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Information Sharing in Competition Policy – Note by the European Union

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1. The application of competition law to information sharing between competitors is not new, however EU antitrust law in this area continues to evolve to take account of market and technological changes, not least the digitalisation of the economy.

2. This contribution summarises the current state of EU antitrust law on information exchange and refers to the relevant chapter of the Commission's Guidelines on Horizontal Cooperation Agreements([1]) ("Horizontal Guidelines"). Those Guidelines were revised in 2023, but this contribution also incorporates more recent case law of the Court of Justice of the European Union ("Court of Justice").

1. Definition of information

3. Information exchange is covered by Chapter 6 of the Horizontal Guidelines. That chapter contains a broad definition of information, encompassing all possible formats, including paper and digital records. The definition also covers a basic component of modern markets: data. The guidance highlights that data can take various forms: (i) raw, unorganised digital content that may need processing in order to make it useful (raw data); (ii) pre-processed data, which has already been prepared or validated, and (iii) data that has been manipulated to produce meaningful information in any form([2]). Accordingly, in this contribution, unless indicated otherwise, references to information include information in all formats. References to competitors include actual and potential competitors.

2. In what ways can information sharing harm competition?

4. The Horizontal Guidelines present the two main competition concerns associated with information exchange between competitors, namely the facilitation of collusion between the participating undertakings and the anti-competitive foreclosure of third-party undertakings, on the same or related markets([3]).

5. As regards the *facilitation of collusion*, information exchange can allow an undertaking to signal to its competitors the conduct that it would like them to adopt, or the conduct that it will itself adopt in reaction to certain conduct by them. It can also create mutually consistent expectations regarding the uncertainties present in the market, thereby allowing the market participants to reach a common understanding regarding their behaviour on the market, without the need for an express agreement. Lastly, information exchange can be used to increase the internal stability of an anti-competitive agreement, by

[1] Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C 259, 21.7.2023, pp. 1–125

[2] See the Horizontal Guidelines, paragraph 367.

[3] Information sharing can also generate efficiencies – see in this regard Section 11 below.

increasing the transparency of the market and thereby allowing the colluding undertakings to monitor whether one of them is deviating from the collusive outcome([4]).

6. As regards *anti-competitive foreclosure*, this can occur where the exchange of information places competitors that do not participate in the exchange at a competitive disadvantage. This may be the case, for example, where the information is useful to compete on the market and the exchange covers a large share of the market([5]).

3. Information exchange as a standalone infringement of Article 101 TFEU

7. The Court of Justice has held that it is a fundamental principle of competition that each undertaking must determine its economic conduct on the market independently([6]). While economic operators have the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors([7]), "the requirement of autonomy inherent in Article 101 TFEU strictly precludes any direct or indirect contact between such operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which [an undertaking] has decided to adopt on that market or contemplates adopting on that market, where those contacts have the object or effect of leading to conditions of competition which do not correspond to the normal conditions of the market in question."([8]) A market is thus deemed to operate under normal conditions where (i) each operator active on the market determines independently the policy that it intends to adopt, and (ii) there is uncertainty, at least as regards the timing, extent and details of any future changes in the conduct of competitors on the market([9]). In accordance with these principles, the exchange of information between competing undertakings can constitute a standalone infringement of Article 101 of the Treaty on the Functioning of the European Union ("TFEU")([10]).

[4] Similarly, information exchange can be used by the parties to an anti-competitive agreement to enable them to detect attempts to enter the market by third parties, allowing the colluding undertakings to target the new entrant.

[5] See, for example, the Commission's Decision of 30 June 2022 in Case AT.40511, Insurance Ireland, where the insurance companies participating in a car insurance claims data pool accounted for 98 % of the relevant market. The data pool enabled the detection of fraud by insurance claimants.

[6] Judgment of 16 December 1975, *Suiker Unie*, C-40/73, EU:C:1975:174, paragraph 174; see also Horizontal Guidelines, paragraph 374.

[7] Judgment of 31 March 1993, *Ahlström Osakeyhtiö and Others v Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 71 and judgment of 16 December 1975, *Suiker Unie*, C-40/73, EU:C:1975:174, paragraph 174.

[8] Judgment of 19 March 2015, Dole Food and Dole Fresh Fruit Europe, C-286/13 P, EU:C:2015:184, paragraph 120 and judgment of 12 January 2023, *HSBC Holdings and Others v Commission*, C-883/19 P, EU:C:2023:11, paragraph 202.

[9] Judgment of 29 July 2024, *Banco BPN v BIC Português and Others*, C-289/22, EU:C:2024:638, paragraph 54; judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 41; judgment of 12 January 2023, *HSBC Holdings and Others v Commission*, C-883/19 P, EU:C:2023:11, paragraph 116.

[10] Article 101 TFEU can apply to information exchanges between undertakings that compete in respect of the same brand (intra-brand competition), as well as exchanges between undertakings that compete under different brands (inter-brand competition).

8. Information exchange can constitute an agreement or a concerted practice within the meaning of Article 101 TFEU. However, for the purpose of establishing an infringement of that Article, it is not necessary to formally distinguish between the two, provided that at least a concerted practice can be proven.

9. The Court of Justice has defined a concerted practice as a "[…] form of coordination between undertakings which, without having reached the stage where an agreement […] has been concluded, knowingly substitutes practical cooperation between them for the risks of competition"([11]). The concept of a concerted practice also implies subsequent conduct on the market by the participating undertakings and a relationship of cause and effect between the two([12]). However, there is a rebuttable presumption that an undertaking that receives information from a competitor and remains active on the market will take that information into account when determining its conduct on the market([13]). To rebut the presumption, the receiving undertaking must publicly distance itself from the exchange (for example, by stating clearly to the other participants that it does not wish to receive such information)([14]), or by reporting the exchange to the administrative authorities. On the other hand, where competitors exchange information in preparation of an anti-competitive agreement, this suffices to prove the existence of a concerted practice([15]).

10. The Court of Justice has held that a concerted practice may be proven not only by direct evidence, but also by means of coincidences and indicia, provided they are objective and consistent([16]). A concerted practice can also be proven through parallel conduct if concertation is the only plausible explanation of such conduct([17]).

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[11] Judgment of 14 July 1972, *ICI v Commission*, C-48/69, EU:C:1972.70, paragraph 64. See also judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 26 and judgment of 31 March 1993, *Ahlström Osakeyhtiö and Others v Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 63, as well as the Horizontal Guidelines, paragraph 14.

[12] Judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 42; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 126.

[13] Judgment of 10 November 2017, *ICAP and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 57; judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 51; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 127 and judgment of 8 July 1999, *Hüls v Commission*, C-199/92 P, EU:C:1999:358, paragraphs 161-163.

[14] Judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 48 ; judgment of 8 July 1999, *Hüls v Commission*, C-199/92 P, EU:C:1999:358, paragraph 162; judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 121. Section 6.2.4.4 of the Horizontal Guidelines refers to measures that undertakings can take to reduce the risk of involvement in information exchanges that infringe Article 101 TFEU.

[15] Judgment of 26 January 2017, *Duravit and Others v Commission*, C-609/13 P, EU:C:2017:46, paragraph 135. See also judgment of 5 December 2013, *Solvay v Commission* , C-455/11 P, EU:C:2013:796, paragraph 40.

[16] Judgment of 21 January 2016, *Eturas and Others*, C-74/14, ECLI:EU:C:2016:42, paragraphs 36 – 37 and, in relation to a vertical agreement, judgment of 29 June 2023, *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraph 56.

[17] Judgments of 31 March 1993, *Ahlström Osakeyhtiö and Others v Commission*, C-89/85, C-104/85, C-114/85, C- 116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraphs 71-72 and 126.

11. In line with the principles set out above, to establish that an exchange of information constitutes a concerted practice that restricts competition within the meaning of Article 101(1) TFEU([18]), the competition authority or claimant must show that the exchange is capable of removing or reducing uncertainty regarding the future conduct of competitors on the market([19]). For that purpose, the Horizontal Guidelines state that it is relevant to assess the nature of the information exchanged, the characteristics of the exchange and the characteristics of the affected markets.

4. The nature of the information exchanged

12. For the purpose of assessing the nature of the information exchanged, the Horizontal Guidelines state that it is relevant to take into account whether the information is commercially sensitive, the degree of aggregation of the information and the age of the information.

13. Information is commercially sensitive where it is capable of reducing or removing uncertainty regarding the operation of the market in question. This applies, in particular, where the information concerns the timing, extent and details of future changes in the conduct of competitors on the market([20]). This requires a case-specific assessment.

14. The Court of Justice has also held that commercially sensitive information includes not only information on pricing([21]), but also information relating to costs, capacity, production, plans to enter or exit markets, or any type of information on a firm's strategy that undertakings active in a genuinely competitive market would not have an incentive to reveal to each other([22]). The Court has also held that strategic information is a broad concept which includes "*any data not already known to economic operators which, in the context of such an exchange, is likely to reduce the uncertainty of the participants as to the future conduct of the other participants with regard to what constitutes, by reason of the nature of the goods or services in question, the actual conditions in which the market functions and the structure of the market, one or more parameters on the basis of which competition on the market in question is established."*([23]) By contrast, information relating to the general state or functioning of an industry, regulatory matters or technical issues relevant to the industry in general is generally not commercially sensitive([24]).

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[18] Article 101(1) TFEU prohibits agreements and concerted practices between undertakings and decisions by associations of undertakings that may affect trade between EU member states and that have the object or effect of preventing, restricting or distorting competition in the internal market.

[19] Judgment of 29 July 2024, *Banco BPN v BIC Português and Others*, C-289/22, EU:C:2024:638, paragraphs 61-62.

[20] See, for example, judgment of 29 July 2024, *Banco BPN v BIC Português and Others*, C-298/22, EU:C:2024:638, paragraphs 54-55 and the case law cited.

[21] Pricing information is generally considered to be commercially sensitive, even if it concerns only a component of the final price; see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 123 and judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 36.

[22] See the Horizontal Guidelines, paragraphs 385 and 414 and the case law cited in Section 7 below.

[23] Judgment of 29 July 2024, *Banco BPN v BIC Português and Others*, C-298/22, EU:C:2024:638, paragraphs 64-65.

[24] See the Horizontal Guidelines, paragraph 386.

15. Information that has been put in the public domain for legitimate reasons – and has therefore become readily accessible to all competitors and customers([25]) – is usually not commercially sensitive([26]). However, even if a particular category of information is readily available (for example, information published by a regulator), an information exchange between competitors may further reduce uncertainty in the market where it goes beyond the information that has been published, for example, due to the granularity of the information exchanged, the frequency of the exchange, or because the participants attach comments to the information that signal to the competitors the joint action that they wish them to take([27]).

16. In general, *individualised information* that enables the identification of the undertaking that provided it is more likely to reduce strategic uncertainty than *aggregated information* that cannot easily be attributed to particular undertakings or that is aggregated across a range of products that have different characteristics or that belong to separate markets. However, in markets with specific characteristics (for example, a tight and stable oligopoly), even the exchange of aggregated information may be capable of facilitating a collusive outcome.

17. As regards the *age of the information*, the exchange of historical information is unlikely to lead to a collusive outcome, as it is unlikely to be indicative of competitors' intended conduct or to facilitate a common understanding on the market. However, whether information can be considered to be historical depends on the characteristics of the particular market, in particular the frequency of sale and purchase negotiations in that market and the age of the information typically relied upon by businesses to make decisions. For example, information can be considered historical if it is several times older than the average length of the pricing cycles or the average length of contracts in the industry, where the latter are indicative of the frequency of price negotiations. See also Section 5 below regarding the frequency of the information exchange.

18. Two conclusions can be drawn from the above. First, commercially sensitive information is not limited to information about future prices or strategy but is instead an open-ended category. Second, it is not possible to define, in the abstract, a level of detail below which information concerning the manner, extent and timing of future changes in the conduct of competitors is incapable of reducing uncertainty in the market. What is decisive is whether, in the particular legal and economic context([28]), including the specific characteristics of the relevant market, the content of the information exchanged is sufficient to reduce the uncertainty that the participating undertakings would have faced in the absence of the exchange.

5. The characteristics of the information exchange

19. The Horizontal Guidelines make clear that the prohibition in Article 101(1) TFEU applies to bilateral and multilateral information exchanges, including, for example, data

[25] Information will not be considered to be readily available if the costs involved in collecting the information deter other undertakings from doing so.

[26] See the Horizontal Guidelines, paragraph 388.

[27] See the Horizontal Guidelines, paragraph 389.

[28] Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission* [2014], paragraphs 53 and 55.

pooling arrangements, but also, under certain circumstances, to unilateral disclosures, public announcements and indirect information exchanges.

5.1. Unilateral disclosure

20. By virtue of the presumption mentioned in Section 3 above, a concerted practice within the meaning of Article 101 TFEU can arise where one undertaking discloses commercially sensitive information to a competitor and the competitor fails to distance itself from the disclosure or report it to the competent authorities([29]). In that case, the receiving undertaking is presumed to take the information into account when it determines its future conduct on the market.

5.2. Public announcements and signalling

21. The fact that information is shared publicly (for example, through publications on a company's website, statements at public conferences or in calls with investors) does not preclude the application of Article 101 TFEU. Undertakings may have legitimate reasons to inform investors, customers or the public about the performance of their business, but they may not use public announcements to signal to competitors the conduct that they intend to adopt on the market or the conduct that they wish their competitors to adopt. For example, it may be public knowledge in a sector that the cost of a certain input is rising. In that case, competitors may refer to the rising cost in public statements, but they must not disclose their strategy for managing the rise in costs, as this would reduce uncertainty regarding their conduct on the market([30]). Likewise, public announcements by suppliers relating, for example, to future capacity or prices may help customers to make informed purchasing decisions, however where the announcements relate to parameters that may not materialize, or they do not commit the supplier *vis-à-vis* its customers, it is less likely that they will generate this type of efficiency and more likely that they may be used to implement or monitor a collusive arrangement([31]). DG Competition is currently investigating various types of information exchange, including exchanges through public channels, such as earnings calls or press releases, which reveal commercial strategy([32]).

5.3. Indirect information exchanges

22. Information exchange between competitors can also take place indirectly via a third party, such as an online platform operator, trade organisation, supplier or customer. An analogous situation is where competitors exchange information via a common algorithm, which may also be used to align prices([33]). Some indirect information exchanges are

[29] Section 6.2.4.4 of the Horizontal Guidelines outlines measures that undertakings can take to reduce the risk of inadvertent involvement in unilateral exchanges of commercially sensitive information.

[30] See the Horizontal Guidelines, paragraphs 387 and 398.

[31] See, for example, Commission Decision of 7 July 2016, Case AT.39850 *Container Shipping*, recitals 40-43.

[32] Maria Jaspers, Director of DG Competition's Cartels Directorate, at the Concurrences Cartels workshop 2026, 22 January 2026. Reported by Concurrences, Mlex.

[33] In this respect, the Horizontal Guidelines make clear that undertakings involved in illegal pricing practices cannot avoid liability on the ground that their prices were determined by algorithms. Algorithms remain under the control of the undertakings that use them, in the same way as an employee or consultant. See also the European Union's contribution on algorithmic competition

referred to as hub-and-spoke arrangements. For example, a common supplier may act as a hub in order to relay information to multiple distributors, or a distributor may act as a hub to relay information to multiple suppliers. A platform can also act as a hub where it facilitates or enforces information exchanges between business users of the platform, for example, to maintain certain price levels. Platforms can also be used to impose technical measures that prevent business users from offering lower prices or other advantages to customers. In these cases, depending on the facts, not only the participating competitors but also the third party may be held liable for infringing Article 101 TFEU. The scope of the prohibition in Article 101(1) TFEU is not limited to undertakings that are active on the markets affected by the restrictive agreement or concerted practice([34]).

23. To determine liability for such indirect information exchanges, it is necessary to assess the level of awareness of each party regarding the actions of the other parties([35]). As regards the competing undertakings, the undertaking that shares the commercially information may be held liable if it agrees, expressly or tacitly, with the third party that the third party may share the information with the undertaking's competitors, or where it intended to disclose the information to its competitors via the third party, or where it could reasonably have foreseen that the third party would share the information with the undertaking's competitors and it was prepared to accept that risk([36]). A competitor that receives the commercially sensitive information may also be held liable if it was aware of the anti-competitive objectives pursued by the undertaking sharing the information and by the third party, and it intended to contribute to those objectives by its own conduct. However, an undertaking that shares information with a third party will not be liable if the third party transmits the information to the undertaking's competitors without informing that undertaking and where that undertaking could not reasonably have foreseen that the third party would transmit the information([37]).

24. As regards the third party that transmits commercially sensitive information, it may be held liable if it intends to contribute by its conduct to the common anti-competitive objectives pursued by the participants to the exchange and it is aware of the actual conduct planned or implemented by other undertakings in pursuit of the same objectives, or could reasonably have foreseen such conduct and was prepared to take the risk([38]).

25. DG Competition is also investigating indirect exchanges involving the use of intermediaries (for example, middlemen or automated pricing software)([39]). It is also

submitted to the 140th OECD Competition Committee meeting on 14-16 June 2023, available at: https://one.oecd.org/document/DAF/COMP/WD(2023)17/en/pdf

[34] Judgment of 10 November 2017, *ICAP and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 103; judgment of 22 October 2015, *AC-Treuhand v Commiss*ion, C-194/14 P, EU:C:2015:717, paragraphs 27, 34-35.

[35] See the Horizontal Guidelines, paragraph 435.

[36] Judgment of 21 July 2016, *VM Remonts and Others*, C-542/14, EU:C:2016:578, paragraph 31.

[37] Judgment of 21 July 2016, *VM Remonts and Others*, C-542/14, EU:C:2016:578, paragraph 30.

[38] Judgment of 10 November 2017, *ICAP and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 100.

[39] Maria Jaspers, then Director of DG Competition's Cartels Directorate (currently Director for Policy), at the Concurrences Cartels workshop 2026, 22 January 2026. Reported by Concurrences, Mlex.

actively examining how the use of algorithms can facilitate collusion and thereby constitute an antitrust infringement([40]).

5.4. Frequency of the information exchange

26. Frequent exchanges of information are more likely to facilitate a common understanding of the market and enable the participants to monitor deviations from any collusive outcome. In markets with long-term contracts, a less frequent exchange may be sufficient to achieve a collusive outcome. By contrast, infrequent exchanges may not be sufficient to achieve a collusive outcome in markets with short-term contracts that are indicative of frequent re-negotiations. However, what constitutes a frequent or infrequent exchange depends on the characteristics of the market concerned. For example, in some retail markets, firms may change their prices several times per day. In other markets, firms may revise their prices only a few times per year. A quarterly exchange of information might not be considered frequent in the former, whereas it might be regarded as frequent in the latter. As a result of the growing importance of real-time data for business decision making, the highest competitive advantage is obtained from automated real-time information exchange. In general, the frequency at which information needs to be exchanged to facilitate collusion also depends on the nature, age and degree of aggregation of the information exchanged. Notwithstanding the above considerations, it should be noted that the Court of Justice has held that an exchange of information at a single meeting between competitors can constitute a concerted practice within the meaning of Article 101 TFEU([41]).

6. Market characteristics

27. The likelihood that an information exchange will result in collusion or foreclosure depends on the characteristics of the markets concerned. Relevant characteristics include, without limitation, the level of transparency in the market, the number of undertakings active in the market (market concentration), the existence of barriers to entry, whether the products concerned are homogenous, whether the undertakings involved are similar, (the complexity of the market), and whether conditions of supply and demand are stable.

28. As regards the level of transparency, the more transparent a market already is, the more likely it is that a further reduction in uncertainty will raise competition concerns. As regards market concentration, it is generally easier to reach a common understanding on the terms of coordination and to monitor deviations in markets in which only a few competitors are present. On the other hand, if a market is fragmented, information exchange between competitors may have neutral or even positive effects on competition – see also Section 11 below([42]). As regards barriers to entry, their existence may make it more difficult for third-party undertakings to undermine any collusive outcome by entering and undercutting the incumbents on the market. Barriers to entry thus make it more likely that a collusive outcome is feasible and sustainable. Likewise, it may be easier to reach a

[40] Linsey McCallum, Deputy Director-General for Antitrust, at ABA Spring meeting April 2026, reported by PaRR on 26 March 2026.

[41] Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 59.

[42] See judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 58 and the case law cited.

collusive outcome where undertakings have similar costs, product ranges and capacities (because their incentives are more aligned) and where the products on the market are homogenous. Collusive outcomes are also more likely where the conditions of supply and demand are stable. Volatile demand, substantial internal growth by some undertakings on the market or frequent market entry may make it more difficult to achieve a collusive outcome or require more frequent exchanges in order to affect competition.

7. Restrictions of competition by object

29. Article 101(1) TFEU distinguishes between restrictions of competition 'by object' and restrictions 'by effect'. The Court of Justice has held that certain agreements and concerted practices reveal in themselves a sufficient degree of harm to competition such that it is not necessary to assess their effects on the market. The Court of Justice has also held that this applies to information exchanges between competitors that reduce or remove the uncertainty faced by the participants regarding the future conduct of their competitors on the market([43]). In order to find that an information exchange restricts competition by object, it is necessary to examine the content of the exchange, its economic and legal context and its objectives and, on that basis, show the precise reasons why the exchange reveals a sufficient degree of harm to competition, i.e. the assessment is case-specific.

30. The case law confirms that information exchanges that restrict competition by object are not limited to those that concern future prices or quantities (for example, future sales, market shares, or sales to particular territories or customer groups). In particular, the Court of Justice or the Commission have also found a restriction by object for exchanges that concern current prices([44]), current and future production capacities([45]), commercial strategy([46]), demand forecasts([47]), sales forecasts([48]), and future product characteristics([49]). The Horizontal Guidelines also make clear that public disclosures that reveal an undertaking's intended strategy in relation to key parameters of competition or which signal to competitors how they should or should not act can also qualify as restrictions of competition by object.

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[43] Judgment of 29 July 2024, *Banco BPN v BIC Português and Others*, C-289/22, EU:C:2024:638, paragraphs 60-62.

[44] Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 96 and judgment of 15 December 2016, Philips and Philips France v Commission, T-762/14, EU:T:2016:738, paragraphs 134-136. It is not necessary for the information to relate directly to prices. Exchanges concerning information that forms a decisive element of the price to be paid by the end user can also amount to a restriction by object; see judgment of 4 June 2009, T-Mobile Netherlands and Others, C-8/08, EU:C:2009:343, paragraph 37.

[45] Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraphs 85 and 96 and judgment of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, EU:T:2016:738, paragraph 104.

[46] Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 98.

[47] Judgment of 9 September 2015, *Samsung SDI and Others v Commission*, T-84/13, EU:T:2015:611, paragraph 51.

[48] Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 96.

[49] Decision of 8 July 2021 in Case AT.40178 *Car Emissions*, recitals 84, 107 and 124-126.

8. Restrictions of competition by effect

31. An exchange of information that does not restrict competition by object may nonetheless infringe Article 101 TFEU if the competition authority or claimant can show that the exchange has actual or potential restrictive effects on competition. For an information exchange to have restrictive effects, it must be likely to have an appreciable adverse impact on one or more parameters of competition in the market, for example, price, output, product quality, product variety or innovation. To establish this, the Horizontal Guidelines state that it is again relevant to examine the nature of the information exchanged, the characteristics of the exchange and the characteristics of the market.

32. For an information exchange to have restrictive effects on competition, the undertakings involved must cover a sufficiently large share of the relevant market. Otherwise, any resulting anti-competitive behaviour may be constrained by third-party competitors. What constitutes a sufficiently large share of the market cannot be defined in the abstract; it depends on the facts of the case, in particular the structure of the market and the type of exchange concerned. An information exchange that contributes little to the transparency of a market is less likely to have restrictive effects than an exchange that significantly increases transparency. Information exchanges implemented in tight oligopolies are more likely to lead to restrictive effects than exchanges in highly fragmented markets.

9. Information exchanges mandated by law

33. Information exchanges that are mandated by law fall outside the Article 101(1) prohibition. However, where undertakings are merely encouraged by regulation or by public authorities to share information with competitors, or where they retain discretion regarding the content or characteristics of the exchange, Article 101 TFEU remains applicable. Therefore, undertakings that are required by regulation to share information should restrict the scope of the exchange to what is required by the regulation([50]). For example, if the disclosure of aggregated information or ranges is sufficient to comply with the regulation, the undertakings should avoid exchanging more granular information. Likewise, if the regulation provides for information to be disclosed or published on a sector-wide basis, it may be possible to use an industry association or independent service provider to collate information from each undertaking and then share or publish it in aggregated form, to ensure that it is not possible to attribute information to individual undertakings.

10. Information exchange as an ancillary restraint

34. Under the ancillary restraints doctrine, where an information exchange takes place in the context of another type of cooperation agreement (for example, joint purchasing or joint production) which itself falls outside the Article 101(1) prohibition because it has neutral or positive effects on competition, the information exchange will also fall outside Article 101(1) if it is objectively necessary to implement the cooperation agreement and is proportionate to the objectives of that agreement([51]).

[50] See the Horizontal Guidelines, paragraph 372.

[51] See the Horizontal Guidelines, paragraph 369. See also paragraphs 370 and 371 of the Horizontal Guidelines, which refer to specific rules that apply to (i) information exchange in the context of

11. The efficiency defence under Article 101(3) TFEU

35. An information exchange that restricts competition by object or effect may nonetheless comply with Article 101 TFEU if the parties can demonstrate that it meets the four conditions of Article 101(3) TFEU, namely (i) it generates objective efficiencies; (ii) the gains for consumers outweigh the negative effects on competition; (iii) the restriction does not go beyond what is necessary to achieve the efficiency gain (for example, the nature of the information exchanged and the characteristics of the exchange are the least restrictive means of generating the gains), and (iv) the exchange does not eliminate competition in respect of a substantial part of the products concerned.

36. The Horizontal Guidelines provide examples of efficiencies that can be generated by exchanges of information([52]). In particular, information sharing can enable undertakings to become more efficient by benchmarking their performance against the best practices in their industry. The implementation of an information exchange for the purpose of publishing best-selling lists or price comparison data can help intermediate and final customers to make more informed purchasing choices by enabling them to compare the price or quality of products. A data-sharing arrangement may enable the participating undertakings to develop new products or technologies. The pooling of information regarding producers that supply sustainable products or that use sustainable production processes may again help consumers make more informed purchasing decisions and help undertakings fulfil their sustainability obligations under EU or national law. In the financial services industry, the pooling of information about consumer risk profiles may improve the knowledge of risks and facilitate the rating of risks by individual service providers. This may benefit consumers by enabling them to access insurance or other financial products that would not otherwise have been available to them. An exchange of information between e-commerce marketplaces about sellers that engage in illegal practices, such as the sale of counterfeit products, may facilitate the detection of such practices by individual marketplaces, thereby enabling them to offer better protection to consumers. The Horizontal Guidelines also recognise that, in some cases, an information exchange will only generate benefits if it covers a sufficiently large share of the market. This applies, for example, to the use of credit or risk registers in the financial services sector.

12. Conclusion

37. Information sharing between competitors can constitute a standalone infringement under Article 101 TFEU. Exchanges of commercially sensitive information are capable of harming competition by facilitating collusion and by foreclosing third-party undertakings from the market. For that reason, they can qualify as restrictions of competition 'by object' (the most serious category of restriction).

38. The Court of Justice has held that an exchange of information between competitors infringes Article 101 TFEU where it is capable of removing or reducing uncertainty regarding the future conduct of competitors on the market. To assess exchanges of information, the Commission examines: (i) the nature of the information exchanged (including whether the information is commercially sensitive, whether it is individualised or aggregated, and the age of the information); (ii) the characteristics of the exchange

vertical agreements where the parties compete at the downstream level and (ii) information exchange in the context of the acquisition of an undertaking or business.

[52] See the Horizontal Guidelines, paragraphs 373 and 425.

(including whether it is private or public or private, direct or indirect, and its frequency), and (iii) the characteristics of the affected markets (including the level of transparency, market concentration, the existence of barriers to entry, whether the products concerned are homogenous, whether the undertakings involved are similar, and whether conditions of supply and demand are stable).

39. Information exchange can qualify as a restriction of competition 'by object' or 'by effect'. Distinct legal tests and evidentiary requirements apply to each of these categories. An information exchange that restricts competition by object or effect may nonetheless comply with Article 101 TFEU if the parties can demonstrate that the exchange generates efficiencies that meet the conditions of the Article 101(3) exception([53]). Examples of such efficiencies include the sharing of information to enable undertakings to benchmark their performance against industry best practice; the provision of information to customers and consumers to enable them to make better purchasing decisions, and the pooling of data to enable producers to create new products or to increase industry knowledge about consumer credit risks.

[53] In practice, restrictions of competition by object are unlikely to fulfil the conditions of Article 101(3). These restrictions generally fail at least two of the conditions of that Article. In particular, they generally do not create objective economic benefits, do not benefit consumers, or they fail the indispensability test.