



European Commission

INFORMATION EXCHANGE UNDER EU LAW

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Reciprocal information exchange (1)

- Information exchange as an ancillary tool:
 - If a way of **enforcing or monitoring a broader cartel**, most of the times there will be no need for a long/in-depth analysis of the underlying information exchange (in a sense, the illegality of the exchange is based on the unlawfulness of the cartel).
 - If **part of a broader cooperation agreement**, e.g. a co-production agreement, it will be assessed in the context of this agreement.

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Reciprocal information exchange (2)

- Information exchange **as an independent infringement**:
 - The exchange may in itself infringe Article 101 of the EU Treaty (*Dole*).
 - The exchange of information can be illegal, even if it is a one time event (*T-Mobile*).
 - There might not be a difference to a cartel.
 - Comprehensive **guidance** in EU Commission's Horizontal Guidelines (2010).

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Agreement or concerted practice?

- Structured information exchange (system) vs informal exchanges.
- Concerted practice: "*a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition*" (*Dyestuffs*).
- Not necessary to define an information exchange as an agreement or a concerted practice (*Asnef-Equifax*).

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By object or by effect restriction?

- An information exchange **can be a by object restriction** (*T-Mobile*, „removing uncertainties“).
- See Horizontal Guidelines, in particular §72-74:
 - Individualised vs aggregated data.
 - Future vs current vs past data.
 - Private intentions vs public information.
- For an effects analysis, the market characteristics and the „delta“ brought about by the information exchange will be crucial (see Horizontal Guidelines §75 ff. and EU Commission’s *UK Tractors* case).

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What about „non-reciprocal“ exchanges?

- A paradox?
- Maybe not: *‘any direct or **indirect** contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market’.* (*Sugar*)
- (Rebuttable) presumption that conduct will follow (*Anic*).
- No defence for lack of effects, but public distancing.
- Relevance, among others, for signalling and hub and spoke.

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Public announcements and signalling

- Generally, a unilateral announcement or an exchange of public information is unlikely to constitute an infringement.
- Is the announcement a genuine unilateral act?
 - "*Strategic response*" and "*readjustment*" to competitors' announcements.
- Is the announcement about genuinely public information?
 - Exchange on individual **intentions** reduces strategic uncertainty between competitors without incurring commercial risk.
- EU Commission Horizontal Guidelines §63, 99.
- **Container shipping** (Commission), **Mobile telephony** (Dutch ACM).

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Hub and spoke

- Information exchanged between competitors through a "hub"/intermediary.
- Existence of a **vertical link** (*ebooks*) vs **facilitator** scenarios (*AC Treuhand*).
- *VM Remonts*: Could the undertaking '*reasonably have foreseen*' that its service provider would share its commercial information with its competitors?

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