

# *Exchange of Information amongst Competitors*

## *Do's and Don'ts*

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# Information exchange: exposure

- New chapter in Commission Guidelines on horizontal cooperation agreements
- New focus of competition authorities
- Relevant in many contexts
  - Cooperation agreements
  - Trade associations
  - *Ad hoc* meetings with competitors at all levels

# Information exchanges and Article 101 TFEU

- Depending on the circumstances information exchange agreements may
  - be innocuous or efficiency enhancing
  - have restrictive effects
  - have a restrictive object and be treated as a cartel

## Information exchange and uncertainty

- Information exchange may affect competition by reducing market uncertainty
- Two relevant types of uncertainty:
  - Uncertainty regarding the functioning of the market
  - Uncertainty regarding the market conduct of competitors

# Exchange must result from collusion

- Article 101 TFEU requires collusion, i.e. a concurrence of wills or meeting of minds of at least two parties. Unilateral conduct (i.e. non-collusive behaviour) is only subject to Article 102 TFEU
  - Article 101 applies if competitors reveal to each other the market conduct which they intend to adopt (*explicit collusion*)
  - Competitors may adapt their own unilateral conduct to the unilateral conduct of others (*tacit collusion*)
  - Article 101(1) applies if explicit collusion facilitates tacit collusion e.g. by artificially increasing market transparency

# Key distinctions

- Restrictions by object
  - Exchanges about intended future prices and output (*T-mobile Netherlands*)
- Restrictions by effect
  - Exchanges of current or past information in concentrated markets (*UK Tractor*)
- Ancillary exchanges
  - Exchanges that are necessary for a commercial cooperation to function properly (*Grand Alliance*)
- Unrelated exchanges
  - Exchanges that are unrelated to or non-ancillary to a commercial cooperation (*compare E.ON/GDF*)
- Stand alone exchanges
  - Organised exchange e.g. in context of trade association (*UK Tractor, European Wastepaper Information Service (EWIS)*)
  - *Ad hoc* exchanges between employees

# Nature of the information

- Aggregated vs individualised data
- Private vs genuinely public data
- Private vs public exchange
- Age of date
- Frequency of exchange

# Information exchange: don'ts

- Don't provide commercially sensitive information to competitors (outside context of cooperation arrangement)
- Don't participate in meetings in which such information is exchanged
- Don't agree to make commercially sensitive information public
- Don't pass on sensitive information to staff not involved in a cooperation arrangement
- Don't exchange individualised information in trade association meetings



## Information exchange: do's

- Exchange information with non-competitors
- Collect market intelligence from suppliers, distributors and customers
- Exchange statistical data on market functioning through trade associations
  - Have effective safeguards against disaggregation
- Exchange genuinely public information but be aware of narrow scope (French petrol stations)

Thank you for your attention

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