

INFORMATION EXCHANGE 2019 KNOW HOW

European Union

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GCR INSIGHT

1 Describe the principal competition rules governing information exchange in your jurisdiction.

Information exchanges are assessed under article 101 of the Treaty on the Functioning of the European Union (TFEU). The first step is to analyse whether the information exchange restricts competition under article 101(1); the second, to assess the extent to which it is possible to raise efficiency arguments under article 101(3) (see question 8).

The constituent elements of article 101(1) are as follows:

Existence of an agreement, concerted practice or decision by associations of undertakings

Information exchanges between competitors are typically assessed as concerted practices under article 101(1) TFEU, which is a looser form of coordination not requiring the establishment of a binding agreement. There are three key components to a concerted practice: concertation; subsequent conduct on the market; and a relationship of cause and effect between the two.

Concertation is a form of coordination between economic operators by which, without having reached the stage where an agreement has been concluded, they knowingly substitute practical cooperation between them for the risks of competition (see Case C-8/08 T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit, at para 26). This is underpinned by the principle that each economic operator should independently determine the policy that it intends to adopt on the market (T-Mobile Netherlands, at paragraphs 32–33). It is sufficient that, through a declaration of intention, a competitor has eliminated or, at the very least, substantially reduced the strategic uncertainty as to the conduct to be expected from it on the market. It follows that a concertation takes place where strategic data is shared between competitors, because it is presumed to reduce the independence of a competitor's conduct on the market and diminishes their incentives to compete.

Information exchange in the context of agreements between competitors may also fall under article 101(1) TFEU, as well as decisions of associations of undertakings. Both concepts are relatively broad and the latter can include an association's rules and regulations, codes of conduct, binding decisions and recommendations.

Between undertakings or associations of undertakings

Under EU competition rules, an "undertaking" encompasses any entity engaged in economic activity (ie, offering goods or services on a market), regardless of its legal status or financing. Economic activities are distinguished from tasks carried out in the public interest, forming part of the essential functions of the state (imperium): activities within the exercise of public powers are not of an economic nature justifying the application of article 101 TFEU. However, public entities may qualify as undertakings to the extent that they are engaging in an economic activity.

Article 101(1) requires that the coordination take place between two or more distinct undertakings. Exchanges between companies forming part of a single economic unit (eg, within the same group) are therefore not caught. Article 101(1) also applies to decisions of associations of undertakings, without the need to identify a formal agreement by the association.

Restriction of competition by object or effect

This distinction is described in more detail in question 5.

Jurisdictional threshold

There are three key elements to establish EU jurisdiction:

- (1) "trade between EU member states": this is a broad concept covering all cross-border economic activity. It requires an impact on cross-border economic activity involving at least two EU member states. A list of EU member states is maintained [here](#).
- (2) "may affect trade" threshold requires it to be possible to foresee with a sufficient degree of probability, based on a set of objective factors of law or fact, that the conduct may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU member states. Conduct that affects the entire territory of a single member state is presumed to have this effect.
- (3) "appreciability": EU law jurisdiction is limited to practices which have effects of a certain magnitude. Appreciability is assessed on a case-by-case basis and depends, among other things on the nature of the practice, products concerned and market position of the undertakings. Note that the effect on trade produced by cross-border cartels is generally, by its very nature, appreciable.

EU Guidelines on the Effect on Trade Concept can be accessed [here](#).

2 Which bodies are responsible for enforcing competition rules on information exchange in your jurisdiction?

Pursuant to Council Regulation No. 1/2003, the Commission, the national competition authorities of the member states (NCAs) and national courts all have parallel competences to apply article 101 TFEU.

At EU level (where the EU jurisdictional threshold is met), the Directorate General for Competition (DG COMP) of the European Commission (the Commission) is the main organ competent to investigate information exchanges.

Commission's initial investigative phase

Information exchange investigations can be triggered by a complaint, an own-initiative investigation or subsequent to an application for immunity (cartel whistle-blower). At the early investigative stage, the case team (comprising a case manager, case handlers, and assistants) takes the lead on the initial investigation. Following an internal consultation, DG COMP then decides either to carry out an in-depth investigation and initiate proceedings or to close the case.

Pursuant to article 11 of Regulation 1/2003, a system of cooperation exists between the Commission and the NCAs (see Commission Notice on cooperation within the Network of Competition Authorities). NCAs and the Commission can investigate an information exchange in parallel, up until the point in time the Commission formally initiates proceedings, relieving NCAs of their competence to apply article 101. Where there is no effect on trade between member states as described above, only the NCAs are competent to investigate the information exchange under national competition rules (which closely reflect article 101(1)). Note that the principle of uniform application of EU competition laws (article 16 of Regulation 1/2003) requires that NCAs, when examining the rules applicable to an information exchange already the subject of an article 101 Commission Decision, cannot act counter to that Decision.

Interplay between Commission, NCAs and courts

Once investigations are complete, the College of Commissioners (made up of political appointees from each EU member state) adopts any eventual Decision, following consultation with the Advisory Committee of Restrictive Practices and Dominant Positions, comprising representatives from the NCAs. Defendants, complainants and, with leave of the court, other parties able to show standing can seek leave to appeal a Commission Decision to the Court of Justice of the EU (ECJ), the EU's highest court, pursuant to article 263 TFEU. They have two months to lodge an appeal.

At first instance, the General Court (GC) has jurisdiction to hear and render judgment as regards the legality of a Commission Decision. The GC's judgment can be appealed on a point of law to the ECJ.

Article 3 of Regulation 1/2003 obliges NCAs and national courts to apply article 101 in parallel to national competition rules when the effect on trade criterion is fulfilled. Like NCAs, when applying article 101 in the context of information exchange, national courts cannot take decisions counter to a Commission decision. National courts must avoid conflicting with a decision contemplated by the Commission and for this reason, often stay national court proceedings pending the outcome of a Commission investigation. National courts can also refer questions of interpretation of article 101 to the ECJ for a preliminary ruling pursuant to article 267 TFEU. The ECJ's opinion on the interpretation of article 101 is binding on the national court. For more information, see Commission Notice on cooperation with courts of the EU member states in the application of articles 101 and 102 TFEU.

National courts are also competent to hear damages claims, either on a stand-alone basis or as a follow-on action to a Commission Decision taken pursuant to Regulation 1/2003. Directive 2014/104 on antitrust damages actions aims to facilitate national damages claims.

3 Describe the types of information exchanges that may be caught under the competition rules in your jurisdiction.

Information exchanges can be horizontal (between actual or potential competitors or through a third-party facilitator) or vertical (for example, between suppliers and retailers or retailers and customers). Horizontal information exchanges can take place directly, through third parties (such as a trade association or market consultancy company) or as a result of publication (for example, on a website, see question 7). They carry significantly higher risk of restricting competition than vertical information exchanges and are, therefore, the focus of this chapter.

There is no hard and fast list of types of permissible and impermissible information exchanges under EU competition rules. The Commission assesses this on a case-by-case basis according to the general framework set out in its Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements (Horizontal Guidelines). However, certain types of individualised information exchanges on future quantities or price, especially when individualised, will almost always be prohibited under article 101(1) TFEU and are typically treated as cartels. A distinction must therefore be drawn between how the Commission examines information exchanges in the context of cartels; and in other contexts (such as part of a horizontal agreement).

(1) General framework for analysing information exchanges

The Commission's Horizontal Guidelines set out a general framework for the competitive assessment of an information exchange, according to which the Commission takes into account the type of information exchanged, and market characteristics.

(a) Type of information

The more strategic the data (ie, the more it reduces uncertainty in the market), the more likely it is the Commission will find it to restrict competition. The Commission takes into account:

- Market coverage: The Commission may take into account the extent of the market coverage of the information exchange (ie, whether it covers a “sufficiently large part of the market”) to consider whether the conduct can be constrained by those not participating in the information exchange (see Horizontal Guidelines, at paragraphs 87–88). This is particularly relevant to information exchange in the context of industry associations and/or data collected and published/distributed by market research companies.
- Individualisation/aggregation of the data: The Commission considers individualised data more likely to restrict competition because it facilitates a common understanding on the market and allows coordinating companies to single out a deviant or recent market entrant. By contrast, the more aggregated the data, the less likely it is to restrict competition (see Horizontal Guidelines, at para 89).
- Age of the data: Data that is genuinely historic is less likely to restrict competition. For example, historic data is unlikely to facilitate the monitoring of deviations from normal competitive conditions. What is historic is decided on a case-by-case basis and will depend on the relevant market. In the past, the Commission has considered data exceeding one year to be historic (see Case IV/31.370, UK Agricultural Tractor Registration Exchange, at para 50).
- Frequency of the information exchange: The more frequent the information exchange, the more likely the Commission considers it may have led to a better common understanding on the market and allowed participants to monitor deviations (see Horizontal Guidelines, at para 91). Note, however, that in some circumstances, depending on the structure of the market and the overall context of the exchange, an isolated exchange or disclosure may be considered to be sufficient (see Case C-8/08 T-Mobile Netherlands and Case C-74/14 “Eturas” UAB and Others).
- Accessibility of the information: exchanges of public information (ie, information easily and equally accessible in terms of costs of access to all competitors and consumers) are unlikely to constitute an infringement of article 101(1) (see joined Cases T-191/98, etc, Atlantic Container Line and others v Commission, para 1154). Information referred to as being ‘in the public domain’ will not be considered public if their accessibility requires excessive costs deterring other companies or consumers to access the information (see Horizontal Guidelines, at paras 92-93) (see question 7 for more details).
- Nature of the information exchanged: public exchanges of information equally accessible to all competitors and consumers are less likely to lead to an infringement of article 101(1) (see Horizontal Guidelines, at para 94) (See question 7 below for more details).

(b) Market characteristics

The Commission considers that certain market conditions – in particular markets that feature high barriers to entry and are transparent, concentrated, non-complex, stable and symmetric – render it easier to sustain coordination because it becomes easier to monitor and punish deviations. Moreover, the Commission considers an information exchange to be more likely to restrict competition where markets are concentrated, feature high barriers to entry, non-complex, stable and symmetric. In particular, the Commission considers that tight oligopolies can facilitate a collusive outcome as it is easier for fewer companies to reach a common understanding on the terms of coordination (see Horizontal Guidelines, at paras 77–85).

(2) Information exchange outside a cartel context

There are two types of information exchange that can occur outside a hardcore cartel context:

- (a) Those ancillary to legitimate “horizontal cooperation agreements” (such as R&D agreements, joint production agreements, joint purchasing arrangements and joint commercialisation agreements) (see Horizontal Guidelines, at paragraphs 111–149, 150–193, 194–224 and 225–256, respectively). These are assessed as part of the agreement and are not likely to carry additional competition risks, so long as they are strictly limited to the information objectively necessary to explore a genuine transaction (see Horizontal Guidelines, at paragraph 56 and point 3(b) to this question below); and
- (b) Pure information exchanges, where the economic function lies in the information exchange itself. The Commission typically applies the general framework described above to assess the extent to which these types of information exchanges are capable of restricting competition. In doing so, the Commission considers (see Horizontal Guidelines at paragraphs 64–71):
 - the extent to which the information exchange results in a collusive outcome (ie, whether it can facilitate coordination (alignment), increasing transparency in the market as regards companies’ competitive behaviour); and/or
 - the extent to which the information exchange may result in anticompetitive foreclosure in the market where the exchange takes place and/or a related downstream market (see Horizontal Guidelines at paragraphs 64–71).

(3) Information exchange in the context of hardcore cartel conduct.

Information exchanges of individualised future price and/or quantities are normally treated as hardcore cartels pursuant to article 101(1)(a), which expressly prohibits restrictions on competition that “directly or indirectly fix purchase or selling prices or any other trading conditions”. A cartel can be described as a group of similar, independent companies joining together to fix prices, limit production or share markets or customers. By relying on their agreed-upon course of action and/or by acting in concert, cartel participants’ incentives to compete in the market are reduced. The Commission sanctions information exchanges between competitors as cartels in two principal scenarios (see Horizontal Guidelines at paragraph 59 and Case COMP/39188 – Bananas (question 13)):

- (a) Where the information exchange has the object of fixing prices or quantities. For example, where the information relates to: quotation prices (Case COMP/39188 – Bananas); future interbank offered rate submissions (Case AT.39914 – EIRD), price forecasts and prices charged to specific customers (Case AT.39574 – Smart Card Chips); information on sales volumes and orders received and at what price (Case COMP/39406 – Marine Hoses); pricing policies, production capacities and sales to individual customers (Case AT.38589 – Heat Stabilisers).
- (b) Where an information exchange forms part of the monitoring or the implementation mechanism for an existing cartel. In this scenario, the Commission assesses the information exchange as part of the cartel (irrespective of whether the information relates to current, past or future prices or quantities). For instance, exchange of information intended to facilitate monitoring of current deliveries in order to ensure that a price-fixing and quota allocation cartel was effective was found to constitute, in and of itself, a concerted practice (Case T-148/89 – Tréfilunion SA v Commission). In a different context, information on sales and exports data formed part of a monitoring system allowing cartel participants to verify that the price increases decided in earlier meetings were in fact being implemented (Joined Cases T-379/10 & T-381/10 – Keramag Keramische Werke AG & Others v Commission (appeal of Case COMP/39092 – Bathroom fittings and fixtures)).

(4) Facilitators

Although cartels normally take place between competitors, this does not preclude a third party that is not active on the allegedly cartelised market (for example, a consultancy, market research company or industry association) from being liable as a participant or facilitator. This will be the case where the third party contributes actively and intentionally to the cartel. In finding a third party liable, the Commission applies the following criteria: the third party, through its own conduct, contributed to the common objectives pursued by the participants; and it was aware of the substantive conduct planned or implemented by other undertakings in pursuance of those objectives, or that it could reasonably have foreseen that conduct and that it was ready to accept the risk (see Case AT.38589 – Heat Stabilisers, at paragraph 382 and Case T-99/04 – AC Treuhand v Commission, at paragraph 122, Case T-180/15 Icap v Commission, on appeal C-39/18 P, not yet decided, and Case C-74/14 “Eturas” UAB and Others). See Example 3 in question 13 for a recent example application of the facilitator doctrine.

4 Are some information exchanges regarded as more serious breaches of the competition rules than others?

On a sliding scale, the Commission views the exchange of information on price as the most serious restriction on competition, followed by information on quantities or capacities and followed by information about costs and demand.

5 To what extent is it necessary for an information exchange to have a negative effect on competition to prove a competition infringement in your jurisdiction?

To be caught by article 101(1) TFEU an information exchange must have either an anticompetitive object or effect.

(i) Object

Restrictions by object (aim or intention) are those that by their very nature have the potential to restrict competition (Case C-209/07 – Beef Industry Development & Barry Brothers (BIDS) at paragraph 7). The Commission can only apply the concept of restriction of competition 'by object' to types of coordination between undertakings which ordinarily reveal such a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (Case C-67/13 P – Groupement des cartes bancaires v Commission, at paragraph 58). The Commission, in this context, will pay particular attention to the legal and economic context in which the information exchange takes place and where it is established that an information exchange amounts to a restriction by object, the Commission will not be required to demonstrate actual or potential competitive effects on the market (paragraphs 27–30 of preliminary ruling in Case C-08/08 – T-Mobile Netherlands, at paragraphs 27–30). The Commission frequently cites the exchange of individualised data on intended future prices or quantities as an example of an object restriction.

(ii) Effect

Where an information exchange does not restrict competition by object, the Commission needs to show that it restricts competition by effect (ie, it must have or be likely to have an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation) (see Horizontal Guidelines at paragraph 27). In doing so, it will follow the analytical framework set out at question 3(1).

6 What types of information exchanges are not caught by the competition laws in your jurisdiction? For example, are certain types of information exchanges viewed as pro-competitive?

In the Horizontal Guidelines, the Commission describes information exchange as a common feature of a competitive market. However, the Commission has not clearly set out the types of information exchanges that are not considered problematic. At the most, it has recognised that certain information exchanges can be pro-competitive. The Horizontal Guidelines at paragraph 57 refer, for example, to the fact that certain information exchanges:

- can address problems of information asymmetries;
- may improve companies' internal efficiencies through benchmarking;
- may assist companies in making cost savings, reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand; and
- may directly benefit consumers by reducing search costs and improving choice.

Similarly, the ECJ has observed that credit information exchange systems between financial institutions about existing or potential borrowers (in particular, whether they have previously honoured debts) are capable of improving competition because they increase the amount of information available to credit institutions, reducing the disparity between creditor and debtor as regards the holding of information, facilitating the lender's ability to foresee the likelihood of repayment. In doing so, such credit registers are, in principle, capable of reducing the rate of borrower default and thus of improving the functioning of credit supply (Case C-238/05 – Asnef-Equifax & Administración del Estado v Ausbanc, at paragraphs 47 and 55).

7 To what extent can public information be caught under the competition rules governing information exchange in your jurisdiction?

Generally speaking, exchanges of genuinely public information (ie, information that is equally accessible in terms of costs of access to all competitors and customers) are unlikely to constitute an infringement of article 101(1). By contrast, the data exchanged may be “in the public domain”, but may not be genuinely public if the costs involved in collecting it deter other companies or customers from doing so. A possibility to gather the information in the market does not necessarily mean that such information constitutes market data readily accessible to competitors. Even if public data is available, the existence of an additional information exchange may give rise to restrictions on competition, if it further reduces strategic uncertainty in the market and tips the market balance towards collusion.

According to paragraph 62 of the Horizontal Guidelines, where an undertaking makes a unilateral announcement that is genuinely public (for example, in a newspaper) this would not generally constitute a concerted practice. For example, in *Joined Cases 89/85, C-104/85 et al - Woodpulp II*, the ECJ held that price announcements did not in themselves lessen uncertainty as to the market, because at the time of the announcement, companies could not be certain of the other parties’ future conduct.

However, the Commission may view announcements as problematic where they: (i) involve invitations to collude; or (ii) were followed by public announcements by other competitors, because strategic responses of competitors to each other’s public announcements (which, might involve 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.

In the *Container Shipping Case (Case AT.39850)*, the Commission raised preliminary competition concerns about the regular announcement of intended future increases of freight prices on websites, via the press or in other ways. Although it did not make a finding of infringement (because it accepted commitments pursuant to article 9 of Regulation 1/2003), the Commission was preliminarily concerned that the announcement of future price increases may have signalled carriers’ intended market conduct and reduced the level of uncertainty about their pricing behaviour, decreasing incentives to compete against each other. The price announcements were in the form of general rate increases, which indicated the amount of the price increase (but not the final price). The Commission’s preliminary concern was that since the announcements provided only partial information to customers, and were not necessarily binding on the carriers, customers may not have been able to rely on them, allowing carriers to adjust prices without the risk of losing customers. According to the Commission’s preliminary assessment, such a practice may have amounted to a concerted practice prohibited by article 101(1). Since the case was brought to an end by an article 9 decision, the Commission did not address whether there was another plausible explanation for the announcements (*Woodpulp II*, cited above). It therefore remains undecided whether such announcements would have been held to be a breach of article 101(1) pursuant to the article 7 procedure.

8 Are there any specific competition rules in place for certain types of information exchange or certain sectors?

Yes. Regulations have been enacted providing special conditions according to which certain types of agreements are group exempted from article 101(1) pursuant to article 101(3) TFEU. When the conditions of a Block Exemption Regulation (BER) are fulfilled, the agreement is automatically valid and enforceable. Below are two examples of BERs that address information exchange:

- Liner Shipping BER: where carriers enter into a liner shipping consortia and have combined market shares not exceeding 30 per cent, they are permitted to exchange information necessary for the functioning of the consortium (such as on vessel slots, ports installations, sailing times, capacity and to use a computerised data exchange system); and
- Technology Transfer BER: subject to certain conditions, agreements between competitors or non-competitors for the licensing of know-how (a package of secret, substantial and identified information resulting from experience and testing) are exempt from article 101(1) where their combined market share does not exceed 20 per cent for agreements between competitors and 30 per cent for agreements between non-competitors.

9 Have public bodies in your jurisdiction published any guidance on the competition rules governing information exchange?

In 2011, the Commission published its revised Horizontal Guidelines, which provide an analytical framework for some of the most common types of information exchange.

10 What defences are available for information exchanges caught by the competition laws in your jurisdiction.

Article 101 TFEU provides the legal framework for a balancing exercise to take into account both the adverse effects on competition under article 101(1) and any pro-competitive effects under article 101(3). It is therefore possible to raise efficiency defences for a restrictive information exchange (provided it does not involve hardcore cartel conduct) where the following cumulative conditions can be fulfilled:

- Efficiency gains: information exchange must contribute to: the improvement of production or distribution of goods/supply of services; or technical or economic progress. The “improvement” must bring appreciable objective advantages to the EU as a whole, and not simply bring private benefit to the parties themselves (see Case C-382/12 P MasterCard v Commission, at paragraph 234). For each efficiency advanced, it is necessary to substantiate: (i) the nature of the efficiency, (ii) its link to the information exchange, (iii) the likelihood and magnitude of the efficiency and (iv) how and when the efficiency would be achieved (see article 101(3) Guidelines, paragraphs 51–54). Examples of efficiencies brought about by information exchange may include:
 - cost information allowing competitors to benchmark their performance against best practices and design internal incentive schemes;
 - information that leads to cost savings;
 - demand or cost information enabling companies to allocate production towards high-demand markets (likelihood depends on market characteristics and the nature of uncertainties on the market); or
 - exchange of consumer data between companies in markets with asymmetric information about consumers (eg, Asnef above).
- Indispensability of the restrictions: article 101(3) does not apply where the restriction is not kept to the minimum necessary to achieve the efficiency gains generated by the information exchange: the data’s subject matter, aggregation, age, confidentiality, frequency, market coverage, etc, must carry the lowest risks indispensable to generating the efficiency. For instance, when benchmarking, individualised data would not normally be indispensable because aggregated information could lead to the same result while carrying a lower risk of a collusive outcome. Information on individualised future intentions is also unlikely to be indispensable, particularly when relating to price and quantity. In the context of horizontal cooperation agreements, the information must not go beyond what is indispensable for the implementation of the economic purpose of the agreement (such as, sharing technology necessary for an R&D agreement or cost data for a production agreement).
- Fair share to consumers: To outweigh the restriction on competition caused by the information exchange, the efficiency gains attained must be passed on to consumers. The lower the market share of the parties, the more likely consumer pass-on will be.
- No elimination of competition: article 101(3) does not apply where the information exchange affords the companies involved the possibility to eliminate competition in respect of a substantial part of the products or services concerned.

In addition to article 101(3), it may be possible for parties to defend an information exchange by arguing that there was another plausible explanation for their conduct (see question 11).

11 What is the standard of proof and on whom does the burden of proof fall in information exchange cases? Are there any scenarios in which the burden of proof is or could be reversed?

Burden on Commission to demonstrate a restriction on competition

According to article 2 of Regulation 1/2003, the burden is on the Commission to demonstrate a restriction on competition. The Commission must adduce evidence to the “requisite legal standard” (ie, sufficiently precise and consistent to support the firm conviction that the alleged infringement took place (see Case C-49/92 - Commission

v Anic Partecipazioni, at paragraph 86)). It is not necessary for the Commission to show that every item of evidence is sufficiently precise and consistent: it is entitled to rely on a body of evidence and to infer an infringement from a number of indicia and coincidences, which, taken together, in the absence of any plausible explanation, may constitute an infringement (see Case 74/ 14 – ‘Eturas’ UAB and Others, at paragraph 36).

When analysing an information exchange as a concerted practice, it may be sufficient for an infringement finding for one party to disclose commercially sensitive information to a competitor and for the latter not to reject the information. This is because there is a rebuttable presumption that an undertaking that took part in a concerted practice and remained active on the market took the information into account when determining its conduct on the market. However, the Commission cannot require undertakings to take excessive or unrealistic steps to rebut: it may be sufficient to prove that the undertaking did not receive the information or did not look at it until time had passed (Eturas, at paragraphs 33–41).

Burden on defendant to demonstrate other plausible explanation

Where the Commission relies solely on the conduct of the undertakings on the market (for example, uniformity of prices) and not on documentary evidence to prove concertation, it is possible to rebut any finding of an infringement by proving the existence of circumstances which cast the facts established by the Commission in a different light, allowing for another “plausible explanation” (see paragraphs 60–99 of Case T-112/07 - Hitachi Ltd and Others v Commission at paragraphs 60–99 and Case T-80/10 Wabco v Commission at paragraph 49). For example, in Woodpulp II, parallel conduct established by the Commission did not constitute evidence of concertation because the price parallelism and pricing trends could be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods.

Burden on defendant to demonstrate efficiencies under article 101(3)

According to article 2 of Regulation 1/2003, and as indicated in question 10, the burden of proof for an efficiency defence rests on the undertaking invoking its benefit (see Case C-68/12 Slovenská sporiteľňa, at paragraph 32). However, when the conduct is covered by a BER (see question 8), the parties are relieved of that burden.

12 What are the sanctions for anticompetitive information exchanges in your jurisdiction?

If the Commission finds there has been an infringement of article 101 TFEU, it may:

- (1) require the undertaking(s)/association concerned to bring the infringement to an end pursuant to article 7(1) of Regulation 1/2003. It may impose behavioural or structural remedies that are proportionate to the infringement and necessary to bring it to an end. Structural remedies are a last resort and are only used when there is no equally effective behavioural remedy or where the latter is too burdensome.
- (2) impose fines on undertakings/associations where they intentionally or negligently infringe article 101 pursuant to article 23 of Regulation 1/2003. The Commission retains a wide discretion as to the amount of any fine imposed on infringing undertakings. The upper limit of the fine cannot exceed 10 per cent of worldwide turnover in the preceding business year (or in the case of an association, 10 per cent of the sum of members’ total turnover). In setting the amount of the fine, the Commission has regard to the gravity and duration of the infringement. Where the article 101 infringement takes place in a cartel context, reductions in fines may be available for leniency and/or cartel settlement (see EU Chapter on Immunity, Sanctions & Settlements). The Commission has published Guidelines on its method of setting the fine.

As an alternative to the article 7 infringement procedure, the Commission may (provided the case does not concern a cartel) decide to bring proceedings to an end by accepting binding commitments to address the Commission’s preliminary competition concerns. The Commission finds that there are no longer grounds for action and does not impose a fine or find an infringement. However, if the parties breach their commitments, the Commission may impose fines pursuant to article 23 of Regulation 1/2003.

13 Describe any recent cases in the area of information exchange of note in your jurisdiction, how they were decided and which sections they concerned.

We highlight below some recent EU information exchange cases.

Example 1 – Eturas (2016)

In Case C-74/14 - “Eturas” UAB and Others, the ECJ preliminarily ruled that the national court could be entitled to presume an article 101(1) restriction from the mere dispatch of a message to travel agents informing them of a cap on discounts of 3 per cent through their e-commerce functionality where: each company understood the measure communicated to them, and failed to distance themselves from it. That presumption could be rebutted if the company showed they objected to the communication, or by showing that they systematically set prices that did not respect the new rule.

Example 2 – Bananas (2015)

In Case COMP/39188 – Bananas (upheld in Case C-286/13 P Dole Food and Dole Fresh Fruit Europe v Commission), the Commission fined Dole, Weichert and Chiquita for engaging in bilateral pre-pricing communications about price-setting factors for bananas. First, the parties discussed (ahead of the quotation price setting and announcement to customers) factors relevant to quotation prices, discussed or disclosed price trends or gave indications of quotation prices for the forthcoming week. The Commission found that this reduced the uncertainty between the parties as regards their price quotations. Second, after the prices were set, the parties exchanged their quotation prices bilaterally. The Commission found that this enabled the companies to monitor individual pricing decisions in light of pre-pricing communications.

Example 3 – AC Treuhand (2015)

The ECJ confirmed the liability of a cartel facilitator in Case C-286/13 P Treuhand v Commission. In 2009, the Commission imposed fines on companies active in the heat stabiliser industry for price fixing, market sharing and the exchange of commercially sensitive information. AC Treuhand is a Swiss consultancy firm active in business management and administration of associations, assisted in the collection, processing and assessment of market data, presentation of market statistics and the audit of the reported figures at the premises of the participants. The Commission considered that AC Treuhand played a significant role in the organisation and conduct of the meetings underpinning the cartel. AC Treuhand had precise knowledge of the anticompetitive arrangements and in fact, drafted and disseminated the information on prices, quotas and customers. It was entrusted with the power to conduct audits with the cartelists. Only data approved by AC Treuhand became the basis of negotiations and arrangements. AC Treuhand made available its location to conceal the cartels. Its role was that of preventing the detection of both infringements. AC Treuhand provided its services, its professional expertise and infrastructure to the cartelists. The Commission characterised such conduct as active participation and involvement conducive to, and facilitating, the anticompetitive arrangements and their implementation. AC Treuhand was fined €174,000. On appeal, the ECJ confirmed that the Commission was correct to hold AC Treuhand liable for the cartel. It found that AC Treuhand’s conduct had been directly linked to the efforts made by the heat stabilisers cartelists, as regards the negotiation and monitoring of the implementation of the obligations entered into by the cartelists: the very purpose of the services provided by AC Treuhand on the basis of service contracts concluded with the cartelists was the attainment, in full knowledge of the facts, of the cartel’s objectives (ie, “price-fixing, market-sharing and customer-allocation and the exchange of commercially sensitive information”).

Example 4 – ICAP (2017)

In Case T-180/15 ICAP v Commission, the General Court stated at paragraph 75 that the mere communication of information regarding the future Yen Libor submissions of a bank was capable of giving an advantage to the banks concerned, removing them from the application of normal competition on the market in a manner such that that exchange of information may be considered as having as its object the restriction of competition within the meaning of article 101(1) TFEU. The case is under appeal (Case C-39/18 P Commission v Icap, not yet decided).

Example 5 – EURIBOR (2016)

In Case COMP/39914 – EURIBOR (on appeal Cases T-105/15, etc HSBC Holdings v Commission, not yet decided), the Commission fined Crédit Agricole, HSBC and JP Morgan Chase for participating in a cartel in euro interest rate derivatives. The traders of the banks were in contact via chat rooms or other instant messaging services and

exchanged sensitive information regarding their respective trading positions or pricing strategies (as well as their intended Euro Interbank Offered Rate (EURIBOR)).

14 Describe any recent changes to legislation in your jurisdiction that may have an impact on information exchanges.

The Insurance BER was allowed to expire on 31 March 2017. This had provided that, subject to certain conditions, article 101(1) TFEU did not apply to agreements between undertakings in the insurance sector regarding joint compilation and distribution of information necessary to calculate average cost of risk coverage and construct mortality, illness, accident and invalidity tables in connection with capitalisation. The expiry means that insurers will need to self-assess their cooperation to verify compatibility with article 101(1) TFEU. The Commission is monitoring developments to examine how insurers adapt to the changed circumstances.

15 Are there any proposals to reform the rules governing information exchange in your jurisdiction?

Directive 2019/01 of the European Parliament and the Council was adopted in December 2018 to strengthen the enforcement activities of the NCAs. Although not specific to information exchange, the result is likely to be greater attention being paid to information exchanges at the national level.

In March 2019, the Commission announced it would shortly begin a review of the Horizontal Guidelines.

16 Are there any other noteworthy characteristics or practical examples specific to your jurisdiction?

In addition to information exchanges between competitors, information exchanges on a vertical level may, in certain circumstances, facilitate collusion between competitors. For example:

- (1) In the context of an agency agreement, where the agent acts for a number of principals and sensitive market information is exchanged between principals through the agent (see paragraph 20 of the Vertical Guidelines); and
- (2) In the case of category management within a distribution agreement. Such a contract entrusts the supplier (the category captain) with the marketing of a category of products, which includes products competing with the suppliers. Where all or most of the competing distributors use the same category captain in the market, the latter may be in a position to provide distributors with a common point of reference for their marketing decisions (see paragraph 211 of the Vertical Guidelines).

In such circumstances, the facilitator doctrine may apply (described in more detail in question 3(3)).



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David Wood is an English and Belgian qualified partner in the Brussels office of Gibson, Dunn & Crutcher LLP. He has lived and worked in Brussels since 1991. Mr Wood's practice encompasses the full range of anti-trust issues, including cartels, merger control (often involving the coordination of cases before several different competition authorities), abuse of dominance, restrictive agreements, sector inquiries and private enforcement. He has particular experience with cases involving abusive pricing and refusals to supply by dominant undertakings, as well as the establishment of joint dominance and network-related issues. He has strong expertise in the financial services, transport and media/high-tech sectors.

Prior to joining Gibson Dunn, Mr Wood spent 10 years at the antitrust enforcement division of the European Commission (DG Competition), including positions as head of the Financial Services Unit and acting head of the Media Unit. He is one of the few lawyers in private practice to have held a senior position in the European Commission, and brings his clients both deep experience of European antitrust enforcement, and valuable insights into how to manage risk and avoid problems.

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