ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMpetition LAW

-- Note by the Delegation of the European Union --

This note is submitted by the delegation of the European Union to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2010.
INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER EU COMPETITION LAW

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1. Introduction

1. Information exchange is a common feature of competitive markets that generates various types of efficiency gains. It solves problems of information asymmetries, thereby making markets more efficient. Moreover, companies often increase their internal efficiency through benchmarking against each others' best practices. Sharing of information can also help firms to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand etc. Furthermore, information exchanges can directly benefit consumers by reducing their search costs and improving choice. This in turn can reduce consumer "lock in" and lead to intensification of competition. Therefore, competition policy in the complex area of information exchange needs to be particularly balanced in order not to discourage pro-competitive information exchanges.

2. At the same time, information exchange may lead to restrictive effects on competition. Most importantly\(^1\), in situations where information exchange enables undertakings to be better aware of market strategies of their competitors (reduces strategic uncertainty in the market) it may facilitate collusion.\(^2\) Since in markets where collusion\(^3\) is feasible there are normally multiple possible collusive equilibria, information exchange can help competitors to collude by eliminating strategic uncertainty as to which equilibrium should be played. To that end, firms can also use information as signals to influence the terms of the collusive agreement. Communication can also help monitoring of deviations from collusion, as well as entry, which is important for ensuring stability of collusion. Communicating between firms can furthermore stabilize collusion by allowing competitors to build trust between each other. Even the so called "cheap talk" can convey useful information if it disciplined by repeated interaction. Experiments with repeated games indeed demonstrate that communication tends to move prices towards collusive outcomes.

3. The competitive outcome of information exchange as a facilitating practice depends on the characteristics of the market in which the conduct takes place (such as concentration, transparency, stability, complexity, symmetry etc.), the type of information that is exchanged (the strategic nature of its

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\(^1\) The primary concern of this paper, as well as of the Commission's draft guidelines on information exchange, is the potential of information exchanges for facilitating collusion in economic contexts of repeated interactions. Welfare effects in “theories of harm” based on static oligopoly settings would be contingent on many unobservable parameters, such as whether firms compete on price or quantity, on the nature of the uncertainties (whether they are "private" or "common value", and whether they are on demand or supply side), as well as on the shape of the demand curve, etc. Therefore, even though information exchanges in static oligopoly could result in negative effects on consumer welfare, they may not be a good basis for workable antitrust guidelines.


\(^3\) By collusion this paper understands coordination (i.e., alignment) of companies' competitive behaviour that result in restrictive effects on competition.
subject matter, its age, frequency, aggregation etc.), as well as on the mechanism through which information exchange may modify the relevant market environment towards one liable to coordination. The mechanism through which information exchange can facilitate collusion can essentially take two different forms. First, information exchange can enable firms to reach a common understanding about the terms of coordination (provide them with the so called "focal point" at which they can collude). Second, it can facilitate stability of collusion by enabling monitoring of deviations and entry.

4. Information exchange can be found in very different contexts. They may be self-standing (the so called pure information exchanges) or be part of another type of horizontal agreement (e.g., the parties to a production agreement share certain information on costs). The assessment of the latter type of information exchanges would normally be carried out in combination with an assessment of the respective horizontal co-operation agreement. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the explicitly agreed terms. These types of exchanges of information are normally assessed as part of the cartel. Finally, information exchange may be found to have the object of fixing prices or quantities, and in those situations would normally be considered and fined as cartels.

5. This paper intends to stimulate this roundtable's discussion by reflecting on the subject of information exchange between competitors in light of EU case law and the draft guidelines on horizontal agreements that the Commission has put forward for public consultation. This document should not be read as the Commission's general guidelines on information exchange, as these are currently in the process of preparation.

2. Information exchange and the scope of Article 101

6. Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a decision of an association of undertakings, or a concerted practice. In line with the jurisprudence of the Court of Justice of the European Union, the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition. The criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual plan to have been worked out, are to be understood in the light of the concept inherent in the provisions of the Treaty on the Functioning of the European Union on competition, according to which each company must determine independently the policy which it intends to adopt on the internal market and the conditions which it intends to offer to its customers.

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4 This paper will focus principally on this first type of information exchanges.
5 Information sharing between competitors can be direct or indirect. The latter can happen through a common agency (e.g., trade association) or a third party such as a market research organisation, or through the companies' suppliers or retailers. Both direct and indirect information exchanges between competitors can infringe Article 101.
7 Please send any comments you may have on this paper to Aleksandra Boutin (until recently Aleksandra Ossowska) in the Antitrust and Mergers Policy and Scrutiny Unit of DG Competition (aleksandra.ossowska@ec.europa.eu)
8 See for example C-8/08, T-Mobile Netherlands, ECR I not yet reported, paragraph 26; Joined Cases C-89/85 et.al., Wood Pulp, [1993] ECR 1307, paragraph 63.
9 See Case C-7/95 P, John Deere, cited in note 1 above, paragraph 86.
7. This does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, however, strictly preclude any direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings, and the volume of the said market. This precludes any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, thereby reducing competitors' independent conduct on the market.

8. A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice. Such disclosures could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces for all the competitors involved strategic uncertainty as to the future operation of the market and increases the risk of diminution of competition and of collusive behaviour. For example, the mere attendance of a meeting, where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices. When a company receives strategic data from a competitor, it will normally be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.

9. Depending on the facts underlying the case at hand, the finding of a concerted practice cannot be excluded also in a case which concerns a unilateral genuinely public announcement, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each others' public announcements (e.g., involving readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination.

3. **Main competition concerns**

10. Conditional on the fact that the presence of an agreement, a concerted practice or a decision of an association of undertakings has been established (as discussed above), the following paragraphs set out the main competition concerns pertaining to information exchanges.

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10  Case C-7/95 P, *John Deere*, cited in note 1 above, paragraph 87.


12  See for example Joined Cases T-25/95 et al., *Cimentos*, [2000] ECR II-491, paragraph 1849: "[…] the concept of concerted practice does in fact imply the existence of reciprocal contacts […]. That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it."


16  Use of the term "main competition concerns" means that the ensuing description of competition concerns is neither exclusive nor exhaustive.
3.1 **Collusive outcome**

11. By artificially increasing transparency in the market, the exchange of strategic information can facilitate coordination (i.e., alignment) of companies' competitive behaviour and result in restrictive effects on competition. This can occur through different channels:

12. One way is that through information exchange companies may reach a common understanding on the terms of coordination, which can lead to a collusive outcome on the market. Information exchange can create mutually consistent expectations regarding the uncertainties present in the market. On this basis companies can then reach a common understanding on the terms of coordination of their competitive behaviour, even without an explicit agreement on coordination. Exchange of information about intentions on future conduct is the most likely to enable companies to reach such a common understanding.

13. Another channel through which information exchange can lead to restrictive effects on competition is by increasing the internal stability of a collusive outcome on the market. In particular, it can do so by enabling the companies involved to monitor deviations. Namely, information exchange can make the market sufficiently transparent to allow the colluding companies to monitor to a sufficient degree whether other companies are deviating from the collusive outcome, and thus to know when to retaliate. Both exchanges of present and past data can constitute such a monitoring mechanism. This can either enable companies to reach a collusive outcome on markets where they were otherwise not able to do so, or it can increase stability of a collusive outcome already present on the market.

14. Similarly, information exchange can lead to restrictive effects on competition by increasing the external stability of a collusive outcome on the market. Namely, information exchanges that make the market sufficiently transparent can allow colluding companies to monitor where and when other companies are attempting to enter the market, thus allowing the colluding companies to target the new entrant. This may also tie into the anticompetitive foreclosure concerns below. Both exchanges of present and past data can constitute such a monitoring mechanism.

3.2 **Anticompetitive foreclosure**

15. An exclusive exchange of information could lead to anti-competitive foreclosure on the same market where the exchange takes place. This can occur when the exchange of commercially sensitive information places unaffiliated competitors at a significant competitive disadvantage as compared to the companies affiliated within the exchange system. This type of foreclosure is only possible if the information concerned is very strategic for competition and covers a significant part of the relevant market.

16. It cannot be excluded that information exchange may also lead to anticompetitive foreclosure of third parties in a related market. For instance, by gaining enough market power, parties exchanging information in an upstream market may be able to raise the price of a key component for a market downstream. Thereby, they could raise the costs of their rivals downstream, which could result in anticompetitive foreclosure.

4. **Restriction of competition by object**

17. The legal category of a "restriction of competition by object" in EU competition law is an administrative rule designed to capture market conducts which are the most likely to be harmful to

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17 To be considered as anticompetitive, a foreclosure would need to be likely to result in consumer harm.

18 Comment relevant to some submissions to this roundtable: The variable "public/non public data" does not constitute an optimal "cut-off" for what should constitute a restriction of competition by object. While
competition. A "restriction by object" under EU competition law does not constitute a "per se" prohibition. The parties to such agreements have the possibility (and burden) of proving that any efficiencies stemming from their agreement on balance offset restrictions of competition in magnitude and likelihood.

18. Therefore, it is information exchanges between competitors of individualised data regarding intended future prices or quantities that should be considered as restrictions of competition by object within the meaning of Article 101(1). Exchanging information on companies' individualised intentions of future conduct regarding prices or quantities is the most likely to lead to a collusive outcome. This is because informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices. Moreover, it is the least likely that this type of information exchange is done for pro-competitive reasons (see the discussion in section 6). In addition, private exchanges between competitors of their individualised intentions on future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities.

19. This is without prejudice to the settled case-law of the Court of Justice of the European Union, which states that in order to conclude that a given information exchange constitutes a restriction of competition by object, regard must be had to the content of the agreement's provisions, the objectives it seeks to attain, and the economic and legal context of which it forms part. To this end, it needs to be assessed whether the information exchange concerned, by its very nature, may possibly lead to a restriction.

19 In specific situations where companies are committed to sell in the future at the prices that they have previously announced to the public (i.e., they can not revise them), such genuinely public announcements of future individualised prices or quantities would not be considered as intentions, and hence would normally not be found to restrict competition by object. This could occur, for example, because of the repeated interactions and the specific type of relationship companies may have with their customers, for instance since it is essential that the customers know exact future prices in advance or because they can already take advanced orders at these prices. In these situations the information exchange would not be an equally costless means for reaching a collusive outcome in the market and would be more likely to be done for pre-competitive reasons. However, this does not imply that in general price commitment towards customers is necessarily pro-competitive. To the contrary, it could limit the possibility of deviating from a collusive outcome and hence render it more stable.

20 Information regarding intended future quantities could for instance include intended future sales, market shares, territories, and sales to particular groups of consumers.

21 This is without prejudice to the fact that public announcements of intended individualised prices may give rise to efficiencies and that the parties to such exchange would have a possibility to rely on Article 101(3).

22 Information exchanges that constitute cartels not only infringe Article 101(1), but in addition they are very unlikely to fulfil the conditions of Article 101(3).

of competition. Further guidance with regard to the notion of restrictions of competition by object can be obtained in the General Guidelines.

5. Assessment of the restrictive effects on competition

20. Except for the exchanges which constitute restrictions of competition by object, the likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. The assessment of restrictive effects on competition must compare the likely effects of the information exchange with the competitive situation that would prevail in the absence of the information exchange. For an information exchange to have restrictive effects on competition within the meaning of Article 101(1), it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation. Whether or not an exchange of information will have restrictive effects depends on both the economic conditions on the relevant markets and the characteristics of information exchanged.

21. Certain market conditions may make coordination easier to reach, sustain internally, or sustain externally. Exchanges of information in such markets may have more restrictive effects compared to markets with different conditions. However, even where market conditions are such that coordination may be difficult to sustain before the exchange, the exchange of information may change the market conditions in a way that coordination becomes possible after the exchange - for example by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. For this reason it is important to assess the restrictive effects of the information exchange in the context of both the initial market conditions, and how the information exchange changes these conditions. This will include an assessment of the specific characteristics of the system concerned in particular, its purpose and the conditions of access to it and participation in it, as well as the type of information exchanged – be that, for example, public or confidential, aggregated or detailed, historical or current –, the periodicity and coverage

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24 Commission guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, p. 97. paragraph 22. Also see for example, Case C-209/07, BIDS, [2008] ECR I-8637, paragraph 17.
26 Case C-7/95 P, John Deere v Commission, cited in note 1 above, paragraph 76.
27 Note that information exchange may restrict competition in a similar way to a merger if it leads to more effective, more stable or more likely coordination in the market; see Case C-413/06 P, Sony, [2008] ECR I-4951, paragraph 123, where the European Court of Justice endorsed the criteria established by the General Court in Case T-342/99, Airtours, [2002] ECR II-2585, paragraph 62: "Such tacit coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article 81 EC in order to be able to adopt a common policy on the market. Moreover, having regard to the temptation which may exist for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must therefore be sufficient market transparency for each undertaking concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving. Furthermore, discipline requires that there be some form of credible deterrent mechanism that can come into play if deviation is detected. In addition, the reactions of outsiders, such as current or future competitors, and also, the reactions of customers, should not be such as to jeopardise the results expected from the coordination."
of the exchange of information and its importance for the fixing of prices, volumes or conditions of
service.28 The following factors are relevant for this assessment.

5.1 Market characteristics

22. Companies are more likely to reach a collusive outcome in markets which are sufficiently
transparent, concentrated, simple, stable and symmetric. In these types of markets companies can reach
a common understanding on the terms of coordination and successfully monitor and punish deviations.
However, information exchange can also enable companies to reach a collusive outcome in other market
situations where they would not be able to do so in the absence of the information exchange. Information
exchange can thereby facilitate a collusive outcome by increasing transparency in the market, reducing
market complexity, buffering instability or compensating for asymmetry. In this context, the competitive
outcome of an information exchange depends not only on the initial characteristics of the market in which
it takes place (such as concentration, transparency, stability, complexity etc.), but also on how the type of
the information exchanged may change those characteristics.29

23. Collusive outcomes are more likely in transparent markets. Transparency can facilitate collusion
by enabling companies to reach a common understanding on the terms of coordination, or/and by
increasing internal and external stability of collusion. Information exchange can increase transparency and
hence limit uncertainties about the strategic variables of competition (e.g., prices, output, demand, costs
etc.). The lower the pre-existing level of transparency in the market, the more value an information
exchange may have in attaining a collusive outcome. However, an information exchange that contributes
little to the transparency in a market is less likely to have appreciable negative effects than an information
exchange that significantly increases transparency. Therefore it is the combination of both the pre-existing
level of transparency and how the information exchange changes this level that will determine how likely
the information will have negative appreciable effects. The pre-existing degree of transparency, inter alia,
depends on the number of market participants and the nature of transactions, which can range from public
transactions to confidential bilateral negotiations between buyers and sellers. When evaluating the change
in the level of transparency in the market, the key element is to identify to what extent the available
information can be used by companies to determine the actions of their competitors.

24. Tight oligopolies can facilitate a collusive outcome on the market as it is easier for fewer
companies to reach a common understanding on the terms of coordination and to monitor deviations. A
collusive outcome is also more likely to be sustainable with fewer companies. With more companies
coordinating, the gains from deviating are greater because a larger market share can be gained through
undercutting. At the same time, gains from the collusive outcome are smaller because when there are more
companies the share of the rents from the collusive outcome declines. Exchanges of information in tight
oligopolies are more likely to cause appreciable negative effects on competition than in non tight
oligopolies, and they are not likely to cause such negative effects in very fragmented markets. However, by
increasing transparency, or modifying the market environment towards one more liable to coordination in
another way, information exchange may facilitate coordination and enable monitoring among more
companies than would be possible in its absence.

25. Companies may find it difficult to reach a collusive outcome in a complex market environment.
However, to some extent, the use of information exchange may simplify such environments. In a complex
market environment more information exchange is normally needed to reach a common understanding on
the terms of coordination and to monitor deviations. For example, it is easier to achieve a collusive

28 Case C-238/05, Asnef-Equifax, [2006] ECR I-11125, paragraph 54.
29 It should be noted that the discussion below is not a complete list of relevant characteristics. There may be
other characteristics of the market which are important in the setting of certain information exchanges.
outcome on a price for a single, homogeneous product, than on numerous prices in a market with many differentiated products. It is nonetheless possible that to circumvent the difficulties involved in reaching a collusive outcome on a large number of prices, companies may exchange information to establish simple pricing rules (e.g., pricing points).

26. Collusive outcomes are more likely where the demand and supply conditions are relatively stable.\textsuperscript{30} In an unstable environment it may be difficult for a company to know whether its lost sales are due to an overall low level of demand or due to a competitor offering particularly low prices, and therefore it is difficult to sustain a collusive outcome. In this context, volatile demand, substantial internal growth by some companies in the market, or frequent entry by new companies, may indicate that the current situation is not sufficiently stable for coordination to be likely.\textsuperscript{31} Information exchange in certain situations can serve the purpose of increasing stability in the market, and thereby may enable a collusive outcome in the market. Moreover, in markets where innovation is important, coordination may be more difficult since particularly significant innovations may allow one company to gain a major advantage over its rivals. For a collusive outcome to be sustainable, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be capable of jeopardising the results expected from the collusive outcome. In this context, the existence of barriers to entry makes it more likely that a collusive outcome on the market is feasible and sustainable.

27. A collusive outcome is more likely in symmetric market structures. When companies are homogenous in terms of their costs, demand, market shares, product range, capacities etc., they are more likely to reach a common understanding on the terms of coordination as their incentives are more aligned. However, information exchange in some situations also allow a collusive outcome to occur in more heterogeneous market structures. Information exchange could make companies aware of their differences and help them to design means to accommodate for their heterogeneity in the context of coordination.

28. The stability of a collusive outcome also depends on the companies’ discounting of future profits. The more companies value the current profits that they could gain from undercutting versus all the future ones that they could gain by the collusive outcome, the more unlikely it is that they will be able to reach a collusive outcome. By the same token, a collusive outcome is more likely among companies that will continue to operate in the same market for a long time as there they will be more committed to coordinate. If a company knows that it will interact with the others for a long time, it will have more incentives to reach the collusive outcome because the stream of future profits from the collusive outcome will be worth more than the short term profit it could have if it deviated, i.e. before the other companies detect the deviation and retaliate.

29. Overall, for a collusive outcome to be sustainable, the threat of a sufficiently credible and prompt retaliation must be likely. Collusive outcomes are not sustainable in markets in which the consequences of deviation are not sufficiently severe to convince coordinating companies that it is in their best interest to adhere to the terms of coordination. For example, in markets characterised by infrequent, large volume orders, it may be difficult to establish a sufficiently severe deterrent mechanism, since the gain from deviating at the right time may be large, certain and immediate, whereas the losses from being punished small and uncertain, and only materialise after some time. The credibility of the deterrence mechanism also depends on whether the other coordinating companies have an incentive to retaliate, determined by their short term losses from triggering a price war versus their potential long term gain in case they induce a


return to coordination. For example, companies' ability to retaliate may be reinforced if they are also interrelated by vertical commercial relationships which they can use as a threat of punishment for deviations.\textsuperscript{32}

5.2 Characteristics of the information exchange

30. The exchange of strategic data i.e. data that reduces strategic uncertainty in the market, between competitors is more likely to be caught by Article 101 than exchanges of other types of information. Sharing of strategic data can give rise to restrictive effects on competition because it reduces the parties' decision-making independence by decreasing their incentives to compete. Strategic subject matter can be related to prices (e.g., actual prices, discounts, increases, reductions, or rebates), customer data, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, R&D programs, and results. Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand. However, if companies compete with regard to R&D it is the technology data that may be the most strategic for competition. The strategic usefulness of data also depends on its market coverage, frequency, aggregation, age, as well as the market context in which the exchange occurs (as discussed above).

31. For an information exchange to be likely to have appreciable restrictive effects on competition, the companies involved in the exchange have to cover a sufficiently large part of the relevant market. Otherwise, the competitors that are not participating in the information exchange could constrain any anticompetitive behaviour of the companies involved. For example, by pricing below the coordinated price level companies unaffiliated within the information exchange system could threaten the external stability of a collusive outcome.

32. What constitutes "a sufficiently large part of the market" cannot be defined in the abstract and will depend on the specific facts of each case and the type of information exchange in question. However, in the context of the Commission's public consultation several stakeholders have suggested that an information exchange covering not more than 20\textsuperscript{\%}\textsuperscript{33} of the relevant market is unlikely to lead to restrictive effects on competition, unless there is a network of parallel information exchanges in the relevant market, which exceeds this market share threshold.\textsuperscript{34} Where, however, an information exchange takes place in the context of another type of horizontal co-operation agreement and does not go beyond what is necessary for its implementation, market coverage below the market share thresholds set out in the relevant chapter of these guidelines, the Block Exemption Regulation or the De Minimis Notice\textsuperscript{35} pertaining to the type of agreement in question will usually not be large enough for the information exchange to give rise to restrictive effects on competition.

\textsuperscript{32} For further discussion of assessment of coordinated effects please refer to the relevant sections in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C31, 05.02.2004, p. 5-18

\textsuperscript{34} This would normally be without prejudice to the fact that exchanges of information in the context of an R&D agreement, if they do not exceed what is necessary for implementation of the agreement, could avail of the safe harbour of 25\% set out in the R&D BER.

\textsuperscript{35} What is considered to be a "low combined market share" depends on the type of agreement in question and can be inferred from the "safe harbour" thresholds set out in various chapters of these guidelines and, more generally, from the Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establish the European Community (de minimis), OJ C368, 22.12.2001, p. 13 ("De Minimis Notice").
33. Exchanges of genuinely aggregated data, i.e., where the recognition of individualised company level information is sufficiently difficult, are much less likely to lead to restrictive effects on competition than exchanges of company level data. The exchange of individualised data facilitates a common understanding on the market, and punishment strategies by allowing the coordinating companies to single out a deviator or entrant. Nevertheless, it can not be excluded that the exchange of aggregated data may facilitate a collusive outcome, in particular in a very tight and otherwise transparent oligopoly. Namely, members of a tight and stable oligopoly exchanging aggregated data could automatically assume that someone defected from the collusive outcome when noticing a market price below a certain level. This would be enough to trigger a price war. In this case retaliation would not be targeted at the deviating companies, but this would be sufficient to trigger a market wide retaliation. In other words, in order to keep collusion stable, companies may not always need to know who deviated, it is enough to learn that "someone" deviated.

34. The exchange of historic data is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' future conduct or to provide a common understanding on the market. Moreover, exchanging historic data is unlikely to facilitate monitoring of deviations because the older the data, the less useful it would be for timely detection of deviations and thus as a credible threat of prompt retaliation. There is no predetermined threshold when data becomes historic, i.e. old enough not to pose risks to competition. Whether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of contract renewals (when they are indicative of the frequency of price re-negotiations). For example, data can be considered as historic if it is several times older than the average length of contracts in the industry if they are indicative of price re-negotiations. Moreover, the threshold when data becomes historic also depends on the data's subject matter, aggregation, frequency of the exchange and the characteristics of the relevant market (e.g. its stability and transparency).

35. Frequent exchanges of information that facilitate both a better common understanding of the market and monitoring of deviations increase the risks of a collusive outcome. In more unstable markets, more frequent exchanges of information may be necessary for facilitating a collusive outcome than in stable markets. For example, in markets with long term contracts (which are indicative of infrequent price re-negotiations) a less frequent exchange of information could be sufficient for reaching a collusive outcome than in markets with short term contracts and frequent price re-negotiations. This also depends on the subject matter, age and aggregation of data.

36. In general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101. Genuinely public information is information that is generally equally easy (i) to access for everyone (in terms of costs of access). For information to be genuinely public, obtaining it should not be more costly for costumers and companies unaffiliated to the exchange system than for the companies exchanging the information. For this reason, competitors would normally not choose to exchange data that they can collect from the market at equal ease, and hence exchanges of genuinely public data are very

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36 For example, in some past cases the Commission has considered the exchange of data which was more than one year old as historic and as not restrictive of competition within the meaning of Article 101(1), whereas information less than one year old has been considered as recent; Commission Decision No 92/157/EEC in Case IV/31.370, See Commission Decision No 92/157/EEC in Case IV/31.370, UK Agricultural Tractor Registration Exchange, OJ L68, 13.3.1992, p. 19, paragraph 50; Commission Decision No 98/4/ECSC in Case IV/36.069, Wirtschaftsvereinigung Stahl, OJ L1, 3.1.1998, p. 10, paragraph 17.

37 Note however that infrequent contracts could decrease the likelihood of a sufficiently prompt retaliation.

38 Joined Cases T-191/98 et al., Atlantic Container Line (TACA), [2003] ECR II-3275, paragraph 1154. Note that this may not be the case if the exchange underpins a cartel.
unlikely. On the contrary, even if the data exchanged between competitors is in what is often referred to as "the public domain", it is not genuinely public if the costs involved in collecting the data deter other companies and customers from doing so. A possibility to gather the information in the market, for example to collect it from customers, does not necessarily mean that such information constitutes market data readily accessible to competitors.

37. Similarly, an information exchange is genuinely public if it makes the exchanged data equally accessible (in terms of costs of access) to all competitors and customers. The fact that information is exchanged in public may decrease the likelihood of a collusive outcome on the market to the extent that non-coordinating companies, potential competitors, as well as customers maybe able to constrain potential restrictive effect on competition. However, even a genuinely public exchange of information may facilitate a collusive outcome in the market.

38. As is demonstrated by the above discussion, a competitive assessment of information exchange needs to consider several interrelated and cumulative factors. Overall, frequent exchanges between competitors of recent, individualised strategic data, covering a large part of a tight, transparent, stable, symmetric and non-complex market, are likely to have restrictive effects on competition. Conversely, exchanges of aggregated historic data, especially when related to a less strategic subject matter than prices or quantities (e.g. costs), are unlikely to have a restrictive effect on competition. Moreover, exchanges of information in fragmented, non-transparent, complex, asymmetric and unstable markets are unlikely to have restrictive effects on competition.

39. In this context, exchanging data that is several times older, or at a frequency that is several times lower, than the average frequency of price renegotiations in a given industry is not likely to lead to restrictive effects on competition. In addition, unless the exchange takes place in a very tight oligopoly, exchanging aggregate data is generally unlikely to create risks for competition. Moreover, in the context of the Commission's public consultation stakeholders have suggested that an information exchanges that covers less than 20% of the relevant market is unlikely to lead to restrictive effects on competition.

Moreover, the fact the parties to the exchange have previously communicated the data to the public (e.g. through a daily newspaper or their website), does not imply that a subsequent non-public exchange would not infringe Article 101.


This does not preclude that a database be offered at a lower price to customers which themselves have contributed data to it, as by doing so they normally would have also incurred costs.

Assessing barriers to entry and countervailing "buyer power" in the market would be relevant for determining whether outsiders to the information exchange system would be able to jeopardise the outcomes expected from coordination. However, increased transparency to consumers may either decrease or increase scope for a collusive outcome because with increased transparency to consumers, as price elasticity of demand is higher, pay-offs from deviation are higher but retaliation is also harsher.

This also applies to situations where after the information exchange the market becomes transparent, stable and non-complex.

Unless there is a network of parallel information exchanges in the relevant market which exceeds this market share threshold.
6 Assessment under Article 101(3)

6.1 Efficiency gains

40. Information exchange may lead to significant efficiency gains. Information about competitors' costs can enable companies to become more efficient if they benchmark their performance against the best practices in the industry and design internal incentive schemes accordingly.

41. Moreover, in certain situations information exchange can help companies allocate production towards high-demand markets (e.g., demand information) or low cost companies (e.g., cost information). The likelihood of these types of efficiencies depends on market characteristics (nature of uncertainties, the strategic variable of competition, etc.). Some forms of information exchanges in this context may allow substantial cost savings where for example they reduce unnecessary inventories, or enable quicker delivery of perishable products to areas with high demand and their reduction in areas with low demand.

42. Exchange of consumer data between companies in markets with asymmetric information about consumers can also give rise to efficiencies. For instance, keeping track of the past behaviour of customers in terms of accidents or credit default provides an incentive for consumers to limit their risk exposure. It also allows detecting which consumers carry a lower risk and should benefit from lower prices. In this context, information exchange can also reduce consumer lock-in, thereby inducing stronger competition. This is because information is generally specific to a relationship and consumers would otherwise lose the benefit from this information when switching to another company. Examples of such efficiencies are found in the banking and insurance sectors, which are characterised by frequent exchanges of information about consumer defaults and risk characteristics.

43. Exchanging past and present data related to market shares may in some situations provide benefits to both companies and consumers by allowing companies to announce it as a signal of quality to consumers. In situations of imperfect information about product quality, consumers often use indirect means to gain information on the relative qualities of products such as price and market shares (e.g., consumers use best-selling lists in order to choose their next book). Especially in markets with switching costs or network externalities, announcing market shares provides a strong (credible) indicator of future performance. In this context an information exchange about sales can benefit both companies and consumers.

44. Information exchange that is genuinely public can also benefit consumers by helping them to make a more informed choice (and reducing their search costs). Consumers are most likely to benefit in this way from public exchanges of current data, which are the most relevant for their purchasing decisions. Similarly, public information exchange about current input prices can lower search costs for companies, which would normally benefit consumers through lower final prices. These types of direct consumer benefits are less likely to be generated by exchanges of future pricing intentions because companies, which announce their pricing intentions, are likely to revise them before consumers actually purchase based on this information. However, to some extent, companies may be disciplined not to change the announced future intentions before implementation for example when they have repeated interactions with consumers. In these situations information exchange may improve customers' planning of expenditures.

45 The discussion of potential efficiency gains from information exchange is neither exclusive nor exhaustive.

46 However, it should be noted that a price commitment vis-à-vis consumers can actually reduce price competition as it could deter competitors from lowering their price, which may be demonstrated in practices such as price matching or price beating guarantees.
As shown above, exchanging present and past data is more likely to generate efficiency gains than exchanging information about future intentions. However, in specific circumstances announcing future intentions could also give rise to efficiency gains. For example, companies knowing early the winner of an R&D race could avoid duplicating costly efforts and wasting resources that can not be recovered.47

6.2 Indispensability

Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an information exchange do not fulfil the conditions of Article 101(3). For fulfilling the condition of indispensability, the parties will need to prove that the data's subject matter, aggregation, age, confidentiality, frequency, as well as coverage, of the exchange are of the type that carries the lowest risks indispensable for creating the claimed efficiency gains. Moreover, the exchange should not involve information beyond the variables that are relevant for the attainment of the efficiency gains. For instance, for the purpose of benchmarking, an exchange of individualised data would generally not be indispensable because information aggregated in for example some form of industry ranking could also generate the claimed efficiency gains while carrying a lower risk of leading to a collusive outcome. Finally, it is generally unlikely that the sharing of future data is indispensable, especially if it is related to prices and quantities.

Similarly, information exchanges that form part of horizontal co-operation agreements are also more likely to fulfil the conditions of Article 101(3) if they do not go beyond what is indispensable for the implementation of the economic purpose of the agreement (e.g., sharing technology necessary for an R&D agreement or cost data in the context of a production agreement).

6.3 Pass-on to consumers

Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by an information exchange. The lower is the market power of the parties involved in the information exchange, the more likely it is that the efficiency gains would be passed on to consumers to an extent that outweighs the restrictive effects on competition.

6.4 No elimination of competition

The criteria of Article 101(3) cannot be met if the companies involved in the information exchange are afforded the possibility of eliminating competition in respect of a substantial part of the products concerned.

7. Conclusions

The paper proposes a structured analytical framework for competitive assessment of information exchanges. This framework is grounded in the economic theory that increased transparency between oligopolists can facilitate collusion. It can do so through two main mechanisms: by reducing uncertainty as to future behaviour between competitors, thereby providing a focal point for collusion, or by serving as a monitoring device that ensures stability of collusion.

It is evident from the above discussion that information exchange can be found to have likely restrictive effects on competition only in markets which are already quite liable to tacit collusion, or

47 Such efficiencies need to be weighed against the potential negative effects of, for example, limiting competition for the market which stimulates innovation.
markets that become liable to tacit collusion after the exchange, i.e. markets that are sufficiently concentrated, transparent, symmetric, non-complex and stable. This is consistent with the framework of analysis of coordinated effects in other areas of antitrust or merger enforcement. Moreover, in order to have likely anticompetitive effects in a given market context, the data exchanged must be sufficiently strategic, i.e. reduce strategic uncertainty in the market to a degree that makes collusion likely. As discussed above, it is predominantly the data's frequency, coverage, subject matter, aggregation and age that determine their strategic usefulness. Recent individualised data on prices and quantities is generally the most strategic, while increased aggregation and age generally reduces strategic usefulness of any data.

52. In the context of analysis of effects on competition, exchanging data several times older, or at a frequency that is several times lower, than the average frequency of price renegotiations in a given industry, should be safe from the competition policy perspective. Moreover, unless the exchange takes place in a very tight oligopoly, exchanging aggregate data is unlikely to lead to restrictive effects on competition. In addition, in the context of the Commission's public consultation stakeholders have suggested that information exchanges that cover less than 20% of the relevant market are not likely to lead to restrictive effects on competition.48

53. Moreover, unlike when exchanging actual data, by exchanging intentions about their future behaviour in the market competitors can arrive at a coordinated higher price level without incurring the risk of losing market share. These types of exchanges constitute the most efficient mechanism for facilitating collusion, and at the same time, as the discussion above demonstrates, are unlikely to be done for pro-competitive reasons. Unlike actual data, which when announced in public can reduce consumer's search costs or improve their purchasing decisions, information on companies' future intentions are unlikely to benefit consumers as they can generally not rely on them when making their consumption plans. It is for these reasons that exchanges between competitors of individualised future intentions on prices and quantities should be considered as restrictive of competition by object, while all the other exchanges need to be assessed on a case by case basis with a view of determining whether they are likely to result in restrictive effects on competition. This discussion has put forward arguments for why this type of legal framework would be an optimal policy design- one clearly discouraging the most harmful information exchanges while at the same time not disincentivising the pro-competitive ones.

54. As has been demonstrated by the above discussion, information exchange between competitors is a complex area of competition law enforcement, and hence today's roundtable discussion between the different delegations is of particular importance.

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48 Unless there is a network of parallel information exchanges in the relevant market which exceeds this market share threshold.