallélisme des prix ni les échanges d'informations ne rendent la collusion plus probable, même lorsqu'ils coexistent. Par conséquent, il recommande de rayer les échanges d'informations de la liste des preuves supplémentaires utilisées pour établir qu'il y a eu collusion tacite en cas de parallélisme des prix. En revanche, les échanges d'informations détaillés doivent toujours être considérés avec méfiance. Des recherches empiriques ont montré qu'il existait une étroite corrélation entre échanges détaillés et augmentation des prix. Il existe en général des solutions autres que les échanges détaillés pour que les entreprises puissent atteindre les gains d'efficacité souhaités. Par conséquent, de tels échanges peuvent indiquer qu'il y a un problème de concurrence.

Le Président remercie M. Kühn pour sa contribution très intéressante, notamment pour ce qui est de l'analyse des zones de sécurité, analyse qui repose davantage sur la nature des informations échangées que sur les parts de marché habituellement utilisées, et de sa proposition concernant le parallélisme des prix et les échanges d'informations, laquelle s'oppose peut-être à la réglementation en vigueur dans certains pays. Il invite ensuite M. Kallaugher à effectuer sa présentation.

M. Kallaugher commence son exposé en soulignant que, même si les conceptions juridiques en matière d'échanges d'informations varient d'un pays à l'autre, tout le monde s'accorde à reconnaître, comme le montre la présente discussion, qu'un échange d'informations peut être soit néfaste, soit bénéfique en termes d'efficacité. Il est difficile de mettre en place un cadre juridique qui distingue les bons des mauvais échanges tout en assurant une sécurité juridique. Quel que soit le pays, il y a globalement deux manières d'organiser la législation en matière d'échanges d'informations : ces deux manières déterminent à la fois l'appréciation de la licéité des échanges et les politiques de concurrence possibles. Les différences entre les deux sont particulièrement importantes pour les pratiques dont l'ampleur dépasse les frontières nationales.

Il y a tout d'abord les pays dits à accord, où en cas d'échange d'informations, les poursuites sont engagées uniquement s'il est prouvé qu'il y a eu accord express ou tacite. Dans ces pays, il existe en général trois types d'échanges d'informations :

- les échanges qui rentrent dans le cadre plus large d'une entente de partage de marché ou sur les prix et qui peuvent servir de preuve indirecte permettant d'établir l'existence d'une telle entente. À cet égard, les échanges détaillés et le contexte dans lequel les informations sont échangées peuvent tous deux servir d'indices ;
- les échanges d'informations qui rentrent dans le cadre d'un accord visant à améliorer l'efficacité (par exemple, une coentreprise) ; ce type d'échanges ne pose en général pas de problèmes ;
- les accords qui se résument à un échange d'informations, souvent conclus sous l'impulsion des organisations professionnelles (par l'exemple dans l'affaire des *Tracteurs* du Royaume-Uni)<sup>6</sup>. Le fait que les informations soient ou non détaillées joue un rôle dans certains pays. Toutefois, il est en général difficile de considérer que de tels accords font partie d'une entente de partage de marché ou d'une entente sur les prix.

Il y a ensuite les pays dits à pratiques concertées, dans lesquels il n'est pas nécessaire de prouver qu'il y a eu accord et où tout échange d'informations en lui-même est susceptible d'être illicite après appréciation du cas d'espèce. Les pratiques concertées sont une catégorie très large qui inclut les démarches dont l'objectif est d'améliorer la coopération entre les concurrents en réduisant les incertitudes sur les comportements présents ou futurs.

Les différences entre pays à accord et pays à pratiques concertées jouent également un rôle important en matière de présomption (zones de sécurité d'un côté et interdictions *per se* de l'autre). Introduire la présomption dans les pays à accord est difficile en raison de l'existence d'un cadre d'analyse plus large fondé sur une distinction entre les règles *per se* et la règle de raison. Les échanges d'informations effectués dans le cadre d'ententes injustifiables sont en eux-mêmes illégaux. Pour les coentreprises et les autres accords de coopération visant à améliorer l'efficacité, on applique la règle de raison. C'est cette règle qui s'applique également dans les cas d'accords d'échange

<sup>6</sup> *UK Agricultural Tractor Registration Exchange*, décision de la Commission, JO L 068 du 13/03/1992 p. 19-33.

d'informations et c'est là où les hypothèses économiques évoquées par M. Kühn et d'autres spécialistes pourraient être utilisées pour mettre en place une analyse similaire à l'« examen rapide » pratiqué aux États-Unis. Néanmoins, des présomptions de ce type ne peuvent constituer ni des interdictions *per se* ni des zones de sécurité.

Dans les pays à pratiques concertées, les échanges d'informations sont presque toujours présumés illégaux car toute communication qui peut permettre de mieux connaître le comportement présent ou futur des concurrents peut être considérée comme une pratique concertée. Dans cette perspective, le projet de lignes directrices européennes sur la coopération horizontale distingue deux types d'échanges en fonction du contenu des informations communiquées. Ainsi, un échange d'informations sur les prix futurs constitue une restriction par objet tandis que l'échange d'autres types d'informations est traité comme une restriction par effet. De l'avis de M. Kallaugher, cette démarche est judicieuse. Cependant, elle peut engendrer des problèmes d'application du fait de la définition très large que la jurisprudence récente de la Cour de justice de l'Union européenne (*T-Mobile*<sup>7</sup>) a donnée de la restriction par objet, laquelle s'étend à toutes les situations où l'absence de telles pratiques se traduirait par une intensification de la concurrence entre les différents intervenants. Cette notion est très différente de l'interdiction *per se* qui existe aux États-Unis. Cependant, les effets négatifs éventuels d'une interprétation aussi large de la restriction par objet peuvent être contrés en appliquant l'article 101, § 3 du TFUE en Europe ou des dispositions similaires dans d'autres espaces juridiques.

En conclusion, M. Kallaugher souligne la nécessité d'adopter une stratégie qui dépend du type d'infraction. Qualifier certains échanges de restrictions par objet peut être utile pour dissuader les entreprises d'y avoir recours. Toutefois, les amendes encourues ne doivent pas être les mêmes que pour les ententes injustifiables de partage de marché ou sur les prix. D'une manière générale, en vue de définir le régime de sanction le plus adapté pour les infractions relatives aux échanges d'informations, il convient sans aucun doute de réfléchir plus largement à la manière de dissuader les entreprises de se livrer à des pratiques anticoncurrentielles.

Le Président remercie M. Kallaugher pour sa contribution et demande à la délégation de la Corée pourquoi, comme l'indique le document qu'elle a soumis, les échanges d'informations ne sont pas considérés en eux-mêmes comme une infraction.

La délégation de la Corée explique qu'en droit coréen, un échange d'informations est *a priori* licite dès lors qu'il ne donne pas lieu à un accord sur les prix ou sur les conditions commerciales ou à d'autres pratiques restrictives de concurrence. En ce sens, les échanges d'informations peuvent servir de preuve indirecte pour établir l'existence d'un accord. Ce qui motive cette approche, c'est qu'un échange d'informations peut avoir beaucoup d'effets en termes d'efficacité et ces effets pourraient disparaître si ces échanges étaient *a priori* qualifiés d'illégaux. Cela n'empêche cependant pas la Commission coréenne de la concurrence (la KFTC) d'engager des poursuites dans des affaires où les échanges d'informations sont manifestement néfastes pour la concurrence. La délégation de la Corée fait état de deux affaires mentionnées dans sa contribution. La première concerne un échange d'informations chez des producteurs de farine. Dans ce dossier, il a été jugé que les producteurs avaient mis en place un accord anticoncurrentiel du fait de la nature des informations mises en commun, de l'intention des parties et de la structure du marché. Dans la deuxième affaire, survenue sur le marché du GPL, la Commission de la concurrence a conclu que l'échange d'informations rentrait dans le cadre plus large d'une entente sur les prix. Cette affaire associait parallélisme des prix et échanges d'informations. L'infraction a été découverte à cause de la fréquence des contacts et des

<sup>7</sup> Affaire C-8/08, *T-Mobile Netherlands*, Rec. I, inédit.

échanges d'informations entre concurrents, du parallélisme des prix, de la structure du marché et des bénéfices anormalement élevés dégagés par les intervenants.

Le Président invite alors la délégation d'Israël à expliquer la démarche de ce pays en matière d'échanges d'informations et à présenter l'affaire survenue dans le secteur bancaire, où l'autorité de la concurrence a établi un juste équilibre entre les avantages et les inconvénients des systèmes d'échange d'informations.

La délégation d'Israël commence par présenter l'affaire des *Banques*<sup>8</sup> de 2009, où cinq des plus grandes banques du pays ont échangé des informations sur les commissions facturées aux particuliers et aux petites entreprises pour les services bancaires. Il a été jugé que cela constituait une infraction *per se* relative aux prix, aux bénéfices, au partage du marché, à la production ou à la qualité. La loi n'imposait pas d'effectuer une étude d'impact, mais celle-ci a montré les effets négatifs possibles de l'échange d'informations (notamment une meilleure connaissance des commissions facturées aux clients, un moindre intérêt à les informer et un moindre intérêt pour les consommateurs de chercher à changer de banque).

Pour ce qui est de la manière dont les échanges d'informations sont envisagés, le droit israélien opère une distinction entre les accords qui, par nature, doivent faire l'objet d'une autorisation délivrée par l'autorité de la concurrence et ceux qui peuvent nécessiter une approbation en fonction de certaines circonstances, notamment des caractéristiques du marché concerné. Les échanges d'informations entre concurrents peuvent entrer dans l'une ou l'autre catégorie, ou dans les deux.

Le Président se tourne vers la délégation du Mexique, qui examine dans sa contribution une disposition du droit national portant expressément sur les échanges d'informations, et lui demande d'exposer comment cette disposition est appliquée en pratique.

La délégation du Mexique explique que les échanges d'informations sont appréciés au cas par cas et que, lorsque l'on conclut que leur objectif ou leur effet est une entente sur les prix ou une manipulation des prix d'achat ou de vente entre concurrents, ils sont considérés comme des infractions *per se*. Les critères utilisés pour évaluer la licéité d'un échange d'informations sont principalement sa nature et son objet. En général, la Commission fédérale de la concurrence (la CFC) examine attentivement les échanges d'informations commerciales sensibles, comme les quantités fabriquées ou vendues, les prix et les futures augmentations de prix ainsi, que les remises et d'autres données.

Jusqu'à présent, la CFC n'a pas publié de lignes directrices sur les échanges d'informations ; néanmoins, la loi prévoit une procédure de consultation qui permet aux entreprises de s'adresser à la CFC pour obtenir des conseils avant d'agir. La CFC est en train d'établir des lignes directrices relatives aux coopérations entre concurrents qui améliorent l'efficacité (co-entreprises, normalisation, licences croisées, etc.), lignes directrices qui traiteront également des échanges d'informations dans ces situations.

Le Président évoque les différentes stratégies mentionnées par les délégations. Certaines contributions abordent la question des zones de sécurité, notamment le document transmis par le Royaume-Uni. Il invite la délégation britannique à exposer ses vues en la matière.

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<sup>8</sup> *Bank Hapoalim Ltd., Leumi Bank Ltd., Israel Discount Bank Ltd., Mizrahi Bank Ltd. et First International Bank of Israel Ltd* (jugé qu'il y a eu accord restrictif de concurrence) 2009 *Antitrust* 5001411.

La délégation du Royaume-Uni explique tout d'abord que sa contribution ne propose pas expressément d'instaurer des zones de sécurité, mais les cite comme moyen possible de traiter les accords de partage d'informations qui sont peu susceptibles de porter atteinte à la concurrence et qui sont appréciés en fonction de leurs effets. Les échanges d'informations peuvent prendre diverses formes, par conséquent les zones de sécurité peuvent présenter des inconvénients. Ainsi, des zones de sécurité définies à partir des parts de marché de chaque entreprise peuvent être utilisées par les grands groupes pour refuser de fournir des informations bénéfiques pour la concurrence à leurs concurrents de plus petite taille. En outre, l'existence de zones de sécurité peut amener certaines entreprises à croire que tout échange d'informations ayant lieu en dehors de ces zones est illicite, ce qui serait regrettable. Pour conclure, la délégation du Royaume-Uni relève que seuls certains problèmes sont pris en compte dans le débat en cours sur la meilleure manière de traiter les échanges d'informations.

M. Kühn conteste l'argument selon lequel les entreprises pourraient estimer que toute pratique située en dehors des zones de sécurité est illégale. Ces pratiques seraient tout simplement examinées en utilisant la règle de raison. Même lorsque l'échange d'informations agrégées rentrerait dans le cadre des zones de sécurité, les entreprises pour lesquelles il serait très avantageux d'échanger des données détaillées ne seraient pas dissuadées de le faire, quand bien même de telles pratiques se situeraient en dehors des zones de sécurité. Ces comportements doivent être examinés attentivement et ne doivent être autorisés que si les gains d'efficacité annoncés sont plausibles. M. Kühn souligne que la question n'est pas tant celle des zones de sécurité en elles-mêmes que celle de la manière dont les analyses qui s'appuient sur la règle de raison sont organisées et menées.

Le Président se tourne vers la délégation de l'Union européenne, délégation qui a, dans sa contribution, fait allusion à la consultation publique concernant les lignes directrices en matière d'accords de coopération horizontale. Il lui demande dans quelle mesure le projet de lignes directrices sera modifié à l'issue de la consultation et si, en droit européen, les échanges qui font intervenir un tiers qui collecte les données et les revend aux concurrents sont appréciés différemment des échanges directs entre concurrents.

Concernant le projet de lignes directrices, la délégation de l'**Union européenne** explique qu'après examen minutieux des réponses reçues dans le cadre de la consultation publique, la Commission européenne continue de procéder aux consultations internes nécessaires. Le projet peut encore être modifié, il est par conséquent trop tôt pour dire quel en sera la teneur finale, même si l'on peut d'ores et déjà relever quelques points précis. Ainsi, la Commission envisage de fixer la zone de sécurité à 20 % de part de marché, seuil en dessous duquel elle estime que les échanges sont peu susceptibles d'avoir des effets anticoncurrentiels. Les lignes directrices contiendront également des précisions sur les questions suivantes :

- Quand un échange d'informations qui a lieu en l'absence d'un accord peut-il être qualifié d'infraction ?
- Quand un échange d'informations stratégiques qui diminue l'incertitude chez les concurrents constitue-t-il une infraction (conformément à la jurisprudence de la CJUE) ?
- Quand une communication unilatérale d'informations stratégiques constitue-t-elle une infraction parce qu'elle s'intègre dans une stratégie de coordination, surtout si elle est suivie de réponses stratégiques apportées par des concurrents ?
- Les échanges d'informations restrictifs par objet sont des communications qui portent sur les intentions futures et non sur les données actuelles, lesquelles peuvent être modifiées.

- Les communications portant sur des investissements irréversibles ou sur des projets d'entrée sur un marché sont rarement anticoncurrentielles.

Pour ce qui est de la distinction entre échanges d'informations directs et indirects, la délégation de l'Union européenne ne voit pas de raison de procéder à une analyse différente ou de créer des zones de sécurité. Les critères utilisés pour examiner la situation, à savoir le contexte du marché et l'impact de l'échange d'informations, sont les mêmes que l'échange soit direct ou indirect.

Le Président demande à la délégation de l'Union européenne son avis sur l'opinion émise par M. Kühn, c'est-à-dire que les échanges d'informations portant sur les coûts sont très rarement néfastes.

La délégation de l'Union européenne explique que si le marché est structuré d'une certaine manière, des communications portant sur l'ensemble des coûts variables des concurrents peuvent faciliter la collusion étant donné qu'elles réduisent l'incertitude pour une variable stratégique. Même si cela arrive moins fréquemment que pour les échanges d'informations sur les prix ou les quantités, cette hypothèse n'est pas à exclure. Par conséquent, l'instauration d'une zone de sécurité ne se justifie pas dans ce cas.

M. Kühn répond en affirmant que ce type d'échanges d'informations ne peut guère servir à effectuer une surveillance et, de ce fait, ne peut faciliter une collusion. En définitive, il n'est pas indispensable de mettre en place une zone de sécurité globale pour les échanges d'informations portant sur les coûts. Cependant, il pourrait être intéressant d'instaurer une telle zone pour les échanges d'informations agrégées portant sur les coûts, échanges qui servent à des fins de comparaison, car ils sont porteurs de gains d'efficacité importants.

Le Président s'adresse à M. Padilla afin qu'il expose quel est, selon lui, le cadre d'analyse idéal des échanges d'informations et qu'il précise si les échanges publics et privés doivent être traités différemment.

M. Padilla souligne tout d'abord les difficultés qu'il y a à étudier les échanges d'informations, étant donné qu'ils peuvent prendre des formes très différentes et avoir des conséquences très diverses et que, de plus, la théorie économique n'est pas concluante sur cette question. Toutefois, c'est un sujet d'actualité qui doit être traité, car, du fait d'une répression accrue des ententes, les entreprises ont recours à des méthodes de coordination plus subtiles et moins visibles (contrairement aux ententes flagrantes conclues dans le passé). Par conséquent, les autorités de la concurrence doivent mettre en place des mécanismes appropriés afin de pouvoir établir si un échange d'informations est utilisé à des fins de collusion.

Pour ce qui est de savoir si les échanges d'informations doivent toujours être appréciés en utilisant la règle de raison, M. Padilla indique que les publications économiques, qu'elles soient théoriques ou empiriques, permettent de conclure que non. De tels échanges peuvent avoir des effets pro- et anticoncurrentiels et il est difficile d'estimer *a priori* quel est le type d'effet qui a le plus de chances de survenir. Les interdictions *per se* ne sont donc pas adaptées aux échanges d'informations.

Cela étant, dans certains cas, on peut limiter le champ d'application de la règle de raison en s'appuyant sur des présomptions afin de garantir la sécurité juridique et d'offrir aux entreprises les mesures incitatives appropriées. Lorsque l'on définit des présomptions, notamment des présomptions d'illégalité, il importe de ne pas s'intéresser seulement à la probabilité des erreurs de première et de seconde espèce mais également au coût de telles erreurs. D'après M. Padilla, des présomptions simples d'illégalité doivent être établies uniquement si, dans le cadre de l'appréciation d'un échange d'informations, une erreur de deuxième espèce est beaucoup plus probable qu'une erreur de première

espèce et si, de surcroît, le coût d'une erreur de seconde espèce est très supérieur à celui d'une erreur de première espèce.

Il existe deux manières de définir une présomption à partir de la nature des informations échangées et de la structure du marché : il peut s'agir des présomptions simples de légalité ou d'illégalité. On a davantage recours au premier type de présomption même si la théorie économique et des recherches empiriques plaident en faveur du second. Si l'on instaure une présomption simple d'illégalité, il est essentiel que celle-ci puisse être réellement réfragable, soit en présentant des éléments qui prouvent que l'échange d'informations offre des gains d'efficacité, soit en montrant qu'il n'entraîne aucun effet anticoncurrentiel.

Pour ce qui est des interdictions *per se*, M. Padilla relève que, même s'il est en général hostile à de telles dispositions, il conçoit qu'elles présentent un intérêt en raison des effets incitatifs exposés précédemment par M. Kühn. Néanmoins, elles ne devraient être instaurées qu'après avoir soigneusement mis en balance les effets bénéfiques des incitations *a priori* et les coûts des erreurs de première espèce qu'elles entraînent inévitablement.

En dernier lieu, M. Padilla relève qu'à l'instar de M. Kühn, il ne voit pas la nécessité de distinguer les échanges d'informations publics des échanges privés car ce qui importe, c'est l'objectif de l'échange, c'est-à-dire surveiller et coordonner. De même, il partage l'avis de la délégation de l'Union européenne sur le fait que les échanges d'informations ne doivent pas être étudiés différemment suivant qu'ils sont directs ou indirects.

Le Président remercie M. Padilla pour sa présentation et invite la délégation des Pays-Bas à exposer la stratégie du pays en matière d'échanges d'informations et à évoquer l'affaire des *Bicyclettes* mentionnée dans sa contribution, affaire dans laquelle un échange d'informations a été jugé licite en raison du caractère public des informations communiquées.

La délégation des Pays-Bas explique qu'il n'y a pas d'interdictions *per se* en matière d'échanges d'informations dans ce pays. On a recours à une analyse au cas par cas en s'appuyant sur la classification des pratiques entre zone « blanche », « noire » ou « grise », classification qui figure dans les lignes directrices qui ont été publiées. Les zones blanches concernent par exemple les échanges d'informations passées ou agrégées. L'affaire des *Bicyclettes* constitue un exemple de situation qui se situe dans la zone grise. Dans ce dossier, l'échange d'informations a été jugé licite du fait que toutes les données rassemblées au sein du système étaient publiques *ab initio* et que les données étaient accessibles à tous les concurrents, de sorte qu'il ne créait pas de barrière à l'entrée. Des échanges d'informations entre concurrents relatifs au comportement futur du marché font en général partie de la zone noire.

Le Président invite alors la France à commenter l'affaire des *Palaces parisiens*<sup>9</sup>, laquelle a donné lieu à un échange d'informations anticoncurrentiel. Le Président demande si ces informations étaient publiques ou privées et comment l'autorité française de la concurrence a établi que cette pratique était en réalité anticoncurrentielle.

La délégation de la France répond que, selon elle, une interdiction complète des échanges d'informations peut empêcher de réaliser des gains d'efficacité bénéfiques et proconcurrentiels. À l'inverse, il convient d'en examiner les effets réels ou éventuels dans chaque situation, en portant une attention particulière aux prix. La délégation, en accord avec la Commission européenne, estime que

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<sup>9</sup> Décision n° 05-D-64 du 25 novembre 2005 relative à des pratiques mises en œuvre sur le marché des palaces parisiens.

même si cela peut s'avérer difficile, les sociétés doivent avoir la possibilité de justifier leurs pratiques d'échanges d'informations en montrant qu'elles permettent d'obtenir des gains d'efficience réels.

L'affaire des *Palaces parisiens* a eu lieu fin 2005 et concernait les six palaces-hôtels parisiens les plus luxueux. L'instruction a montré que ces hôtels échangeaient régulièrement des informations sur les taux d'occupation, le prix moyen par chambre louée et le revenu moyen par chambre disponible. Il s'agissait de données essentielles car, dans ces hôtels, les tarifs dépendent de plusieurs paramètres du marché. Chaque semaine, les directeurs des six palaces s'échangeaient ces informations. Au lieu de contester la nature des informations échangées, les parties ont soutenu qu'elles ne formaient pas un oligopole et n'étaient que six sociétés au sein d'un marché des palaces beaucoup plus vaste. Ce qui est remarquable dans cette affaire, c'est la manière dont les informations agrégées permettaient de suivre les résultats de chaque hôtel concurrent, de telle sorte que les palaces pouvaient adapter leur stratégie commerciale et maintenir l'équilibre collusif existant.

La délégation a ensuite répondu au point soulevé par M. Padilla, à savoir que cet échange d'informations était une pratique relativement ancienne. Même si ce système était en place depuis un siècle, ce qui rend l'affaire des *Palaces parisiens* intéressante, c'est la période d'examen, soit 1999-2002. Après le 11 septembre 2001, la demande sur le marché parisien des hôtels de luxe a considérablement baissé. Pour faire face à cette situation, les six palaces ont tous réduit leurs prix dans les mêmes proportions, preuve que même si les informations échangées étaient agrégées et limitées à trois données, elles étaient suffisamment ciblées pour empêcher toute déviation vis-à-vis de la collusion qui était en place depuis des années.

Ainsi, le fait que les informations soient publiques ou privées importe peu car, même si l'on pouvait appeler chaque hôtel pour connaître le prix des chambres, le plan d'action commerciale et la politique commerciale de chaque hôtel étaient définis à partir des autres données. De plus, alors que les hôtels affirmaient que les informations échangées n'étaient pas stratégiques, ils exigeaient qu'elles restent confidentielles et soient considérées comme des secrets commerciaux. Cela confirme que l'échange était anticoncurrentiel. Enfin, le fait que ces informations soient stratégiques et régulièrement mises à jour permettait aux palaces de supprimer les incertitudes au sein de l'oligopole et de maintenir l'équilibre collusif dans ce secteur.

Le Président invite la délégation du Royaume-Uni à présenter la suggestion qui figure dans sa contribution : classer un échange d'informations par objet ou par effet pourrait dépendre du caractère public ou privé de l'information échangée entre les parties.

La délégation du Royaume-Uni explique que cette ébauche de proposition résulte de l'intention de tracer une ligne de démarcation claire entre les échanges d'informations nocifs et ceux qui améliorent l'efficience. Même si MM. Kühn et Padilla jugent tous deux qu'il est impossible de distinguer les échanges privés des échanges publics, la délégation du Royaume-Uni souligne que la plupart des avantages des informations communiquées aux consommateurs proviennent du fait que ces informations sont publiques et non privées. En outre, lorsque les informations sont publiques, les autorités de la concurrence et les plaignants peuvent plus facilement les examiner.

Le Président passe alors à la question de la différence entre informations agrégées et informations détaillées et demande à la délégation de la Finlande d'indiquer quel est, en Finlande, le degré d'agrégation requis pour éviter d'encourir des sanctions.

La délégation de la Finlande décrit le critère mis au point pour déterminer à quel degré d'agrégation il est possible d'extraire d'une information des données qui peuvent être utilisées à des fins de surveillance. Pour ce qui est du degré d'agrégation, la délégation est du même avis que M.



Kühn, à savoir que l'agrégation est suffisante lorsqu'il est impossible d'en déduire des informations individualisées sur les prix.

Le Président invite la délégation de la Turquie à présenter l'affaire de *l'Association des distributeurs automobiles*<sup>10</sup>, mentionnée dans sa contribution, et à indiquer si le degré d'agrégation a joué un rôle dans la décision de considérer l'échange d'informations comme licite.

Tout d'abord, la délégation de la Turquie explique comment l'autorité turque de la concurrence étudie les échanges d'informations au cas par cas en tenant compte à la fois de la nature des informations échangées et de la structure du marché. Dans l'affaire de *l'Association des distributeurs automobiles*, une association gérait un site Internet où figuraient des informations agrégées concernant les ventes, les parts de marché et les importations de nouveaux véhicules en Turquie. L'examen a porté sur un grand nombre de paramètres liés à la structure du marché, mais le fait que les informations échangées étaient agrégées a certainement joué un rôle important dans la décision finale. La délégation de la Turquie fait également état d'une autre affaire sur le même marché, instruite en 2009<sup>11</sup>. Dans ce dossier, des échanges périodiques d'informations portant sur les ventes et sur les prix actuels conseillés effectués par courriel, ainsi que des prévisions de ventes échangées lors des réunions des associations concernées ont été jugés licites. Cette décision a été prise alors que les données n'étaient pas agrégées, que les informations sur les prix étaient également publiées sur les sites Internet des parties et que les communications portant sur les prévisions de ventes servaient davantage à évaluer l'état du marché qu'à établir une collusion.

Le Président passe alors à la question de l'intervention des pouvoirs publics en matière d'échange d'informations. Il invite la délégation de la Pologne à exposer une affaire survenue dans le secteur du ciment<sup>12</sup>, affaire dans laquelle des informations commerciales très sensibles ont été échangées au travers d'une association, et à donner son avis sur le fait que tous les fabricants ont été sanctionnés mais pas l'association.

La délégation de la Pologne relève tout d'abord que, dans cette affaire, il n'y avait aucun problème d'intervention des pouvoirs publics, si ce n'est éventuellement un comportement hérité de la planification en vigueur à l'époque communiste. Cela dit, cet aspect n'entraîne pas en ligne de compte étant donné que cette affaire a été tranchée en 2009. L'association mentionnée dans cette affaire était complètement contrôlée par ses membres, lesquels ont été sanctionnés, et les échanges les plus néfastes ont en réalité eu lieu en dehors de cette association. L'autorité polonaise de la concurrence en a conclu qu'elle n'était qu'un instrument aux mains de ses membres, instrument utilisé uniquement à des fins de collusions, et ne lui a donc pas infligé d'amende.

Le Président en vient alors au dernier sujet de la table ronde : la publication de lignes directrices dans le domaine des échanges d'informations. Il invite M. Kallaugher à effectuer une présentation introductive portant sur des considérations pratiques, les spécificités sectorielles et d'autres paramètres à prendre en compte.

Avant d'aborder des considérations pratiques, M. Kallaugher revient sur certains points évoqués auparavant pendant la discussion. Tout d'abord, en ce qui concerne les échanges publics et privés, il a

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<sup>10</sup> Décision *Association des distributeurs automobiles* (datée du 15.4.2004 et portant le numéro 04-26/287-65).

<sup>11</sup> Décision *Association des distributeurs automobiles/Association des constructeurs automobiles* (datée du 9.9.2009 et portant le numéro 09-41/998-255).

<sup>12</sup> Décision, n° DOK-7/2009.

souligné le rôle du journalisme économique, rôle qui n'avait pas été évoqué jusqu'à présent. Il est certain qu'il faut appliquer des sanctions lorsque des dirigeants donnent publiquement des informations à la presse dans le but de faciliter une coordination entre les entreprises. Cela étant, il n'est pas souhaitable de porter atteinte à la liberté d'expression en interdisant aux entreprises de parler aux médias. Le second point concerne les erreurs de première et de deuxième espèce, une question soulevée par MM. Kühn et Padilla. M. Kallaugher souligne que ces erreurs ne doivent pas être évaluées au cas par cas ou à l'échelle d'un secteur d'activité mais au niveau de l'ensemble du pays afin de refléter convenablement l'équilibre entre les coûts et les avantages de la dissuasion. En troisième lieu, M. Kallaugher a évoqué la question des zones de sécurité. D'après lui, elles jouent un rôle important en supprimant les coûts supportés par une entreprise pour savoir si une pratique est ou non licite, qui sont essentiellement des coûts de transaction.

Pour ce qui est des considérations pratiques, M. Kallaugher axe sa réflexion sur l'aspect humain des échanges d'informations. Des règles sans ambiguïté séduisent les autorités de la concurrence aussi bien que les entreprises car elles diminuent les coûts de mise en conformité avec la loi et augmentent la sécurité juridique. Néanmoins, une vision théorique centrée sur les effets négatifs et les avantages d'un échange d'informations peuvent masquer le contexte dans lequel les règles doivent être appliquées et dans lequel les individus doivent respecter la loi. Tout le monde sait qu'une entente sur les prix est illicite. Cependant, en raison de l'existence de nombreuses zones grises, il est beaucoup plus difficile pour les individus de savoir ce qu'ils ont le droit de communiquer en cas d'échange d'informations. Il est donc difficile de respecter pleinement la réglementation.

En matière d'échanges d'informations, certains problèmes peuvent dépendre du secteur d'activité concerné. Dans certains secteurs comme le transport aérien, la construction ou les hautes technologies, les contacts entre concurrents sont normaux et nécessaires. Il est inévitable que dans le cadre de ces contacts qui, par ailleurs, sont légitimes et contribuent à l'efficacité économique, des individus s'engagent dans des discussions qu'ils ne devraient pas avoir. Ce n'est pas nécessairement parce que ces personnes ont l'intention d'établir une collusion mais plus simplement parce que l'être humain a une tendance naturelle à montrer qu'il dispose de certaines informations. Des discussions utiles qui contribuent à l'efficacité peuvent avoir lieu en même temps que des discussions regrettables. Par conséquent, mettre en place des règles drastiques peut dissuader les entreprises d'avoir des échanges, quels qu'ils soient. En revanche, dans certains secteurs comme la production de marchandises, les produits de marque ou la distribution au détail, les contacts entre concurrents sont rares et peu utiles. Dans ces secteurs, une interdiction *per se* des échanges portant sur les prix actuels ou futurs pourrait se justifier. Il convient également de tenir compte du fait que, dans certains secteurs et dans certaines régions, la plupart des personnes concernées se connaissent et communiquent entre elle régulièrement pour des raisons parfaitement légitimes.

M. Kallaugher souligne que, si ces paramètres doivent être étudiés dans les lignes directrices, la manière dont ils sont pris en compte en pratique au regard des sanctions est également importante. Par conséquent, des comportements qui présentent de nombreuses zones grises où il est impossible d'empêcher les personnes de s'aventurer ne doivent pas être sanctionnés aussi sévèrement que des ententes injustifiables sur les prix. En outre, les discussions peuvent avoir lieu à différents niveaux, mais plus la position des personnes concernées dans l'entreprise est élevée, plus le risque d'effets néfastes augmente.

Le Président s'adresse à la délégation de l'Espagne, qui a, dans sa contribution, évoqué un rapport sur le secteur agroalimentaire et sur le rôle que peut jouer la transparence dans l'amélioration de son fonctionnement.

La délégation de l'Espagne explique que, dans l'agroalimentaire, les pratiques anticoncurrentielles se sont fortement développées ces dernières années. C'est pourquoi, en juin 2010, l'autorité espagnole de la concurrence a publié un rapport sur la concurrence dans la filière agroalimentaire, rapport qui présente plusieurs mesures visant à améliorer la transparence afin que la situation soit la même pour les grandes et les petites entreprises en termes d'accès à l'information. Ce rapport reconnaît qu'une transparence accrue peut non seulement avoir des effets bénéfiques en termes d'efficience, mais aussi entraîner des phénomènes de collusion. Pour empêcher cela, il juge nécessaire que le degré d'agrégation des informations échangées soit élevé, que la collecte des données soit effectuée par des tiers et que leur publication soit confiée à des organismes publics.

Le Président demande alors à la délégation des États-Unis de présenter les lignes directrices applicables à la coopération entre concurrents (*Antitrust Guidelines for Collaborations among Competitors*), lignes directrices qui s'appliquent aux échanges d'informations.

En premier lieu, la délégation des États-Unis tient à remercier le Président et le Comité pour cette discussion si utile et intéressante. Même s'il n'y a pas de fort consensus au sein des participants à cette table ronde, il y a eu des points d'accord. Tout d'abord, la notion d'échange d'informations entre concurrents n'est pas problématique en elle-même et peut même être bénéfique pour la concurrence. Il convient de s'attacher à l'objectif et aux effets de l'échange ainsi qu'à la nature des informations communiquées, à la période sur laquelle portent les informations sur les prix et à la structure du marché concerné. Ensuite, l'agrégation des données joue également un rôle important. Aux États-Unis, par exemple, les échanges de données agrégées bénéficient d'une zone de sécurité dans le secteur de la santé.

Pour ce qui est des zones de sécurité en général, les principes directeurs fixent un seuil de 20 % de part de marché, limite qui s'applique non seulement aux échanges d'informations mais également aux coopérations horizontales comme les coentreprises, par exemple. Il existe une zone de sécurité spécifique pour le domaine de la santé, zone qui protège les échanges des informations les plus sensibles (par exemple, les montants facturés par les fournisseurs en échange de leurs services). Cependant, la zone de sécurité n'est valable que dans des conditions très strictes : les informations doivent être gérées par un tiers, dater d'au moins trois ans et provenir d'au moins cinq sources différentes, sachant qu'aucune de ces sources ne peut représenter plus de 25 % des résultats finaux.

D'après la délégation des États-Unis, les zones de sécurité protégeant les échanges qui ont peu de risques d'être problématiques sont utiles en ce sens qu'elles augmentent la sécurité juridique, réduisent au minimum les effets dissuasifs sur les échanges bénéfiques à la concurrence et permettent aux pouvoirs publics de concentrer leurs efforts sur les affaires les plus délicates. Pour ce qui du risque que les zones de sécurité donnent le sentiment aux entreprises que tout échange effectué en dehors de ces zones restreint la concurrence, les autorités américaines de la concurrence disposent d'instruments qui permettent une consultation préalable de ces autorités au sujet de comportements envisagés, instruments qui peuvent être utilisés pour réduire ce risque.

La licéité d'un échange d'informations dépend également du fait qu'il fait ou non partie d'un accord plus vaste qui tombe sous le coup des incriminations pénales prévues par le Sherman Act (entente sur les prix, soumissions concertées ou partage du marché). En pratique, il ne serait pas suffisant de démontrer à un jury que plusieurs parties se sont simplement mis d'accord pour s'échanger des informations. Le plus souvent, l'échange d'informations s'ajoute à une activité plus manifestement illicite.

Pour ce qui est des échanges de données agrégées, le Président invite le BIAC à présenter ses commentaires sur les questions qui ont fait l'objet de discussions.

Le BIAC commence par insister sur les avantages des échanges d'informations en termes d'efficacité, avantages qui ont été reconnus au cours de la discussion et qui sont examinés en profondeur dans sa contribution. Il poursuit en relevant que, d'après lui, les échanges d'informations ne doivent pas être considérés comme des infractions autonomes mais doivent être appréciés en fonction d'autres pratiques et de leurs effets. Pour les ententes injustifiables, il est légitime qu'il y ait des règles *per se* mais les autres comportements qui donnent lieu à des échanges d'informations doivent être jugés en appliquant la règle de raison. De plus, les règles *per se*, même si elles augmentent la sécurité juridique, peuvent avoir des conséquences imprévues importantes. Pour ce qui est des zones de sécurité, le BIAC fait part de son inquiétude quant à ses éventuels effets dissuasifs sur les échanges bénéfiques pour la concurrence qui ne rentrent pas dans ce cadre. Il convient de traiter ce problème, par exemple en publiant des lignes directrices qui indiqueraient les types d'échanges d'informations susceptibles d'engendrer des problèmes.

Le Président se tourne vers la délégation de la République tchèque, dont la contribution appelle à une harmonisation accrue en matière d'échanges d'informations.

La délégation de la République tchèque souligne l'intérêt des nouvelles lignes directrices européennes sur les accords de coopération horizontale, lignes directrices qui apporteront de la clarté et attireront l'attention sur cette question difficile. Même si les lignes directrices ne couvrent pas toutes les situations possibles ni tous les problèmes abordés lors de cette table ronde, elles sont établies sur des bases très solides et seront, dans la pratique, très utiles à l'autorité tchèque de la concurrence.

Le Président invite ensuite les trois experts à présenter leurs observations finales sur la question des échanges d'informations à partir des discussions qui ont eu lieu pendant la table ronde.

M. Kühn souligne de nouveau que les gains d'efficacité possibles d'un échange d'informations doivent être appréciés en appliquant la règle de raison sauf s'ils sont totalement improbables ou inacceptables. En accord avec M. Padilla, il estime qu'il est pratiquement impossible pour une autorité de la concurrence de procéder à une analyse classique des gains d'efficacité dans ce contexte. Néanmoins, il relève qu'une manière possible d'aborder cette question est de se demander si l'échange d'informations a lieu sous une forme qui est nécessaire et adaptée aux gains d'efficacité que l'entreprise prétend atteindre.

En premier lieu, M. Padilla indique qu'il est convaincu de l'intérêt des lignes directrices, car ces documents augmentent la sécurité juridique, même en l'absence de zones de sécurité ou de règles *per se*, en expliquant comment la règle de raison s'applique. Il souligne ensuite qu'il y a de bonnes raisons d'instaurer des présomptions d'illégalité pour les types de comportements qui risquent fortement d'engendrer des problèmes de concurrence. Cela étant, ces présomptions doivent être soigneusement définies afin de ne pas nuire aux échanges qui améliorent l'efficacité. M. Padilla doute qu'elles puissent reposer sur la nature des informations échangées. Enfin, il suggère que les autorités de la concurrence publient occasionnellement des décisions d'autorisation, ainsi que l'analyse qui les a conduites à juger un échange d'informations bénéfique pour la concurrence. Cela augmenterait la sécurité juridique et renforcerait la crédibilité de ces organismes.

M. Kallaugher relève qu'alors que l'essentiel de la réflexion économique sur les échanges d'informations date de plus de 25 ans, la présente table ronde et les interventions de MM. Padilla et Kühn enrichissent de manière importante la théorie économique sur ces questions. Dans ce domaine, il est essentiel de disposer d'une législation qui reflète fidèlement les connaissances économiques et, dans cette optique, la présente discussion a été très utile.

Le Président clôt la séance et remercie les intervenants ainsi que tous les participants pour cette table ronde aussi intéressante que stimulante.