Competition Law

Exchanges of information between competitors: how to comply with competition rules?

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Summary of the main developments contained in the draft Guidelines on horizontal cooperation agreements of the European Commission regarding exchanges of information between competitors.

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Exchanges of commercially sensitive information between competitors may, in themselves, entail an infringement of competition rules. Competition authorities can declare that the exchange is illegal, even in cases where the competitors have not simultaneously fixed their prices or shared clients. Companies should be extremely cautious in this regard, as both the European Commission and other competition authorities have recently imposed very high fines for competition rules infringements arising from exchanges of sensitive information between competitors (even stating that these practices amounted to cartel behaviour).

The European Commission has recently published draft Guidelines on horizontal cooperation agreements (C(2022)1159). This project contains a chapter summarising how competition rules currently apply to exchanges of information between competitors. It also includes new guidance on relevant issues such as (i) anti-competitive exchanges through algorithms and online platforms; and (ii) compliance protocols that companies can put in place to ensure that information exchanges between competitors do not trigger competition rules infringements.

The draft Guidelines on horizontal co-operation agreements provide guidance on a wide range of issues. In this newsletter we confine ourselves to describing its main developments on exchanges of information. Separate newsletters will address their impact on other areas: (i) joint ventures; (ii) consortia and subcontracting agreements; (iii) mobile infrastructure sharing agreements; and (iv) sustainability.

1. Competition risks arising from information exchanges between competitors.

The fundamental principle of competition is that each company should autonomously determine its economic behaviour in the market. It is permissible for companies, without contacting one another, to adapt themselves intelligently to the current or expected behaviour of their competitors or to the prevailing market conditions.

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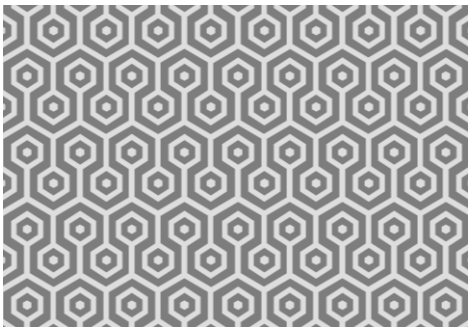
1. The draft Guidelines are available via the following link.
2. Our note on (i) joint ventures; (ii) consortia and subcontracting agreements; and (iii) mobile infrastructure sharing agreements is available in this link.



However, competition rules prevent competitors from exchanging commercially sensitive information, where such conduct would lead to a distortion of normal competitive conditions in the market. An exchange of confidential information between competitors that could influence their commercial strategies may entail an infringement of the competition rules. This is the case where the information, once exchanged, reduces uncertainty as to the future actions of competitors. An infringement may thus exist if one competitor discloses to another competitor the behaviour it will adopt in the market, as this exchange influences its business policies, to the detriment of clients.

Competition rules prohibit the exchange of commercially sensitive information between competitors, regardless of the means by which it takes place. Hence, the infringement can be committed, for example, through website postings, (chat) messages, e-mails, phone calls, input into a shared algorithmic tool, meetings, etc. Information can also be exchanged indirectly via a third party (such as a service provider, a platform, an online tool or an algorithm), a common agency (e.g. a business association), a market research organisation or via common suppliers or distributors.

For the conduct to be in breach of competition rules, it is sufficient for a company to disclose to a competitor the commercial conduct it intends to apply in the market, even if the latter does not disclose, in turn, its own commercial plans to the former.

2. Concept of commercially sensitive information.

Competition rules set out limits on exchanges of sensitive information between competitors. Commercial information that is considered sensitive and the exchange of which is, in principle, prohibited by competition rules covers the following:

- Pricing and pricing intentions.
- Current and future production capacities.
- Intended commercial strategy.
- Current and future demand.
- Future sales.
- Current state and its business strategy.
- Future product characteristics which are relevant for consumers.
- Positions on the market and strategies at auctions for financial products

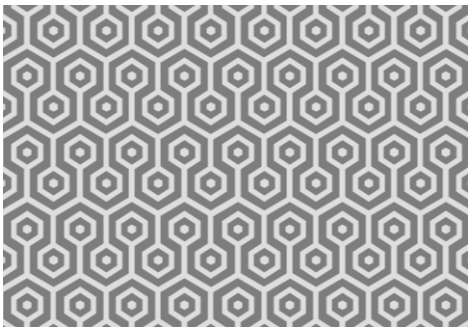
3. Exchanges of information on inputs price increases.

An exchange of information should not be held anti-competitive when it concerns publicly available data. In relation to the public nature of the information, the draft Guidelines note that - even if the information is publicly available (e.g. information published by regulators) - an exchange of additional information by competitors may lead to restrictive effects on competition, if it further reduces strategic uncertainty in the market. In this case, it is the additional information exchanged that is vital to tip the market equilibrium towards a collusive outcome.

The draft Guidelines provide a very timely example in this regard, given the current economic context. The scenario is a market where it is common knowledge that raw material costs are rising. At industry association meetings, competitors can legitimately hold high level discussions on this trend. But they should not jointly assess the cost increases in detail, if this reduces the uncertainty about each other's future actions in the market. This is because each company must determine autonomously the policy it intends to adopt in the market. Each competitor will thus have to decide independently how it will respond to rising supply costs.

4. Historic information.

The exchange of historic information should not be problematic. The draft Guidelines state that the assessment of



whether information is current or already historic should be made on a case-by-case basis. Previously, it has been declared that information older than one year could already be considered historic. The draft Guidelines add that information can also be held historic if it is several times older than the average length of the pricing cycles or the contracts in the industry if the latter are indicative of price re-negotiations.

5. Algorithms and information exchanges.

When several competitors decide to share the same algorithmic tool, they may end up infringing competition rules. This may lead to a situation known as "collusion by code", which refers to the deliberate application by competitors of common algorithms, with the aim of coordinating their respective commercial policies. Collusion by code is normally considered by competition authorities as cartel behaviour.

Moreover, an optimisation algorithm shared between several competitors may be problematic if it makes business decisions based on commercially sensitive data-feeds from various competitors. When algorithmic software draws on publicly available data there is, in principle, no competition problem. On the other hand, the aggregation of commercially sensitive information in a pricing tool offered by a single IT company to which various competitors have access may constitute an anti-competitive agreement.

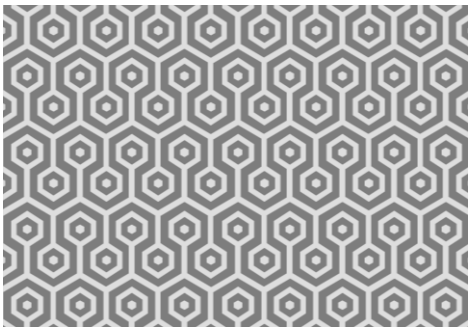
Also problematic is the situation where competitors have harmonized / coordinated the features or mechanisms of optimization of the automated tools they share. Competitors' decision to introduce a pricing rule in a shared algorithmic tool (for instance, the lowest price on the relevant online platform(s) or shop(s) +5%, or the price of one competitor -5%) is likely to be anti-competitive, even in the absence of an explicit agreement to align future pricing.

A hub & spoke cartel situation occurs when several competitors (spokes) coordinate their commercial policies, to the detriment of consumers, through a common distributor (hub). This type of cartel can occur without the need for direct contacts between competitors (spokes) as they communicate indirectly through the common distributor (hub). The draft Guidelines warn that online platforms may give rise to hub & spoke cartel conduct, for example, if they facilitate exchanges of information between competitors using the platforms, in order to guarantee certain margins or price levels. Another risky conduct is to use a platform to impose operating restrictions on the system that prevent competing user companies from offering lower prices or other advantages to end-customers.

The draft Guidelines also mention (less significant) risks even with regard to the individual use of algorithms by each competitor, if this leads to collusive outcomes. This is because algorithms may allow competitors to increase market transparency, detect price deviations in real time and make retaliation mechanisms for price deviations more effective. But for this scenario leading to algorithmic collusion, the following conditions must be met (i) specific design of the algorithms for this purpose, (ii) high frequency of interactions between competitors, (iii) limited buyer power, and (iv) the presence of homogenous products/services.

6. Efficiencies derived from information exchanges.

Information exchanges between competitors are not always anti-competitive. Some types of exchange can lead to efficiency gains (such as solving problems of information asymmetries). In recent years, in particular, data sharing has gained importance and has become an essential element to inform decision making through the use of data intelligence and



machine learning techniques.

In addition, companies often improve their internal efficiency through benchmarking. Information sharing can also help companies to save costs by reducing their stocks, enabling faster delivery of perishable products to consumers or coping with unstable demand, etc. Information exchanges can also directly benefit consumers by reducing their search costs and improving choice. For example, information on the relative qualities of products (through the publication of best-seller lists or price comparators) can be made available.

Efficiencies can also result from the exchange of customer data between companies operating in markets with asymmetric information. For example, monitoring customers' past behaviour in terms of accidents or non-payment of debts provides an incentive for customers to limit their exposure to risk. It also allows for the identification of consumers who pose a lower risk and should benefit from lower prices. In this context, the exchange of information helps to reduce customer lock-in, thereby inducing greater competition. This is because the information is usually relationship-specific and customers would lose the benefit of this information if they were to switch suppliers. Examples of such efficiencies are found in the banking and insurance sectors, which are characterised by frequent exchanges of information on customer defaults and risk characteristics.

7. Boycotts preventing information access.

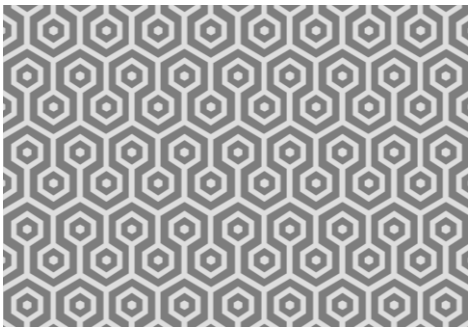
Sometimes the information (lawfully) exchanged between competitors is so valuable that preventing another player (such as a new entrant) from having access to it may entail boycott conduct. Therefore, the exchange of such strategic information will only be lawful if it is accessible to all companies active in the relevant market in an open and non-discriminatory manner.

8. Competition compliance protocols.

An exchange of information may be permissible when it is ancillary to a pro-competitive benchmarking exercise or when it is indispensable to implement a cooperation agreement between competitors that is competition law compliant. In this context, the draft Guidelines advocate the establishment of compliance protocols to prevent the exchanges of information between competitors from triggering competition infringements.

In a benchmarking project, competitors are advised to use an independent third party, which will receive individual information from each company on a bilateral basis and under a confidentiality agreement. This third party will collect the information, analyse it and aggregate it into an average/anonymised data study. The key to ensuring the compatibility of the project will be that the ensuing study prepared by the independent third party does not offer the possibility to infer the individual figures of each company participating in the project.

When cooperation is aimed at data sharing, participants to a data pool should in principle only have access to their own information, and the aggregated information of other participants. Measures can ensure that a participant is unable to obtain commercially sensitive information from other participants. The management of a data pool can for instance be given to an independent third party that is subject to strict confidentiality rules as regards the information received from participants in the data pool. The data pool managers should also ensure that the information is collected only on a need-to-know basis for the legitimate purpose of the data pool.



When the exchange is ancillary to a competition law compliant cooperation agreement between competitors, “clean teams”, for example, could be used to receive and process the information. A clean team generally refers to a restricted group of individuals from a company that are not involved in the day-to-day commercial operations and are bound by strict confidentiality protocols with regard to the commercially sensitive information. A clean team can for instance be used in the implementation of a horizontal cooperation agreement to ensure that the information provided for the purposes of such cooperation is transmitted on a need-to-know basis and in an aggregated manner.

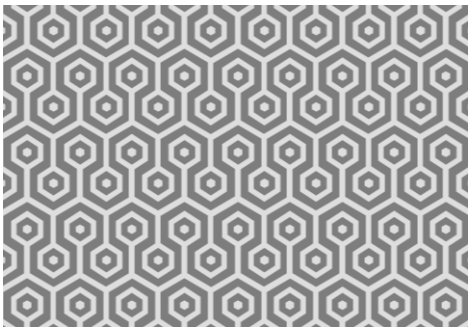
An additional example in this respect from the draft Guidelines is very timely in the current context. It concerns the scenario in which several manufacturers of essential products face a situation of temporary shortage of supply of essential products. In order to improve supply and increase production in the most effective and expedient manner, the industry association proposes to gather data and model demand and supply for the essential products concerned. In addition, they would gather data to identify production capacity, existing stocks and potential to optimise the supply chain. The draft Guidelines recommend that, in order to comply with competition rules, the association should engage a consultancy firm. The consultancy firm will sign confidentiality agreements with each producer. The consultancy firm would assist the association in collecting and aggregating the data in a model. The aggregated data would be returned to the producers in order to rebalance and adapt their individual capacity utilisation, production and supply.

The draft Guidelines speculate, within the same example, about the possibility of the producers having to exchange confidential information directly among them (beyond the information that would be collected and shared in aggregated form by the trade association and the consultancy firm). Such an additional exchange between producers is justified, for example, to allow competing manufacturers to jointly determine where it is more appropriate to shift production or increase capacity. To be compatible, such exchanges would need to be strictly limited to what is indispensable for effectively achieving the aims of the initiative. Any information and exchanges with regard to the project would need to be well documented to ensure the transparency of the interactions. Participants would need to commit to avoid any discussion of prices or any coordination on other issues that are not strictly necessary for achieving the aims of the project. The initiative should also be limited in time so that the exchanges immediately cease once the risk of shortages stops being a sufficiently urgent threat to justify the cooperation. Finally, to avoid problems of foreclosure, the initiative should be open to operators who are not part of the association.

9. Price signaling.

A unilateral and truly public announcement by a company, for instance through a publication on a publicly accessible website, a statement in public or a newspaper, does not normally constitute conduct that is likely to be prohibited by competition rules.

Competition authorities may regard a unilateral public announcement mentioning a company's future pricing intentions as potentially problematic, for example, where it does not bind the company making the announcement to its customers, but may convey important signals to its competitors about the advertising company's intended market strategy. This will be the case, in particular, if the information is sufficiently precise. The draft Guidelines note that such advertisements often do not bring efficiencies that benefit consumers and may facilitate collusion.



Unilateral public announcements may also be indicative of an underlying anti-competitive agreement or concerted practice. On a market where there are only few competitors present and high barriers to entry exist, companies that continuously publicize information without apparent benefit for consumers (for instance, information on R&D costs, costs of adaptations to environmental requirements, etc.) may – in the absence of another plausible explanation – be engaged in an infringement of competition law. However, this is an area where it is particularly problematic for the competition authorities to prove an infringement.

10. Entry into force.

The European Commission has launched a public consultation on the draft Guidelines on horizontal cooperation agreements containing these rules on exchanges of information between competitors. Once the final version is published in the Official Journal of the European Union, it is expected to enter into force on 1 January 2023.