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Information Sharing in Competition Policy – Note by Colombia

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Colombia

An Analysis from the Perspective of Protecting Free Economic Competition in Colombia

1. In Colombia, the issue of the exchange of sensitive information—as a relevant factor when analyzing anticompetitive practices—has been addressed from various perspectives by the Competition Authority. The first point to note is that there is no a specific prohibition in competition law that classifies this type of conduct as anticompetitive. However, this situation has been analyzed in several cases as an element of anticompetitive conduct. It is worth noting that the approach to this issue has not been consistent or unified. In any case, the Superintendency has established guidelines in specific cases—such as those involving trade unions and associations—regarding the preventive measures that must be considered to ensure that such scenarios do not serve as platforms that facilitate or allow the transfer of sensitive information among competitors.

2. To present the analysis conducted by the authority regarding the exchange of sensitive information within the framework of free competition in Colombia, this contribution will address four topics. First, the applicable regulations will be described; second, their implementation in four specific cases will be explained; third, the guidelines of the Superintendency of Industry and Commerce for trade unions and associations will be detailed; finally, the challenges posed by this type of conduct for the competition authority will be identified.

1. An Approach to the Exchange of Sensitive Information from the Perspective of Colombian Law

3. Under Colombian law, the exchange of sensitive information is not specifically classified as anti-competitive conduct. There are certain behaviors that may relate to the prohibition against competitors communicating relevant information that could facilitate the formation of conduct that restricts competition. Some examples of how the transfer of sensitive information can be approached from a legislative perspective include cases such as the prohibition on the concentration of administrative positions; or as an element forming part of anticompetitive agreements; or in application of the general prohibition.

4. The restriction on the concentration of administrative positions is defined in Article 5 of Law 155 of 1959[1] . This provision prohibits members of boards of directors, directors,

[1] **Law 155 of 1959**. "Enacting certain provisions regarding restrictive business practices." **Article 5.** The incompatibility established in Article 7 of Law 5 of 1947, applicable to members of the Boards of Directors and managers of credit institutions and stock exchanges, shall be extended to the presidents, managers, directors, legal representatives, administrators, and members of the Boards of Directors of companies whose purpose is the production, supply, distribution, or consumption of the same goods or the provision of the same services, provided that such companies, considered individually or collectively, have assets valued at twenty million pesos ($20,000,000.00) or more. **Law 5 of 1947**. "On the Statutory Audit of Official Credit and Development Institutions." Article 7. Members of the Boards of Directors and Managers of banking institutions may not serve on the Boards of Directors of other credit institutions or on the stock exchanges, with the exception of the Board of the Central Bank. Violation of the foregoing provision shall result in the imposition of a

legal representatives, and managers of companies in the banking sector, the stock exchange, or companies offering the same services or goods in the market from holding positions in two or more competing companies. This restriction has not been significantly applied in the cases analyzed by the Superintendency. However, this regulation reflects that, since 1959, Colombian legislation has recognized that the concentration of administrative positions could be anticompetitive, and one reason for this is the possibility that an individual might possess strategic information about competing companies, which would facilitate collusion among them.

5. Another way in which the transfer of sensitive information has been addressed in the context of anti-competitive practices has been from two perspectives. On the one hand, as a complementary element to the anti-competitive agreements provided for in Article 47 of Decree 2153 of 1992[2] ; thus, when analyzing conduct such as price-fixing agreements, the Superintendency examines what information competitors have shared to reach this agreement and whether this information, by its nature, facilitated the conduct under investigation. From this perspective, the transfer of sensitive information is analyzed within the framework of the anticompetitive agreement as an element constituting the conduct under investigation.

6. The competition authority has also, in some investigations, treated the transfer of sensitive information as an autonomous conduct. In these cases, this conduct has been brought under the law through the general prohibition of anticompetitive practices set forth in Article 1 of Law 155 of 1959[3] . In such cases, it has been established that having "facilitated" the exchange of sensitive information can be problematic in terms of free competition.

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fine of one thousand pesos ($1,000) to five thousand pesos ($5,000), imposed by the Superintendency of Banking. Article 10 of Law 16 of 1936 is hereby amended as set forth above.

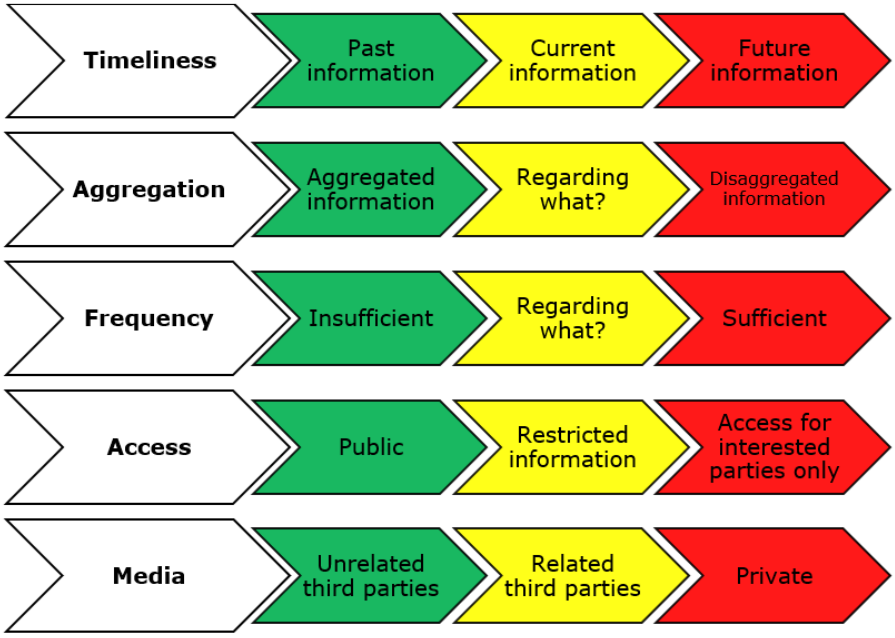
[2] **Decree 2153 of 1992**. "Whereby the Superintendency of Industry and Commerce is restructured and other provisions are enacted." **Article 47**. Agreements contrary to free competition. For the purposes of fulfilling the functions referred to in Article 44 of this Decree, the following agreements, among others, are considered contrary to free competition: 1. Those whose object or effect is the direct or indirect fixing of prices. 2. Those whose object or effect is to determine discriminatory conditions of sale or marketing vis-à-vis third parties. 3. Those that have as their object or effect the division of markets among producers or among distributors. 4. Those that have as their object or effect the allocation of production or supply quotas. 5. Those that have as their object or effect the allocation, division, or limitation of sources of supply for production inputs. 6. Those that have as their object or effect the limitation of technical developments. 7. Those that have as their object or effect the conditioning of the supply of a product on the acceptance of additional obligations that, by their nature, were not the object of the transaction, without prejudice to the provisions of other regulations. 8. Those that have as their object or effect refraining from producing a good or service or affecting production levels. 9. Those whose object is collusion in bids or tenders, or those whose effect is the allocation of contract awards, the allocation of tenders, or the setting of terms for proposals. 10. Those whose object or effect is to prevent third parties from accessing markets or marketing channels.

[3] Law 155 of 1959. "Enacting certain provisions regarding restrictive business practices." **Article 1**. Amended by Art. 1, Decree 3307 of 1963. The new text is as follows: Agreements or arrangements (sic) that directly or indirectly have as their object the limitation of the production, supply, distribution, or consumption of domestic or foreign raw materials, products, goods, or services are prohibited, as are, in general, all kinds of practices, procedures, or systems tending to limit free competition and to maintain or determine unfair prices.

2. Cases in which the exchange of sensitive information has been analyzed as a practice restricting competition

7. The Superintendency of Industry and Commerce has examined the exchange of sensitive information in several cases. In each of these cases, the authority has been very careful to define what constitutes sensitive information and in which cases this information may have a significant impact on anti-competitive practices. To define what constitutes sensitive information, a traffic-light-style tool has been used to measure the risk that the transfer of information may pose, depending on the nature of the information. The tool was presented by Luis Berenguer Fuster (former president of the then-Spanish National Competition Commission) at the Third International Congress on Free Economic Competition, titled "Information Exchanges Among Competitors"[4] .

8. The objective of this tool is to identify evaluation criteria that allow the transfer of sensitive information to be placed on a risk scale ranging from low to high for free competition. To conduct this analysis, Superintendency has defined five fundamental criteria: the timeliness of the information, its degree of aggregation or disaggregation, the frequency of access, the public or confidential nature of the data, and how it is obtained. By way of illustration, the "timeliness" criterion measures risk based on the likelihood of affecting competition: "past" data represents a low risk, "present" data a moderate likelihood, and "future" data a high likelihood of leading to illicit coordinated effects.



9. This tool is applied in every case analyzed by the Superintendency that involves the transfer of sensitive information, along with other elements related to the evidence gathered in each case, to establish the risk to free economic competition. This tool may be used from the drafting of the statement of charges and the opening of an investigation. However, during the administrative proceedings, the parties under investigation may challenge the analysis of the information exchanged among competitors, which the

[4] See:https://anuariocompetencia.cnmc.es/files/2010/2010.pdf

competition authority may have deemed sensitive and posing a high risk of affecting free economic competition.

10. The issue of exchanging sensitive information has been analyzed in several cases, and in this contribution, we will present four (4) investigations. As will be described, the Superintendency's position has not been consistent. In two cases, the Superintendency imposed sanctions on anticompetitive practices. In another case, the final decision was to close the investigation. And in the last case to be analyzed, which is currently pending, the Superintendency has issued three relevant administrative acts: first, it ordered the implementation of precautionary measures aimed at preventing competitors from sharing sensitive information; second, it initiated an administrative investigation to determine whether certain market participants engaged in anticompetitive conduct; third, it prematurely closed the investigation against an association because the association offered commitments aimed at modifying the way market information was presented to competing market participants, thereby permanently halting the transfer of sensitive information among competitors.

2.1. Sanctioned cases in which the transfer of sensitive information was one of the elements analyzed

11. In 2016, the Superintendency sanctioned two cases involving business cartels in which the exchange of sensitive information was analyzed. The first case concerns a price-fixing agreement in the tissue paper market—toilet paper, napkins, kitchen towels, and hand and facial tissues. The Superintendency issued a statement of charges against several companies, including Productos Familia S.A., Colombia Kimberly Colpapel S.A., Papeles Nacionales S.A., and Drypers Andina S.A. The first conduct for which charges were brought was a price-fixing agreement in the market, in accordance with the provisions of paragraph 1 of Article 47 of Decree 2153 of 1992. The second conduct for which the investigation was initiated was based on Article 1 of Law 155 of 1959, as the competition authority considered at that time that conduct tending to restrict free competition had occurred through the exchange of sensitive information regarding prices, marketing channels, and market strategies, among other aspects[5] .

12. After conducting its investigation, the Office for the Protection of Competition recommended in its Reasoned Report that the Superintendent's Office not impose a penalty for the conduct involving the "exchange of sensitive information." This conclusion stems from the fact that the Deputy office determined that the exchange of sensitive information in this case served to implement the price-fixing agreement and therefore should be considered ancillary conduct and subsumed within the analysis of the price-fixing agreement. This recommendation was accepted by the Superintendent's Office, and the parties under investigation were not sanctioned for this conduct. However, in the Resolution by which the Superintendency decided to sanction this case, the Superintendent's Office stated that:

> *"on some occasions, exchanges of sensitive information on their own have the potential to constitute an autonomous anticompetitive act under Article 1 of Law 155 of 1959 (general prohibition), there are other cases in which such exchange of information constitutes an ideal vehicle for implementing an anticompetitive agreement, for example, direct or indirect price fixing, such that conduct should not be sanctioned twice for the same act.*

[5] Superintendency of Industry and Commerce. Resolution No. 69518 of November 24, 2014. "Whereby an investigation is opened and a statement of charges is issued."

> *In the present case, it is observed that, during the existence of the business cartel for price fixing in the tissue paper sector, the exchange of current and disaggregated confidential information was the defining feature that allowed all those under investigation to learn about the commercial strategies related to the prices of the products under investigation and, most importantly, their direct or indirect fixing.*
>
> *(…) This anticompetitive agreement was made possible, among other things, by the continuous exchange of information among the investigated parties through various means, such as the numerous emails through which price lists for the products under investigation were exchanged and the discount percentages to be offered to their customers were set."*[6]

13. In the second case, the Superintendency analyzed a price-fixing agreement in the market for writing notebooks. The companies investigated in this case were Carvajal Educación S.A.S., Colombia Kimberly Colpapel S.A., and Scribe Colombia S.A.S. The initial charge was price fixing (Article 47(1) of Decree 2153 of 1992) and the general prohibition on practices restricting free economic competition (Article 1 of Law 155 of 1959). In this case, through the general prohibition, the Superintendency established the transfer of sensitive information as a separate and independent act distinct from the price-fixing agreement.

14. Once the Deputy office for the Protection of Competition had conducted its investigation, it concluded that the companies under investigation engaged in the conduct of "exchange of sensitive information." The Deputy office analyzed this conduct in accordance with the tool described in this article in section 1. In this specific case, the Deputy office analyzed the information that the investigated parties shared within the framework of a "Credit Committee." In that committee, the investigated companies shared information related to debt collection strategies, financial discounts applicable to their customers, and the companies' customer lists. In the Deputy office 's view, the exchange of sensitive information carried out through the "Credit Committee," particularly between two of the investigated companies—Scribe Colombia S.A.S. and Carvajal Educación S.A.S.—constituted anti-competitive conduct that should be analyzed and sanctioned as a separate violation. The Deputy office concluded as follows:

> *"The companies under investigation, by having a system that allowed them to consolidate information related to customers with irregular payment behavior—in which they knew the credit limit assigned to the customer, the payment terms, the time taken to pay, and, in general, the terms of the payment, exposed the market to the generation of illicit coordinated effects, since sharing such information increased the likelihood of generating a standardized or collective response toward that delinquent customer and even toward others, by standardizing coordinated strategies for all customers.*
>
> *In fact, the companies under investigation, by having this information and treating it as a risk factor within their company—as part of their credit and portfolio policy—could also influence their commercial policy, insofar as they avoided risks they would generally take or might take if they did not have the information shared in the committee, such as increasing the credit limit for a specific customer or*

[6] Superintendency of Industry and Commerce. Resolution No. 31739 of May 26, 2016. "Whereby sanctions are imposed for violations of the competition protection regime and other determinations are adopted." Page 180.

granting credit to a new customer, based solely on the company's internal variables."[7]

15. The Deputy Office recommended to the Superintendent's Office that sanctions be imposed for the conduct involving the "transfer of sensitive information," in accordance with the general prohibition set forth in Article 1 of Law 155 of 1959, as such conduct could constitute an act intended to restrict free competition. This recommendation was accepted by the Superintendent's Office, and several sanctions were imposed for this conduct through Resolution No. 54403 of August 18, 2016.

16. It is important to note that in both cases—the "soft paper" case and the "notebooks" case—despite the conclusion that anti-competitive conduct did occur, some companies, such as Scribe Colombia S.A.S. and Colombia Kimberly Colpapel S.A., were exempted from paying the fine because they had availed themselves of leniency programs, having acted as whistleblowers in the investigations.

2.2. Case in which the investigation was closed because the transfer of information was not considered to be anti-competitive

17. In 2018, through Resolution No. 56979 of August 10, the Deputy office initiated an investigation into a contract involving, among others, the following companies: CASS Constructores S.A.S. and Constructora Conconcreto S.A. In this case, a statement of charges was issued regarding a possible agreement within the framework of a public procurement process conducted to contract the expansion of the road connecting the city of Bogotá, D.C., to the municipality of Girardot in Colombia. Additionally, a statement of charges was issued regarding the possible exchange of sensitive information as a practice, procedure, or system intended to restrict free economic competition, in accordance with the provisions of Article 1 of Law 155 of 1959.

18. In this case, the Deputy office found that there were emails and messages between the two parties under investigation in which information related to the public procurement process was exchanged. Specifically, the Superintendency had as evidence a message in which CASS Constructores S.A.S. informed Constructora Conconcreto S.A. that they would not submit a financial bid because they did not have sufficient credit capacity to be awarded the contract. For the Deputy office, this information was sensitive and confidential, as it was an essential element that facilitated the development of a strategy for submitting bids in the public procurement process.

19. After completing the investigation, the Deputy office concluded that this transfer of sensitive information was not sufficient to affect the competitive process in the context of the project's procurement. In this case, the Deputy office stated that for conduct to be considered anti-competitive, it must, at a minimum, increase the likelihood that the participants will be awarded the contract in the selection process. In this case, the Deputy office was able to prove that sensitive information was indeed shared among competitors. However, the information regarding one participant's inability to meet the credit quota was insufficient; furthermore, this information could also be verified through public sources, such as the Electronic System for Public Procurement in Colombia, where all the processes in which CASS Constructores S.A.S. had been contracted could be consulted.

20. The Superintendent's Office reviewed the Deputy office 's arguments and accepted the recommendation that no penalty should be imposed for this conduct. On this occasion,

[7] Superintendency of Industry and Commerce. Deputy office for the Protection of Competition. Reasoned Report. Single version. File No. 14-151039, "Notebooks" case. 2016. Page 120.

the Superintendency stated that to establish the exchange of sensitive information as anti-competitive, the following elements must be examined:

> *"(i) there must be evidence of the exchange or improper provision and use of a competitor's information; (ii) there must be certainty regarding what the information was and whether it is of a sensitive or confidential nature; (iii) there must be no public mechanism through which such information can be accessed; and (iv) the market agent must have obtained a competitive advantage in the market through such information"*[8]

21. This case is an example of how the Superintendency, between the opening of the investigation and the final decision on the case, can analyze and conclude that the indications it initially considered potentially anti-competitive had occurred for a reason that justified the actions of the market agents. For this reason, it was possible to close the investigation into this case.

3. Measures implemented by the Superintendency in cases where the exchange of sensitive information is a relevant element of the conduct

22. In Resolution No. 61131 of October 11, 2024, the Superintendency decided to issue precautionary measures to prevent certain market participants from gaining access to sensitive information that could be used to establish anti-competitive coordination mechanisms. The case began because the "United Nations Conference on Biodiversity" (COP 16) was to be held in the city of Cali, Colombia, in October 2024. People from 190 countries were expected to attend the event, making accommodation essential for the event to take place. Through media reports, the Superintendency learned that prices had risen excessively for the dates on which COP 16 was to take place. To verify what was happening in Cali, the Superintendency conducted administrative visits to hotels in that city.

23. Based on the evidence gathered during the investigation, the Superintendency found elements that could constitute market restrictions and determined that it was necessary to order precautionary measures to prevent market participants from accessing sensitive information that would enable them to coordinate prices or conditions related to lodging. In this case, the Superintendency found that the Colombian Hotel and Tourism Association (COTELCO) operated a Hotel Information System (HIS) through which member hotels shared sensitive operational data in disaggregated form and in real time (via daily reports). Furthermore, the access granted by COTELCO to the hotels allowed them to view the information reported by their competitors, both in aggregate form (as statistics) and in disaggregated form (for each hotel), including the ability to make comparisons and view indicators for each of the competing hotels.

24. As of the date Resolution No. 61131 of 2024 was issued, the Superintendency had not opened an investigation. However, it was necessary to take measures to prevent hotels from having access to information that would allow them to coordinate, so the Superintendency ordered COTELCO to immediately suspend the SIH and any tool or platform that allowed access to the sensitive information reported by the hotels to the association.

25. On October 17, 2024, through Resolution No. 62110, the Deputy office for the Protection of Competition opened an investigation against certain hotels for possibly

[8] Superintendency of Industry and Commerce. Resolution No. 28751 of June 16, 2020. "Whereby an investigation is closed." Page 105.

engaging in price-fixing conduct as established in paragraph 1 of Article 47 of Decree 2153 of 1992. In addition, it opened an investigation against the Valle del Cauca chapter of COTELCO for acts of influence in accordance with paragraph 2 of Article 48 of the same decree. These two types of conduct are currently being evaluated by the Deputy office for the Protection of Competition; therefore, no final decision has been reached as of the date of this report.

26. In addition to the conduct described above, the Deputy office also opened an investigation against COTELCO and the other parties under investigation for the exchange of sensitive information, in accordance with the general prohibition (Article 1 of Law 155 of 1959). In particular, it focused on analyzing the information exchanged by market participants through the association and the SIH. While this investigation, COTELCO made an offer of commitments with the aim of having the Superintendency close the investigation as a result of implementing measures that would lead to the cessation of potentially anti-competitive conduct and, furthermore, to a structural modification of the way in which the association collected information. The Superintendency evaluated the offer of commitments and concluded that it was sufficient and therefore closed the investigation against COTELCO.

27. Through Resolution No. 65366 of August 29, 2025, the Superintendency established that COTELCO must modify the SIH so that access is limited to aggregated information by chapters and zones. The Superintendency acknowledges that having information on the markets is useful; therefore, such measures can lead to a better understanding of each market without providing agents with detailed and sensitive information that would facilitate coordination. Additionally, COTELCO was required to eliminate the possibility for hotels to compare information in detail. The Superintendency ordered that any comparison of information be historical, aggregated, and anonymized. In addition to these orders, the Superintendency directed COTELCO to conduct training on free competition for its members, as well as to implement compliance programs regarding free economic competition. As of the date of this article, the Superintendency is monitoring COTELCO's compliance with these commitments.

4. Guidelines from the Superintendency of Industry and Commerce for trade associations and other associations regarding the exchange of sensitive information

28. The Superintendency has analyzed several cases in which one of the key factors is the exchange of sensitive information among competitors within the framework of associations or trade groups. One such example is that of COTELCO, which was discussed in the previous chapter. In addition to the Superintendency's decisions on this matter, the competition authority has published a guideline that establishes guidelines for associations aimed at preventing anticompetitive practices.

29. Regarding the exchange of sensitive information, the Superintendency stated that associations play a fundamental role in reviewing the sector's context; this is why the preparation of market studies or reports can have a positive impact on the market, such as correcting information asymmetries to make competition more efficient. This type of information can also be useful for individuals seeking to compete in the market, providing them with data to develop competitive strategies, as well as informing competitors so they can make rational consumption decisions.

30. However, in this regard, the Superintendency identified information exchanges that could have negative effects on free competition. To this end, it identified the following criteria:

1. Market structure: when a market is highly concentrated, information exchange is more likely to have anticompetitive effects
2. Nature of the product: in markets with homogeneous products (such as oil, cement, and soybeans), the exchange of information can contribute to the homogenization of behavior among market participants
3. The type and nature of the information exchanged: the Superintendency has determined that the more detailed the information, the more anti-competitive effects it may have, especially if it relates to prices, quantities, commercial strategies, investment projects, among others.
4. Time frame of the shared information: current or projected information has the potential to affect free competition.
5. The frequency of information exchange: the more frequently information is exchanged, the more likely it is to facilitate the adaptation of competitive strategies by competitors.

31. To prevent the exchange of sensitive information within the framework of associations from facilitating anti-competitive conduct by companies, the Superintendency proposed several measures in the guide, which are:

> *"a. That the meetings held by the association have an agenda known in advance to the meeting participants; b. That within the association, a record of the meetings be kept through minutes that cover all the topics discussed during the meeting; c. That the data shared with members be historical data, since, for example, information related to current or future prices could encourage anti-competitive conduct; d. That information shared which may influence competitors' decisions be aggregated; e. That members who witness practices contrary to free competition oppose the association's decision, do not carry out the agreed-upon conduct, and report it to the Superintendency of Industry and Commerce; f. That professional associations do not serve as a forum for members to discuss the disseminated data and its implications for business strategies; g. That the association's officials responsible for collecting and aggregating information (including employees, contractors, consultants, etc.) be independent of its members, such that they do not simultaneously belong to or perform functions within both the association and the affiliated companies."*[9]

32. These measures are illustrative and do not preclude the Superintendency from evaluating the exchange of information carried out within the framework of associations or professional bodies.

5. Challenges for the competition authority when analyzing the exchange of sensitive information among competitors

33. As described in this article, the exchange of sensitive information has been analyzed in several cases, some of which have resulted in sanctions and others in no sanctions. At this time, the Superintendency does not have a unified position because the

[9] Superintendency of Industry and Commerce. "Guide on the Application of Competition Rules to Business Associations and Professional Associations or Colleges." Available at:http://www.sic.gov.co/recursos_user/documentos/CARTILLA_GREMIOS.pdf, p. 19.

exchange of sensitive information is analyzed on a case-by-case basis and in accordance with the evidence gathered.

34. One of the challenges currently facing the competition authority is establishing strategies to identify cases of sensitive information exchange using tools that systematize databases containing millions of data points. In the era of Artificial Intelligence, data systematization is becoming increasingly easy and can be done quickly, which means that through the exchange of sensitive information, competitors can make competitive decisions in less time. This limits the competition authority's ability to make timely decisions regarding the prevention of conduct that could affect markets and free economic competition.