

# SCF

Sofia Competition Forum

## GUIDELINES ON INFORMATION EXCHANGE BETWEEN COMPETITORS

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support growth  
convergence  
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BULGARIAN COMMISSION  
ON PROTECTION OF COMPETITION



UNITED NATIONS CONFERENCE  
ON TRADE AND DEVELOPMENT

**GUIDELINES  
ON INFORMATION EXCHANGE  
BETWEEN COMPETITORS**



## **I. OBJECTIVE OF THE GUIDELINES**

**§.1.** These Guidelines aim at providing undertakings, associations of undertakings and all interested parties, a point of reference with regard to the nature, forms and effects of information exchange between competitors and its competitive assessment. Information exchange between competitors may take various forms; it may either enhance or restrict competition, hence its assessment shall be carried out on a case-by-case basis as the results of the assessment would depend on a combination of various case specific factors<sup>46</sup>.

**§.2.** These Guidelines provide an outline of the types of information which competitors exchange most frequently, the characteristics of the unlawful exchange of information, and the specificities of the market context in which the information exchange between competitors may lead to prevention, distortion or restriction of competition. Along these lines, the Guidelines also contain specific examples of unlawful exchange of information between competitors that have been established in the practice of the Commission on Protection of Competition (CPC), the European Commission (EC) and other national competition authorities (NCA) in the member-states of the European Union (EU).

**§.3.** The current practice of the competition authorities shows that the associations of undertakings have a central role to play in the exchange of information between competitors. Despite the indisputably beneficial activities they carry out for the undertakings from the respective branches and sectors of the economy, often times associations function as centres for accumulation and exchange of commercially sensitive information between their members. Enhancing or facilitating the exchange of

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<sup>46</sup> The Guidelines were adopted by the CPC decision No. 778/20.12.2011

such information between undertakings may reduce their readiness to exert effective competitive pressure on one another, and thus, may restrict the competition in the relevant market. That is why, the activities of associations and branch organizations shall take into account the rules of competition, and more specifically the prohibition for exchange of commercially sensitive information between competitors as a form of infringement of Article 15 (1) of the Law on Protection of Competition (LPC) and/ or Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU).

§.4. These Guidelines aim at familiarizing undertakings, associations of undertakings and all interested parties, with the main aspects of the competitive assessment of information exchange between competitors. They can be useful both to the economic activity of undertakings and to the lawful functioning of associations of undertakings with a view to enhancing the effective competition in the country and creating conditions for improving the welfare of consumers.

## **II. THE NOTION OF INFORMATION EXCHANGE BETWEEN COMPETITORS**

### **2.1. Information exchange as a form of horizontal cooperation between competitors: economic benefits**

§.5. The exchange of information between undertakings which operate on the same level of the production or distribution chain of certain products (goods or services) and form an independent market, shall be considered a form of horizontal cooperation between competitors.

§.6. In the contemporary conditions of market relations development the opportunity for information exchange between competitors is of primary importance for the effective

implementation of economic activity in each relevant market. The access to reliable market information can enable undertakings to effectively plan and forecast their production and commercial activities as well as to invest in new production powers or in R&D, which can, on their part, lead to better quality, more innovations and lower prices of the offered goods and services.

§.7. Information exchange may create preconditions for adapting the supply of goods and services according to the demand, for improving the economic efficiency of the undertakings functioning in the relevant market, as well as for raising the awareness of new entrants or investors who would like to establish their positions in the market. For example, the collection of aggregated data on the supply and demand of the goods and services that form the relevant market may contribute to the more efficient redistribution of the products to geographic markets that are characterized by a demand higher than the supply, or to stimulate the product differentiation of goods or services with respect to the current demand on the part of consumers. Sharing of information may help companies rationalize their costs for production and realization of the respective products and maximize the results of their economic activity which, on its part, may lead to expanding their market presence through entering new markets or positioning new products in the relevant market.

§.8. The exchange of information may also be of benefit to consumers by reducing their search costs which would directly lead to improving their welfare. They will be able to make their choice as consumers only if they are well informed about the prices, characteristics, uses and quality of the different products that are offered in the market. In fact, one of the prerequisites for the development of effective market competition is for the consumers to be given the opportunity to compare the prices and commercial conditions offered by the different suppliers of goods or services. The availability of such an opportunity for consumers

has to do with ensuring a certain level of market transparency which, on its part, turns out to be an essential prerequisite for the development of the competitive market process.

§.9. The exchange of market information which increases market transparency is beneficial to effective competition as long as it does not lead to establishing conditions for concerted or coordinated conduct of the market participants. There are certain types of information which, if exchanged and made accessible to the market participants, would lead to surpassing the favourable level of market transparency and to restricting the competition among them. In this sense, the exchange of information shall not lead to reducing the number of incentives for undertakings to adopt the competitive conduct in the relevant market and shall not remove or considerably reduce the economic risk stemming from the uncertainty as to the current or future market conduct of the competitors and their market strategies for attracting more consumers.

## **2.2. The notion of *exchange* of information**

§.10. In its competitive and legal nature information exchange is a form of horizontal cooperation between competitors by means of which they offer to each other, directly or indirectly, unilaterally or bilaterally, historic, current or future data on important parameters of their economic activity, namely:

✓ *Price parameters* (selling prices, pricing mechanism, cost price of the offered products, discounts, structure of the production and realization costs, etc.) or

✓ *Non-price parameters* (marketing strategies, advertising campaigns, promotions, intentions for positioning of new products, entering new markets, relations with other companies, etc.).

§.11. For information exchange among competitors to fall within the scope of competition law, the existence of an agreement, a decision by an association of undertakings, or a concerted practice shall be established. It is on the basis of these agreements, associations or concerted practices that undertakings disclose information among themselves or forward it to their association which is responsible for centralizing, systematizing and processing the information and presenting it back to the participants in an agreed form and at agreed intervals. This form of cooperation between undertakings shall be subject to legal regulation by competition law as it gives rise to competitive effects in at least three directions: the way in which the individual undertakings take economic decisions; the way in which customers choose the respective products; and the ways in which the competitive pressure among the participants in the relevant market is exercised.

### **2.3. The notion of exchange of information *between competitors***

§.12. Competition law is interested in the exchange of information between undertakings which are in relations of competition in the market. *Undertaking* is any natural person, legal entity, or unincorporated entity which carries out economic activities, regardless of its legal and organisational form<sup>47</sup>. In accordance with the constant practice of the European Commission (EC) and the Court of Justice of the European Union an *undertaking* covers any entity engaged in an economic activity regardless of its legal status and the way in which it is financed. In this sense, an undertaking is defined on the basis of its functional character which requires the respective entity to be engaged in an *economic activity*. *Economic activities* shall mean the activities of

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<sup>47</sup> According to § 1 (7) of the Additional Provisions of the Law on Protection of Competition



undertakings the results of which are designed for exchange on the market<sup>48</sup>. In accordance with the EU competition law, *economic* is any activity of offering goods or services into the market. This activity may be carried in a way which could lead to the realization of profit in private interest without the need for such profit to be actually realized.

### **2.3.1. The notion of *actual competitors***

§.13. An undertaking is treated as an actual competitor if it is active in the same relevant market, or if it is able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in relative prices, i.e. when the respective products are substitutable. When the substitutability of the offered products makes it necessary for the undertaking to change considerably its tangible and intangible assets, to undertake considerable additional investments, to take strategic decisions, or to experience substantial losses, the undertaking in question shall be considered not an actual, but a potential competitor.

### **2.3.2. The notion of *potential competitors***

§.14. An undertaking is treated as a potential competitor if there is evidence that it could and would be likely to undertake the necessary additional investments or other necessary switching costs to enter the relevant market in response to a small and permanent increase in prices. This assessment has to be based on realistic grounds, the mere theoretical possibility to enter a market is not sufficient.

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<sup>48</sup> According to § 1 (13) of the Additional Provisions of the Law on Protection of Competition

### **III. INFORMATION EXCHANGE BETWEEN COMPETITORS AS A FORM OF PROHIBITED CONDUCT**

**§.15.** Information exchange is a common feature of many competitive markets. From the point of view of the economic benefits it generates, information exchange turns out to be a prerequisite for increasing market transparency and customers' awareness which, on their part, can lead to greater economic effectiveness and efficiency and can improve customers' welfare. On the other hand, however, information exchange may infringe competition rules by eliminating or reducing the strategic uncertainty of undertakings as to the current or future competitive conduct of the other participants in the market. When the information exchange between companies reduces the strategic uncertainty in the market, this exchange shall be prohibited in the sense of Article 15 (1) of the LPC or Article 101 (1) of TFEU.

#### **3.1. Functions of the exchange of information between competitors**

**§.16.** The exchange of information between competitors may have different functions in the context of the various forms of prohibited conduct of undertakings functioning on the same level of the production or distribution chain. That's why in assessing information exchange as a potential infringement of competition law a clear distinction shall be made between two basic functions of information exchange between competitors which may lead to the prevention, restriction or distortion of competition in the relevant market. On the one hand, information exchange between competitors may manifest itself as part of another form of prohibited horizontal cooperation between undertakings and may, in its essence, constitute a mechanism which facilitates or monitors the implementation of anti-competitive practices of

undertakings which function in the market as a *cartel*<sup>49</sup>. On the other hand, information exchange may manifest itself as an independent form of cooperation and may in itself constitute an infringement of competition law due to the anticompetitive effect it gives or may give rise to.

### **3.1.1. Information exchange as part of another form of prohibited conduct of undertakings**

§.17. When the exchange of information between competitors is carried out in the context of another form of prohibited horizontal cooperation between undertakings (cartels), it shall not be considered an individual infringement of competition rules and shall be thought of as only having an auxiliary function with regard to the respective infringement. In this way, for example, information exchange may serve as a means for increasing the internal or external stability of a given cartel. Information exchange can serve as a means for increasing the internal stability of a cartel by providing the companies who participate in it the required level of market transparency thus helping them keep track of whether a company diverts from the subject of the agreement as well as take counter actions and impose specific sanctions against that company. Information exchange can also serve as a means for increasing the external stability of a given cartel by providing the companies who participate in it the opportunity to keep an eye on potential new entrants as well as to take coordinated actions for closing the market and excluding potential competitors.

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<sup>49</sup> According to § 1 (5) of the Additional Provisions of the Law on Protection of Competition *cartel* shall mean an agreement and/ or concerted practice between two or more undertakings, competitors on the relevant market, aimed at restricting competition through price fixing or fixing pricing conditions for purchase or sale, allocation of production quotas or sales or allocation of markets, including in rigging of public bids or tenders or public procurement award procedures.

**§.18.** When information exchange is an auxiliary action to the functioning of a cartel, its competitive assessment shall be carried out in the context of the assessment of the cartel itself as the gravest infringement of competition. The advantage in this case is that the assessment of information exchange as a form of prohibited conduct does not require additional economic analysis as the cartel gives rise to anti-competitive effects and is prohibited *per se* pursuant to Article 101 (1) of TFEU and/ or Article 15 of the LPC. The main difficulty in establishing that form of prohibited information exchange between competitors is related to the requirement for achieving the higher standard of providing evidence about the cartel itself.

### **3.1.2. Information exchange as an independent form of prohibited conduct of undertakings**

**§.19.** Information exchange can be an independent form of horizontal cooperation between competitors which manifests itself in one of the three forms of prohibited conduct pursuant to Article 15 (1) of the LPC and/or Article 101 (1) of TFEU: an agreement between undertakings, a decision by an association of undertakings, a concerted practice. In view of the fact that some of the significant characteristics of those three alternatively regulated legal norms of prohibited conduct coincide, it is possible for the information exchange between competitors to satisfy more than one of these characteristics in certain cases.

**§.20.** The availability of an agreement, a decision by an association of undertakings or a concerted practice is not in itself indicative of an infringement of the respective provisions of the LPC and the TFEU. With a view to the applicability of the antitrust prohibitions, it has to be established that the respective agreement, decision or concerted practice has as its objective or effect the prevention, restriction or distortion of competition in the relevant market. Therefore, the exchange of information between

competitors can be regarded as an independent form of prohibited conduct to the extent to which it has an anticompetitive objective or leads to an anticompetitive effect. Such would be the situation when information exchange reduces or eliminates the uncertainty of the participants in the market with regard to the development of their competitive relations, and results in restricting the competition between companies. Every economic subject should determine independently the market policy it is going to adhere to. It is for that reason that companies are not allowed to establish any direct or indirect contacts with other operators which may exert influence on the competitors' conduct or reveal their own, current or future, conduct, if the objective or the effect of those contacts is to establish competition conditions which do not correspond to the conditions considered normal for the relevant market.

§.21. The advantage in the assessment of information exchange as an independent infringement of competition rules is that it allows for a comparatively easier collection of evidence. The main difficulty stems from the fact that the collected evidence is subject to an in-depth economic assessment which shall confirm or reject the anticompetitive effect (objective or effect) of the specific information exchange between competitors.

### **3.2. Legal forms of information exchange as an independent infringement of competition**

#### **3.2.1. Information exchange between competitors as and agreement between undertakings**

§.22. “*Agreement between undertakings*” in the sense of Article 15 (1) of the LPC and Article 101 (1) of the TFEU and in accordance with the constant practice of the CPC, the EC and the

Court of Justice of the EU<sup>50</sup>, shall mean a form of cooperation between competitive undertakings by means of which they express their common intention to adopt a certain market conduct. For an agreement to be in place the concurrence of the intentions of at least two undertakings shall be achieved, regardless of the form, name or legal action of those intentions<sup>51</sup>. The agreements can be oral or written, signed or unsigned, legally binding or not. They may even exist in the form of the so called „gentlemen agreements”. The physical presence of the parties is not necessary for signing such an agreement, which can be achieved by exchange of letters or phone calls. The leading argument in assessing information exchange is the fact that it exists in the form of an object or substantial content achieved among competitive undertakings and that it is aimed at preventing, restricting or distorting the competition among them. By achieving an agreement to exchange market information among themselves, the undertakings express their common intention to adopt a certain coordinated conduct in the relevant market.

### **3.2.2. Information exchange between competitors as a decision by an association of undertakings**

**§.23.** „*A decision by an association of undertakings*”<sup>52</sup> as a form of coordinated or concerted conduct of independent undertakings is motivated or facilitated by a subject, which is not actually carrying out economic activities in the relevant market. It, however, unites independent economic entities in the form of

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<sup>50</sup> See Decision of the Court of Justice of the EU under Case T- 7/ 89 SA Hercules Chemicals NV v Commission [1991] ECR II- 1711, para.2

<sup>51</sup> See. Decision of the court of Justice of the EU under Case T- 41/ 96 Bayer AG v. Commission [2000] ECR II- 3383, para. 69

<sup>52</sup> See . Decision of the court of Justice of the EU under Case National Sulphuric Acid Association, OJ, 1980, L 260/24, CMLR 429; Decision of the court of Justice of the EU under Case Sippa, OJ, 1991, L 60/19; Decision of the court of Justice of the EU under Case Visa International, OJ, 2001, L 293/24, CMLR 168

branch organizations and aims at protecting their interests by making them adhere to certain economic conduct whereby the effective competition between them is replaced by cooperation between them.

§.24. The nature of the decision by an association of undertakings is in the objective or effect of the decision, regardless of its form, to influence or to coordinate the conduct of the members of the association. The decisions by associations of undertakings for information exchange between competitors may exist in different forms – letters, orders, instructions, protocols, forecasts, recommendations, verifications, etc., which do not necessarily adopt the form of a “decision”<sup>53</sup>. In this relation, the articles of establishment of the associations as well as the organizational documents adopted by them or by their management or executive boards can also be considered “a decision” under the meaning of the general prohibition, including when they contain the objectives or assign the respective associations with the functions to collect, aggregate and disseminate market information among their members<sup>54</sup>. For information exchange to be in place in the form of „a decision by an association of undertakings”, it is not necessary for all members of the association to have actually provided the data that the association is collecting from them, nor is it necessary for the exchange of information to be carried out in the form of implementing a legal obligation that has been assigned to the members of the association<sup>55</sup>.

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<sup>53</sup> See. Decision of the court of Justice of the EU under Case <sup>HOV SVZ/MCN, 1994, OJ</sup> 104/34, para. 46.

<sup>54</sup> See . Decision of the court of Justice of the EU under Case Re Nuovo CEGAM, 1984, OJ L 99/29, CMLR 484.

<sup>55</sup> See. Decision of the court of Justice of the EU under Case T-14/93 UIC v/s Commission, 1995, ECR II-1503

§.25. Information exchange in the form of a decision by a association of undertakings is in place when the association has established, on the strength of its internal acts, traditions in its practice, or in some other way, a mechanism to function as a centre for unilateral provision and/or mutual sharing of information which its members usually keep as their own commercial secret. The practice of associations of undertakings to use the commercial secrets provided to them for drafting information notes or other analyses on the basis of which they could later issue specific recommendations or forecasts for the economic activity of their members shall be considered a specific legal form of this type of prohibited conduct. In its practice the Court of Justice of the EU has explicitly pointed out that the issuing of recommendations by an association to its members, even if they are not binding, shall be considered a prohibited decision by the association where those recommendations can be implemented after they have been discussed within the association<sup>56</sup>. Information exchange between competitors may exist under the legal form of a decision by an association of undertakings when it is achieved by means of any form of assistance provided by the association which has as its objective or effect to influence or coordinate the market conduct of its members.

### **3.2.3. Information exchange as a concerted practice between undertakings**

§.26. *Concerted practice*<sup>57</sup> shall mean the coordinated action or inaction of two or more undertakings. In its practice the Court of Justice of the EU has pointed out that the concerted practice is a form of coordination between undertakings which,

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<sup>56</sup> See. Decision of the Court of Justice of the EU under Case 8/72 *Vereeniging van Cementhandelaren v Comission*, ECR 977, paras 18-22

<sup>57</sup> Under § 1 (1) of the LPC



without having reached an agreement, have purposefully replaced the risks of competition with the practical cooperation among themselves<sup>58</sup>.

§.27. For the purpose of distinguishing between a concerted practice of undertakings and a prohibited agreement, it has been agreed that the concerted practice is such a form of coordination between undertakings in which they have not reached an agreement (concurrence of the intentions of at least two undertakings) for restricting competition, but it is through their actual market conduct that they have eliminated the economic risk inherent to the process of competition and practically carry out their economic activity in the conditions of cooperation among one another<sup>59</sup>. In this form of coordination between competitors information exchange is not carried out with a view to drafting a common plan for restricting competition and shall be considered a form of prohibited conduct when it infringes the overall objective of the antitrust prohibitions under Article 15 (1) of the LPC and Article 101 (1) of the TFEU which requires undertakings to independently arrive at their market policy and the trade conditions they offer to their clients<sup>60</sup>. Information exchange between competitors exists in the form of a concerted practice when the parties consciously use the market information to adopt or adhere to a market strategy which in practice leads to coordinating their market reactions in the relevant market<sup>61</sup>.

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<sup>58</sup> See. Decision of the Court of Justice of the EU under Case 172/80 Gerhard Züchner v Bayerische Vereinsbank AG [1981] ECR 2021

<sup>59</sup> See. Decision of the Court of Justice of the EU under Case C- 48/69, Imperial Chemical Industries v. Commission, [1972] ECR 619

<sup>60</sup> See. Decision of the Court of Justice of the EU under Case C-8/08, T-Mobile Netherlands, para. 26

<sup>61</sup> See. Decision of the Court of Justice of the EU under Case T-7/89 Hercules v Commission [1991] ECR II-1711 para 256.

**§.28.** The information exchange between competitors may be considered a concerted practice when it leads to reducing the strategic uncertainty in the market, thus facilitating the achievement of practical cooperation between competitors, and to the extent to which the information exchanged is of strategic nature<sup>62</sup>. Information exchange between competitors leads to concerted practices because it restricts the independence of their conduct and reduces the number of incentives for them to compete.

**§.29.** A concerted practice is in place when one undertaking unilaterally discloses strategic information to its competitors<sup>63</sup>. The information can be disclosed by means of regular mail, electronic messages, phone calls, meetings, etc. In all of these cases it is irrelevant whether the undertaking informs its competitors about its planned market conduct or whether the competitors inform one another about their intended conduct in the relevant market. When one undertaking alone reveals to its competitors strategic commercial information concerning its future commercial policy, that reduces the strategic uncertainty as to the future operation of the market for all other competitors and increases the risk of collusive behaviour<sup>64</sup>. For example the mere attendance at a meeting where a company disclose its pricing plans to its competitors<sup>65</sup>, is likely to be considered a prohibited

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<sup>62</sup> See. Decision of the Court of Justice of the EU under Case C-89/85 and others, Wood Pulp, [1993] ECR 1307, paragraph 63

<sup>63</sup> See. Decision of the Court of Justice of the EU under Case T-25/95 и други, Cimenteries, [2000] ECR II-491, пар. 1849: „[...] the notion of a concerted practice presupposes the existence of contacts between competitors, characterized by mutuality [...]. This condition is met when the disclosure of the of the intentions or the future market conduct of one competitor to another has been requested or at least accepted by the latter.“

<sup>64</sup> Вж. Становище на генералния адвокат Kokott по Дело C-8/08, T-Mobile Netherlands, [2009] ECR I-04529, para 54.

<sup>65</sup> See. Decision of the Court of Justice of the EU under Case C-8/08, T-Mobile Netherlands, para 59: „In view the structure of the market the opportunity for

concerted practice, even in the absence of an explicit agreement for increasing prices<sup>66</sup>. When a company receives strategic data from a competitor in any form, it will be presumed to have accepted the information and adapted its market conduct accordingly unless it has stated clearly in front of its competitor that it does not wish to receive such data<sup>67</sup>.

**§.30.** Depending on the facts underlying the case at hand, a unilateral announcement that contains strategic information about the current or future market conduct of a certain participant in the market (for example, a publication in a print media or a statement in an electronic media), followed by public announcements by other competitors, can also be considered a concerted practice among undertakings.

### **3.3. Subject of information exchange between competitors as an independent form of prohibited conduct**

**§.31.** Information exchange between undertakings shall be considered an independent form of prohibited conduct only when it has as its objective or effect the prevention, restriction or distortion of competition in the relevant market. The specific manifestations of the prohibited anticompetitive conduct of undertakings have been enumerated under Article 15 (1) of the LPC and Article 101 (1) of the TFEU, namely: fixing of prices or other trade conditions; sharing of markets or sources of supply; limiting or controlling

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one single case of establishing contact, as is the one in the dispute under the main proceedings, to be sufficient for the respective undertakings to concert their market conduct and thus achieve practical cooperation which replaces competition and the risks it involves, is not excluded.”

<sup>66</sup> See. Decision of the Court of Justice of the EU under Case T-202/98, Tate & Lyle v Commission, [2001] ECR II 2035, para 54.

<sup>67</sup> See. Decision of the Court of Justice of the EU under Case C-199/92 P, Hüls, [1999] ECR I-4287, пар. 162; Дело C-49/92 P, Anic Partecipazioni, [1999] ECR I-4125, para 121.

production, trade, technical development or investment, etc. The information whose exchange may lead to restricting competition is most frequently related to the following parameters of the economic conduct of competitors: prices, quantities, suppliers and clients, introduction or closure of production facilities, application of technologies and standards, etc.

#### **IV. CHARACTERISTICS OF THE INFORMATION PROHIBITED FOR EXCHANGE BETWEEN COMPETITORS**

##### **4.1. Strategic (sensitive) commercial information**

**§.32.** The information whose exchange between competitors shall be considered prohibited is most often referred to as *strategic* or *sensitive* commercial information. This is information about the economic conduct of undertakings which is often kept as their commercial secret and whose disclosure or sharing among competitors may lead to reduction of the strategic uncertainty in the market and to elimination or reduction of the public benefits of the presence of competition among economic operators.

**§.33.** 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 information can be related to prices (actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programs, etc.

**§.34.** Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand. However, if the relevant market is a technology

market and the companies in it compete with regard to R&D, it is the technology data that may turn out to be the most strategic for competition, even more strategic than the information about prices and quantities. In all cases, the strategic usefulness of data also depends on its aggregation and age, as well as on the market context in which it is disclosed and shared, and the frequency of the exchange between competitors.

## **4.2. Individualized and aggregated data**

§.35. *Individualized* data refers to a particular and individualized company whereas *aggregated* information combines data from several companies where the recognition of individualized company level information is impossible.

§.36. The exchange of aggregated data among companies where there's no chance of recognizing individualized company level information, is much less likely to lead to restrictive effects on competition compared to exchanges of company level data. In its essence, the exchange of individualized data facilitates the achievement of anticompetitive coordination in the market and allows the coordinating companies to single out a deviator or entrant. Collection and publication of aggregated market data (such as sales data, data on costs of inputs and components, etc.) by a market intelligence firm or a trade organization may benefit both suppliers and customers by allowing them to get a clearer picture of the economic situation of a sector or a relevant market. Such data collection and publication may allow market participants to make better-informed individual choices in taking their economic decisions in the relevant market.

## **4.3. Historic, current and future data**

§.37. The exchanged data can be classified as *historic*, *current (up-to-date)* or *future* depending on the period to which it

refers. The age of the data exchanged between competitors is of considerable importance for the competitive assessment of information exchange and depends on the case specific circumstances and the specifics of the relevant market. As a rule, the exchange of historic data, which is presented in a statistical (aggregated) format, complies with competition rules as it is not likely to exert any impact on the current or future conduct of the undertakings participating in the relevant market<sup>68</sup>.

**§.38.** The common understanding, in both theory and practice, is that *historic* data refers to a period of at least one year before the time when the exchange took place whereas the data referring to a period of less than one year before the exchange is considered to be current (up-to-date). Despite that understanding, the classification of information as historic or current should be flexible and should take into account the so called “aging period” of the information in the relevant market in view of its characteristics. As a rule, this period is shorter for aggregated data than it is for individualized data, as aggregated data exists in a statistical format which ages quickly.

**§.39.** The age of data also depends on the pace of carrying out the respective economic activity and more specifically the frequency of renewing contracts with suppliers and clients. For example, data about the activity of a company can be considered historic if it is several times older than the average length of contracts in the industry and if the latter are indicative of price and quantity re- negotiations and of the other important parameters of economic activity.

**§.40.** *Future* is the data which is neither historic, nor current. In most of the cases it relates to the business plans and forecasts of the company for the development of the relevant

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<sup>68</sup> See EC Decision on Case IV/36.069, *Wirtschaftsvereinigung Stahl*, OB L 1, 3.1.1998

market, or to the strategy it is planning to adhere to in that market. In most of the cases, the exchange of future data is aimed at a forecast for the prices of or the sales revenues from a certain product. The exchange of this type of data reveals the trade strategy a certain company is going to take in the market and its future price conduct and it could considerably reduce the readiness of the other companies in the relevant market to compete with it in terms of prices. On the other hand, the exchange of data with regard to the future market volume determined on the basis of the quantity of the manufactured products is less problematic for competition law, especially if the data is presented in an aggregated format.

#### **4.4. Public and confidential data**

§.41. *Public* is the data which, on the strength of the law or the usual commercial practice for the relevant market, companies disclose to or share with the other participants in the market, their customers, and the controlling state authorities. The companies are, for example, obliged to publish their annual financial reports which include reports on costs and revenues. What is more, in carrying out their economic activity, companies usually disclose information which is directed to their clients and consumers and is aimed at informing them about the prices, quality, characteristics and use of the goods and services they offer on the relevant market. This information exists in the so called „public domain” and it can be received without any obstacles and under equal conditions by all market agents. As a result, the access to such information does not require the establishment of a specific exchange system. That is the reason why competitors usually do not take part in the coordination mechanisms for the exchange of this type of information as they can collect it easily directly from the market.

§.42. If the access to certain data is related to incurring certain costs on the part of the respective market agents who would like to use it, then the data may not possess the characteristics of “public data”. The data wouldn’t be considered “public” even though it exists in the public domain when the costs involved in collecting the data pose a serious barrier to their use.

§.43. Even if there is public access to certain data (for example information published by sectoral regulatory bodies in exercising certain supervisory functions in the relevant market), it does not exclude the existence of prohibited information exchange between competitors. For example, the data that is publicly available may not be sufficient in view of determining the strategic market conduct of the companies to which it refers. As a result, the competitors who would like to reduce the strategic uncertainty with regard to the competition in the market may create an additional mechanism for exchanging data which does not have a meaning of its own but only adds to or clarifies the publicly available information. In this case, the data exchanged at a later stage, along with the publicly accessible data, may as a whole be considered strategic (sensitive) commercial information the exchange of which among competitors may be considered a form of prohibited conduct.

#### **4.5. Strategic indexes and absolute data**

§.44. The form in which data is disclosed or shared among competitors is of primary importance to the analysis of the anticompetitive effects which the exchange may have on the relevant market. Presenting the data in the form of *statistical indexes* that reflect the numerical ratios between the parameters of the activity of different companies is less likely to be considered an infringement of competition law compared to presenting it in *absolute values*, provided that the indexes do not allow the respective companies to be individualized to the extent to which



the other market agents may directly or indirectly determine the market strategies of their competitors.

§.45. If the use of statistical indexes is of the nature to lead to elimination or reduction of the level of uncertainty with regard to the development of a competitive market, the exchange of this type of information may also be considered an infringement of the rules of competition. In the analysis of the possible anticompetitive effects from the exchange of information in the form of indexes (of prices, volume of production, etc.), the level of aggregation of information shall be taken into account, as well as its age and frequency of exchange.

## **V. CHARACTERISTICS OF THE PROHIBITED EXCHANGE OF INFORMATION BETWEEN COMPETITORS**

### **5.1. Market coverage of information exchange**

§. 46. Information exchange is more likely to have restrictive effects on competition if the companies involved in it have a sufficiently large *coverage (market shares) of the relevant market*. Otherwise, a potential pricing above the competitive price level would naturally lead to a decline in the demand of their products due to redirecting the clients to the other competitors who are not involved in the exchange.

§. 47. What constitutes a “sufficiently large” part of the market covered by the information exchange will depend on the specific facts of each case. Where, for example, an information exchange takes place in the context of another horizontal cooperation agreement and does not go beyond what is necessary for its implementation, it has been presumed that the information exchange may give rise to anticompetitive effects, if the

companies involved have market coverage below the market share thresholds set out in accordance with the de minimis rule pursuant to Article 16 (2) (1) of the LPC.

## **5.2. Frequency of information exchange**

§.48. The *frequency* of information exchange is critical for its assessment as a form of prohibited conduct of companies. As a rule, the more frequent the exchange of information between competitors is, the more favourable conditions there are for coordinated and aligned market reactions of undertakings. The frequent exchange of information facilitates the concerted market conduct of undertakings and reduces, or even eliminates, their readiness to compete among themselves.

§.49. The influence of information exchange frequency on competition depends on the characteristics of the market in which the exchange is carried out. More frequent information exchanges may be necessary to facilitate a collusive outcome in the so called *dynamic markets*, characterized by short-term contracts which are indicative of frequent price and quantity re-negotiations, whereas in the so called *stable markets* with long-term contacts a less frequent exchange of information between competitors would normally be sufficient to achieve a collusive outcome. What is more, in the analysis of whether information exchange frequency may facilitate the restriction of competition, the age and aggregation of data should also be taken into consideration. The frequent exchange of information would lead to greater anticompetitive effects when the competitors exchange up-to-date and individualized data and not when they exchange historic or aggregated data.

### **5.3. Public/ non-public exchange of information**

§.50. An information exchange is genuinely *public* if it makes the exchanged data equally accessible to all competitors in the relevant market as well as to their clients and customers. In carrying out their economic activity companies usually disclose and disseminate among themselves the general public information about the prices, characteristics, quality and use of the products and services they offer in the market, and that is considered to be a public exchange of information. The fact that information is exchanged in public may decrease, without entirely excluding it, the likelihood of a collusive outcome in the market to the extent that non-coordinating companies may be able to constrain potential restrictive effect on competition.

§.51. If competitors exchange information about their future conduct with regard to prices, discounts, pricing, capacities, data about clients and geographic markets, without disclosing it to all companies in the relevant market and their clients and customers, there is a *secret* information exchange which may lead to the most serious anticompetitive effects on the relevant market. Unusually cartels are carried out by means of secret information exchange between competitors.

### **5.4. Direct and indirect information exchange**

§.52. A very important component of the assessment of the information exchange between competitors is the analysis of its mechanism – whether it is carried out in terms of *direct exchange* between the companies themselves, or in terms of *indirect exchange* through the participation of an association of undertakings or another agent acting on their behalf or in defence of their economic interests. In practice, in most of the cases information exchange takes place in the framework of associations of undertakings as a result of which their activity is

also subject to analysis with a view to establishing forms of prohibited conduct under competition law.

**§.53.** As a rule, the exchange of information between competitors in the framework of their association or of another agent acting on their behalf or in defence of their economic interests, shall not be considered an infringement of competition law provided that the association or the agent do not function as: (1) a forum of meetings between the participants in a cartel, (2) an organization issuing anticompetitive recommendations or forecasts for the market conduct of its members or (3) a centre for exchange of information which reduces or eliminates the level of uncertainty with regard to the functioning of competition in the market.

### **5.5. Unilateral and bilateral information exchange**

**§.54.** The exchange of information can be either *unilateral* or *bilateral* depending on whether the companies disclose their commercial information to their competitors unilaterally or whether they take part in a mechanism for the reciprocal sharing of such information. A situation in which only one company discloses sensitive commercial information to its competitors may also be considered an infringement of competition law.

**§.55.** When one undertaking alone reveals to its competitors strategic commercial information concerning its future commercial policy, that reduces the strategic uncertainty as to the future operation of the market for all other competitors and increases the risk of collusive behaviour. In addition to that, the mere attendance at a meeting where a company discloses its business plans to its competitors is likely to be considered an infringement of competition rules, even in the absence of an explicit agreement for restricting competition. When a company receives strategic data from a competitor (be it in a meeting, by

mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly. This presumption can be refuted if the company provides evidence that it has declared clearly in front of its competitor that it does not wish to receive data concerning its economic activity and revealing the direction of its market conduct.

## **VI. MARKET CHARACTERISTICS THAT CONTRIBUTE TO THE EXCHANGE OF INFORMATION BETWEEN COMPETITORS**

**§.56.** In the assessment of information exchange, its actual or potential anticompetitive consequences for the relevant market shall be considered for each individual case as the results of the analysis depend on the combination of many factors that are specific for the individual cases. The assessment shall reflect the actual or potential impact of information exchange and shall compare it against the competitive market situation which would come as a result of the absence of such information exchange. That's the reason why the assessment of information exchange shall take into consideration the characteristics of the relevant market which could contribute to the exchange of information between competitors.

### **6.1. Structure of the relevant market**

**§.57.** There are relevant markets whose structure or mechanism of functioning may facilitate the exchange of information between competitors. Such markets are characterized by a small number of participants who have the opportunity to monitor their conduct, and respectively their pricing and commercial policy. This market structure is called an oligopoly and is characterized by: homogenous products; a constant level of demand (or with small growth); low price elasticity of demand; high barriers to market entry; high level of market transparency.

**§.58.** In the case of a small number of economic operators in the oligopoly market, none of the individual companies possesses the market power which could allow it to unilaterally control the relevant market or a part of it. One of the characteristics of the oligopoly structure is that each of the market operators expects its conduct to trigger responses on the part of its competitors. For example, the reduction of prices by one company would quickly attract to it the clients of the other competing companies and the effect will be so serious that they will have to respond by reducing their prices. In the conditions of oligopoly one company cannot unilaterally increase the prices because in the presence of a homogeneous product and a high level of market transparency it will lose all its clients. The presence of interdependence would inevitably lead to a distortion of the model of effective competition for which the uncertainty with regard to the market conduct of competitors plays a central role. The small number of participants in the market gives all of them the opportunity to have at their disposal sufficient information about the market strategy of their competitors and be able to change their own strategy accordingly which, on its part, would lead to them adopting similar market conduct without the need for entering into an explicit agreement for restricting competition.

## **6.2. Market concentration**

**§.59.** The level of market concentration is a key element in determining the structure of the relevant market and an important indication that serves as a prerequisite for the conduct of companies and the type of competition among them. Market concentration shows the extent to which the process of competition is controlled by one or more undertakings. In the market structures with high concentration, the market is characterized by a low level of intensity of the competitive process, and respectively, by a large relative share owned by the small number of market participants. In such markets each one of

the participants can easily collect information about the market conduct of its competitors and can forecast their future strategies. And vice versa, when there are many participants in the market who do not have large market shares, the relevant market shows low concentration and offers conditions for intensive competition.

### **6.3. Market transparency**

**§.60.** The market structures with a small number of participants are characterized by a high level of transparency with regard to prices and the other important aspects of economic activity (output quantity, dynamics of supply, the structure of production costs, etc.) of all competitors. The presence of price transparency in a given market can be determined by the characteristics of the market and by the market structure itself. The interdependence between the small number of market participants, characteristic of the oligopoly market structure and the availability of a high level of price transparency resulting from public exchange of information, may lead to the adoption of the same market policy by the participants in the market. Information exchange may additionally increase market transparency and thus limit the uncertainty with regard to the strategic parameters of competition. In the conditions of market transparency companies are significantly facilitated by having the opportunity to have collusive behaviour or to increase the internal stability of the cartels they take part in.

### **6.4. Characteristics of the product which forms the relevant market**

**§.61.** This characteristics of the market shows whether the companies offer similar (homogeneous) products or whether there is significant product differentiation among them. If the market is characterized by product differentiation, the competition process is based on different marketing approaches and strategies

directed more to distinguishing the respective individual products and directing them to a certain segment of consumers, while the intensity of price competition is not that clearly expressed. If, however, the products offered by the different suppliers are homogeneous, do not differ in terms of composition and use, and are usually manufactured in accordance with the established standards, competition in the market is carried out mainly in terms of products' prices. In view of the characteristics of the products which form the relevant market, competitors are more likely to exchange price information in the markets where a homogeneous product is offered, and non-price information in the markets formed by a non-homogeneous product.

## **6.5. Dynamics of supply and demand**

**§.62.** Market dynamics shows whether demand is relatively constant or whether considerable changes can be observed, which on their part, may influence the companies' conduct with regard to the quantities that are going to offer in order to meet the changes in demand. In markets characterized by a relatively stable level of demand, each of the participants can obtain information concerning the quantities offered by the other participants as the total volume of the market is a relatively constant quantity. The collection of market information concerning the future conduct of competitors is impeded only if there are considerable or unpredictable changes on the level of demand. At the same time, in increasing the level of demand the relevant market may become attractive for investments which would lead to the entry of new participants attracted by the higher prices. In those conditions companies have difficulties in keeping track of or forecasting the conduct of its actual or potential competitors in the relevant market which provides them with incentives for establishing information exchange mechanisms among themselves.



## VII. COMPETITIVE ANALYSIS OF INFORMATION EXCHANGE BETWEEN COMPETITORS

### 7.1. The main principle of competition

§.63. The main principle of competition is that each undertaking shall independently determine its economic conduct in the relevant market. This means that it has to determine independently both the common policy it is planning to implement in the market, and the specific conditions under which it is going to offer products to its clients and customers<sup>69</sup>. Despite the fact that undertakings have the opportunity to intelligently adapt to the current or future conduct of their competitors, the requirement for independence excludes all direct or indirect contacts between competitors, the objective or effect of which is to create conditions for competition which do not correspond to the usual conditions in the relevant market which are determined by the nature of the offered products, the size and number of companies and the volume of the market<sup>70</sup>. The main principle of competition excludes all direct or indirect contacts between competitors whose objective or effect is to influence the market conduct of an actual or potential competitor, or to disclose to such a competitor the line of conduct that the undertakings have independently decided to or are planning to adhere to, thus facilitating the coordinated conduct of the competitors in the market<sup>71</sup>.

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<sup>69</sup> See. Decision of the Court of Justice of the EU of 28 May, 1998 under Case C-7/95 P, *John Deere*, para 86.

<sup>70</sup> See. Decision of the Court of Justice of the EU of 28 May, 1998 under Case C-7/95 P, *John Deere*, para 87.

<sup>71</sup> See. Decision of the Court of Justice of the EU of 14 July 1981 under Case C-40/73, *Suiker Unie*, para 174; Decision of the Court of Justice of the EU of 23 November 2006 under Case C-238/05, para 52

## **7.2. Information exchange as a restriction of competition by object**

**§.64.** Article 15 (1) of the LPC and Article 101 (1) of the TFEU contain an imperative norm which prohibits all types of agreements between undertakings, decisions by associations of undertakings as well as concerted practices between two or more undertakings which have as their objective or effect the prevention, restriction or distortion of competition in the relevant market. Information exchange can be considered an infringement of this prohibition if, independently or as part of an agreement, decision or concerted practice, it has as its *objective* or *effect* the prevention, restriction or distortion of competition in the relevant market.

**§.65.** In assessing whether an information exchange constitutes a restriction of competition by *object*, particular attention will be paid to the legal and economic context in which the information exchange takes place. The basic question will be whether information exchange, by its very nature, may possibly lead to eliminating the strategic uncertainty of the companies in the market with regard to the market conduct of their actual or potential competitors in such a way as to create conditions for their coordinated conduct. For example, exchanging information on companies' individualised intentions concerning their future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome as well as to higher prices of the respective product. That's why the exchange of information between competitors concerning future prices or quantities shall be considered a restriction of competition by *object*.

## **7.3. Information exchange as a restriction of competition by effect**

**§.66.** In assessing information exchange as a restriction of competition by effect, its actual and potential impact on the competition in the relevant market shall be taken into account. The notion of *effect* is of objective nature and reflects the actual or potential anticompetitive effects of information exchange. Information exchange restricts competition by effect when it has exerted or is likely to exert unfavourable impact on one or more of the significant parameters of competition such as price, quantity, quality, variety and innovativeness of products. In assessing the actual and potential anticompetitive effects of information exchange the current condition of the competitive environment shall be compared to the market situation that would be in place in the absence of the respective mechanism for anticompetitive coordination among undertakings<sup>72</sup>.

#### **7.4. Potential precompetitive effects of information exchange**

**§.67.** The availability of an anticompetitive objective or effects of information exchange between competitors is an element of the infringement under Article 101 (1) of the TFEU or Article 15 (1) of the LPC. But in the cases when information exchange is not part of a cartel between undertakings, its competitive assessment shall by all means contain an assessment of its potential *precompetitive* effects.

**§.68.** In the presence of established pocompetitive effects the information exchange between competitors may be considered exempt from the prohibition on the strength of the law when it meets the conditions provided by law. The assessment of whether and to what extent information exchange satisfies the conditions for exemption form the prohibition shall be carried out

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<sup>72</sup> See. Decision of the Court of Justice of the EU under Case C-7/95 P, John Deere, para 76.

by the undertakings involved in the exchange. They have to judge whether a given agreement, decision or concerted practice in which they participate, and which falls within the scope of the general prohibition, satisfies the conditions for exemption from the prohibition. The exemption conditions can be applied both with regard to certain individual agreements, decisions and concerted practices which have as their subject the exchange of information between competitors (*individual exemption*), but also with regard to certain categories of agreements for horizontal cooperation between competitors (*block exemption*).

### **7.5. Individual exemption from the prohibition for information exchange between competitors**

§.69. Information exchange between competitors shall be considered exempt from the prohibition when it satisfies one of the following requirements for block exemption<sup>73</sup>:

*✓ It contributes to the improvement of the production or distribution of goods or provision of services, or to the promotion of technological and/or economic progress*

According to this condition, the economic benefits of information exchange shall be able to compensate for its anticompetitive effect in the relevant market. Information exchange may lead to 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. What is more, in certain situations information exchange can help companies allocate production towards high-demand markets or to keep track of the past behaviour of customers in terms of accidents or credit default which may limit their risk exposure.

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<sup>73</sup> See Article 17 (1) of the LPC and Article 101 (0) of the TFEU

***✓ It ensures a fair share of the resulting benefits to the consumers***

Information exchange can benefit not only the respective companies that participate in it, but also the consumers of the respective products who are directly or indirectly involved in the exchange. Improving efficiency should be transferred to the consumers to the extent to which it goes beyond the restriction of competition resulting from information exchange. Exchange of information that is genuinely public can benefit consumers by helping them make a more informed choice, reduce their search costs and thus lead to rationalization of consumers' behaviour as a whole.

***✓ It does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives.***

If there is a small number of restrictive methods for achieving economic benefits, the claimed increase of economic benefits cannot justify the restrictions of competition stemming from information exchange. The indispensability condition is met only when the parties provide evidence that the content, aggregation, age, confidentiality and frequency of information exchange, as well as its volume, are such that they can lead to the lowest possible risk level for restriction of competition without which the respective economic benefits, that consist of improving efficiency, cannot be attained.

***✓ It does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the relevant market***

This condition is not met when the undertakings participating in the information exchange may eliminate competition for a considerable part of the relevant market.

## **7.6. Block exemption from the prohibition for information exchange between competitors**

§.70. It has been established in the practice that certain categories of agreements for horizontal cooperation between competitors as a whole satisfy the requirements for exemption from the prohibition. Such agreements, decisions and concerted practices may be considered exempt from the general prohibition if they fall within the scope of a CPC decision, respectively an EC Regulation (see CPC Decision No. 55/20.01.2011). The categories of agreements which satisfy the conditions for block exemption from the prohibition shall be considered exempt from it *ex lege*. The assessment of whether and to what extent the respective agreements satisfy the conditions for exemption from the prohibition shall be carried out by the respective undertakings involved in them.

§.71. The agreements between undertakings which fall within the scope of the block exemption in the country are: specialization agreements; research and development agreements; technology transfer agreements; insurance agreements. The exchange of information carried out as part of any of the above categories of horizontal cooperation agreements shall be considered exempt from the general prohibition in view of the conditions and requirements of the quoted CPC Decision for block exemption.

## **7.7. Liability for exchange of information between competitors**

**§.72.** If, as a result of the assessment of the above exemption conditions, it is established that the specific information exchange between competitors shall not be considered exempt from the prohibition, then it shall be considered an infringement of Article 101 of the TFEU and/or Article 15 of the LPC. The undertakings and associations of undertakings involved in the mechanism of information exchange shall be liable for the infringement. In all those cases the CPC shall impose a pecuniary sanction on the undertaking or the association of undertakings further to the provisions of the LPC, in an amount not exceeding 10% of the total turnover in the preceding financial year<sup>74</sup>.

## **VIII. CONCLUDING**

**§. 73.** These Guidelines have been adopted by CPC Decision No. 1778/20.12.2011 and reflect the understanding of the CPC of the possible approaches to the assessment of information exchange between competitors, while taking into account the best practices in this field of the EC and of the national competition authorities in the other EU member-states. With a view to improving the effectiveness of the Guidelines, a Black list of practical examples of prohibited information exchange between competitors has been attached to them. The examples have been taken from the practice in applying the rules of competition on the part of the EC, the CPC and some other national competition authorities in the EU member-states. The Guidelines and the List attached to them are subject to further amendments with a view to arriving at an adequate reflection of CPC practice in implementing Article 15 of the LPC and Article 101 of the TFEU in the country.

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<sup>74</sup> See Article 100 (1) of the LPC

**ANNEX TO GUIDELINES  
ON INFORMATION EXCHANGE BETWEEN  
COMPETITORS**

**A LIST OF  
PRACTICAL EXAMPLES OF PROHIBITED  
INFORMATION EXCHANGE BETWEEN  
COMPETITORS<sup>75</sup>**

***Example 1. Exchange of strategic information in an oligopoly market***<sup>76</sup>

After September 11 there has been a drastic decrease in the demand for luxury hotels, as well as in the revenues from these services. In response to the described situation, the managers of the top six luxury hotels in Paris had a number of conversations and decided to adopt a common action plan. They started exchanging information on a regular basis by means of carrying out meetings, exchanging emails and letters concerning their economic activity, the countries of origin of their clients, their marketing plans. The information about their activity covered the following: data on the average room price per day, week, month and year; average revenue per room; room occupancy rate; forecasts for the next year. The hotel managers also exchanged information about their marketing plans including data on the area of rooms and conference rooms, the prices of the different apartments, breakfasts and menus, the number of personnel as well as data on the percentage of the turnover that was going to be used for hotel marketing.

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<sup>75</sup> The examples are taken from the practice of applying the competition rules by the EC as well as by the national competition authorities of the EU member-states

<sup>76</sup> Decision of the French Competition Council No. 05-D-64 of 25 November, 2005



Provided that the market is an oligopoly market, the exchange of sensitive commercial information artificially increases market transparency and creates conditions for collusive behaviour on the part of the participants in the market.

***Example 2. Exchange of information by means of an association of undertakings in a high concentration market***<sup>77</sup>

The major producers and importers of tractors exchanged information that revealed the retail sales and market shares of each one of them. The information was exchanged by means of an association of importers of agricultural equipment. Each member received aggregated data about the sales as well as data about the sales of certain products, the territory of distribution and the time period covered. For certain geographic regions the aggregated data contained information for 10 or less tractors that were sold, which allowed for the exact quantities sold by the individual competitors to be identified. In addition to the aggregated data, each member received information about the retail sales and the market share of each of the undertakings involved in the information exchange, along with details about the make, product group, geographic region. The data were provided on an annual, quarterly, monthly and even daily basis. This allowed each undertaking involved in the exchange to keep track of the sales and market entry of its competitors, even in the smallest geographic regions. Moreover, on the basis of the information received from the registration forms used in the import of new tractors, the producers had the opportunity to identify the source of a parallel import of tractors.

The improved transparency in a market with high concentration is likely to lead to elimination of competition. The information exchange considerably increases the number of barriers to entry in the market as it allows the old participants to

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<sup>77</sup> EC Decision of 17 February 1992 on cases 31.370 and 31.446 *UK Agricultural Tractor Registration Exchange*

immediately notice any new entrant and to react accordingly in order to protect their market positions.

***Example 3. Exchange of strategic information by means of an association of undertakings***<sup>78</sup>

The main suppliers of products in the perfume and cosmetics industry met to exchange detailed data on sales, advertisement costs, returned products, planned launch of new products, price increase, conduct to perfumeries and other aspects of their marketing strategies.

The collected information shall be considered sensitive commercial information concerning individual companies. The exchange of such information is likely to lead to restriction of competition.

***Example 4. Public indirect exchange of information***<sup>79</sup>

An association of companies for goods transportation designed and published a programme for calculating land transport costs and recommended profit levels of 10% and 15%. Moreover, it published a forecast for the costs of land transport as well as a programme for electronic calculation of those costs in view of the increased price of oil. The association issued a recommendation for its members to transfer the costs related to oil to their customers by means of including the so called “Oil Clause” in their contracts.

The information exchange on the part of the association is aimed at restricting competition by coordinating the conduct of its members which, on its part, leads to unifying their prices.

***Example 5. Exchange of information on future conduct through an association***<sup>80</sup>

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<sup>78</sup> Decision of the German Competition Authority of July 2008

<sup>79</sup> Decision of the Danish Competition Authority of 17 December, 2008

A trade association sent a newsletter to their members prompting them to increase the prices for tourist transportation by 4% as of a certain date. The increase was related to an increase in fuel prices. The association also disseminated a schematic information note on the calculation of the additional fee as well as a standard letter by which it informed its members of the additional fee.

***Example 6. Public exchange of information through several associations of undertakings***<sup>81</sup>

Several associations of undertakings for food products disseminated a series of press releases with the ostensible aim to inform the public about an increase in the costs for the production of certain goods. All press releases contained quantitative values of the price increase. The associations had common management and carried out communication among themselves with the view of building a strategy for information exchange, including the drafting and dissemination of press releases.

***Example 7. Exchange of aggregated strategic information through an association***<sup>82</sup>

The association of the producers of Christmas trees informed its members about price statistics, market conditions and models for calculating prices. This information was exchanged by means of newsletters and meetings within the association. The association also provided advice to its members as to how to use the exchanged information and recommended the use of minimal prices with a view to restricting price competition in the market.

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<sup>80</sup> Decision of the Danish Competition Authority of 1 April 2009

<sup>81</sup> Decision of the Spanish Competition authority of 14 October 2009 under case S/0053/08, *FIAB Y ASOCIADOS Y CEOPAN*

<sup>82</sup> Decision of the Danish Competition Authority of 24 September, 2009 under case № S-1011-09

***Example 8. Public exchange of statistical indexes through an association***<sup>83</sup>

An association of undertakings in the field of the textile industry published an index of costs which could be used by its members, as well as by other companies in the market of textile services. In addition to that, the association established a special committee on the costs index within which the members of the association discussed the weight of the different types of costs. The index was issued twice a year and showed the increase of the main costs (in percentage) in the textile industry, as well as the increase of general costs. This information exchange is likely to lead to coordination of the price policy of the undertakings in the textile industry.

***Example 9. Exchange of strategic information in a high concentration market***<sup>84</sup>

Three undertakings, which controlled almost 80% of the market of purchasing of timber, exchanged information about current purchasing prices and purchased quantities for the last four weeks. They reached an agreement not to purchase timber at a price which was above the average. The final objective of this cooperation was to restrict the competition among the participants in the agreement and to achieve joint control over the price of timber.

***Example 10. Regular exchange of strategic information through an association***<sup>85</sup>

Thirteen undertakings, producers of sunflower oil, carried out a number of meetings in the form of meetings of the association in which they took part. They discussed issues related

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<sup>83</sup> Decision of the Danish Competition Authority of 25 November 2009

<sup>84</sup> Decision of the Finnish Market Court of 3 December 2009

<sup>85</sup> CPC Decision No. 1150/27.12.2007

to sunflower yield as well as to the specific prices and trade conditions that they should apply as members of the association. That's how they exchanged sensitive commercial information and reached an agreement to fix the purchase price of sunflower seed. Moreover, the association started a correspondence with its members by means of which it carried out the exchange of sensitive commercial information and provided specific recommendations related to the future market, including pricing, conduct of its members.

This is a way in which the exchange of sensitive commercial information leads to reducing the uncertainty with regard to the other competitors in the market, thus eliminating competitive pressure and distorting market competition.

***Example 11. Indirect bilateral exchange of aggregated information***<sup>86</sup>

Fourteen insurance companies and the associations they were all members of reached an agreement with regard to fixing a uniform minimum premium for the Civil Liability Insurance and setting maximum levels of the commissions paid to insurance brokers. The agreement envisaged the calculation of a uniform minimum premium on the basis of joint statistical data. The commitments taken under the agreement, related to the joint exchange of actuarial calculations of the average values of covering the insurance risk, or to the joint investigation of the frequency of complaints under a given insurance, went beyond the scope of the required horizontal cooperation among the companies as the statistical data should not be used for coordinating and/or concerting the market conduct of insurers, still less should it be used for reaching agreements about their price policy in the relevant market.

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<sup>86</sup> CPC Decision No 576/15.07.2008

***Example 12. Exchange of aggregated information through an association and public exchange of individualized information***<sup>87</sup>

The union of poultry breeders, as a branch organization, organized meetings among its members, producers of eggs and chicken, with the aim of coordinating and concerting their market conduct. At those meetings the producers of chicken regularly exchanged sensitive commercial information with a view to maintaining minimum price levels. Such information exchange led to coordinated actions as well as to restriction of competition. The coordination process was also facilitated by the dissemination of individualized price information by the biggest producers of chicken via the mass media.

***Example 13. Secret indirect exchange of aggregated information***<sup>88</sup>

Two branch organizations in the bread sector designed and applied a mechanism for cooperation among its members, as well as for concerting and coordinating significant aspects of the market and the price conduct of bread producers.

The associations collected sensitive commercial information from their members, which was at a later stage disseminated among all involved companies. Information notes were prepared on a regular basis on the prices of bread and flour for certain periods and regions, and the collected data was disseminated along with instructions for a planned increase of bread prices. A number of meetings were carried out with the clear objective of achieving an anticompetitive agreement among the members of the associations on offered prices, thus protecting their interests against the competitors who offered lower prices. In

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<sup>87</sup> CPC Decision No. 601/17.07.2008

<sup>88</sup> CPC Decision No. 622/22.07.2008

this way, the associations created actual conditions for collusive behaviour of the participants in the relevant market.

***Example 14. Indirect exchange of individualized information***<sup>89</sup>

An association of companies in the dairy industry collected and disseminated among its members data on the activity of each one of them by means of completing observation forms, collecting data on dairying per day and collecting detailed information of the economic activity of the companies in the sector.

***Example 15. Indirect exchange of price information***<sup>90</sup>

The chamber of builders collected price information from its members by means of a questionnaire. The builders who completed the questionnaire provided up-to-date information on the prices of construction and installation activities for the respective type of construction work they carried out. The collected data was specific and new as of the moment of its sending. That was due to the fact that, on the one hand, the questionnaires themselves were divided by types of construction work – high, road, hydro technical. On the other hand, each type of construction work was presented as a combination of the activities common to it and those which were of individual importance. At a later stage the information was processed by the Chamber which published on its website tentative prices in the field of high, road and hydro technical construction. By means of its conduct, the Chamber created conditions for eliminating the competitive pressure and for imposing concerted price behaviour.

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<sup>89</sup> CPC Decision No. 650/24.07.2008

<sup>90</sup> CPC Decision No. 496/04.05.2010

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