**Horizontal Information Exchanges**

Information exchanges can take several forms, such as direct sharing of information between competitors, via a trade association or other third party, or via public disclosure. But whichever form it takes, “information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision of an association of undertakings”[[1]](#footnote-1). In the *T-Mobile* decision*,* the ECJ held that even a one-time exchange of information among competitors can amount to a prohibited concerted practice under Article 101 TFEU.

The Commission recognized in its revised Guidelines that the effects of information exchanges on competition can be both positive and negative, depending on the circumstances of each particular case.[[2]](#footnote-2) From a purely economic prospective, information exchanges that, for example, increase a company’s ability to predict demand fluctuations can help optimize inventories and avoid overproduction or shortages. This type of information exchange makes the producers more efficient, reduce supply chain cost and, eventually, bring benefits to consumers in the form of lower prices. However, information exchanges can also be destructive to competition by leading to coordination and collusive behavior. For instance, information exchanges that create transparency of future price or capacity could lead to collusion even in the absence of express anti-competitive agreement, especially in an oligopoly - a market with only a few competitors, which makes it easier to monitor behavior and compliance of other companies.

Nonetheless, certain conditions must be present in order to enable competitors to collude. First, the market structure must be sufficiently transparent. If the market is too opaque or too dynamic, collusion will be hard or nearly impossible to sustain. Second, the firms must be able to police compliance by monitoring collusion and punishing/deterring deviations. Lastly, the barriers to entry must be sufficiently high, and there can be no substitute product or service available that consumers can easily switch to. Thus, collusion can be hard to establish and maintain. In addition, since it is normally unclear whether information exchanges will benefit or harm competition, it would be appropriate for the ECJ to analyze cases involving information exchanges under the ”illegal by effect” approach, rather than holding that information exchanges are “illegal by object”. The ECJ’s analysis in the *T-Mobile* decision has, however, demonstrated that horizontal exchanges of information are typically considered violations by object.

The determination that a violation by object has occurred eliminates the need to consider effects on competition. The Commission’s Guidelines on Article 101(3) state: “Restrictions of competition by object are those that … have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) [101(1)] to demonstrate any actual effects on the market.”[[3]](#footnote-3) This reasoning has a circular aspect to it - in order to avoid having to show effects on competition, one must prove that effects are so self-evident that they do not need to be shown. In circumstances where there is an actual agreement between competitors that aims to restrict output or stabilize prices, the Court’s reasoning does not create a major practical problem[[4]](#footnote-4). On the other hand, in the context of information exchanges, where effects on competition are often ambiguous, it raises a difficult question of determining whether the conduct is in reality sufficiently anti-competitive that consideration of effects becomes unwarranted.

The *T-Mobile* decision establishes that the object test is satisfied as long as the concerted practice has the **potential**to have a negative effect on competition. Thus, since information exchanges reduce uncertainty, such practices are violations by object[[5]](#footnote-5). But any practice that generates information will, by definition, reduce the uncertainty. The main question should be not whether the exchange reduces uncertainty, but whether it allows the participants of exchange to influence prices, and competition in general, adversely.

Information exchanges cover an enormous spectrum of conduct and their effects are arguably too uncertain and too dependent on the economic context and circumstances of each particular case to be subject to what amounts to per se unlawfulness under Article 101(1). Instead, it seems the sounder conclusion to view the Treaty as requiring sufficient evidence in order to justify placing exchanges of information in the same line of cases as full scale horizontal price fixing agreements.

1. I would rather link it to the paragraph in the guidelines than provide citation ( paragraph 55) <http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf> [↑](#footnote-ref-1)
2. Same source, paragraph 58 [↑](#footnote-ref-2)
3. *Commission Notice – Guidelines on the Application of Article 81(3) of the Treaty,* OJ [2004] C 101/97, para. 21 [↑](#footnote-ref-3)
4. Link to the Beef case analysis [↑](#footnote-ref-4)
5. [rather that a citation I would link it to the Kokott’s opinion in para. 51 and 54 where she talks about information exchanges reducing uncertainty] [↑](#footnote-ref-5)