

# Information exchange in committees – infringements of competition law?\*

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In many expert committees representatives of various companies operating within the same sector participate and meet for a professional exchange about the discussed issues. Of course they also talk during the breaks as well as in bars in the evening. The exact discussions are not protocolled. May there result infringements of competition law from a concerted practice because the EU commis-

sion or the Federal Cartel Office assume that at the meetings there has been exchanged information which constitute an infringement of competition law? This does not mean an exclusion of participating in such expert committees. It is just necessary to comply with some rules. Symposiums and public conventions form another field. The speakers present their knowledge to a general audience.

## Informationsaustausch in Gremien als Wettbewerbsverstoß

In Fachausschüssen sind vielfach Vertreter verschiedener Unternehmen derselben Branche vertreten und kommen dort zum Fachaustausch über die behandelten Themen zusammen. Selbstverständlich unterhalten sie sich auch in den Pausen sowie abends an der Bar. Was dort genau gesprochen wird, ist nicht protokolliert. Können sich daraus Wettbewerbsverstöße aus einer abgestimmten Verhaltensweise ergeben, weil die EU-Kommission

oder das Bundeskartellamt annimmt, bei diesen Treffen seien unerlaubt Informationen ausgetauscht worden, die einen Wettbewerbsverstoß konstituieren? Damit ist freilich die Teilnahme an solchen Fachausschüssen nicht ausgeschlossen. Es müssen nur bestimmte Regeln eingehalten werden. Kolloquien und öffentliche Tagungen bilden ohnehin ein anderes Feld. Dort präsentieren die Referenten ihre Erkenntnisse einem allgemeinen Publikum.

### 1 Approach

Natural competition is thus characterised by the circumstance that every undertaking is required to act with a lack of knowledge of the business and pricing strategies of its competitors. Agreements to exchange such information distort competition as they eliminate uncertainty on the part of other undertakings and thus enable mutual coordination of business and pricing strategies – to the detriment of consumers who are potentially faced with artificially high prices. The same applies in the case of coordinated practices based on an exchange of information; this the most effective means of this type of conduct.<sup>1</sup>

This close connection between an exchange of information and the coordination of business strategy makes the mere mutual exchange of information appear to be problematic – even in the case of information that is not inherently confidential because it is either publicly available, relates to the past or is merely statistical in nature. This applies in any event if the exchange of information accompanies other anti-competitive actions such as

setting prices in parallel. The exchange of information likewise permits better monitoring of whether other agreements have been observed.<sup>2</sup>

However, the deliberate exchange of information as such already results in contact between two undertakings that otherwise acted without any closer contact.<sup>3</sup> This leads to a risk of coordination which extends beyond sharing information. In any event, this increases transparency in the market. For example, it may be easier to obtain information directly from a competitor than it would have been if one had to pour through tedious publications. Even if there are few competitors in a market, openness may nonetheless be increased because the exchange of information between undertakings becomes automated and more extensive. The exchange of information between competitors as such artificially alters normal competitive conditions and is thus in any event generally capable of restricting competition. The extent to which this applies in a specific case depends on the circumstances. This is particularly true in the case of unilateral transfers of information - which are however gladly accepted by competitors.<sup>4</sup>

It can also include information sharing within the framework of committees, which cancels the general separation of compa-

\* Translated by Craig Aird and Johanna Otting.

1 *Emmerich*, in: Immenga/Mestmäcker, Vol. 1/1 Article 101 (1) TFEU marginal no. 96.

2 ECJ, Case C-204 inter alia/00 P, ECR 2004, I-123 (marginal no. 281) – Aalborg Portland.

3 See *Heyers*, NZKart 2013, 99 (101) regarding OLG Düsseldorf, ruling of 29/10/2012, V-1 Kart 1-6/12 (Owi) et al., marginal no. 33, 37, 41, 44 et seq.

4 In relation to a competing party to a licensing agreement, *Dreher/Körner*, WuW 2013, 104; further discussion of the entire topic, below marginal no. 1648 et seq.

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nies – such as the exchange about technical innovations in VDI committees. In many cases the information exchange shall be reduced as inconspicuously as possible. However they have to restrict the competition whether they intend it or they have such a genuine effect (see Art. 101 TFEU: “have as their object” or “effect”). So their level cannot be detached from that – e.g. if they discuss a specific problem in a committee without disclosing company internal information or at least if company related data are communicated to competitors. The line is often very thin and competition authorities are not present in the meetings, so they need to reconstruct the concerned information.

## 2 Required restraints of competition

Whether an exchange of market and other information have an anti-competitive effect primarily depends on who exchanges what information in what manner. Such an exchange of information may, in particular, occur via collective, central institutions or however via suppliers or retailers of an undertaking or directly between competitors. The new version of the horizontal cooperation guidelines specifically address the exchange of information in all of its variety for the first time.<sup>5</sup>

The fundamental requirement for the relevance of an exchange of information for purposes of competition law is that is based on, or is part of, an agreement between undertakings, a concerted practice or the decision of an association of undertakings<sup>6</sup> – for example in the context of a research and development agreement which is based upon the exchange of the resulting progress. However, a concerted practice is already founded in cases where an intentional, practical collaboration replaces competition exposed to risk<sup>7</sup> even if such collaboration does not yet relate to a specifically developed plan. For such purposes, the exchange of strategic data itself is sufficient because this reduces independence of action in the market;<sup>8</sup> this is even the case for the unilateral disclosure of such data accepted by the recipient: Reciprocal contacts are already present in such cases – as is required for concerted practices.<sup>9</sup> This factor distinguishes such cases from the case of merely (public) information, even from competitors or customers, for example as to price as well as parallel conduct similarly based on certain, albeit publicly-available, knowledge, which is permitted.<sup>10</sup> Involving committees it has to be differentiated whether otherwise confidential kept data that have an impact on the market are shared – even during breaks – or only generally accessible knowledge.

- 5 Commission Communication - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements; Official Journal 2011 C 11 p. 1 (marginal no. 55 et seq.), last amended by OJ 2011 C 172 p. 22. Recently also OLG Düsseldorf dated 29/10/2012, V-1 Kart 1-6/12 (Owi) et al. Critical view *Heyers* (2013), 99 (103) with additional citations.
- 6 Commission Communication - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements; Official Journal 2011 C 11, p. 1 (marginal no. 60), last amended by OJ 2011 C 172, p. 22.
- 7 ECJ, Case C-7/95 P, ECR 1998, I-3111 (marginal no. 86) – John Deere; Case C-8/08 P, ECR 2009, I-4529 (marginal no. 26) – T-Mobile Netherlands.
- 8 Commission Communication - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements; Official Journal 2011 C 11, p. 1 (marginal no. 61), last amended by OJ 2011 C 172, p. 22.
- 9 European General Court, Case T-25 inter alia/95, ECR 2000, II-491 (marginal no. 1849) – Cimenteries CBR. Critical and limiting, *Heyers* (2013), 99 (102).
- 10 See *Emmerich*, in: Immenga/Mestmäcker, Vol. 1/2 Article 101 (1) TFEU marginal no. 93 et seq.

## 3 Detrimental exchange of company specific data

According to the established decisional practice of the Commission, an exchange of information has an anti-competitive effect in any event if the information relates to orders, prices,<sup>11</sup> turnover,<sup>12</sup> investments,<sup>13</sup> or the current business policies<sup>14</sup> of an undertaking.<sup>15</sup> These forms of information are normally trade or business secrets.<sup>16</sup> Accordingly, functioning competition generally rests upon uncertainty as to the actions of competitors.<sup>17</sup> This form of uncertainty encourages undertakings participating within a market to act more competitively.<sup>18</sup> A system for exchanging information may replace the uncertainty of competition with practical collaboration between undertakings.<sup>19</sup> This end may already result from an exchange of information capable of removing uncertainty on the part of market participants as to timing, quantity and means of making adjustments.<sup>20</sup>

Accordingly, any form of direct or indirect contact between different undertakings is covered if the market behaviour of competitors is influenced or they are informed of one's future conduct – whether already settled or merely planned.<sup>21</sup> This specifically applies to the discussion of confidential information, especially in the course of frequent contacts.<sup>22</sup> Those can also occur in committees with regular meetings.

This type of contact is even sufficient if its object or effect is that competitive conditions other than those common in the respective area arise; their capacity to influence the behaviour of competitors is enough as is providing them information about one's own actions.<sup>23</sup> What is common is determined based on the type of goods or services, the importance and number of undertakings involved as well as the scope of the market under consideration.<sup>24</sup>

- 11 Commission Decision 89/190/EEC, OJ 1989 L 74, p. 1 (marginal no. 17 et seq., 29 et seq.) – PVC.
- 12 Commission Decision 92/157/EEC, OJ 1992 L 68, p. 19 (marginal no. 17 et seq.) – UK Agricultural Tractor Registration Exchange.
- 13 Commission Decision 84/405/EEC, OJ 1984 L 220, p. 27 (marginal no. 67) – Zinc Producer Group.
- 14 Commission Decision 84/405/EEC, OJ 1984 L 220, p. 27 (marginal no. 68) – Zinc Producer Group.
- 15 *Haag*, in: von der Groeben/Schwarze, following Art. 81 EG – groups of cases: cooperation agreements marginal no. 65 et seq.
- 16 Cf. here Commission Decision 2004/138/EC, OJ 2004 L 56, p. 1 (marginal no. 423) – Austrian Banks („Lombard Club“).
- 17 Supra ECJ, Case 40 amongst others/73, ECR 1975, I-1663 (marginal no. 173/174) – Suiker Unie; European General Court, Case T-4/89, ECR 1991, II-1523 (marginal no. 219) – BASF/Commission; Commission Decision 92/157/EEC, OJ 1992 L 68, p. 19 (marginal no. 43) – UK Agricultural Tractor Registration Exchange.
- 18 Commission Decision 92/157/EEC, OJ 1992 L 68, p. 19 (marginal no. 43) – UK Agricultural Tractor Registration Exchange.
- 19 Cf. Commission Decision 2001/418/EC, OJ 2001 L 152, p. 24 (marginal no. 229) – Amino acids.
- 20 ECJ, Case C-8/08 P, ECR 2009, I-4529 (marginal no. 33) – T-Mobile Netherlands.
- 21 Supra ECJ, Case 40 amongst others/73, ECR 1975, I-1663 (marginal no. 173/174) – Suiker Unie; similarly, European General Court, Case T-202 inter alia/98, ECR 2001, II-2035 (marginal no. 56) – Tate & Lyle; Commission Decision of 20/10/2004, COMP/38238 (marginal no. 268) – Raw tobacco Spain.
- 22 Commission Decision of 27/11/2013, AT.39633, see also IP/13/175 – Shrimp.
- 23 ECJ, Case C-8/08, ECR 2009, I-4529 (marginal no. 33) – T-Mobile Netherlands.
- 24 ECJ, Case 172/80, ECR 1981, 2021 (marginal no. 14) – Züchner; Case C-7/95 P, ECR 1998, I-3111 (marginal no. 87) – John Deere; Case C-199/92 P, ECR 1999, I-4287 (marginal no. 161 et seq.) – Hüls.

Abnormal competitive conditions may result merely from the circumstance that the normal risk of uncertain consequences associated with a change in behaviour no longer apply, namely because an undertaking knows how a competitor will act.<sup>25</sup>

The communication of confidential business data is especially explosive<sup>26</sup> because precisely such information is not normally provided to competitors. Additional forms include joint meetings at which the status of the market is discussed<sup>27</sup> as well as the discussion or even the mere submission of drafts of an agreement, a comprehensive plan or guidelines for future conduct in the market.<sup>28</sup>

In this respect, what is involved are substantively specific measures which hint at a rather close cooperation. However, this is not necessary. A plan need not be created nor must meetings be organised.<sup>29</sup> Informal contact or an entirely non-binding exchange of information is sufficient if, contrary to common market practices, they eliminate uncertainty regarding future market conduct. It is precisely this complete lack of binding effect gives concerted practices a much further reach than that of agreements between undertakings where, at the least, a mutual will to implement the agreement must be proven.<sup>30</sup> By contrast, in this case a unilateral desire countered by sufficient receptivity, which need not be declared in advance, is enough.

Information, in particular, is passed along in many cases. This likewise eliminates uncertainty regarding the behaviour of competitors and thus breaches the typical framework in which competition occurs. Accordingly, this comprises a concerted practice to such an extent.<sup>31</sup> The text of Art. 101 (1) - (3) TFEU does not require mutual, but rather concerted, practices. These may also be effected through the unilateral actions of individual market actors to the extent other undertakings are willing to accept them. For this reason, in the case of unilateral price announcements for example, it is necessary that another undertaking adapts its behaviour accordingly and is aware of this announcement so that it no longer has uncertainty as to the behaviour of its competitor.<sup>32</sup>

#### 4 Systemic relevance

For example, an exchange of information may be part of an anti-competitive system. Accordingly, it is of particular importance in implementing price fixing. This is so because price fixing is based precisely on an exchange of information. It was in this manner that the cement cartel developed a system of pricing information in which members from all of the Member States were included.<sup>33</sup> However, this form of information exchange is only relevant for purposes of competition law, and thus prohibited, to the extent it relates to specific information about market actors which they

normally do not disclose; this does not usually apply to purely generic statistical data,<sup>34</sup> however indeed the exchange of bids in order to coordinate a response to a call for tender.<sup>35</sup>

In part, what is at issue in the case of an exchange of information is conformance with competition law from an overall perspective so that it is examined as part of the other behaviours that are problematic from the perspective of competition law.<sup>36</sup> However, independent market information systems may also be problematic from the perspective of competition law. This is the case because the exchange of information itself may have an effect on competition and thus result in behaviour that would not otherwise occur under normal conditions. By itself, the structure of an exchange of information binds the participants together and thus reduces competition - this in the case it doesn't directly promote anti-competitive behaviour from the outset.<sup>37</sup> This also serves as the basis for the proposition that this form of market behaviour, namely the creation of the system of information exchange, is itself sufficient even if it does not cause a distortion of competition but only has that as its purpose.

#### 5 Authority of the market structure

The relevant market structure and the degree of concentration of undertakings determines what competition-related information is critical. This determines the types of information which actually should ordinarily be kept confidential in the case of autonomous action on the part of the undertakings so that they may act independently.<sup>38</sup> For example, in the case of a fragmented supply side, an exchange of information may not eliminate the normal uncertainty in the market regarding the behaviour of competitors in specific cases.<sup>39</sup>

Such an effect is more likely with regard to potential collusive effects in the case of a sufficiently concentrated, non-complex, stable and symmetrical market with participants active in the market for a long period of time.<sup>40</sup> If there is lively competition, then the exchange of sensitive information has less of an anti-competitive effect on the market than is the case of a market characterised by homogeneous products from a few large participants in the market.<sup>41</sup> Conversely, the exchange of information may in fact spur competition in circumstances there is lively competition amongst a large number of smaller market participants.<sup>42</sup>

However, a concentrated, oligopolistic market has the peculiar feature that the exchange of information is easier from the out-

25 ECJ, Case 48/69, ECR 1972, 619 (marginal no. 101) – ICI.

26 Commission Decision 1999/60/EC, OJ 1999 L 24, p. 1 (marginal no. 138) – Pre-insulated pipe cartel; *Roth/Ackermann*, in: Frankfurter Kommentar, Art. 81 (1) EC – Fundamental questions marginal no. 117 above.

27 Commission Decision 69/243/EEC, OJ 1969 L 195, p. 11 (13) – Dyestuffs; 80/256/EEC, OJ 1980 L 60, p. 21 (marginal no. 51 et seq.) – Pioneer.

28 *Schröter*, in: id./Jakob/Mederer, Art. 81 marginal no. 87.

29 *Schröter*, in: id./Jakob/Mederer, Art. 81 marginal no. 87, contrary to a prior widely-held opinion, e.g. *Mailänder*, in: Gemeinschaftskommentar, Art. 85 EC marginal no. 13 above.

30 See above 2.

31 *AG Cosmas*, ECJ, Case C-49/92 P, ECR 1999, I-4125 (marginal no. 40) – Anic Partecipazioni, citing the protection of free competition and protection as an institution as well..

32 ECJ, Case C-89 inter alia/85, ECR 1993, I-1307 (marginal no. 64) – Ahlström.

33 Commission Decision 94/815/EC, OJ 1994 L 343, p. 1 (marginal no. 16 et seq.) – Cement.

34 European General Court, Case T-354/94, ECR 1998, II-2111 (marginal no. 112) – Stora.

35 European General Court, Case T-29/92, ECR 1995, II-289 (marginal no. 191) – SPO; distinguished from Commission Decision 94/601/EC, OJ 1994 L 243, p. 1 (marginal no. 61 et seq.) – Cartonboard.

36 See European General Court, Case T-148/89, ECR 1995, II-1063 (marginal no. 73) – Tréfilunion.

37 *AG Ruiz-Jarabo Colomer*, ECJ, Case C-7/95 P, ECR 1998, I-3111 (marginal no. 47) – John Deere.

38 See supra Commission, Seventh Report on Competition Policy 1977, sub-section 5 et seq.

39 European General Court, Case T-35/92, ECR 1994, II-957 (marginal no. 51) – John Deere.

40 Detailed treatment, Commission Communication - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements; Official Journal 2011 C 11 p. 1 (marginal no. 77 et seq.), last amended by OJ 2011 C 172 p. 22.

41 See Commission Decision 92/157/EEC, OJ 1992 L 68, p. 19 (marginal no. 38) – UK Agricultural Tractor Registration Exchange: In this case, four undertakings held an 80% market share in the British market for tractors.

42 European General Court, Case T-35/92, ECR 1994, II-957 (marginal no. 51) – John Deere.

set.<sup>43</sup> The exchange of information thus raises the danger that the strategies of the market participants will be completely disclosed<sup>44</sup> resulting a foreclosure effect as to external actors<sup>45</sup> even if the information exchange does not directly relate to prices or other anti-competitive mechanism.<sup>46</sup> In addition, in cases where prices are generally known, the enquiring market participant is robbed of the opportunity to cause competition on the demand side.<sup>47</sup>

## 6 Conclusion

The occurring constellations for anti-competitive information exchange are versatile. They can cover meetings of bodies and committees as well as regular discussions in the margins. Oligopolistic markets and company specific data are most likely to have an impact on the market.<sup>48</sup> The exchange of official information and thus easy and favorable to procure is usually without an effect on the market<sup>49</sup> – except if employed for a cartel and based on cooperation<sup>50</sup> or reduces even minor the uncertainty on the

market. In contrast, symposiums and lecture events are focused on a public presentation, not an exchange between undertakings.

If the exchanged data only represent a historic interest since they give no indication of the market players' current competitive behavior, a restriction of competition does not occur for lack of effects on the current competition.<sup>51</sup> More problematic are, however, data that provide information on the future behavior. In this perspective, preceding data can also be relevant, e.g. when prices are unusual to be renegotiated.<sup>52</sup> The competition is also reduced when all relevant sales data are communicated.<sup>53</sup> It is generally problematic when information do not relate to past activities, but to current and future ones. It suffices if information make a constant monitoring of current deliveries possible.<sup>54</sup>

It should be noted that no sensitive company data are exchanged. Discussions should rather concentrate on general issues that do not notify present competitors about the current commercial strategy. That should not even occur in the margins. The regular participation in symposiums concerning continuous briefings between business representatives is a possible problematic point. It affords no protection against judicial pursuit of violations of competition that the meeting takes place a neutral location in the frame of another organization. If the aforementioned rules are applied, there will not be an infringement of competition law.

43 European General Court, Case T-34/92, ECR 1994, II-905 (marginal no. 91) – Fiatagri.

44 European General Court, Case T-34/92, ECR 1994, II-905 (marginal no. 91) – Fiatagri; if the information exchange does not serve to make other classic cartel agreements possible in the first place, cf. on this issue regarding an exchange of information without reporting unit, Commission Decision 2004/421/EC, OJ 2004 L 125, p. 50 (marginal no. 11) – Industrial tubes as well as *Gipsplatten* (Commission Decision COMP/E-1/37.152), summarised in Commission 32nd Report on Competition Policy 2002, p. 206 et seq.

45 European General Court, Case T-34/92, ECR 1994, II-905 (marginal no. 87) – Fiatagri.

46 European General Court, Case T-34/92, ECR 1994, II-905 (marginal no. 91) – Fiatagri.

47 *Haag*, in: Schröter/Jakob/Mederer, Art. 81 - groups of cases: Cooperation agreements marginal no. 66.

48 Commission Communication (Fn. 5), marginal no. 89 a.E.

49 European General Court, Case T-191/98 inter alia, Atlantic Container Line, ECR 2003, II-3275, marginal no. 3275.

50 See the case OLG Düsseldorf, ruling of 19/10/2012, V-1 Kart 1-6/12 (OWI) et al.

51 Commission Decision 92/157/EEC, OJ 1992 L 68, p. 19, marginal no. 50 – UK Agricultural Tractor Registration Exchange: The commission assumed here, that an annual exchange of one year old data does not give information about current competitive behavior anymore.

52 Commission Communication (Fn. 5), marginal no. 90.

53 ECJ, Case C-7/95 P, ECR 1998, I-3111 (marginal no. 51) – John Deere.

54 See European General Court, Case T-148/89, ECR 1995, II-1063 (marginal no. 72) – Tréfilunion.