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Information Sharing in Competition Policy – Note by France

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1. While exchanges of information between undertakings may, in certain situations, improve economic efficiency by reducing information asymmetries, for example by informing operators about the state of demand or by increasing the efficiency of their production, they may also distort competition by leading to a risk of reduced competitive intensity. This is the case, for example, when competitors communicate with one another about the commercial policies they intend to pursue.

2. Exchanges of information are therefore capable of being apprehended from the point of view of the prohibition of anticompetitive agreements laid down in Article 101(1) of the Treaty on the Functioning of the European Union (hereinafter the 'TFEU') and, in national law, in Article L. 420-1 of the French Commercial Code.

3. Depending on their characteristics and the legal and economic context of which they form part, they may be classified as restrictions of competition by object or must be assessed in the light of their effects, with the Autorité de la concurrence (hereinafter 'the Autorité') then having to demonstrate their actual or potential anticompetitive scope. The analysis benefits from the guidance provided by the European Commission's Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements [1] (hereinafter the 'Guidelines'), which concretely illustrate the '"gradual" approach to be applied to exchanges of information.

4. Examples of infringements by object are exchanges of information between competitors on current and future pricing, current and future production capacity, or future product characteristics relevant to consumers[2]. In the case of an exchange of commercially sensitive information whose content, objectives and the economic and legal context of which it forms part do not present a sufficient degree of harm to competition to be classified as infringements by object, the Guidelines and the case-law call for an analysis of the nature of the information exchanged and the characteristics of the exchanges and of the market concerned[3].

5. The Guidelines also specify that the prohibition laid down in Article 101(1) TFEU applies to exchanges of '*commercially sensitive*' information that may influence the commercial strategy of the competitors[4]. In addition to information on prices, costs, capacity, production or customers[5], other types of information may, depending on the context, be assessed as commercially sensitive. Exchanges of information relating to the staff mobility and mobility plans of two competing undertakings thus served as a support for an anticompetitive no-poach agreement sanctioned by the Autorité in a decision of 11 June 2025[6].

[1] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 259, 21.7.2023.

[2] Paragraph 414 of the Guidelines.

[3] Paragraph 424 of the Guidelines. See also the judgment of the Court of Justice of 29 July 2024, *Banco BPN/BIC Português SA v Autoridade da Concorrência*, paragraphs 52 to 65, C-298/22.

[4] Paragraph 384 of the Guidelines.

[5] Paragraph 385 of the Guidelines.

[6] Decision No 25-D-03 regarding no-poach practices in the engineering, technology consulting and IT services sectors. This decision is currently under appeal before the Paris Court of Appeal.

6. This example illustrates the need for the Autorité to follow a case-by-case analysis, based on the data specific to each information exchange practice, as does the European Commission.

7. That analysis *in concreto* involves assessing each practice in all its dimensions, in particular its material dimension, since exchanges of information may take various forms (1), and the contextual dimension, since the economic and legal context of the exchanges makes it possible to distinguish an established cartel from legitimate cooperation (2).

1. The material examination: the plurality of forms of exchanges of information

8. The characteristics of the transmission of information may vary considerably depending on the circumstances of the case.

9. The Autorité frequently sanctions exchanges of information that are part of traditional price-fixing or market-sharing agreements, for example in the context of secret meetings or bilateral exchanges involving competitors, as in its decision of 16 July 2020 in the buying and selling of pork cuts and cold meat products[7].

10. More atypical exchanges have also been encountered in the Autorité's recent practice, for example at anti-competitive meetings whose participants have not even sought to ensure secrecy.

11. Thus, faced with the legal prohibition of Bisphenol A (BPA) from 2015 in France, canning and packaging manufacturers coordinated to prevent any competition based on the 'BPA-free' argument, thereby depriving consumers of health-related information[8]. The agreement took place during the transitional period in which food containers with and without Bisphenol A were simultaneously placed on the market, a period established to allow the disposal of stocks. If the strategy developed was hidden from the public, one of the specificities of this case was the official and institutional nature of the exchanges. They could take place at meetings of boards of directors or technical committees, within professional bodies. Therefore, there was plenty documentary evidence of the agreement: the meetings were the subject of minutes and the participants signed attendance sheets expressly including the company names of the undertakings present and the date of their participation.

12. In addition, the Autorité was also able to sanction, under Article 101(1) TFEU, unilateral communications from an undertaking to one of its competitors[9]. Indeed, the mere fact of receiving this information and becoming aware of it enabled the recipient to adjust its future conduct on the market, thereby distorting competition. The undertaking should thus have publicly distanced itself from it.

13. Finally, the exchange of information between two undertakings may take place indirectly, *via* an intermediary that collects and transmits the information. The Autorité thus considered that the absence of direct contact between two wholesalers did not preclude

[7] Decision No 20-D-09 of 16 July 2020 regarding practices implemented in the buying and selling of pork cuts and cold meat products. This decision, upheld in essence by the Paris Court of Appeal, is currently under appeal before the Court of Cassation.

[8] Decision No 23-D-15 of 29 December 2023 relating to practices in the sector of the manufacture and sale of foodstuffs in contact with materials that may contain or may have contained Bisphenol A.

[9] Decision No 24-D-06 of 21 May 2024 regarding practices implemented in the pre-cast concrete products sector. This decision is currently under appeal before the Paris Court of Appeal.

a finding that there was a concerted practice between them, since they had been able to exchange information through their supplier[10].

2. The contextual examination: the importance of the economic and legal context of the exchanges

14. The *in concreto* approach is at the heart of the assessment of the degree of harm of an exchange of information. This approach means that the Autorité must place the exchange of information in its economic and legal context in order to assess its anticompetitive nature.

15. This approach is particularly relevant where the exchanges are intended to discipline the market in the face of external constraints. For example, in the BPA case[11], the Autorité analysed the exchanges of information in light of the introduction of a regulatory change. Indeed, it was in the context of an imminent ban on BPA in the composition of food containers, and in order to avoid a crisis in the sector, that the parties sought to obstruct the provision of information to consumers as to the presence or absence of this substance, contrary to the consumer-protection effort intended by policymakers, which contributed to demonstrating the harmful nature of these exchanges.

16. In addition, the analysis of the context makes it possible to identify strategies of resistance to the structural changes affecting a sector. Thus, in a case where manufacturers and suppliers colluded in order to fix the retail selling prices of their household electrical appliances[12], it was, in particular, in light of the economic context of the sector that the Autorité analysed the harmfulness of the exchanges. In this particular case, the growth of online sales was causing a significant deterioration in resale prices, which the manufacturers and suppliers wished to counter. These exchanges were thus intended to prevent a fall in prices that online competition should naturally have brought about, thereby demonstrating their harmfulness.

17. The specific nature of this *in concreto* approach is particularly apparent in the field of tenders. It may then lead to the adoption of diametrically opposed solutions, the liability of the undertakings concerned being either established or set aside, even though they have similarly exchanged information with one another in order to respond jointly to calls for tenders.

18. The economic context may indeed make it possible to conclude that an announced consortium or joint-contracting project is in reality merely the vehicle for a cartel. In that regard, the Commission's Guidelines mention '*bid rigging*' among the exchanges of information that may be regarded as anticompetitive agreements[13].

[10] Decision No 20-D-04 of 16 March 2020 regarding practices implemented in the Apple products distribution sector. The Autorité considered, however, that in the present case the data exchanged were not, in themselves, such as to reduce their autonomy of conduct and their incentive to compete with one another.

[11] Decision No 23-D-15 of 29 December 2023 relating to practices in the sector of the manufacture and sale of foodstuffs in contact with materials that may contain or may have contained Bisphenol A. This decision is currently under appeal before the Paris Court of Appeal.

[12] Decision No 24-D-11 of 19 December 2024 regarding practices implemented in the sector for the manufacture and distribution of household appliances. This decision is currently under appeal before the Paris Court of Appeal.

[13] Paragraph 417 of the Guidelines.

19. The Autorité thus sanctioned an exchange of information that took place between two undertakings in the context of the award of a contract for the restoration of a church, before the deadline for the submission of bids[14]. The two competitors argued that this exchange, which concerned the prices for the public contract, had taken place in the context of an initial joint-contracting project that had ultimately not materialised. However, that project, the existence of which was not established, did not meet any economic or technical necessity. The Autorité found such an exchange to be anticompetitive, recalling that exchanges of information between undertakings that may participate in a consortium must not concern elements of the tender as long as the consortium has not been formed, otherwise competition between undertakings that are still liable to submit independent bids may be distorted.

20. *A contrario*, the examination of the context may confirm the genuine and economically rational nature of a consortium or joint-contracting project. In that case, a more granular analysis of the nature of the information exchanged is required, in order to determine whether that transmission is anticompetitive. Indeed, since each bid submitted must be drawn up entirely independently, the information exchanged must not go beyond what is necessary to negotiate the subcontracting or the consortium.

21. The Autorité thus sanctioned, in the context of a call for tenders launched by the city of Lille for the contract for the technical management of its buildings, a unilateral exchange of information that took place between two tenderers during the preparation of their bids[15]. The exchange, which concerned sensitive financial and technical information, was, according to the undertakings, justified by a subcontracting project. However, the submission of two separate applications, ostensibly including individual bids, had necessarily distorted competition and misled the contracting authority as to its intensity. Since the information exchanged went beyond what the drawing-up of the subcontracting project required, the practice did indeed constitute a restriction by object, as confirmed by the Court of Appeal[16] and then by the Court of Cassation[17].

22. By way of counterpoint, the Autorité has also been able to set aside the anticompetitive nature of exchanges that took place in circumstances which, at first sight, were similar. In a 2023 decision, it thus issued a decision finding no grounds for action with regard to two undertakings that had exchanged information in order to define a joint response to a call for tenders concerning the management of heating networks[18]. The partnership project had ultimately been abandoned, and the two undertakings had responded individually to the call for tenders. The Autorité noted that, in the present case, the two undertakings were offering different technological solutions, so that the information received by each from its competitor in the context of negotiating a possible joint bid was of little use in enabling them to anticipate the positioning of its individual bid. Moreover, they had taken precautions to limit the risks associated with the exchanges of information, in particular by withdrawing from their teams access to the information exchanged in the context of the negotiations, after it had become clear that those

[14] Decision No 23-D-06 of 14 June 2023 regarding practices implemented in the sector for the renovation and restoration of roofing and timber frameworks for public or private heritage buildings in the Hauts-de-France region.

[15] Decision No 21-D-05 of 4 March 2021 regarding practices implemented in the building management systems sector for the city of Lille (Lille métropole communauté urbaine).

[16] Judgment of the Court of Appeal of 9 March 2023, No RG 21/06028.

[17] Judgment of the Court of Cassation of 24 September 2025, appeal No 23-13.733.

[18] Decision No 23-D-11 of 7 December 2023 regarding practices implemented in the sector for the delegated management of heating networks.

negotiations had failed. The Autorité therefore considered that the conditions for the application of Article L. 420-1 of the French Commercial Code were not met.

23. Likewise, in the second limb of the so-called 'white goods' case[19], exchanges of confidential information within a professional association were not sanctioned by the Autorité. In that decision, it considered that the strategic nature of these data was not established. Indeed, although very recent, confidential and of interest to undertakings for the purposes of carrying out retrospective analyses, this information related to past sales. Its analysis gave no indication as to future commercial strategy. Consequently, the Autorité considered that these exchanges were not such as to reduce uncertainty as to the future conduct of the other participants with regard to what constitutes a competition parameter.

[19] Decision No 24-D-11 of 19 December 2024 regarding practices implemented in the sector for the manufacture and distribution of household appliances.