FACULTY OF LAW
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Master of European Affairs programme, Law

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Information Exchange between Undertakings

Master thesis
10 points

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Competition Law

Spring 2006

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Summary

Communication between competing undertakings comes in different guises: It is an indispensable and inherent feature of every cartel, it is at the heart of the activities of every trade organisation, and today many firms are involved in some type or another of benchmarking, which is also based on an exchange of information between the participating companies. This thesis deals primarily with information exchanges as an independent infringement of competition law, unconnected to more far-reaching cartel agreements. It takes European competition rules as a starting point, but includes case examples from a variety of European jurisdictions for further illustration and comparison.

In order to fully grasp the anti-competitive potential of pure information exchanges, it is required to get acquainted with the economic environment in which they occur. The theory of oligopolistic interdependence constitutes an important tool in this respect: It explains how competition can be impaired in markets with only few sellers and raises the question of how competition authorities can fight the undesired results of tacit collusion in such markets. Game theory provides the insight that tacit collusion is easier to sustain if communication between the competitors is intense and transparency is increased. Information exchanges are one very effective way of reducing uncertainty and discouraging competitive action: If deviations from the collusive path are detected immediately and with high likelihood and if retaliatory measures are swift and targeted, hidden competition is virtually eliminated. Information exchanges should therefore be considered as facilitating practices and prohibited as such if the market structure is conducive to tacit collusion. The fact that market transparency, one of the characteristics of perfect competition, is enhanced, cannot overturn these findings: If the information exchange occurs in a highly concentrated oligopolistic market and exclusively between the sellers or producers, the negative effects clearly prevail.

The European Commission has dealt with a few cases that concern pure information exchanges and with a larger number where information exchanges formed an important part of a wider cartel. The leading case remains the *UK Tractor Registration Exchange* from 1992 whose main findings were upheld by the Community courts. Two principal aspects have to be taken into account in the assessment of information exchanges: First, the market structure must present characteristics that favour tacit collusion, and second, the features of the information exchange itself must be examined as to their suitability for monitoring competitive measures.
Concerning market structure, the Community courts have confirmed that information exchanges are particularly harmful in a highly concentrated oligopolistic market. Other relevant factors that have repeatedly been mentioned are high barriers to entry, product homogeneity, structural links between the companies and stagnant or declining demand. In economic

science, a large number of additional criteria have been identified which make a market prone to tacit collusion, and some of them have already appeared in national competition law cases. It is also interesting to note that parallels can be drawn to the law of mergers: There, the aim is precisely to prevent such markets from coming into being in the first place. It remains to be seen whether a fully harmonised approach will be taken.
As regards the features of the information exchange, the Commission and the Courts focus, *inter alia*, on the type of information, the state of aggregation, the age of the data and the frequency of the exchange. The more sensitive, detailed and recent the data and the more frequent the exchange, the more likely it is that the practice will fall foul of the competition rules. Interesting problems arise when the data are publicly available in some way or another and merely collected from the market.
As a summary, one could say that once the Commission finds the market to be a highly concentrated, oligopolistic one, it will carefully scrutinise the features of the information exchange and is unlikely to be very receptive to efficiency claims.

The next section of the work is dedicated to some defences and justifications that the incriminated undertakings have put forward, for example, the absence of an agreement between them or the fact that coordinated market behaviour had not been proved. The argumentation used by the competition authorities and courts to reject such claims is very instructive insofar as it gives sharper contours to the case law and helps undertakings estimate their chances of success.
The recent *Plasterboard* decision, which contains a somewhat puzzling statement on how the Commission treats information exchanges under competition law is analysed and put into context.

Finally, as a conclusion, a short survey of the antitrust implications of information exchanges in the course of due diligence proceedings preceding a merger is presented – a type of case which is familiar to the United States Federal Trade Commission, but which has not made an appearance on the European stage yet.

Abbreviations

AGCM	Autoritá garante della concorrenza e del mercato (Italian Competition Authority)
EC	European Community (Treaty)
ECSC	European Coal and Steel Community Treaty
OFT	Office of Fair Trading

1 Introduction

1.1 Information exchange – a case for the competition authorities?

Imagine Paris. Imagine six very expensive, very luxurious hotels in Paris, which are referred to modestly as the "palaces parisiens". Their directors have an amicable relationship: On a weekly, monthly and yearly basis, they inform each other in meetings, in writing, or via e-mail about the average price per room, the average revenue per available room, the occupancy rate of their palace, the home country of their clientele and many other issues such as the size of the rooms and the number of personnel. This information exchange is in fact an old tradition among those involved.[1]
Now imagine an insurance agent in Italy. The insurance company he works for has recently acquired a fantastic database from a business consultancy: The major insurance companies in the Italian market regularly report their prices and conditions to that firm, which then compiles statistics in the form of a regularly updated database, identifying exactly which product is offered by which company at what price. This database is of course a great help for entrepreneurial decision-making, particularly because consumers and competitors do not have access to it.[2]

These are two recent examples of information exchange agreements that have been struck down as anti-competitive by the respective French and Italian competition authorities. The information exchanges occurred independent of a more far-reaching cartelisation. They were unconnected to practices like price fixing or market allocation and consequently treated as a separate category of infringement.
The assessment of such information exchanges is "an area where both courts and economists have had the greatest difficulty in distinguishing between anti-competitive and competitive activities."[3] It is uncontested that increased market transparency can have beneficial effects, but it is equally clear that under certain conditions, liberal information flows between competitors may facilitate anti-competitive behaviour.[4] The aim of this work is to help draw a clearer line between objectionable conduct with results undesired from a competition law point of view and innocent, rational market behaviour, which is advantageous for all those involved.

[1] Conseil de la Concurrence, Décision No. 05-D-64 du 25 novembre 2005 relative à des pratiques mises en oeuvre sur le marché des palaces parisiens.
[2] Autoritá garante della concorrenza e del mercato, Provvedimento N. 13622 del 30 settembre 2004, I575 – RAS-Generali/IAMA Consulting.
[3] Bissocoli, *Trade Associations*, p. 79; see also Ritter/Braun/Rawlinson, *EC Competition Law*, pp. 191/192.
[4] See e.g. Whish, *Competition Law*, p. 442.

1.2 Purpose and methods

1.2.1 Purpose of this work

Originally, this thesis was intended to examine how European competition law deals with information exchange agreements when they constitute an independent infringement, i.e. when they are not part of a larger cartel agreement. To that end, the relevant cases and judgments were to be presented and analysed, some criticism voiced and some conclusions drawn.
However, during my research, I came across a whole lot of very recent, highly interesting and varied case examples from other European jurisdictions (such as the ones presented above), and I discovered theories from economic science that gave me a deeper understanding of the environment in which information exchanges occur and the possible consequences they entail. I considered that these insights and fantastic sources of arguments and intriguing new questions should not end up crammed into the footnotes of a work which focuses on European case law and ignores parallel developments on a national level. Both case law and scholarly articles, written by lawyers and economists alike, and from various jurisdictions, constitute important elements of input into a common European competition law. The competition rules are similar if not identical in the Member States, and the problems posed by oligopolistic market structures and information exchanges are the same in every jurisdiction, so there is no reason why insights from the leading Italian case should not be used in a similar situation arising in Sweden or Estonia. Looking across the border into other Member States is especially helpful because the number of Community cases on pure information exchange agreements is rather limited, and conclusions drawn from them must be treated with caution as to their general applicability. Cases from other jurisdictions may contain ingenious lines of argumentation from both the competition authorities and the incriminated undertakings, which may well be of universal use. A basic knowledge of the economic background creates another essential tool for dealing with novel cases with very specific features. Economic science will help determine whether a conduct is clearly anti-competitive or whether pro-competitive effects or other efficiencies can be identified, and can thus be useful when defensive strategies are to be devised.
Thus, based on the case law from the European Commission and the Community courts and on insights from legal and economic doctrine, the overall aim of this thesis is to define more clearly the criteria that should be taken into account in the assessment of information exchange agreements.

1.2.2 Methods applied

Traditional legal methods are used to accomplish these aims. The focus will be on an analysis of case law and legal doctrine. Due to the large number of languages in the European Union and the limited availability of cases in English, not all jurisdictions in Europe can be represented. The examples mentioned throughout this work are from the United Kingdom, Ireland,

France, Spain, Germany, Italy, Denmark, Sweden and Hungary. A full comparative study of how information exchange agreements have been treated in all the Member States is not envisaged.
Information exchanges between buyers, between firms on different levels of distribution and in bidding procedures are not examined, but the principles presented in this work will undoubtedly be useful for an assessment of these types of case, too.
Literature from the field of economic studies has been surveyed to some extent in order to achieve and convey the necessary background knowledge. The economic literature on collusion, oligopoly and information exchange between competitors under certain market conditions is immense, and only a fraction of it could make its way into this thesis. Moreover, even though this work is written in the framework of an interdisciplinary programme, the part on the economic point of view will not involve any of the complex econometrics linked with oligopoly theory but focus on those insights which are relevant for competition lawyers, and which can be adequately expressed in words and sentences rather than in graphs and variables.

1.3 Outline

The section on the economic point of view introduces the reader to the oligopoly problem, game theory and the concept of facilitating practices. Readers who are primarily interested in the discussion and analysis of case law may skip this section and go directly to the core part of this work. There I present the leading cases on the European level and analyse the criteria used by the European Commission and the European courts to determine the anti-competitive character of such agreements. These elements of assessment are crosschecked against the insights gained by economic science and compared with the criteria used in national cases. In the light of the abovementioned overall aim of the thesis, namely to provide a source of arguments for those who are faced with an information exchange case, some defences and justifications put forward by the incriminated undertakings are examined as to their validity. The concluding section attempts to reconcile the insights gained with a quizzical statement made by the Commission in a recent decision.

2 Insights from economic science

The purpose of this section is to provide the reader with some basic concepts from economic science that recur in the discussion of information exchange agreements and that form the economic background that always has to be kept in mind by competition lawyers. In the course of these explanations, it will quickly become clear why it can be difficult to distinguish with certainty between evidently anti-competitive conduct and information exchange agreements that are neutral or even have pro-competitive effects.[5]

2.1 The oligopoly problem

2.1.1 What is an oligopoly?

The first answer that comes to mind is that the term literally refers to the number of undertakings in a market. It describes a market where only few sellers are active, the number starting at two and with an undetermined upper limit.[6] The competitive behaviour of companies in an oligopolistic market is of special concern to competition authorities. This is, however, not due to the mere fact that there are only few companies, but due to what has been termed the "oligopolistic interdependence" between them.

2.1.2 Oligopolistic interdependence

Where the number of firms in a given market is low, their individual decisions on output or pricing perceptibly influence the market outcome as a whole, and such changes are closely monitored by the competitors who draw conclusions from their observations and act accordingly. Competitive action taken by one of the firms will invariably affect the demand for the products of a rival. In such an environment, it is rational for firms to take into account the potential reactions of their rivals to any business action they envisage. As *Scherer/Ross* put it, "the firms are interdependent and acutely aware of it."[7] This interdependence can result in a situation where competitive action like price-cutting is immediately observed and followed by the other players or even leads to retaliatory measures. The profits for the price-cutter are thus dramatically diminished, and a price war eventually harms the entire industry, so that there is no incentive to compete vigorously in the first place. However, as several authors point out, this is not to be

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[5] Ritter/Braun/Rawlinson, *EC Competition Law*, p. 194.
[6] Faull/Nikpay, *The EC Law of Competition*, para. 1.72.
[7] Scherer/Ross, *Industrial Market Structure*, p. 199. See also Yao/deSanti, *Game Theory*, p. 116.

perceived as an automatism – in fact, "with oligopoly everything goes",[8] and there are examples of both cases where oligopolistic interdependence has resulted in excessive prices and where, despite an oligopolistic market structure, competition is fierce.[9]

2.1.3 What is the problem?

It should have become clear by now that the structural interdependence between firms in an oligopolistic market is likely to entail a certain alignment of market behaviour, to the detriment of the consumer, without the need for explicit communication or even agreements between the undertakings. The mere fact that they are aware of each other's presence and business conduct and that they act accordingly – which is the only economically rational thing for them to do – may enable firms in an oligopolistic environment to earn supra-competitive profits.
This phenomenon is commonly called "tacit collusion" by economists, but as lawyers immediately think of an agreement or concerted practice when they hear the term "collusion", alternative expressions that avoid misunderstandings are "conscious parallelism" or "tacit coordination".[10]

2.1.4 Criticism of the theory of oligopolistic interdependence

The main point of criticism is that the theory of tacit collusion, even though it offers some compelling insights into the mechanisms of deviation and retaliation, does not satisfactorily explain how the competitors can reach a supra-competitive price level in the first place without an explicit agreement. If one of them decided unilaterally that it would be a good idea to raise prices, how can he be sure that the competitors will follow suit if it is more profitable for them to maintain their prices at a lower level, because they will gain the customers that have left their competitor because of the high price? In the *Plasterboard* decision, the Commission brings it to the point: "… for a price increase to be successful, the competitors had to be satisfied with the market share they held."[11] Even if higher prices are beneficial for the industry as a whole, it seems to be a very risky business to be the first one to raise prices because the other firms will possibly take advantage of the situation and try to increase their market share. The common, but according to *Posner* and *Whish* rather unconvincing, answer given by the theory of oligopolistic interdependence is that a pattern of price leadership develops.[12]
However, if market transparency is high on the producer side and low on the consumer side, a company will be willing to take the risk, because it can

[8] Faull/Nikpay, *The EC Law of Competition*, para. 1.73. See also Posner, *Antitrust Law*, p. 69.
[9] Scherer/Ross, *Industrial Market Structure*, p. 199; Whish, *Competition Law*, p. 460.
[10] Whish, *Competition Law*, p. 462.
[11] Commission Decision of 27 November 2002, Case COMP/E-1/37.152, *Plasterboard*, para. 432.
[12] Posner, *Antitrust Law*, pp. 58/59; Whish, *Competition Law*, p. 464.

rapidly observe how the competitors react to the initiative while the loss of business is insignificant.[13] An example for a sophisticated system of price leadership that may result in an industry-wide price increase to the detriment of consumers can be found in a case from the United States: It concerned coordination among airlines and involved a system of pre-announcement of higher prices, which should take effect thirty days after the publication. If the company that takes the first step and announces such an increase realises that, within the following thirty days, its competitors have correctly understood the message and also raised their prices, the new prices will become effective. If there is no reaction from the competing airlines, the price increase will be revoked and never take place.[14] Such a mechanism allows for a virtually risk-free coordination without the need for explicit agreements.

2.1.5 Why is the problem so hard to tackle?

How should competition authorities deal with such cases? Conscious parallelism leads to undesired results, like higher prices for consumers or a limitation of output. However, the nature of the problem is structural rather than behavioural, and when the companies in an oligopoly take into consideration the likely reactions of their rivals and adapt their conduct accordingly, they only do what any rational market player would do in their situation. Three difficulties for competition law enforcement can be identified:[15]

First, the anti-competitive effect is triggered without any underlying agreement or concerted practice that could form the object of scrutiny or constitute reliable evidence for competition law enforcers.

Second, there is the question of culpability – what is wrongful about a firm's conduct which simply constitutes its best strategy, given the features of the market?[16]

And third, if one accepts the fact that oligopolists cannot help but notice their interdependence, it would be completely unreasonable to issue an injunction ordering them not to do so. Therefore, the question is whether there can be effective remedies against conscious parallelism at all.

2.2 Introduction to game theory

In order to better understand oligopolists' conduct and to find ways of tackling the anti-competitive effects of conscious parallelism, economists have had recourse to game theoretical models. The next section explains some basic ideas of game theory, and takes us one step closer to an

[13] OECD, *Price Transparency*, p. 9.

[14] Airline Tariff Publishers, 1994, referred to in Konkurrensverket, *Konkurrensen i Sverige*, p. 45.

[15] Yao/deSanti, *Game Theory*, p. 116; see also Posner, *Antitrust Law*, pp. 55-57.

[16] Neven/Papandropoulos/Seabright, *Trawling for Minnows*, p. 52, point out that it is virtually impossible to distinguish between rational behaviour in pursuit of profit-making and behaviour to support implicit coordination.

understanding of the importance of information exchange agreements between firms in an oligopolistic market.

2.2.1 What is game theory?

Game theory is the formal study of decision-making where several players must make choices that potentially affect the interests of the other players.[17] The game played by oligopolists is best captured by a non-cooperative game theory model, i.e. one where the players cannot make binding agreements[18] (in our case, such agreements would be anti-competitive and unenforceable in court), but where they assess the potential actions of their competitors when choosing a strategy.

2.2.2 Oligopoly as a non-cooperative game setting

A very simplified setting could include two players, i.e. two companies, and two choices that can be labelled "co-operate" for collusion and "defect" for competition. Not knowing with full certainty which conduct the other player is going to choose and not being able to agree on a common conduct, each player must determine his best strategy.
Three principal assumptions can be made:
First, the collectively optimal outcome (e.g. high supra-competitive profits for both of them) occurs if both co-operate. As they cannot be sure of their fellow player's behaviour and they cannot make an arrangement that both should follow this strategy, it is unlikely that they achieve it.
Second, the player who defects takes business away from the competitor who sticks to the collusive prices. Therefore, if player A co-operates, player B's best response would actually be to defect.
And third, the individual profits of the players are higher when both of them choose to compete than the profits of the player who co-operates while the other party defects. So if player A defects, it would be better for player B to defect, too.
In the form of a payoff matrix, showing player A's profits as the first figure and player B's profits as the second figure, this setting looks like this:

		Player B	
		Co-operate	Defect
Player A	Co-operate	8; 8	4; 10
	Defect	10; 4	6; 6

It follows that defecting is the dominant strategy in this game, which is an example of the famous Prisoners' Dilemma setting.[19] Now one might ask,

[17] Turocy/von Stengel, *Game Theory*, p. 2.
[18] Lenares, *Economic Foundations*, p. 68; Pénard, *Les jeux répétés*, p. 3.
[19] Excellent accounts of the Prisoners' Dilemma and the implications of game theory in the context of oligopolistic interdependence can be found in Faull/Nikpay, *The EC Law of Competition*, paras. 1.77 to 1.104 and Scherer/Ross, *Industrial Market Structure*, pp. 208 to 214.

where the problem is – apparently all players have an incentive to compete. The model clearly shows that collusion is inherently instable, because the incentive to deviate always exists. The collective interest of all companies participating in the collusion diverges from the interests of each individual member.[20]

2.2.3 Oligopoly as a repeated game

The problem is that oligopolists do not play the game only once, but meet in the market an indefinite number of times. In the language of game theory, the setting is a dynamic rather than a static one; the game is not a one-shot game, but a repeated game. The players are capable of learning – they choose a strategy at a certain point of time, they observe what happens, and their experience teaches them the path to take next time. Their strategies might prove unsuccessful if they are too short-sighted and do not take sufficient account of their competitors' likely future reactions. Competing might yield high profits in the short term, but it is likely that a price cut will immediately be followed by the other players or even punished with suitable retaliatory measures. If a company's deviation from the strategies of tacit collusion is observed, this entails the return to fierce competition for an uncertain length of time. Therefore, firms will think twice before they defect, because if their behaviour is detected, this means that they forgo the collusive profits in the long term for the sake of a short-lived success.
The necessary conclusion is that if deviation is detected with a short time lag and with high certainty, and if retaliation can be triggered swiftly and targeted effectively, the incentive to compete virtually disappears. Despite the underlying Prisoners' Dilemma, collusion becomes sustainable over time. Both for monitoring and detecting deviations and for devising tailor-made retaliatory measures, a high degree of transparency is required, which can be brought about very reliably by a vast information exchange between undertakings.[21]

2.2.4 The vital role of communication and transparency

Game theory has thus taught us that "the problem in the classic Prisoners' Dilemma is one of information and communication".[22] For coordination to be stable, the companies involved must find a way to make co-operation the dominant strategy, i.e. they must create a credible way to detect and punish cheaters, so that defecting does not pay any longer.[23] That is why competition authorities should treat with suspicion any attempts by oligopolistic rivals to make the market more transparent, because such conduct changes the rules of the game and thus facilitates tacit collusion.

[20] Van den Bergh/Camesasca, *European Competition Law*, p. 175.
[21] Overgaard/Møllgaard, *Information Exchange*, p. 13/14.
[22] Scherer/Ross, *Industrial Market Structure*, p. 215.
[23] OECD, *Price Transparency*, p. 24.

2.2.5 Criticism of game theory

Peeperkorn is of the opinion that game theory seriously underestimates the likelihood of collusion. Therefore, he stresses that tackling information exchanges can only be interpreted as the minimum which competition policy should do to fight tacit collusion. Companies do not behave as purely rationally as is assumed by game theory and its Prisoners' Dilemma, which means that they actually tend to cooperate to a considerably higher extent than could be expected.[24]

2.3 Facilitating practices

As we have seen above, tacit collusion or conscious parallelism itself cannot be sanctioned. However, in the meantime, we have learnt that companies might be inclined to turn to practices which reduce the uncertainty about their rivals' conduct and which drastically diminish the incentive to "cheat". Information exchanges are one example. Such practices make it easier for them to coordinate price or other behaviour in an anti-competitive way and significantly increase the likelihood of collusion.[25]

2.3.1 A simple example

For an illustration of how an information exchange agreement can act as a disincentive for secret price cutting, let me come back to the French case on the six Parisian hotels, where the French Conseil de la Concurrence gives a simple example: The exchange of data on sales figures makes it possible for each participating company to distinguish between two situations – one situation where, faced with a decrease in demand, a firm looks at the statistics and learns that all the competitors are affected in the same way, and a second situation, where the information exchange reveals that the demand for the rivals' products has remained stable or even increased. This is a clear signal that a competitor has deviated by lowering prices or adopting other competitive measures, and it will trigger punishment strategies.[26] Where uncertainty is reduced in such a way, any remaining hidden or secret competition between the oligopolists will be eliminated or at least strongly discouraged because of the threat of immediate detection and reaction by the competitors. Indeed, as the European Commission correctly states in the leading *Tractor* case, active competition in close oligopolies is conceivable only if each competitor can keep its action secret for a while or even succeeds in misleading its rivals.[27]

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[24] Peeperkorn, *Competition Policy Implications*, p. 1, 9/10.
[25] deSanti/Nagata, *Competitor Communications*, p. 94/95.
[26] Conseil de la Concurrence (French Competition Authority), Décision No. 05-D-64 du 25 novembre 2005 relative à des pratiques mises en oeuvre sur le marché des palaces parisiens, para. 234.
[27] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, para. 37.

2.3.2 A solution for the oligopoly problem: focus on communication

It therefore seems appropriate for competition authorities to take a closer look at information exchange agreements concluded by oligopolistic rivals. Contrary to mere conscious parallelism, every information exchange presupposes some sort of agreement, concerted practice or decision that can be the object of scrutiny, it exceeds what is rational behaviour of companies in an oligopolistic market and there can be effective remedies along the lines of “cease and desist”.[28] In the same spirit, *Kühn*[29] advocates that collusion should primarily be fought by targeting certain types of communication between firms that are particularly likely to facilitate collusion, instead of purely relying on market data to establish that prices are above the competitive level. In his view, the likelihood of misinterpretation of market data is high, whereas facilitating practices such as information exchange are much more easily observable and verifiable in court. Their high anti-competitive potential justifies that such facilitating practices are regarded as independent violations of Art. 81 (1) EC.

2.3.3 Economic evidence

This does not mean that economic evidence is not used in practice in order to strengthen the charges of anti-competitive behaviour. In *RC Auto*, a large number of car insurance providers engaged in an exchange of detailed information on prices and terms and conditions. The Italian competition authority proved that prices had increased considerably during the years when the information exchange system was installed, and that these increases had actually accelerated when the information exchange became more frequent.[30] The French competition authority, in the *Palaces parisiens* case presented above, proved that prices had increased and converged, and that following the events of September 11, 2001, the expected price dumping had not occurred, which was due to “a very nice coordination during these difficult moments”, according to the director of one of the hotels.[31] The Spanish competition authority, in a case of a statistical cooperation between major breweries, noted that while the information exchange was operational, the combined market share of the participating firms had risen dramatically.[32]

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[28] Yao/deSanti, *Game Theory*, pp. 120/121.
[29] Kühn, *Fighting Collusion*, pp. 168, 171; see also Grillo, *Collusion and Facilitating Practices*, pp. 18/19.
[30] Autoritá garante della concorrenza e del mercato, Provvedimento N. 8546 del 28 Iuglio 2000, I388 – RC AUTO, paras. 69 to 71; Grillo, *Collusion and Facilitating Practices*, p. 17.
[31] Conseil de la Concurrence, Décision No. 05-D-64 du 25 novembre 2005 relative à des pratiques mises en oeuvre sur le marché des palaces parisiens, paras. 270 et seq.
[32] Tribunal de Defensa de la Competencia, Expediente A 329/02, Estadísticas Cerveceros, 30 March 2004, para. 6.

2.4 Market transparency

Some words need to be said about the notion of market transparency. Alongside the existence of many actual competitors, the absence of entry barriers, mobility of resources employed, free access to technologies and homogeneous goods, market transparency is one of the characteristics of perfect competition.[33]

2.4.1 Less than perfect competition

At first glance, information exchanges between undertakings make the market more transparent and seem to bring it closer to the competitive ideal. This is, however, for several reasons not really the case: Only if all the remaining conditions are met can full market transparency contribute to perfect competition. In oligopolistic markets, the number of competing firms is *per definitionem* low – under these circumstances, a liberal flow of information between companies constitutes an obstacle to hidden competition and facilitates collusion, as has been shown above.[34]

2.4.2 Both sides of the story – transparency for sellers and buyers

Moreover, a distinction has to be made between transparency on the producer side, i.e. between firms, and on the consumer side, i.e. between firms and consumers.[35] *Grillo* writes that if the dissemination of information occurs only among the producers, "it is utterly incorrect to speak about market transparency."[36] Where the information exchange takes place between competitors, excluding consumers, it removes uncertainty and allows for effective monitoring of competitive behaviour. As soon as transparency on the consumer side is increased to the same extent, the picture changes somehow: Well-informed consumers will quickly discover price cuts and consequently, demand switches rapidly to the firm with the lower price. This makes it principally more attractive for undertakings to deviate from collusion because a large number of consumers can be attracted quickly and the profits can be reaped immediately. However, another connected effect must not be neglected: If the level of information among consumers is high, retaliatory schemes are more effective. If one company can gain many customers from its rivals by cutting the price, then the same is true vice versa. The effects of transparency on the customer side are therefore ambiguous from the point of view of competition law, but the

[33] Overgaard/Møllgaard, *Information Exchange*, p. 4; Scherer/Ross, *Industrial Market Structure*, pp. 17/18.
[34] Mestmäcker/Schweitzer, *Europäisches Wettbewerbsrecht*, p. 256; Nilsson, *When is Transparency Good for Competition?*, p. 153.
[35] Overgaard/Møllgaard, *Information Exchange*, pp. 3/4 and 10 et seq.
[36] Grillo, *Collusion and Facilitating Practices*, p. 17; see also Kühn/Vives, *Information Exchanges*, p. 93.

general stance taken by competition authorities appears to be that the pro-competitive aspect prevails.[37]

2.4.3 A Danish disaster

An interesting case from Denmark gives an impressive example of a misunderstanding of the notion of market transparency. With the aim of invigorating competition, the Danish Competition Council decided to gather and regularly publish statistics of transaction prices of individual firms for the sale of concrete. The statistics were meant to make it possible for potential customers to shop around and put pressure on the sellers to lower their prices. However, the attempt to make the oligopolistic concrete market more competitive backfired: Prices increased and converged, and the only sensible explanation seemed to be that competition was actually reduced precisely because of the artificially increased market transparency.[38] *Nilsson* notes that the result would probably have been different if entry had been easy.[39] This underlines the statement made supra, that increased transparency can only enhance competition where the other criteria for perfect competition are present.

2.4.4 Positive effects of market transparency

Finally, let me make some points in favour of market transparency and information exchange. For consumers, it may result in lower search costs, and the risk to take disadvantageous purchase decisions is minimised.[40] They can freely compare prices and conditions and choose the product that is most suitable for their needs. On the company side, new market entrants or fringe players will find it easier to compete with the incumbents if the market is transparent.[41] Faster and larger scale entry benefits buyers by shortening the periods in which they might have to endure collusive prices.[42] Moreover, a high level of knowledge about market conditions improves investment decisions and product positioning, and benchmarking as a method of organisational learning has become more and more popular.[43] Where the market structure is not conducive to tacit collusion, the danger that information exchanges have anti-competitive effects is minimal. That is why a thorough analysis of the market structure is essential in every case of information exchange. Efficiency gains are regularly put forward by companies charged with an infringement of competition rules by

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[37] Overgaard/Møllgaard, *Information Exchange*, pp. 12/13; Faull/Nikpay, *The EC Law of Competition*, para. 6.347; Kühn/Vives, *Information Exchanges*, p. 79; Schultz, *Transparency on the Consumer Side*, p. 280, who makes a distinction between markets where goods are homogeneous and markets with differentiated goods.

[38] Albaek/Møllgaard/Overgaard, *Government-assisted Oligopoly Cooperation?*, p. 428/429 and 440; Albaek/Møllgaard/Overgaard, *Law-assisted Collusion?*, case mentioned at p. 342; Nilsson, *When is Transparency Good for Competition?*, pp. 155/156.

[39] Nilsson, *When is Transparency Good for Competition?*, p. 156.

[40] Ten Kate/del Carmen Dircio, *Intercambio de Información*, p. 109.

[41] Capobianco, *Information exchange*, p. 1257.

[42] OECD, *Price Transparency*, p. 24.

[43] Nitsche/von Hinten-Reed, *Competitive Impacts*, p. 4.

exchanging sensitive information, but competition authorities have not been particularly receptive to such arguments so far. Often the purpose stated by the undertakings could have been served by a less frequent exchange of less detailed and less sensitive data.

2.5 Economic analysis in Commission decisions

The European Commission has gradually refined its approach to information exchange agreements. In early cases, it stated that such agreements between undertakings "removed an important element of uncertainty on the part of each of them as to the activities of the others"[44] and identified "an artificially created market situation in which abnormal standards of information ... eliminate certain competitive risks."[45]
More recent decisions are framed in less vague terms and reveal a deeper understanding of the functioning of information exchange systems in oligopolistic markets. In *Wirtschaftsvereinigung Stahl*, the Commission clearly held that "(b)y eliminating any hidden competition in the market, the information exchange reduces considerably the advantage to be gained by an undertaking from competitive action and tends to dissuade it from trying to increase its market share",[46] and in the leading *Tractor* case, it elaborates that this transparency "takes the surprise effect out of a competitor's action thus resulting in a shorter space of time for reactions with the effect that temporary advantages are greatly reduced."[47] The elimination of hidden competition is thus considered as an infringement of Art. 81 EC.[48]

2.6 Conclusion

The aim of the preceding section was to use the tools of the theory of oligopolistic interdependence and of game theory in order to pinpoint the anti-competitive potential of information exchange agreements. The implications of increased market transparency have been examined and the idea of facilitating practices has been presented as a possible solution to the problem of tacit collusion. It has been shown that the market structure plays a vital role in the analysis of such cases, and that the concept of hidden competition is at the centre of argumentation.

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[44] Commission Decision of 2 December 1986, Case IV/31.128, *Fatty Acids*, para. 37.
[45] Commission Decision of 8 September 1977, Case IV/312-366, *COBELPA/VNP*, para. 28.
[46] Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl*, para. 39.
[47] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, para. 37.
[48] Caballero Sanz, *Information Exchange Mechanisms*, p. 32.

3 Information exchange agreements under EC competition law – the basics

3.1 Prevention, restriction or distortion of competition

Information exchange agreements are not featured in the non-exhaustive enumeration of typical anti-competitive behaviour in Art. 81 (1) EC, and a random investigation into national legal rules reveals that this is not the case either for instance in Germany, the UK, France, Spain or Italy, which all rely on a broad wording. European competition law treats as infringements agreements or concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the Common Market. The notion of competition and how it is affected by communications between competitors was addressed to some extent for example in the *Suiker Unie* judgment:[49]

> "The criteria of coordination and cooperation … must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that *each economic operator must determine independently the policy which he intends to adopt on the Common Market* … Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does, however, strictly preclude any *direct or indirect contact between such operators*, the object or effect whereof is either to influence the conduct on the market of an actual competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."

These lines make clear that behaviour dictated by the inevitable interdependence of firms under certain market conditions is not considered as an infringement of the competition rules, but they also hint at the anti-competitive concerns raised by "contacts" between companies. The difficult task of the Commission is to distinguish between the firms' legitimate competitive interactions in the market and their conscious efforts to support some form of implicit coordination.[50]

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[49] Judgment of the European Court of Justice of 16 December 1975, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities, 1975 ECR 1663, paras. 173/174.
[50] Van den Bergh/Camesasca, *European Competition Law*, p. 202.

As regards information exchanges in the strict sense of the term, there exist, however, a number of documents and cases both recent and dating back almost forty years, which permit the extraction of more concise criteria of assessment. The area of law is still partly controversial and on the move.

3.2 The practice of the Commission

3.2.1 Policy statements

Information exchange agreements were mentioned as early as in 1968 in the Commission Notice on Co-operation Agreements between Enterprises.[51] The Notice contains little of immediate relevance, but it clarifies for example that practices like common market research and the common compilation of statistics are usually considered innocent, and it already recognizes that information exchange mechanisms are particularly dangerous in oligopolistic markets with homogeneous goods.
In the VIIth Report on Competition Policy[52] – after the Commission had actually dealt with some cases of information exchange[53] – three criteria for assessment were specified, namely the type of the information exchanged, the structure of the relevant market and the fact that the information exchange is of benefit only for the producers or sellers.
For the sake of completeness, let me mention that there exists a Block Exemption for certain types of agreements involving information exchanges between insurance companies[54] and that the Technology Transfer Block Exemption[55] also contains rules on information exchange to a certain extent.

3.2.2 Case law

Since then, the topic has popped up in a considerable number of Commission decisions and court cases. However, it must not be forgotten that “communication plays a central role in almost any collusion case”[56] and that consequently information exchange is of interest for competition authorities in a variety of different circumstances.[57]

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[51] Notice concerning Agreements, Decisions and Concerted Practices in the field of Co-operation between Enterprises, 1968 OJ C 75/3. This notice was replaced in 2001 by the Commission’s Guidelines on the applicability of Article 81 to horizontal co-operation agreements, 2001 OJ C 3/2, which however does not cover information exchanges.
[52] VIIth Report on Competition Policy, paras. 5 et seq.
[53] Both the Vth Report on Competition Policy, paras. 39 to 41 and the VIth Report on Competition Policy, paras. 134 et seq, contain examples of information exchange agreements.
[54] Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, 2003 OJ L 53/8.
[55] Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81 (3) of the Treaty to categories of technology transfer agreements, 2004 OJ L 123/11.
[56] Kühn, *Fighting Collusion*, p. 170.
[57] See Kühn/Vives, *Information Exchanges*, p. 74.

Most often, it is part of a larger agreement that is prohibited, for example, where it serves as a monitoring tool for market allocation or export limitations.[58] Where prices are at issue, information exchange can amount to an indirect way of price-fixing. It might also be regarded as sufficient evidence for a more far-reaching infringement.[59]

It must be noted that the Commission's approach used to lack consistency – sometimes the information exchange was treated as a separate (but connected) infringement and sometimes as a kind of integral feature of the cartel and consequently not even mentioned in the operational part of a decision. The Commission seemed to be insecure as to the correct legal assessment of such agreements.[60] This problem reappeared in the late 1990s, as the *Steel beams* case demonstrates: The Court of First Instance criticised the Commission for the partly ambiguous phrasing of its decision, because it had not clarified sufficiently whether the information exchange which was linked to a larger cartel arrangement was actually treated as a separate infringement or not – a relevant question especially with respect to the fines that can be imposed.[61]

Finally, and this is the type of case that I want to concentrate on and which is rather rare, an information exchange agreement can be considered as a breach of competition law in itself, independent of any underlying cartel. I therefore focus on cases where information exchange was the only or at least an independent infringement and examined separately. The Commission has made clear that the scrutiny differs, depending on whether the information exchange is a facilitating device for the running of an unlawful agreement or whether it constitutes a potential infringement in itself.[62] This should always be kept in mind when one wants to use cases of the former type as a source of arguments for cases of pure information exchange.

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[58] For some examples, see Bellamy/Child, *European Community Law on Competition*, para. 4-115.

[59] Commission Decision of 23 November 1984, Case IV/30.907, *Peroxygen products*, para. 48: „This arrangement indicates that the producers were still united by an express or implied agreement to divide the market.“

[60] E.g. Commission Decision of 12 December 1978, Case IV/29.535, *White lead*, para. 27: „This exchange of information in itself restricts competition, but the fact that it is complemented by a system of delivery quotas produces another anti-competitive effect.“; Commission Decision of 11 May 1973, Case IV/791, *SCPA - Kali und Salz*: „Such exchange of information constitutes the means for carrying out the cooperation in question and thus likewise comes within the prohibition laid down in Article 85 (1).“

[61] Commission Decision of 16 February 1994, Case 94/215/ECSC, *European producers of beams*; Judgment of the Court of First Instance of 11 March 1999, Case T-136/94, Eurofer ASBL v Commission of the European Communities, paras. 68-79.

[62] Commission Notice, Case IV/34.936/E1, *CEPI-Cartonboard*, para. 1.

4 The main cases

I have identified three main Commission decisions dealing exclusively with information exchanges and one which concerns a larger cartel, but where information exchanges were of great significance and which poses some interesting new questions. Exemptions and comfort letters on the topic also provide useful insights.

4.1 Fatty Acids

Fatty Acids[63] is the first decision I would like to mention, dating back to 1986. Four, later three major players in the market for fatty acids agreed to give each other access to their annual sales figures for the three preceding years and to exchange such figures quarterly afterwards. Even though this information exchange was the only infringement identified by the Commission, this is in some respects a borderline case: The circumstances indicated that the undertakings' aim was to allocate quotas and to drive smaller competitors out of the market with predatory measures. However, this would have been much more difficult to prove, so *Fatty Acids* might have been a kind of test case, the first one where an information exchange agreement was attacked as an independent infringement of Art. 81 (1) EC.[64] It contains no general principles for the assessment of such conduct, no particularly detailed market analysis and it looks upon the information exchange primarily as an indirect means of fixing quotas.

4.2 Tractor Registration Exchange

The undisputed leading European case on information exchange is still the *Tractor* case from the year 1992.[65] It gave the Commission the opportunity to establish criteria for assessment, which were upheld by both the Court of First Instance[66] and the European Court of Justice[67] and have since been invoked and interpreted by several national competition authorities and courts.

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[63] Commission Decision of 2 December 1986, Case IV/31.128, *Fatty Acids*.

[64] Kühn/Vives, *Information Exchanges*, pp. 93-96; Kühn, *Fighting Collusion*, p. 193, footnote 26; Johnsson/Carle, *Benchmarking*, footnote 12.

[65] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, reported in 1992 European Law Review (17), Competition Checklist CC 5.

[66] Judgment of the Court of First Instance of 27 October 1994, Case T-35/92, John Deere v Commission of the European Communities, 1994 ECR II-957; Judgment of the Court of First Instance of 27 October 1994, Case T-34/92, Fiatagri and New Holland Ford v Commission of the European Communities, 1994 ECR II-905.

[67] Judgment of the European Court of Justice of 28 May 1998 Case C-7/95 P, John Deere Ltd v Commission of the European Communities, 1998 ECR I-3111; Judgment of the European Court of Justice of 28 May 1998, Case C-8/95, New Holland Ford v Commission of the European Communities, 1998 ECR I-3175.

4.2.1 Facts

Seven tractor manufacturers in the United Kingdom (with four of them jointly holding about 80 per cent of the market) were involved in an information exchange scheme of unprecedented extent and level of detail. The exchange was based on data included in vehicle registration forms, which have to be completed whenever a tractor is sold in the UK, and which contain information on the type and make of the vehicle, its serial number, the dealer, and the location and identity of the purchaser. This data was collected and put into statistical form by a third party on behalf of the companies' trade association, broken down according to specific models, product groups and geographic areas, ranging from the entire UK down to postcode sectors. It was disseminated on a yearly, quarterly, monthly and even weekly basis, thus allowing for the identification of individual transactions.

4.2.2 Law

According to the Commission, the tractor market in the UK with its high concentration and considerable entry barriers displayed all the characteristics of a tight oligopoly. Furthermore, the market was stagnant and marked by overcapacity. Taking into consideration the market structure and the features of the information exchange, the Commission concluded that the agreement had a potential anti-competitive effect for two reasons: First, it prevented hidden competition in a highly concentrated market, and second, it constituted a barrier to entry for non-members. If a newcomer decided not to take part in the exchange, he would be at an informational disadvantage compared to the incumbents, and if he chose to participate, then his strategies would immediately become known to the others, allowing them to defend their positions more effectively.
The *Tractor* case brought a novel aspect to the discussion of information exchanges: The agreement in question was neither directly concerned with prices, nor did it underpin any other anti-competitive arrangement. However, both the CFI and the ECJ agreed with the Commission on the potential anti-competitive effects of such conduct and stressed the importance of the market structure for the correct assessment:

> "..on a *truly competitive market* transparency between traders is in principle likely to lead to intensification of competition between suppliers, since in such a situation, the fact that a trader takes into account information made available to him in order to adjust his conduct on the market is not likely, having regard to the atomised nature of the supply, to reduce or remove for the other traders any uncertainty about the foreseeable nature of its competitors' conduct. On the other hand, … general use, as between main suppliers and … to their sole benefit and consequently to the exclusion of the other suppliers and of consumers, of exchanges of precise information at short intervals, … is *on a highly concentrated oligopolistic market*

… likely to impair substantially the competition which exists between traders."[68]

4.3 Wirtschaftsvereinigung Stahl

A few years later, the Commission had the opportunity to apply the Tractor reasoning to a new case of information exchange in *Wirtschaftsvereinigung Stahl*.[69] The decision was later annulled by the Court of First Instance,[70] but this was due to a misreading of the facts by the Commission; legal issues were not in dispute. Had the factual background been as the Commission assumed it to be, then the decision would most certainly have been upheld. It should also be noted that the case concerned the steel industry and came under Art. 65 ECSC and not Art. 81 EC, but the Commission believed that the findings from the *Tractor* case were transposable to the ECSC Treaty. The European Court of Justice has in the meantime clarified that this is indeed the case.[71]
Sixteen German steel producers and the trade association that they belonged to were involved in the information exchange. It covered data on the deliveries of different steel products, broken down according to Member States and third countries and according to quality and consumer industry, allowing for the calculation of market shares. The data were exchanged monthly. The industry was characterised by considerable barriers to entry, high fixed costs and chronic overcapacity. The market was mature and products were homogeneous. Concentration was rather high, with only about twenty suppliers in the entire Community and the four leading firms accounting for at least half the production in all the relevant product markets. The Commission summarized the findings of the Tractor case nicely, stating that:

> "… an agreement to exchange information which is both sensitive, recent and individualized in a concentrated market where there are important barriers to entry, is liable to restrict competition between the undertakings parties thereto in so far as it increases market transparency to such a degree that any independent competitive action on the part of an undertaking can immediately be noticed by its competitors which are able to take suitable retaliatory measures."[72]

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[68] Judgment of the Court of First Instance of 27 October 1994, Case T-35/92, John Deere v Commission of the European Communities, 1994 ECR II-957, para. 51, supported by the ECJ in Judgment of the European Court of Justice of 28 May 1998 Case C-7/95 P, John Deere Ltd v Commission of the European Communities, 1998 ECR I-3111, paras. 88 to 90.
[69] Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl.*
[70] Judgment of the Court of First Instance of 5 April 2001, Case T-16/98, Wirtschaftsvereinigung Stahl v Commission of the European Communities, 2001 ECR II-1217.
[71] Judgment of the European Court of Justice of 2 October 2003, Case C-194/99 P, Thyssen Stahl AG v Commission of the European Communities, 2003 ECR I-10821, at para. 81.
[72] Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl*, para. 39.

4.4 Plasterboard cartel

In 2002, the Commission issued a decision against four companies that had operated a vast cartel on the market for plasterboard.[73] The fines imposed amounted to 478 million Euros, one of the highest fines ever in European competition law. The market was extremely concentrated; the four incriminated companies represented virtually the whole supply.

At several meetings, three, later four major manufacturers of plasterboard expressed their common desire to reduce competition and adjust their strategies and subsequently installed several information exchange mechanisms for monitoring purposes. There was no explicit price fixing or market allocation (or at least the Commission did not have sufficient evidence for it), but it was clear that the companies intended to stabilise the German, French, UK and Benelux plasterboard markets. To this end, they basically agreed not to enter new markets and not to try and increase their market share. The Commission, relying on the evidence that the competitors a) had had strategic meetings and b) that information on sales volumes, market shares and future price increases was exchanged between high level representatives, identified seven such instances and held that each of them constituted a "particular manifestation of the complex, continuous agreement having as its object the restriction of competition on the plasterboard market".[74]

All four companies have appealed the decision.[75] In my opinion, the decision contains some excellent, very clear and convincing economic analysis, and it will be exciting to see what the Court of First Instance has to say on this matter. Furthermore, the case adds one novel and controversial issue to the discussion which, as far as I can see, has not been commented on yet, and which deserves and receives some closer analysis (see below in section 7).

4.5 Exemptions and comfort letters

In addition to these decisions, there are also two exemptions and one comfort letter issued by the Commission that deal with pure information exchange agreements. In *Eudim,*[76] an information exchange between wholesalers of installation materials was cleared because the market was too fragmented, the companies involved had relatively low market shares and the exchange only covered a very small range of the products sold by them.

CEPI[77] concerned a statistical data exchange system between producers of carton board, who had previously been sanctioned for participation in a

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[73] Commission Decision of 27 November 2002, Case COMP/E-1/37.152, *Plasterboard*.

[74] Ibid., para. 452.

[75] Cases T-50, 52, 53 and 54/03, Gyproc Benelux, Knauf Westdeutsche Gipswerke, BPP and Lafarge v Commission of the European Communities.

[76] Notice pursuant to Article 19 (3) of Council Regulation No 17, Case No IV/33.815, 35.842, *Eudim*.

[77] Notice pursuant to Article 19 (3) of Council Regulation No 17, Case No IV/34.936/E1 – *CEPI-Cartonboard*.

massive cartel. The Commission insisted on several changes to the original agreement, making sure that identification of individual undertakings was impossible and that the data were sufficiently "historical" so that they could not be used as a device for facilitating coordination.
Finally, the Commission dealt with the tractor market again when it gave guidelines for a new information exchange between tractor and agricultural machinery manufacturers[78] and made sure that the data was aggregated or that, in the case of individual data, it was at least a year old.

[78] XXIXth Report on Competition Policy, pp. 156-158.

5 The assessment criteria

As the first overview of the most important cases in the area has revealed, the criteria used by the European Commission and the European Courts in the examination of information exchange agreements broadly fall into two categories: First, an analysis of the market structure needs to be carried out, and second, a closer look is taken at the features of the information exchange itself.

5.1 Market structure

Both in the *Tractor* case and in *Wirtschaftsvereinigung Stahl*, the Commission conducted a comprehensive market analysis. The prime factor mentioned is the high degree of concentration. Various characteristics of the market and the industry are taken into account in this respect, such as the number of producers present in the market, the existence of structural links between them, the combined market shares of the main undertakings and the barriers to entry.[79] In connection with the latter, the Commission identifies as relevant aspects that the market is stagnant or declining with general overcapacity and that there exists brand loyalty among consumers.[80] Moreover, product homogeneity is mentioned.[81]

In the judgments following the *Tractor* decision, both the Court of First Instance and the European Court of Justice use a shortened formula, stating that information exchange agreements are particularly likely to have anti-competitive effects "on a highly concentrated oligopolistic market."[82] However, a very recent judgment by the European Court of Justice indicates that the last word might not have been spoken yet on the issue. The case seems to have been overlooked by commentators writing about information exchange, or else they would certainly have made some remarks on it – in *Thyssen Stahl* the ECJ explicitly held that,

> "Contrary to what the applicant claims, an information exchange system may constitute a breach of competition rules

[79] Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl*, para. 45.

[80] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, para. 8.

[81] Commission Decision of 16 February 1994, Case 94/215/ESCS, *European producers of beams*, para. 269; Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl*, para. 24.

[82] Judgment of the Court of First Instance of 27 October 1994, Case T-35/92, John Deere v Commission of the European Communities, 1994 ECR II-957, para. 51; Judgment of the European Court of Justice of 28 May 1998 Case C-7/95 P, John Deere Ltd v Commission of the European Communities, 1998 ECR I-3111, para. 88.

> even where the relevant market is not a highly concentrated oligopolistic market”,[83]

which virtually turns upside down the statements made earlier in the *Tractor* judgments. The European Court of Justice interprets the *Tractor* judgments and finds that a number of criteria was taken into regard there, and believes that the only general principle applied in relation to the market structure was that supply must not be atomised.[84] It was therefore sufficient for the Court of First Instance in *Thyssen Stahl* to focus exclusively on the oligopolistic structure of the market in question, without seeking to establish whether the market was highly concentrated.[85] It seems that the ECJ thus put more emphasis on the mere low number of undertakings than on their relative market shares. Whether this somewhat puzzling and opaque ruling will be reflected in the handling of future information exchange cases by the Commission remains to be seen.

5.1.1 The single characteristics

5.1.1.1 The number of firms

A decisive criterion?

It must be pointed out that the number of undertakings active on the market and/or involved in the information exchange is by no means always particularly low, yet competition authorities have sanctioned the conduct. In *Wirtschaftsvereinigung Stahl,*[86] sixteen firms took part in the exchange, in the leading German case on a statistical information system between producers of concrete,[87] the number of companies was 45, in an Irish case[88] concerning producers and wholesalers of veterinary products, seventeen firms participated, and in the *CEPI*[89] case, the trade association organising the exchange had between 26 and 30 members. The mere number of undertakings is thus obviously not decisive, even if the abovementioned *Thyssen Stahl* judgment seems to point in that direction.

[83] Judgment of the European Court of Justice of 2 October 2003, Case C-194/99 P, Thyssen Stahl AG v Commission of the European Communities, 2003 ECR I-10821, para. 86.

[84] Ibid.

[85] The case deals with a comprehensive cartel but information exchanges were treated as a separate infringement. Altogether, nineteen companies were involved, ten of which accounted for two thirds of the market. The information exchange agreement at issue concerned twelve undertakings.

[86] Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl.*

[87] Bundeskartellamt, B1-63/00, 9 August 2001, *Statistisches Informationssystem Transportbeton*.

[88] Irish Competition Authority, Decision No. 579 of 28 January 2000, Notification No CA/10/98 – *Animal & Plant Health Association Ltd / Others*.

[89] Notice pursuant to Article 19 (3) of Council Regulation No 17, Case No IV/34.936/E1 – *CEPI-Cartonboard.*

High combined market share
In cases where a considerable number of firms are involved, what counts is that the participating companies have a high combined market share.[90] This makes sense from the point of view of the theory of oligopolistic interdependence: If the fringe of independent competitors who do not take part in the information exchange is sufficiently large, these companies might possess enough market power to constitute a constant threat to the sustainability of the collusion.[91] Furthermore, where only a limited number of the competitors present in the market submit data, the monitoring task cannot be fulfilled effectively – the information is not necessarily representative of the general trend in the market, and it becomes much more difficult to detect deviations, because changes in the figures may always be attributed to the competitive conduct of the outsiders.[92]
One of the reasons why the information exchange in *Eudim* was cleared was that the ten participating firms only formed a very small part of the European market for wholesalers of installation materials. The situation in the concrete industry in the German case was somewhat special: The concrete market consists of many sub-markets, each of them made up of a circle around the individual plants (because freshly produced concrete can only be transported a distance of around thirty kilometres), so that one can speak of a large number of little regional oligopolies or even duopolies.

Conclusion
One should therefore not stubbornly focus on the literal meaning of "oligopoly", few sellers in the market. Where the number of participating companies is not particularly low, it becomes decisive to establish whether they represent a substantial part of the market together.

5.1.1.2 Market concentration

The criteria of market concentration should also be taken with a grain of salt. If one uses the Herfindahl-Hirschmann-index to calculate the market concentration, then the result is that the tractor market in our leading case was by no means as clearly highly concentrated as the Commission wants to make us believe: The HHI is about 1800, which, according to DG Competition's online glossary,[93] constitutes the boundary between moderate and high concentration. The French case mentioned in the introduction involved six hotels accounting for 100% of the market, but the HHI was about 1700. Market concentration defined as the extent to which a small number of firms account for a large proportion of output seems to be of less importance than the fact that the firms participating in the information exchange account for a high aggregate market share.

[90] Kühn/Vives, *Information Exchanges*, p. 116; Faull/Nikpay, *The EC Law of Competition*, para. 6.354.
[91] Posner, *Antitrust Law*, p. 71.
[92] Ten Kate/del Carmen Dircio, *Intercambio de Información*, p. 121.
[93] http://europa.eu.int/comm/competition/general_info/h_en.html.

5.1.1.3 Stagnant or declining market

The markets in the *Tractor* and *Wirtschaftsvereinigung Stahl* cases had one more feature in common: they were marked by overcapacities and stagnant or declining demand.

Likelihood of collusion

From the economists' viewpoint, it makes sense to examine the development of demand in connection with cases of tacit collusion: In a growing market where the demand conditions are ever changing, collusion is much more difficult to police. If a company loses customers or does not keep pace with its partners in collusion, this might of course be due to secret price-cutting by a competitor, but it might also just mean that the company has failed to attract new customers. The results of the information exchange thus lose their character as convincing evidence for cheating. Moreover, a growing market will encourage entry of new firms, which also works as a countervailing force against collusion.[94]

In this connection, some reservations must be made: Where a market is characterised by growing demand but for some reason, new entry is not to be expected, the picture changes somewhat. Under such circumstances, short-term gains are small compared to potential future profits. Firms value possible profits in the future higher than today's gains from an instance of cheating. Such an attitude is believed to reduce the incentive to deviate and thus favours collusion.[95]

A case example from France

Interestingly, in a recent French case[96] involving an information exchange between three mobile telephony operators on the number of their customers, the companies tried to convince the Conseil de la Concurrence that the market in question was by no means mature but marked by constant growth and movement, with ongoing innovations, lively price competition and a volatile demand, because customers often changed between providers and products. However, the Conseil, quoting the relevant paragraph of the *John Deere* judgment, found that, for an information exchange to be anti-competitive, the Court of First Instance only required the market to be a closed oligopoly. Market characteristics of a less structural nature – such as the development of demand – were not part of the legal assessment, but only useful for measuring the anti-competitive effects.[97]

In the light of the insights gained by the study of tacit collusion, it is doubtful whether such an outright rejection of the importance of certain market characteristics is appropriate. On the other hand, with three companies with a combined market share of 100%, the mobile phone case is very clear in terms of oligopolistic interdependence and high concentration,

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[94] Posner, *Antitrust Law*, p. 77; Ten Kate/del Carmen Dircio, *Intercambio de Información*, p. 121; Bishop/Walker, *Economics of EC Competition Law*, para. 7.38.

[95] Ivaldi et al., *Economics of Tacit Collusion*, pp. 26/27; Konkurrensverket, *Konkurrensen i Sverige*, p. 42.

[96] Conseil de la Concurrence, Décision No. 05-D-65 du 30 novembre 2005 relative à des pratiques constatées dans le secteur de la téléphonie mobile.

[97] Ibid., para. 164.

so even if the Conseil had shared the companies' views on the development of demand, this would possibly not have been sufficient to tip the balance in favour of their information exchange, especially because new entry was virtually impossible.

5.1.1.4 Product homogeneity

Another criterion that regularly appears in cases of information exchange is product homogeneity. If the products are sufficiently homogeneous, this facilitates tacit collusion – it is a lot easier to come to a silent understanding on the price of one single product, identical for all the sellers, than to coordinate common strategies in a market of differentiated products. Similarly, cheating is much more easily detected (and deterred, for that matter) under these circumstances,[98] and cheating by altering the product quality is practically rendered impossible.[99] This is one reason why it is reasonable for competition authorities to concentrate their activities on such markets when it comes to the uncovering of facilitating practices such as information exchanges. In addition, where the information exchange only concerns one homogeneous product, vital figures such as the price may be worked out easily from a seemingly aggregated table and data can more reliably be attributed to individual undertakings.[100] This may be exemplified by the German concrete case, where the undertakings exchanged information on the amount of concrete delivered to a certain area and on the average sales revenue. Because the product in question was largely homogeneous, the average price could easily be deduced.[101]

5.1.1.5 High barriers to entry

The European Commission and the Courts generally put considerable emphasis on the closed character of the oligopoly. High barriers to entry are among the factors that make tacit collusion more likely and more stable: Principally, the high prices attained by the colluding firms make it attractive for new firms to enter the market, but each new entry threatens the sustainability of the collusive coordination.[102] That is why high barriers to entry form a kind of protective wall around the incumbents, and competition authorities are right to focus on oligopolies where entry takes a long time. Where barriers to entry are low, competition is increased in the long run due to constant entry of new firms, and the oligopoly problem is just temporary.[103]

The question of what actually constitutes a barrier to entry is not answered in a clear way in the decisions concerned, which is somewhat unsatisfactory because of the considerable controversy and uncertainty surrounding the

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[98] Posner, *Antitrust Law*, p. 75; Ten Kate/del Carmen Dircio, *Intercambio de Información*, p. 122.

[99] Posner, *Economic Analysis of Law*, p. 312.

[100] Johnsson/Carle, *Benchmarking*, p. 77; Seabright/Halliday, *Networks Good, Cartels Bad*, p. 94.

[101] Bundeskartellamt, B1-63/00, 9 August 2001, *Statistisches Informationssystem Transportbeton*, para. 10, 2.2.2.2.

[102] Posner, *Antitrust Law*, p. 72, who is, however, sceptical of the term „barriers to entry".

[103] Whish, *Competition Law*, p. 465.

concept.[104] In *Tractor*, the Commission mentioned three aspects under the heading of "high entry barriers", namely that a dense distribution and service network was required, that the market was stagnant or even declining with overcapacities and that brand loyalty was an important feature of the market.[105] In *Wirtschaftsvereinigung Stahl*, it made some less concrete remarks about the industry being capital-intensive, the high initial costs of the necessary investments and high fixed costs and mentioned chronic overcapacity again.[106] The Swedish competition authority provides a nice explanation for sunk costs and economies of scale in the *SPI* case, which involves an agreement between oil companies about a monthly exchange of their sales figures. The authority notes that significant financial investments and risks have to be taken upon entry because a well-developed network of outputs with high volumes is required for the sale to be profitable, causing costs that are lost to a large extent when a firm decides to leave the market.[107] In the French *Palaces parisiens* case, the Conseil de la Concurrence pointed out that the purchase and maintenance of such a luxurious hotel involved high costs, and that the establishment of an "image" was a slow and difficult process.[108]

The *Plasterboard* decision condemns information exchanges in oligopolistic markets if they affect the freedom of traders to take independent business decisions as *per se* infringements of Art. 81 (1) EC. There is no explicit requirement that the oligopoly should be a "closed" or "tight" one any more, and the entire decision does not touch upon the question of high barriers to entry even once. It is of course conceivable that this is because the case involves a more far-reaching cartel, so that slightly different rules apply and barriers to entry lose their pivotal importance. Nevertheless, it strikes me as inconsistent that the issue (which is stressed by the Courts insofar as they require the market to be a *closed* oligopoly) is ignored completely in a case where information exchanges are the most eye-catching feature and treated as separate and vital parts of one comprehensive infringement.

5.1.1.6 Structural links

In *Wirtschaftsvereinigung Stahl*, the Commission mentions the existence of structural links between the undertakings as one of the factors in the assessment of market concentration.[109]

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[104] See e.g. McAfee/Mialon/Williams, *What is a Barrier to Entry?*, and Harbord/Hoehn, *Barriers to Entry and Exit in European Competition Policy*.

[105] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, para. 8.

[106] Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl*, para. 22.

[107] Marknadsdomstolen, Beslut Dnr A 35/98, Konkurrensverket/Svenska Petroleuminstitutet och medlemsföretagen i SPI, 26 October 1999, p. 5.

[108] Conseil de la Concurrence, Décision No. 05-D-64 du 25 novembre 2005 relative à des pratiques mises en oeuvre sur le marché des palaces parisiens, para. 218.

[109] Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl*, para. 45.

Internal forwarding of information
The Commission explains that if one undertaking communicates data on its products to another firm which produces different goods, this is basically innocent, but if the second firm is part of a larger group and another company within the group is actually a competitor of the first firm which provided the data, then chances are high that the information is passed on within the group and thus ends up in the hands of a competitor after all. Similarly, and taking this argumentation one step further, the German Federal Cartel Office noted that even minority shareholdings confer information rights, so that the problem may even occur where companies are not affiliated to a group in the narrow sense of the term.[110]

Reduced competition
The Italian Consiglio di Stato, dealing with an appeal in a case of information exchange between insurance companies (*RC Auto*),[111] agreed with the AGCM (Italian Competition Authority) that a close network of intertwined shareholdings and personal links – "interlocking directorship" – between the companies constituted a potential distortion of competition. This finding, among others, was used to justify the prohibition of the information exchange in a market that was not a highly concentrated oligopoly. There will be a discussion of this and another similar Italian case a bit further below.

More stable collusion
Generally, it is rather obvious that the divergence between a company's individual interest and the industry's collective interest, which represents the main reason for the inherent instability of any collusive arrangement, diminishes considerably if firms are linked in some way or another.
In the case of deviation, the punishment inflicted on the cheater has indirect repercussions on the other cartel members if they are structurally intertwined and hold stakes in the punished company. This might reduce the incentive to deviate because the risk of detection affects not only the cheater himself but also the stakeholders.[112] The potential consequences are more far-reaching and undesired conflicts might arise if the stakeholders bear some of the costs even though they had no say in the choice of strategy. On the other hand, the stakeholders do not only share the penalty: They also benefit indirectly from the profits yielded during the time of deviation and are therefore less affected by the loss of business due to the cheating of a competitor which he partly owns.[113]
It depends on the circumstances of each case which effect prevails. In this respect, *Gilo/Moshe/Spiegel* identify a number of conditions to be fulfilled for partial cross-ownership to facilitate collusion, for example that every

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[110] Bundeskartellamt, B1-63/00, 9 August 2001, *Statistisches Informationssystem Transportbeton*, para. 8.2.
[111] Consiglio di Stato, Decisione 23 Aprile 2003, N. 2199/2002, Axa Assicurazioni v Autoritá Garante della concorrenza e del mercato, para. 7.2.2.
[112] Van den Bergh/Camesasca, *European Competition Law*, p. 182, with further references; see also Konkurrensverket, *Konkurrensen i Sverige*, p. 41.
[113] Gilo/Moshe/Spiegel, *Partial Cross Ownership*, p. 8.

firm in the industry must have a stake in at least one rival and that investments in the industry maverick should be regarded as innocent.[114] It follows that partial cross-ownership can be a supporting factor in the assessment of the likelihood or sustainability of collusion.

To sum up, structural links may play a role both in connection with the features of the information exchange itself, in the sense that data is eventually disseminated to more firms than can be seen at first glance, and as a factor which shows that competition in the relevant market is already reduced and incentives to deviate are diminished.

5.1.2 Observations and more possible criteria

If information exchanges are sanctioned in their function as a facilitating device for tacit collusion, then it is logical that this can only be justified if the market is sufficiently conducive to conscious parallelism.

5.1.2.1 The buying side

An aspect that appears to have been neglected in the discussion of information exchanges so far is the question to what extent the market characteristics on the buying side are of relevance. Which conditions must prevail in order to make tacit collusion more likely, i.e. to discourage cheating and facilitate the detection of deviations?

Concentration on the buying side
Posner is of the opinion that cheating is more attractive where the number of buyers is limited. One single instance of price-cutting yields relatively high profits, and the loss of one customer will be considered a random event by the competitors. Conversely, if the lower price must be made known to a large number of actual and potential customers, the probability of detection inevitably increases.[115] *Bishop/Walker*, on the other hand, claim that it is more difficult to detect deviations if there are many small customers, because it is not particularly meaningful when one of them switches supplier.[116] *Whish* agrees and writes that high concentration on the buying side acts as a disincentive for competition because it will be easy to detect attempts to attract particular customers away from their current supplier.[117]
I assume that only a thorough examination of the functioning of the market in question reveals which model is the more realistic. If collusion is indeed harder to sustain in markets with a large number of buyers because deviations are more difficult to detect, this difficulty can be remedied precisely by installing a detailed information exchange mechanism.

[114] Ibid., p. 13.
[115] Posner, Antitrust Law, p. 68; Stigler, *A Theory of Oligopoly*, p. 47, similarly Konkurrensverket, *Konkurrensen i Sverige*, p. 41.
[116] Bishop/Walker, *Economics of EC Competition Law*, para. 7.40.
[117] Whish, *Competition Law*, p. 463.

Frequency of seller-buyer-interaction
If the market is characterised by infrequent large orders, possible retaliatory measures following an instance of cheating are not imminent and companies might be more willing to take the risk if considerable profits can be made in the short run.[118] *Bishop/Walker* also believe that tacit collusion is harder to sustain if transactions in the market are large and infrequent.[119] Frequent interaction facilitates collusion because firms can react more quickly to a deviation, so that punishment is immediate and therefore more effective.[120]

Buyer power
Generally, buyer power can undermine tacit collusion because companies will find it hard to resist if a major buyer offers to buy at a price below the collusive level but still considerably above the marginal costs of supply.[121] In *Tractor*, the Commission found that demand was dispersed, so that the competitive pressure from the demand side was low, strengthening the Tractor manufacturers' market power.[122]

5.1.2.2 Strength in numbers?

Legal certainty for companies could be enhanced and the application of competition rules could be simplified if one could identify a number of companies which constitutes the threshold between a market where tacit collusion is unlikely and information exchanges therefore prima facie innocent and a market prone to conscious parallelism.
Peeperkorn suggests the following delimitation, based on "rough intuitive thoughts":[123] First, there are markets that display the characteristics of a non-cooperative game without Prisoners' Dilemma, i.e. a situation where cooperation is the dominant strategy without any intervention by the companies. In his opinion, this is the case in markets with up to four players, and the competitive problems caused by such an industry are more of a structural than of a behavioural nature. Second, as the number of firms increases, the setting changes to a game with Prisoners' Dilemma, i.e. companies have a constant incentive to free ride and might choose to install an information exchange mechanism in order to change the payoff structure and make deviations less attractive. This is unlikely to succeed in markets with more than ten or twelve players.
Ten Kate/del Carmen Dircio's standpoint[124] is that information exchanges enjoy a strong presumption of legality in markets with more than ten competitors and low barriers of entry. From these insights, it would follow

[118] Konkurrensverket, *Konkurrensen i Sverige*, p. 41.
[119] Bishop/Walker, *Economics of EC Competition Law*, para. 7.32 and 7.47.
[120] Ivaldi et al., *Economics of Tacit Collusion*, p. 19.
[121] Bishop/Walker, *Economics of EC Competition Law*, para. 7.32 and 7.47; Van den Bergh/Camesasca, *European Competition Law*, p. 173.
[122] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, para. 39.
[123] Peeperkorn, *Competition Policy Implications*, pp. 8/9, based on sources from economic science. Similarly, relying on the same sources, Faull/Nikpay, *The EC Law of Competition*, paras. 1.101 to 1.105.
[124] Ten Kate/del Carmen Dircio, *Intercambio de Información*, p. 122.

that competition authorities should concentrate their scarce resources on cases arising in markets with more than four and less than twelve operators. *Bishop/Walker*[125] mention studies suggesting that tacit collusion is unlikely if coordination of more than four firms is required to control 50% of the market, but point out that other scientists believe that effective competition can occur in a market with as little as three firms. They conclude that it is problematic to formulate general rules, and I fully agree. *Wirtschaftsvereinigung Stahl* is one of the most straightforward and instructive cases in the area of information exchange, and yet it involved sixteen companies. The number of firms alone is of course an indicator for the propensity to tacit collusion, but it should never be (and has never been, for that matter) decisive for the antitrust assessment of information exchanges.

5.1.2.3 Low demand elasticity

Posner[126] identifies no less than seventeen features that characterise a market in which the conditions are propitious for collusion, and it is quite conceivable that some of them might appear in information exchange cases eventually. Among these is, for example, the inelastic demand at the current market price. If firms can raise the price without having to fear a decrease in demand, collusion is a particularly attractive option. The German Federal Cartel Office notes that demand in the concrete business depends on demand for construction works and can hardly be stimulated by lower prices. This situation leads to a tendency to cooperate in order to avoid price wars that would be extremely costly for all the competitors involved.[127] Contrarily, if demand elasticity is high, the incentives for deviation are stronger because sales can be increased quickly and significantly by cutting the price.[128]

5.1.2.4 Price the most important competitive factor

In this regard, one might also name another aspect, namely that collusion is more likely to succeed if price competition is more important than other forms of competition (e. g. speed of delivery, product presentation, after-sales service or the mere quality of the product), which are much more difficult to coordinate. If a price cut can be camouflaged by a variety of different advantageous contract terms on freight and delivery, discounts and storage, a monitoring system would have to be extremely detailed which makes it more costly and increases the risk of discovery.[129]

5.1.2.5 Symmetry of firms

Feasibility of collusion is enhanced if the firms all sell at the same level in the chain of distribution, if they have similar cost structures and production

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[125] Bishop/Walker, *Economics of EC Competition Law*, para. 7.30.
[126] Posner, *Antitrust Law*, pp. 69 to 79.
[127] Bundeskartellamt, B1-63/00, 9 August 2001, *Statistisches Informationssystem Transportbeton*, para. 3.
[128] Bishop/Walker, *Economics of EC Competition Law*, para. 7.38.
[129] Nitsche/von Hinten-Reed, *Competitive Impacts*, p. 25, referring to an old but illustrative American case involving the sugar industry.

processes and if the ratio of fixed to variable costs is high. The same is true for asymmetries in capacity constraints: Firms with important capacity constraints cannot convincingly make threats of retaliation, while a company with high unused capacity will have a stronger incentive to deviate.[130]

Similar costs and the importance of fixed costs were mentioned by the French Conseil de la Concurrence in the *Palaces parisiens* case. It held that the number of actors alone was not sufficient for the qualification of the market as oligopolistic and that the concrete conditions of the functioning of the market also had to be taken into consideration. In that respect, it pointed to the degree of symmetry between the six hotels, which held market shares between 16 and 22.5%, without a really dominating player.[131]

5.1.2.6 No innovation

Tacit coordination is more difficult in markets with a high pace of innovation, because the products do not remain the same in the course of time, which necessitates a frequent change of rules. Moreover, firms will be more inclined to compete if innovation plays an important role in the market because customers will quickly be attracted if a new and better product is launched.[132] It follows that information exchanges in highly innovative markets must be deemed to have a low anti-competitive potential.

5.1.2.7 Anti-competitive record and personal acquaintances

In markets where firms co-operate with each other in legal ways, where the people involved know each other well and where there are ample opportunities for discussion, for example at fairs or at trade association meetings, the "infrastructure" for collusion exists and the costs for reaching a common understanding are reduced.

A record of previous charges of anti-competitive behaviour also indicates a propensity to collude. The concrete producers in the leading German case had in fact been prosecuted for quota fixing just a year or two before they decided to put up their information exchange, as a supposedly legal alternative that still allowed them a certain degree of coordination.[133]

5.1.2.8 Multimarket contact

There is evidence for the fact that multimarket contact between companies may play a role in tacit collusion. The term refers to situations where firms either sell multiple products in separate product markets, or where they sell

[130] Ivaldi et al., *Economics of Tacit Collusion*, p. 41.

[131] Conseil de la Concurrence, Décision No. 05-D-64 du 25 novembre 2005 relative à des pratiques mises en oeuvre sur le marché des palaces parisiens, paras. 215, 217, 221. This approach (i.e. to take into account features of the market functioning) diverges markedly from the view taken in the mobile telephony case, decided five days later: There, the Conseil held that the only relevant question was whether the market could be defined as a closed oligopoly, and that other criteria were not necessary for the legal assessment.

[132] Bishop/Walker, *Economics of EC Competition Law*, para. 7.42; Capobianco, *Information Exchange*, p. 1268.

[133] Bundeskartellamt, B1-63/00, 9 August 2001, *Statistisches Informationssystem Transportbeton*, para. 4.

the same product in geographically separated markets. The assumption is that a company will not deviate in all of the markets in question because the risk for detection is too high in such a case, and neither will it deviate in just one market because if the cheating is discovered, then retaliatory measures can be taken in more than just the market concerned and cause so much damage that even though the risk of detection is low, the fear of effective and widespread retaliation is great and results in a decision to refrain from deviating.[134] Therefore, the main reason why multimarket contact is believed to be an advantageous factor of collusion is that it increases the scope of punishment.[135]

5.1.3 Parallel problems in the law of mergers and collective dominance?

Paragraph 39 of the new Horizontal Merger Guidelines[136] reads:

> "A merger in a concentrated market may significantly impede effective competition, through the creation or the strengthening of a collective dominant position, because it increases the likelihood that firms are able to coordinate their behaviour … and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Article 81 of the Treaty."

5.1.3.1 Tackling tacit coordination

Thus, mergers may be prohibited because they create industry structures that make anti-competitive conduct more likely. Information exchanges may be prohibited because they may constitute facilitating practices for collusion. In both cases, the fear is that competition is replaced by tacit coordination, and both sets of rules tackle the same problem, but from different angles: Merger law intends to prevent that markets prone to conscious parallelism come into existence at all, and antitrust law fights tacit collusion on such markets by prohibiting conduct that facilitates it.

5.1.3.2 A harmonised approach?

Several authors point out that a harmonised approach is possible and desirable.[137] *DeSanti/Nagata*, in the context of US antitrust law, sum up the argument nicely when they write that a market structure that might raise concerns in a merger context might also raise concerns in a facilitating practices context because both cases deal with the likelihood of tacit collusion.[138]

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[134] Matsushima, *Multimarket Contact*, p. 160.
[135] Bernheim/Whinston*, Multimarket Contact*, p. 3.
[136] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 OJ C 31/5.
[137] Kühn/Vives, *Information Exchanges*, pp. 112/113; Nitsche/von Hinten-Reed, *Competitive Impacts*, p. 5; Johnsson/Carle, *Benchmarking*, p. 75, focusing on collective dominance.
[138] deSanti/Nagata, *Competitor Communications*, p. 97.

The issue has already made some shy appearances in case law. In the French mobile telephony case, the companies argued that their information exchange was innocent because retaliatory measures were difficult or even impossible to implement on the market in question. The Conseil de la Concurrence held[139] that the Community case law on information exchanges did not consider the possibility of retaliation as a relevant aspect of assessment, in contrast to the jurisprudence concerning collective dominance, where effective retaliation measures were indeed named as one of the conditions to make tacit coordination sustainable.[140] The Conseil thus refused to transpose an issue from merger law to the legal assessment of information exchanges.

A case decided by the Hungarian Competition Council[141] illustrates the overlap of criteria nicely: It deals with both an information exchange between producers of cement and the abuse of collective dominance by one of them, and the analysis of the market structure is principally identical in both parts of the case. It seems that the requirements for the establishment of collective dominance might be somewhat stricter, but in general, once the information exchange was condemned as anti-competitive, it was just a small step to conclude that there was a situation of collective dominance among the producers involved.

It remains to be seen whether this cross-fertilisation proposed by writers in doctrine will be adopted by competition authorities and courts in the future.

5.1.4 *RC Auto* and *IAMA Consulting* – an Italian revolution?

In two rather recent decisions on information exchange agreements, the AGCM (Italian Competition Authority) might have broken new ground. Both cases concerned the exchange of detailed information, including prices, conditions, discounts and rebates, costs and a variety of other data, between insurance companies.

5.1.4.1 Facts

In *RC Auto,*[142] a business consultancy was charged with the organisation of the exchange. At times, up to forty undertakings submitted and received data. About a hundred insurance companies were active in the market, the ten leading firms accounting for half of the market. The industry could therefore by no means be described as oligopolistic or highly concentrated.

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[139] Conseil de la Concurrence, Décision No. 05-D-64 du 25 novembre 2005 relative à des pratiques mises en oeuvre sur le marché des palaces parisiens, para. 180.

[140] Judgment of the Court of First Instance of 6 June 2002, Airtours plc v Commission of the European Communities, Case T-342/99, 2004 ECR II-1785.

[141] Gazdasági Versenyhivatal (Hungarian Competition Council), VJ-73/2001, Cement Cartel and Abuse of Collective Dominance (English summary).

[142] Autoritá garante della concorrenza e del mercato, Provvedimento N. 8546 del 28 Iuglio 2000, I388 – RC AUTO.

In *IAMA Consulting,*[143] a third party collected and collated the information and created an electronic database. Thirteen companies belonging to nine groups were involved, with an aggregate market share of more than 70%, the HHI being about 1600. One tends to agree with the incriminated undertakings when they describe the market as "moderately concentrated". The AGCM prohibited both agreements, giving lengthy explanations of the economic reasoning, and the administrative court[144] seized with an appeal in the *RC Auto* case dealt critically with the judgments rendered by the Community courts in the *Tractor* case.

5.1.4.2 The AGCM's point of view on market structure

RC Auto

In *RC Auto*, the AGCM stated clearly that for an information exchange to be anti-competitive, it was not necessary that the market should be defined as oligopolistic. Especially in cases where the information exchange concerned prices and where the increase of transparency did not benefit consumers, such conduct might be harmful for competition even in markets that are not oligopolistic. In fact, in less concentrated markets the exchange of information was even more essential in order to achieve a collusive coordination, because the costs of acquiring such information in other ways would be too high.[145]

It is interesting to note that this idea seems to have appeared in Community competition law before: In the *Wood pulp* case, the Commission was also faced with collusion among a large number of firms, and held that:

> "Although the large number of competitors should theoretically make concertation between producers more difficult, this difficulty was neutralized by the transparency of prices on the market. This transparency, however, is not inherent but results from a behaviour that the producers deliberately choose in constant direct or indirect mutual contact. The market is made artificially transparent …".[146]

The Italian court – referring to the excerpt of the *John Deere* case quoted above[147] - held that markets could not simply be subdivided into "truly competitive" and "highly concentrated" ones, but that there obviously existed markets with intermediate characteristics. The market structure could therefore be no absolute parameter, distinguishing legal information exchanges from illegal ones. Its relevance lay only in the fact that it determined whether the agreement had an anti-competitive effect or not. Even in less concentrated markets, the acquisition of information on the

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[143] Autoritá garante della concorrenza e del mercato, Provvedimento N. 13622 del 30 Settembre 2004, I575 – RAS-Generali/IAMA Consulting.

[144] Consiglio di Stato, Decisione 23 Aprile 2003, N. 2199/2002, Axa Assicurazioni v Autoritá garante della concorrenza e del mercato.

[145] Autoritá garante della concorrenza e del mercato, Provvedimento N. 8546 del 28 Iuglio 2000, I388 – RC AUTO, paras. 252 to 255.

[146] Commission Decision of 19 December 1984, Case No. IV/29.725, *Wood pulp*, para. 85.

[147] See above para. 4.2.2.

competitors' strategies created the conditions for arriving at a collusive equilibrium.[148]

IAMA Consulting
In *IAMA Consulting*, the AGCM quoted these findings, defined the market as moderately concentrated and went on to point out some peculiar features of the life insurance market: It was characterised by reduced incentives to compete because consumers were unable to make the necessary "competitive confrontations". This was due to the complexity of the product – the average consumer would have to make considerable efforts if she wanted to compare the terms and conditions of different life insurances. She would therefore rely heavily on the competence of her consulting agent, who most probably only offered insurance policies with one specific company. This "information asymmetry" to the disadvantage of the consumer justified the condemnation of the information exchange as anti-competitive.[149]

5.1.4.3 Summary

It seems that the Italian Competition Authority has basically dropped the requirement of an oligopolistic, highly concentrated market and demonstrates a high degree of flexibility in the assessment of information exchanges. Where an industry is only moderately concentrated, specific features of the market (such as the information asymmetry in *IAMA Consulting*) may tilt the balance. *RC Auto* takes the concept of facilitating practices one step further – an information exchange which covers strategic variables (such as the price) creates a framework for coordination, which can then be tacit in so far as it does not need to take the form of an explicit agreement any more.[150]

5.1.4.4 Conclusion

I believe that these decisions are possibly less revolutionary than they appear at first glance. It must not be forgotten that both agreements at issue included the exchange of price information. A closer reading of the judgments rendered in the *Tractor* case reveals that the Commission puts information exchange agreements into (at least) three categories: Either they underpin another anti-competitive agreement, or they directly concern prices, or they do not fall within either of these categories, like the *Tractor* case.[151]

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[148] Consiglio di Stato, Decisione 23 Aprile 2003, N. 2199/2002, Axa Assicurazioni v Autoritá garante della concorrenza e del mercato, para. 7.2.2. For a justification of this judgment from the economic point of view, see Colombo/Grillo, *Collusion when the Number of Firms is Large*.
[149] Autoritá garante della concorrenza e del mercato, Provvedimento N. 13622 del 30 Settembre 2004, I575 – RAS-Generali/IAMA Consulting, paras. 170 to 175. The case is discussed in Capobianco/Fratta, *Information Exchanges*, pp. 5/6.
[150] See also Grillo, *Collusion and Facilitating Practices*, pp. 18/19.
[151] Judgment of the Court of First Instance of 27 October 1994, Case T-35/92, John Deere v Commission of the European Communities, 1994 ECR II-957, para. 51: „... the Decision is the first in which the Commission has prohibited an information exchange system ... which

Consequently, the *Tractor* case did not constitute a hundred percent suitable precedent for the two Italian cases. Earlier Commission decisions support the idea that information exchanges that concern prices receive special treatment, with less emphasis being put on the market structure. In *IFTRA Glass*, the Commission held that "(i)t is contrary to the provisions of Art. 85 (1) of the EEC Treaty for a producer to communicate to his competitors the essential elements of his price policy such as price lists, the discounts and terms of trade he applies …"[152] In *Hasselblad*, the Commission referred to several older cases and confirmed that "the mutual notification between competitors of prices and of the conditions governing discounts, bonuses, rebates, etc., which rank as business secrets, constitutes an anti-competitive measure within the meaning of Article 85 (1)".[153] There is therefore evidence from Community case law that the exchange of price information is much more objectionable and more likely to be deemed anti-competitive than exchanges of data on sales, demand or costs, independent of the market structure.

5.2 The features of the information exchange

The second main aspect that competition authorities are interested in when it comes to information exchange agreements is an examination of their features – questions like what kind of information is exchanged, how often, and who has access to the statistics will be asked.
In the course of this assessment, one has to keep in mind the reason why information exchanges have an anti-competitive potential. Each feature should therefore be checked as to its suitability as a tool for facilitating conscious parallelism – does it make collusion more likely or easier to police? Does it allow for quick and reliable detection of deviation and targeted retaliation? Can one think of any pro-competitive effects?

5.2.1 Mode of organisation

As we have already seen from the case examples mentioned in the course of this work, information exchanges can be organised in a variety of ways. The simplest way is probably a direct exchange between the participating undertakings, like in the French *Palaces parisiens* case, where the hotel directors sent each other friendly letters and emails, asking for and providing information, and kept each other informed in regular meetings. Often, there is third party involvement of some kind – both in the *Tractor* case and in *Wirtschaftsvereinigung Stahl*, the trade association played some role in the collection of data and the compilation of statistics. In the Italian *IAMA* case, an independent business consultancy provided and administered

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does not directly concern the prices of those products, but which does not underpin any other anti-competitive agreement either."

152 Commission Decision of 15 May 1974, Case No IV/400 – *Agreements between manufacturers of glass containers*, para. 43.

153 Commission Decision of 2 December 1982, Case No IV/25.757 – *Hasselblad*, para. 50.

an electronic database, and in a Spanish case involving breweries,[154] data were submitted to a notary who then prepared the statistics and forwarded them to the trade association.
The way how data are collected and disseminated is, however, hardly of relevance for the competition law assessment.[155] Information exchanges are objectionable because they allow for the monitoring of the competitors' conduct and the detection of deviations, and the mode of organisation does not affect the suitability for this purpose. One could at most state that the involvement of an official entity such as a notary might be preferable from the companies' point of view because it might help prevent the deliberate reporting of wrong figures where the true data would reveal an instance of deviation.
Three points are interesting to note in this connection, though. The first is that, according to the Commission, where the parties knowingly report incorrect information, this merely confirms that the exchange was actually used as a monitoring mechanism.[156] Second, the trade organisation charged with the information exchange may commit an infringement of Art. 81 (1) EC itself, because such a system necessarily presupposes and express or implied "decision by an association of undertakings".[157] Third, if there is already an official (presumably legal) information exchange or statistical service in an industry, and yet the firms put up their own alternative one, that will raise suspicion.[158]

5.2.2 Type of information

A survey of all available cases of information exchanges reveals that they mostly deal with sales figures (quantities) or prices, occasionally with terms and conditions, costs, production figures, capacities, order inflow, stocks, turnover, and more industry specific data such as sponsorships in the Spanish breweries case, the size of rooms in the French hotel case or technical information in a Commission decision involving software firms.[159]

Prices
Prices take a somewhat special position, as has already been alluded to in the discussion of the two Italian cases. Indeed, price information seems to be "well-nigh impossible to exchange", because there is a very real risk that

[154] Tribunal de Defensa de la Competencia, Expediente A 329/02, Estadísticas Cerveceros, 30 March 2004.
[155] Whish, *Competition Law*, p. 443; Ten Kate/del Carmen Dircio, *Intercambio de Información*, p. 122.
[156] Commission Decision of 27 November 2002, Case COMP/E-1/37.152, *Plasterboard*, para. 451.
[157] Judgment of the Court of First Instance of 11 March 1999, Case T-136/94, Eurofer ASBL v Commission of the European Communities, para. 17.
[158] Commission Decision of 8 September 1977, Case IV/312-366, *COBELPA/VNP*, para. 26; Commission Decision of 23 December 1977, Case IV/29.176, *Vegetable parchment*, para. 64; Kühn/Vives, *Information Exchanges*, p. 118.
[159] Commission Decision of 15 December 1986, Case IV/31.458, *X/Open Group*.

the Commission will equate such an exchange with a price cartel.[160] In both *Eudim* and *CEPI*, where the Commission cleared information exchange agreements, it insisted that they were by no means to cover prices.[161] Similarly, one of the reasons why the Irish Competition Authority issued an exemption certificate in the *APHA* case was that the exchange did not include any information on prices actually charged.[162] In a publication of the British Office of Fair Trading, one section deals with exchange of price information, and another one with "non-price information", pointing out that the market structure is of relevance in such cases.[163] That prices receive special treatment is probably justified because price is the most common and the most obvious means of competition and therefore particularly sensitive. It is difficult to make out a real interest among competitors (apart from the desire to collude) in the exchange of price information.[164]

Quantities

Data on quantities produced or sold, sometimes broken down according to territory or buyer group, seems to be the undertakings' favourite type of information to exchange, for obvious reasons: If a competitor deviates from tacit coordination, i.e. by cutting the price or taking other, less visible competitive measures, he will attract more customers and his action will inevitably be reflected in his sales figures. Monitoring market shares is therefore a very efficient method of detecting secret price-cutting, an ideal method of enforcing tacit collusion on prices.[165] In that respect, information about sales volumes can be described as an "indirect channel to price information" and should principally be put in the same league with price information, concerning the anti-competitive potential. In the *Tractor* case, the Commission convincingly proved that the possibility to monitor collusion on prices does not depend on an exchange of data on prices but that sales figures serve exactly the same purpose, with high reliability and the same chilling effect on competition.[166] Konkurrensverket, the Swedish Competition Authority, also notes that both types of information – prices and quantities – can be used to monitor tacit coordination, that they can be substitutes for one another and finally, that information on sales volumes is in some respects even of superior value because it also captures changes of

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[160] Johnsson/Carle, *Benchmarking*, p. 78. See also Seabright/Halliday, *Networks Good, Bartels Bad*, p. 95.

[161] Notice pursuant to Article 19 (3) of Council Regulation No 17, Case No IV/33.815, 35.842, *Eudim*; Notice pursuant to Article 19 (3) of Council Regulation No 17, Case No IV/34.936/E1 – *CEPI-Cartonboard.*

[162] Irish Competition Authority, Decision No. 579 of 28 January 2000, Notification No CA/10/98 – *Animal & Plant Health Association Ltd / Others,* para 15.

[163] Office of Fair Trading, *Trade associations*, p. 10.

[164] Bissocoli, *Trade associations*, p. 83.

[165] Stigler, *A Theory of Oligopoly*, p. 46. But see Nitsche/von Hinten-Reed, *Competitive Impacts*, pp. 5/6, who claim that effective collusion requires the monitoring of much more than just prices and quantities.

[166] Nilsson, *When is Transparency Good for Competition*, p. 156; see also Kühn, *Fighting Collusion*, p. 188.

market shares which are due to aggressive competitive measures other than price cuts.[167]

Cost, demand, capacity and other data

Information of this type is not immediately suitable for the detection of deviations, but it helps to determine the feasibility and endurance of retaliatory measures.[168] Together with data on research and development and planned capacity increase or decrease, it forms a useful input for the process of reaching a convergence of views. It helps establish a common understanding of the terms of collusion in the first place, an essential exercise, because firms will presumably not have identical cost structures, production capacities or general business interests, so that a solution acceptable to all participants has to be found.[169] Before the undertakings can agree on what price seems appropriate or which market share should be envisaged by each of them, they need to know how the market works and ascertain that their competitors share their estimates in that respect.

The UK Office of Fair Trading makes out another danger: In a case concerning independent schools, the OFT believes that the exchange of data on staff salaries could be anti-competitive because they represent a large portion of the school's fees, so the data is commercially sensitive. In a way, this would amount to an indirect and less precise exchange of price information. If the costs in question constitute a highly significant input that is clearly reflected in and immediately determines the price, caution is advised.[170]

In reality, information exchanges are unlikely to cover only such type of data; they may be a part of a more comprehensive system, but information on quantities is nearly always featured, too.

Some insights from the United Kingdom

A publication of the UK Office of Fair Trading offers some more valuable insights into how competition authorities think when they are faced with an information exchange. The OFT makes the interesting distinction between information of a qualitative nature – such as a discussion of the impact of certain legislation on the undertakings concerned or the sharing of opinion and experience – and quantitative information, such as prices or major costs.[171] In this connection, it is appropriate to point out another issue: The authority also advises caution when it comes to an information exchange between schools which covers the terms and conditions of scholarships and charges for music lessons, sports coaching and school trips, because these are important means of competition besides the fees, so an exchange might adversely affect the competitive process.[172] Where hidden competition can

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[167] Marknadsdomstolen, Beslut Dnr A 35/98, Konkurrensverket/Svenska Petroleuminstitutet och medlemsföretagen i SPI, 26 October 1999, p. 8.

[168] Peeperkorn, *Competition Policy Implications*, p. 7; Nitsche/von Hinten-Reed, *Competitive Impacts*, pp. 6, 23.

[169] Nitsche/von Hinten-Reed, *Competitive Impacts*, pp. 6, 23; see also Posner, *Antitrust Law*, pp. 65/66.

[170] Office of Fair Trading, *Independent Schools FAQ*, p. 5.

[171] Office of Fair Trading, *Independent Schools FAQ*, p. 1.

[172] Ibid., p. 6.

consist of other means than just price cuts, then the monitoring of such activities will deter the undertakings from engaging in them.

5.2.3 State of aggregation

Data is aggregated when individual undertakings or individual transactions cannot be identified. In general, it is therefore correct to say that for effectively monitoring tacit collusion, recognising deviations, detecting and punishing the deviator, aggregated data is not suitable. The Commission soon recognised the low anti-competitive potential of an exchange of aggregated data and held that there was no objection where two trade associations in different Member States forwarded to each other statistical information on the output and sales of the relevant industry without identifying individual undertakings.[173]

No identification possible

It is not sufficient that the data is formally aggregated – what counts is that, even with additional information, individual undertakings or transactions cannot be identified. Logically, aggregation makes no sense where the data refers to only two undertakings, because each of them knows their own figures and can easily deduce the competitor's figures from the sum. In *CEPI*, the Commission consequently insisted that the number of companies submitting figures was at least three.[174] Similarly, if the aggregated data covers different regions of a Member State, but in some regions, only two of the undertakings that participate in the exchange are active, for that part the aggregation is worthless.[175] But even where the number of companies is higher, aggregation can become a farce if there are close structural links between them, allowing for an internal flow of information between the undertakings of one group.[176] The Commission addressed this issue in the guidelines for a new information exchange agreement between tractor manufacturers and stated that aggregate data may be forwarded to the competitors if the data are supplied by at least three dealers belonging to different industrial or financial groups.[177]

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[173] Commission Decision of 8 September 1977, Case IV/312-366, *COBELPA/VNP*, para. 25; Commission Decision of 23 December 1977, Case IV/29.176, *Vegetable parchment*, para. 63; Commission Decision of 16 February 1994, Case 94/215/ECSC, *European producers of beams*, para. 266; see also Notice pursuant to Article 19 (3) of Council Regulation No 17, Case No IV/34.936/E1 – *CEPI-Cartonboard*, para 16: „...the policy of the Commission is in general not to object to the exchange by trade associations of aggregate data which do not reveal to competitors individual market positions."

[174] Notice pursuant to Article 19 (3) of Council Regulation No 17, Case No IV/34.936/E1 – *CEPI-Cartonboard*, para 16; see also Faull/Nikpay, *The EC Law of Competition*, para. 6.343.

[175] Tribunal de Defensa de la Competencia (Spanish Competition Authority), Expediente A 329/02, Estadísticas Cerveceros, 30 March 2004, para. 7. The decision is a bit unclear in that respect and is currently under appeal before the Audiencia Nacional.

[176] This was an important issue in Bundeskartellamt, B1-63/00, 9 August 2001, *Statistisches Informationssystem Transportbeton*.

[177] XXIXth Report on Competition Policy, pp. 156-158.

Three? Four? Ten?
It is difficult to extract clear numbers from the Commission's practice. In *CEPI*, it was held that data was aggregated if three companies take part in the exchange, but in *European Wastepaper Information Service,*[178] the Commission required that the figures of at least four undertakings should be aggregated. Moreover, the number ten has popped up twice, once in connection with the *Tractor* case, where the Commission stipulated that if there are less than three dealers, then the figures exchanged must concern at least ten tractor units,[179] and in *CEPI,*[180] where the Commission demanded that for "order inflow statistics", at least ten producers must submit data. So it is hard to make general statements. The number of companies required for true aggregation seems to depend to a certain extent on the sensitivity of the information and its age, and aggregation concerning the products or the sales territories may act as a counterbalance for insufficient aggregation in the number of undertakings.

Is individualised information always prohibited?
Under certain circumstances, the exchange of individualised information does not raise any competitive concerns, as is demonstrated by the *Eudim* case. The market was fragmented, the undertakings participating in the information exchange were relatively small, their number was negligible compared to the high number of companies active in the market, and the products covered by the exchange amounted only to about 5 to 10% of the total range of products sold by them. The Commission gave the green light to this agreement.

Is aggregate data always innocent?
Several authors note that both aggregate and individual data may facilitate collusive agreements.[181] If the collusion concerns quantities, and the aggregated figure is higher than the sum of the quantities assigned to each of the competitors, or if the collusion concerns prices, and the average market price is lower than the collusive price agreed upon, it is sufficiently clear that one of the members has defected, and the companies will be likely to adopt punishment strategies.[182] Individualised information helps to put the finger on the defector, but if all undertakings are aware that defection leads to a price war, harmful for the entire industry and rapidly eliminating any short-term gains, this constitutes already undoubtedly a mighty disincentive for competition. That is why the exchange of aggregate data should not uncritically be considered harmless from a competition policy point of

[178] Notice pursuant to Article 19(3) of Regulation No 17, Case No IV/32.076 - *European Wastepaper Information Service*.
[179] XXIXth Report on Competition Policy, pp. 156-158. The number of ten was accepted as appropriate by the ECJ in Judgment of the European Court of Justice of 28 May 1998 Case C-7/95 P, John Deere Ltd v Commission of the European Communities, 1998 ECR I-3111, para. 36.
[180] Notice pursuant to Article 19 (3) of Council Regulation No 17, Case No IV/34.936/E1 – *CEPI-Cartonboard*, para. 18. The Commission possibly regarded this type of information as more commercially sensitive, Johnsson/Carle, *Benchmarking*, p. 76.
[181] Kühn/Vives, *Information Exchanges*, p. 81.
[182] Ten Kate/del Carmen Dircio, *Intercambio de Información*, p. 120.

view.[183] To my knowledge, there has not been a case yet where this argumentation was used.

5.2.4 Age of the information

The age of the information exchanged plays a vital role in the competition law assessment, and not all issues arising in connection with the temporal dimension have been touched upon in case law yet. The Swedish Competition Authority believes that the time scale is possibly the most important factor in determining whether an information exchange is anti-competitive.[184]
Three categories of data can be distinguished: historical data, which are principally of no use for monitoring purposes because any conceivable retaliatory measures would come too late, recent information, relating to current activities and those in the near past, and information on planned future conduct.[185]

Historical data
The Commission acknowledges that when a certain period of time has elapsed, information relating to past transactions becomes truly historic and cannot have any impact on future behaviour any longer. Cheating would only be detected with a very long time lag so that the profits can be reaped fully and the fear of being detected and punished becomes irrelevant. In the *Tractor* case, the Commission held that an annual exchange of one-year-old sales figures would not be objectionable[186] and in *Wirtschaftsvereinigung Stahl,*[187] this statement was repeated and elaborated insofar as all information less than one year old were deemed to be recent and their exchange thus had anti-competitive potential. When the Commission called "historical" information distributed every other week and covering aggregate sales figures of the last four weeks in *CEPI,*[188] this is rather a case of "temporal aggregation" than of real historical data.

Recent data
Most information exchanges refer to data from the last week, month, or quarter. Still, companies have tried to claim that the data they exchange is historical insofar as it relates to past behaviour and does not give any indications of future conduct in the market. The Commission did not accept such defences, stating that in markets where demand is stable or declining

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[183] Peeperkorn, *Competition Policy Implications,* p. 6; Yao/deSanti, *Game Theory*, pp. 130/131, referring to the trigger-price game of Green and Porter.
[184] Konkurrensverket, Beslut Dnr 1041/93, Ansökan om icke-ingripandebesked enligt 20 § konkurrenslagen (1993:20) för statistiksamarbete inom oljebranschen (Svenska Petroleuminstitutet), 7 March 1995, p. 6.
[185] Faull/Nikpay, *The EC Law of Competition*, para. 6.364.
[186] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, para. 50.
[187] Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl*, para. 52.
[188] Notice pursuant to Article 19 (3) of Council Regulation No 17, Case No IV/34.936/E1 – *CEPI-Cartonboard*, para. 18.

(as was the case in both *Tractor* and *Wirtschaftsvereinigung Stahl*), forecasts of competitors' conduct could be made based on the data of past transactions, and that the restrictive effects on competition depended precisely on a close observation of competitors' past actions.[189]

Data on future behaviour

The situation is less clear for information relating to planned actions or estimations of future market developments. Such data helps achieve a convergence of views and thus makes it easier for companies to determine a common strategy. In the language of game theory, "communication plays an important role in resolving strategic uncertainty".[190] Some authors therefore conclude that such data should be banned because it significantly facilitates the establishment of tacit collusion.[191]

On the other hand, communication about future behaviour is often referred to as "cheap talk" because without effective monitoring and retaliation mechanisms, there is no guarantee that firms actually stick to their agreements, be they explicit or tacit. Only the incentives to defect and to cooperate are relevant, and insofar there is no difference between fully-fledged cartel agreements and tacit collusion – their feasibility depends on the payoff matrix, i.e. the question whether secret competition pays or not.[192] Anti-competitive agreements are not enforceable by legal means; their functioning depends entirely on their effective policing. The idea is not to sanction collusive agreements or the attempt to conclude them, but to make them inoperable.[193]

If one adopts this view, then information exchanges on future data alone have a relatively low anti-competitive potential. The question is probably purely theoretical, because companies are of course aware of the problems of policing and would certainly design their information exchange agreements accordingly, so that they include recent data suitable for monitoring each other's market conduct.

5.2.5 Frequency of the exchange

The connection to the preceding paragraph is obvious: If data is exchanged at short intervals, and always refers to the last period, it is automatically more recent, and the frequency of the exchange affects the incentives to deviate and thus the degree of hidden competition that remains. A low frequency might allow for sufficient time to reap the extra profits from a defection before retaliation measures set in, while a regular exchange with very short intervals makes deviation entirely unattractive. Some authors specifically note that the criterion of frequency plays an important role and

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[189] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, para. 50; Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl*, para. 52.

[190] Kühn, *Fighting collusion*, p. 182.

[191] Overgaard/Møllgaard, *Information Exchange*, p. 17.

[192] Peeperkorn, *Competition Policy Implications*, p. 3; Ten Kate/del Carmen Dircio, *Intercambio de Información*, p. 119.

[193] Pénard, *Les jeux répétés*, p. 5.

should not be underestimated or neglected in comparison to other criteria such as aggregation.[194]

5.2.6 Confidential nature of the data

The Court of First Instance, summing up the findings of the Commission in *Tractor* and *Wirtschaftsvereinigung Stahl*, concluded that "the sensitive nature of the data is a fundamental factor in the assessment of the restrictive nature of an information exchange agreement".[195]

Trade secrets

It is a common defence for the incriminated undertakings to claim that the information they exchanged should by no means be considered as trade secrets, but that, on the contrary, it was publicly available. For example, in the two French cases cited above, the companies tried to demonstrate that price information was freely available on the internet and that official statistics already contained all the information that they exchanged or at least allowed them to calculate the required figures themselves. The Conseil de la Concurrence went to great lengths to prove that the publicly available data were not identical with the data exchanged, but much less accurate, that they were published at longer intervals and that they only contained average figures, in sum, that the data exchanged did in fact constitute trade secrets.[196] Konkurrensverket rightly points out in that respect that information that constitutes a trade secret today needs not be one at a later point of time – the mere fact that at some stage, the relevant information is published in statistics does not remove the confidential character of this data when it is exchanged sooner.[197]

Giving oneself away

Often, the companies give themselves away by actually designating the information as confidential when they forward it to their competitors, to make sure that only parties to the information exchange agreement obtain access to it.[198] In the Spanish breweries case, the competition authority referred to a previous merger case, where the companies had asked for confidential treatment for exactly the same type of information.[199]

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[194] Kühn/Vives*, Information Exchanges*, p. 81; Faull/Nikpay, *The EC Law of Competition*, para. 6.366; Johnsson/Carle, *Benchmarking*, p. 79.

[195] Judgment of the Court of First Instance of 5 April 2001, Case T-16/98, Wirtschaftsvereinigung Stahl v Commission of the European Communities, 2001 ECR II-1217.

[196] Conseil de la Concurrence, Décision No. 05-D-64 du 25 novembre 2005 relative à des pratiques mises en oeuvre sur le marché des palaces parisiens, paras. 221 to 229; Conseil de la Concurrence, Décision No. 05-D-65 du 30 novembre 2005 relative à des pratiques constatées dans le secteur de la téléphonie mobile, paras. 197 to 203.

[197] Marknadsdomstolen, Beslut Dnr A 35/98, Konkurrensverket/Svenska Petroleuminstitutet och medlemsföretagen i SPI, 26 October 1999, p. 17.

[198] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, para. 49.

[199] Tribunal de Defensa de la Competencia, Expediente A 329/02, Estadísticas Cerveceros, 30 March 2004, para. 7.

Similarly, in *EATA*, the defendant undertakings had claimed confidentiality vis-à-vis the complainants in the procedure.[200]

Indication of market sharing or price fixing?

In *Vegetable Parchment*, the Commission held that the discovery of a practice such as the regular sending to a trade association of invoices or other data that is normally regarded as confidential would be an indication of a more far-reaching anti-competitive agreement.[201] I tend to agree with the criticism of this approach voiced by *Kühn/Vives*: They explain that, in order to create credible statistics, trade associations depend on an input of accurate, reliable information. If it is forbidden to send such data – which necessarily constitute trade secrets – to a third party charged with the compilation of statistics, then any serious information exchange would be prohibited, including practices which are actually beneficial for competition.[202] A Spanish case involving statistics on quantities and the average price of milk also makes the distinction between the data which is submitted to a third party and which undoubtedly constitutes trade secrets and the aggregated data disseminated to the competitors. The fact that a notary who had a duty to keep the information secret was used as data administrator guaranteed confidentiality.[203] As long as the confidential information does not reach the competitors, mere impartation should not be considered objectionable.

5.2.7 Public availability of the data

This aspect is of course closely linked to the preceding discussion of confidentiality, but there are some special issues that justify a separate section. The question is what happens if the data really is freely available, but someone makes the effort to collect it and put it into an easily readable form? In *COBELPA*, the Commission admitted that the information in question could have been obtained through other sources, but this was no excuse, because it would have been a more complicated and more time-consuming method.[204] In *TACA*, the Court of First Instance held that if data was in the public domain as a result of a compulsory publication under US law, the disclosure of the same data to competitors could not be an infringement of Art. 81 (1) EC.[205]

Three aspects

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[200] Commission Decision of 30 April 1999, Case IV/34.250 – *Europe Asia Trades Agreement*, para. 156.

[201] Commission Decision of 23 December 1977, Case IV/29.176, *Vegetable parchment*, para. 64.

[202] Kühn/Vives, *Information Exchanges*, p. 82.

[203] Tribunal de Defensa de la Competencia, Expediente A 309/01, Información Estadística FENIL, 1 March 2002, para. 4.

[204] Commission Decision of 8 September 1977, Case IV/312-366, *COBELPA/VNP*, para. 30.

[205] Judgment of the Court of First Instance of 30 September 2003, Cases T-191 and 212/98, Atlantic Container Line AB and others v Commission of the European Communities, para. 1154.

The cartel members in *Plasterboard* claimed that the information transmitted to their competitors on price increases was disclosed at an earlier stage to their customers and therefore could have been gathered independently on the market. The Commission rejected this argument, having recourse to a judgment of the Court of First Instance, where three aspects played a role:[206] First, the fact that a producer notifies to his customers the prices he intends to charge does not mean that those prices constitute objective market data that are readily accessible for anyone. Second, the information exchange allowed the competitors to become aware of the changes more simply, rapidly and directly. And third, where information is exchanged in meetings, the regular participation creates a climate of mutual certainty as to the future pricing policies. The first two aspects also occur, in a very similar fashion, in the Italian *IAMA Consulting* case.

"Public data" and "data in the public domain"

The Italian Competition Authority makes an interesting distinction between public data – like prices and terms and conditions, because they are inevitably communicated to customers and are thus by definition public – and data in the public domain, that is, data which are immediately and speedily accessible without any effort for anyone who is interested in acquiring them. Even though this distinction is later held to be largely irrelevant, it is worth mentioning because it illustrates the difficulty of defining "public availability". The Court of First Instance in *Tate & Lyle* was also aware of this problem when it rendered the abovementioned judgment, and the information at issue in *Plasterboard* would, according to the categories suggested by the AGCM, probably have been public, but not in the public domain.

Cheaper, Faster, Better

Secondly, the AGCM explains where the focus should be instead. What counts for the assessment of the anti-competitive effects of an information exchange agreement is whether it reduces the costs and time which a single undertaking would have to invest if it wanted to collect the information itself and whether it offers the possibility to obtain a more complete and reliable set of information. If this is the case, then little does it matter whether the information was theoretically already "public".[207] This approach is identical with the one taken by the Community courts.

Finally, one more remark should be made: Information obtained by asking customers is not nearly as reliable as data directly transmitted by a competitor, because a firm could never trust customers' answers – they will

[206] Commission Decision of 27 November 2002, Case COMP/E-1/37.152, *Plasterboard*, para. 474; Judgment of the Court of First Instance of 12 July 2001, Joined Cases T-202, 204 and 207/98, Tate & Lyle plc and others v Commission of the European Communities, 2001 ECR II-2035, para. 60.

[207] Autoritá garante della concorrenza e del mercato, Provvedimento N. 13622 del 30 settembre 2004, I575 – RAS-Generali/IAMA Consulting, paras. 158 to 165.

be inclined to state a lower price in order to induce the inquiring firm to reduce the price even more.[208]

5.2.8 Private character of the information exchange

Already in the VIIth Report on Competition Policy, the Commission stated that, apart from the market structure and the features of the information exchange itself, it also took into account whether the information exchange improved "only the sellers' knowledge of the market".[209] In the *Tractor* case, one factor in the condemnation of the information exchange was that the data was intended only for the undertakings participating in the exchange, to the exclusion of their competitors and of consumers.[210]

Transparency on the consumer side – a two edged sword
The reasoning behind these cases is clear from what has been set out above in the paragraph on market transparency: If information is only exchanged privately between firms, the anti-competitive potential is high because it may serve as a monitoring mechanism for collusion. If the information is made available to consumers, they can quickly react to any competitive measures taken by one of the firms, making deviation more attractive. But it has been shown that this also means that retaliation strategies can be more effective. So how do competition authorities and authors in doctrine evaluate these two concomitant effects?

Examples from Italy and Spain
The Italian Competition Authority is of the opinion that the first effect prevails over the second, especially in markets with differentiated products, and thus attaches great relevance to the question whether the information is exchanged exclusively between the companies, not benefiting consumers.[211]
According to *Capobianco/Fratta*, the findings of the AGCM could well amount to a powerful defence for undertakings faced with charges for an information exchange agreement insofar as there seems to be a presumption that such conduct is not anti-competitive if the information is made available to consumers.[212]
Another nice illustration is provided by a Spanish case involving a statistical project by the trade association for the audiovisual sector. The competition authority pointed out that the result of the information exchange, a kind of

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[208] Posner, *Law and Economics*, p. 310.
[209] VIIth Report on Competition Policy, para. 8.
[210] Judgment of the Court of First Instance of 27 October 1994, Case T-35/92, John Deere v Commission of the European Communities, 1994 ECR II-957, para. 51; Judgment of the European Court of Justice of 28 May 1998 Case C-7/95 P, John Deere Ltd v Commission of the European Communities, 1998 ECR I-3111, para. 89. See also Judgment of the Court of First Instance of 11 March 1999, Case T-141/91, Thyssen Stahl AG v Commission of the European Communities, 1999 ECR II-347, para. 398.
[211] Autoritá garante della concorrenza e del mercato, Provvedimento N. 13622 del 30 settembre 2004, I575 – RAS-Generali/IAMA Consulting, para. 166. This is in line with the findings of Schultz, *Transparency on the Consumer Side*, p. 280.
[212] Capobianco/Fratta, *Information Exchanges*, p. 6.

yearbook, would be available in 3000 video stores and that a consumer protection agency had actually also subscribed to it.[213]

Conclusion
Caballero Sanz[214] writes that the exclusive use of the information exchanged by the members of the agreement is a necessary condition for an infringement of Art. 81 (1) EC, that the availability to third parties consequently constitutes the decisive borderline between desired market transparency and undesired anti-competitive effects. Similarly, for communication about future plans, *Kühn* explains that if such communication is public, for example in the form of price announcements, it contains a sort of commitment to the consumers, which makes up for the potential facilitation of coordination.[215] On the other hand, *Nitsche/von Hinten-Reed* point out that companies may choose to revert to public information exchange just because a private information network would be too costly to entertain. In such a case, the anti-competitive potential does not really diminish only because the information is now public.[216]
During my research, I have not come across a case where an information exchange agreement was cleared because the data was made available to a larger public. It remains to be seen whether undertakings will try to use this defence or whether they find that availability of the data for everyone rather undermines the original purpose of their agreement.

5.2.9 Discussion of the data

This aspect was mentioned several times by the Commission as a kind of aggravating circumstance. Regular contacts allow firms to decide together whether changes in the figures are due to someone's cheating and to coordinate retaliatory measures accordingly. In the *Tractor* case, the Commission lists factors taken into account in the assessment of the information exchange, and one of them is the fact that the members meet regularly within the framework of their trade association that gives them a forum for discussion.[217] In *CEPI*, it insisted that some safeguards should be inserted into the agreement, among others a rule that the statistics should not be discussed during meetings between competitors.[218] The Court of First Instance in *Thyssen Stahl*[219] believed that the reasoning from *Tractor* applied *a fortiori* where the information exchanged is the subject of regular

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[213] Tribunal de Defensa de la Competencia, Expediente A 296/01, Anuario Videográfico, 9 April 2002, para. 4.
[214] Caballero Sanz, *Information Exchange Mechanisms*, p. 32.
[215] Kühn, *Fighting Collusion*, p. 196.
[216] Nitsche/von Hinten-Reed, *Competitive Impacts*, p. 24; see also Ten Kate/del Carmen Dircio, *Intercambio de Información*, pp. 112 and 120, who claim that for an assessment of the anti-competitive effects as opposed to the procompetitive effects, the public character of the information exchange is of no importance.
[217] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, para. 35.
[218] Commission Notice, Case IV/34.936/E1, *CEPI-Cartonboard*, para. 10.
[219] Judgment of the Court of First Instance of 11 March 1999, Case T-141/91, Thyssen Stahl AG v Commission of the European Communities, ECR II-347, para. 410.

discussion. The UK Office of Fair Trading adds that, even though aggregated and historical data are principally innocent, competition concerns could arise if such data were used to discuss the level of fees in the future.[220]
It follows that, while an information exchange agreement can probably be deemed anti-competitive even if there are no regular meetings and discussions of the data, such communications may attract the attention of competition authorities, and even exchanges with a low anti-competitive potential may amount to an infringement if they are accompanied by intensive contacts between the competitors.

5.2.10 Conclusion

This list of criteria clearly shows that companies that wish to establish a waterproof information exchange system have to proceed with great care. Even though, for example, historical information is principally innocent, this might not be the case where it becomes the object of regular discussions, and diligence is required when it comes to the aggregation of data, because factors like structural links between the firms, the concentration in sub-markets, the homogeneity of the product and the question to what extent other public information may make possible the identification of companies and transactions all have to be taken into account. The criteria mentioned in the section on market structure clearly interact with the characteristics of the information exchange to some extent, and the enumeration of possible points of interest should therefore not be seen as a list for ticking off. The conditions imposed by the Commission in *CEPI* reveal that the every single provision in an information exchange agreement will be the object of scrutiny.
The discussion on how information exchanges should be dealt with in competition law is by no means terminated yet.

[220] Office of Fair Trading, *Independent Schools FAQ*, p. 4.

6 Defences and justifications

In this section, I would like to present some of the arguments put forward by the undertakings when they were faced with infringement proceedings. In most cases, the competition authorities and courts have not been particularly responsive to such claims, but the examination of these arguments certainly sheds more light on their way of reasoning and might help companies to better estimate their chances of success.

6.1 No agreement

The parties in the *Tractor* case argued that Art. 81 (1) EC was not fulfilled because there was no “agreement between undertakings”. They claimed that there was only a bundle of vertical agreements between each of them and the company responsible for the collection and collation of the data. This argument was, however, of no avail: The Court of First Instance endorsed the Commission’s view. It held that, first, in order for the statistics to be fully effective, the companies had to agree that dealer territories should be defined by reference to the UK postcode system, because this was the smallest territory covered by the statistical breakdown, and that second, they had to establish an institutional framework which enabled them to receive information via their trade association.[221]

The Italian Competition Authority was faced with the same arguments in both *RC Auto* and *IAMA Consulting*. The insurance companies claimed that they only had concluded bilateral contracts with the business consultancy, that there was therefore no reciprocity and that, moreover, they had adhered to the exchange system at different points of time and had acquired different sets of information. The AGCM found a more convincing and elegant solution than the Commission: It stated that the mere involvement of a third party could not relieve the parties of their liability because this would amount to a circumvention of the law. The third party is but the instrument of their plan, and the fact that they conclude contracts with this third party demonstrates their willingness to share strategic information with competitors. Their information exchange therefore could be qualified as a concerted practice.[222] The German Federal Cartel Office adds that in such cases, the vertical contracts are designed in a way that makes it impossible to enter into the vertical agreement without at the same time agreeing to a horizontal coordination.[223]

[221] Judgment of the Court of First Instance of 27 October 1994, Case T-35/92, John Deere v Commission of the European Communities, 1994 ECR II-957, paras. 63-66.

[222] Autoritá garante della concorrenza e del mercato, Provvedimento N. 13622 del 30 settembre 2004, I575 – RAS-Generali/IAMA Consulting, paras. 148 to 152; Autoritá garante della concorrenza e del mercato, Provvedimento N. 8546 del 28 Iuglio 2000, I388 – RC AUTO, paras. 223/224.

[223] Bundeskartellamt, B1-63/00, 9 August 2001, *Statistisches Informationssystem Transportbeton*, para. 2.1.

It follows that the mere involvement of a third party as an administrator of the exchange system cannot be claimed in order to escape liability because of a lack of an "agreement between undertakings".

6.2 No actual anti-competitive effect

Both in *Tractor* and in *Wirtschaftsvereinigung Stahl*, the companies argued that the Commission had failed to prove the anti-competitive effect of the information exchanges. However, the Commission pointed out that both in the context of Art. 65 ECSC and Art. 81 EC, account had to be taken not only of the actual, but also of the potential effects of an agreement, and if these are sufficiently marked, the agreement constitutes an infringement of competition law. The same is true if an agreement creates a structure that is likely to be used for anti-competitive purposes.[224] The Court of First Instance reiterated the Commission's findings as to the elimination of hidden competition and the negative effects on market access and concurred with the Commission's view that the *Tractor* information exchange did indeed infringe the Treaty's competition rules.[225]
Thus, it appears that, provided the market structure is favourable to tacit collusion and the features of the information exchange make it a suitable monitoring device, the burden of proof for the Commission is rather low for the anti-competitive effect of such an agreement.

6.3 Freedom of action not affected

In *Eurofer*, a court case following the *Steel beams* decision, the incriminated trade association relied on the Community law concept of competition in order to challenge a Commission decision. Both the Commission and the Community courts have repeatedly formulated that, for competition to exist, each economic operator must determine independently the policy that he intends to adopt on the Common Market. *Eurofer* argued that the freedom of action thus defined of the undertakings involved in the agreement was not affected either by receiving data from competitors nor by providing information in return. If they adopted a certain coordinated behaviour at a later stage because of their extended knowledge, this was not an immediate effect of the information exchange itself and could not be taken into consideration in its assessment.[226] The Court of First Instance did not specifically address this claim but merely reiterated what the Commission decision had said about the potentially detrimental effects on competition. It came to the conclusion that the information exchange in question made it

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[224] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, para. 51; Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl*, para. 53.
[225] Judgment of the Court of First Instance of 27 October 1994, Case T-35/92, John Deere v Commission of the European Communities, 1994 ECR II-957, paras. 47-52.
[226] Commission Decision of 16 February 1994, Case 94/215/ECSC, *European producers of beams*; Judgment of the Court of First Instance of 11 March 1999, Case T-136/94, Eurofer ASBL v Commission of the European Communities, para. 46.

possible for the participating undertakings to substitute practical cooperation between them for the normal risks of competition, and that their agreement thus "tended to prevent, restrict or distort competition" according to Art. 65 ECSC.[227] The case is an example for the fact that even agreements that do not contain clauses that directly restrict the commercial freedom of the parties can restrict competition between them and may be caught by the Community competition rules.[228]

It seems that the Community institutions assume that firms cannot help but adapt their commercial behaviour in an anti-competitive way once they have created the desired market transparency, and this danger is evidently seen as very plausible and not remote at all. Advocate General Ruiz-Jarabo Colomer clearly states in his opinion in the *Tractor* case that the reduction of uncertainty brought about by an information exchange agreement does restrict the freedom of undertakings to adopt independent commercial decisions.[229]

6.4 No anti-competitive use, no alignment of business conduct

In *Plasterboard*, the companies denied that they had used the data received from their competitors in the definition of their own strategies.[230] The French mobile telephony operators argued that the information they exchanged was not actually used for any anti-competitive purposes. Contrary to what the authority reproached them with, they had not used it for the surveillance of each other's activities or for targeted retaliation.[231]

The six Parisian hotels claimed that their information exchange had not led to an alignment of their commercial strategies and that the Conseil de la Concurrence had in particular not charged them with price alignment. They claimed that an information exchange should only be considered an independent anti-competitive practice if it resulted in their commercial conduct to be in perfect concordance.[232]

The Conseil de la Concurrence shot down these arguments with a simple recourse to Community case law, which says that information exchanges can be prohibited because of their damaging effect on hidden competition by artificially increasing transparency in an oligopolistic market. This case

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[227] Ibid., para. 95.

[228] Faull/Nikpay, *The EC Law of Competition*, para. 2.79.

[229] Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-7/95 P, John Deere Ltd v Commission of the European Communities, 1998 ECR I-3111, para. 49. See also Judgment of the Court of First Instance of 11 March 1999, Case T-141/91, Thyssen Stahl AG v Commission of the European Communities, 1999 ECR II-347, paras. 401, 406.

[230] Commission Decision of 27 November 2002, Case COMP/E-1/37.152, *Plasterboard*, para. 162.

[231] Conseil de la Concurrence, Décision No. 05-D-65 du 30 novembre 2005 relative à des pratiques constatées dans le secteur de la téléphonie mobile, para. 214.

[232] Conseil de la Concurrence, Décision No. 05-D-64 du 25 novembre 2005 relative, à des pratiques mises en oeuvre sur le marché des palaces parisiens, paras. 205, 209.

law did not require proof of an actual anti-competitive use of the information exchanged, nor of an alignment of commercial policies.[233]
The Commission in *Plasterboard* found similarly clear words, stating that it was not the actual use, but rather the fact that the information *might* be used which posed the problem. The fact that it was not necessary for the companies to have recourse to the information exchanged in the definition of their strategies could also be an indication for the very smooth functioning of the collusion and the effective monitoring. The Commission also mentioned that, if the firms did not consider the data useful, they would not have surrounded their information exchange with such secrecy.[234]
One can conclude that the anti-competitive use of strategic data is not a requirement for the condemnation as anti-competitive of an information exchange, and that these agreements themselves constitute such a great danger for competition that the actual proof of coordinated conduct is not necessary any more.

6.5 Efficiencies

The UK tractor manufacturers purported that their information exchange system could at least be exempted according to Art. 81 (3) EC because the data was helpful and actually used for quicker product development, better production planning and better monitoring of dealers. They also claimed that it was essential for checking warranty or bonus claims. The Commission was not convinced by these arguments. Even if these benefits existed, they were outweighed by the danger for competition, and by no means was such an extremely detailed exchange as in the present case indispensable to achieve these aims.[235] It is true that information exchanges can improve the internal efficiencies of firms, but these benefits may mostly be achieved with summary statistics about industry performance, i.e. in ways that are much less likely to facilitate collusion.[236]
Similarly, the Swedish oil companies boldly claimed that their statistics on sales figures was supposed to be a basis for independent commercial decisions on prices, rebates and product development and distribution. Konkurrensverket was not impressed by this argument and explained that, in order to evaluate the effect of one's competitive measures, all that was needed were one's own sales figures and the total market volume.[237]
It seems that once the abovementioned criteria are fulfilled, i.e. the information exchanged is recent and disaggregated and of strategic value,

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[233] Conseil de la Concurrence, Décision No. 05-D-65 du 30 novembre 2005 relative à des pratiques constatées dans le secteur de la téléphonie mobile, para. 218; Conseil de la Concurrence, Décision No. 05-D-64 du 25 novembre 2005 relative, à des pratiques mises en oeuvre sur le marché des palaces parisiens, paras. 269, 197 to 200.
[234] Commission Decision of 27 November 2002, Case COMP/E-1/37.152, *Plasterboard*, paras. 163/164.
[235] Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, paras. 60, 65.
[236] Kühn, *Fighting Collusion*, p. 191.
[237] Marknadsdomstolen, Beslut Dnr A 35/98, Konkurrensverket/Svenska Petroleuminstitutet och medlemsföretagen i SPI, 26 October 1999, p. 17.

and the frequency of the exchange is high, it will be quite impossible to claim efficiencies.

6.6 Data less precise than in the *Tractor* case

In several national cases of information exchange agreements, both the competition authorities and the incriminated undertakings have relied heavily on the *Tractor* case. The companies tried to prove that their case was fundamentally different and that *Tractor* therefore could not serve as a precedent. The case was special insofar as the tractor manufacturers exchanged an alarming amount of data with an extremely high degree of precision at very short intervals. Often information exchanges only cover one type of data, namely sales figures or quantities, and the exchanges take place less frequently.

In the French mobile telephony case, the Conseil de la Concurrence acknowledged that the data exchanged monthly by the three companies (net number of customers, terminated contracts) was a lot less precise than the information in the *Tractor* case. However, this did not mean that the exchange could not have anti-competitive effects – the precision itself was not decisive, but the link between the nature of the information and the possibility of each company to monitor the impact of its own commercial decisions and its competitors' policies on its own sales. In other words, the data must be of strategic interest.[238]

On the other hand, the Swedish market court came to the conclusion that the information exchange between oil companies concerning sales figures was not directly comparable to the *Tractor* case, because the data there was considerably more detailed.[239] Even though this finding was not the main reason why the competition authority's decision was quashed, it certainly influenced the outcome of the case.

I tend to agree with what the French competition authority said about the strategic value of data. The information exchange agreement at issue in *Tractor* was unprecedented in its comprehensiveness and level of detail. It would most certainly not have survived the Commission's scrutiny even if the information had been a lot less detailed and exchanged less frequently.

6.7 No additional transparency

Finally, *SPI* is the only case where the incriminated undertakings put up a successful defence. Principally all oil companies in Sweden, the six biggest accounting for 97% of the market share, participated in a monthly exchange of individualised sales figures. The Swedish competition authority explained nicely how information exchanges work in the context of oligopolistic

[238] Conseil de la Concurrence, Décision No. 05-D-65 du 30 novembre 2005 relative à des pratiques constatées dans le secteur de la téléphonie mobile, paras. 204 to 209.

[239] Marknadsdomstolen, Beslut Dnr A 35/98, Konkurrensverket/Svenska Petroleuminstitutet och medlemsföretagen i SPI, 26 October 1999, p. 21.

interdependence, but the companies came up with a strong counter-argument: They claimed that there was basically hardly any hidden competition, because prices were displayed in huge letters at every petrol station, and even secret rebates for major customers were not really secret. At the time when the statistics on quantities was published, the competitors already knew whether someone had lowered their prices or granted special discounts. The market court accepted these submissions and quashed the decision.[240]

Authors commentating on this case agree that Konkurrensverket should have focused more on the part of the market that was less transparent and conducted some more thorough investigations in that respect. It had relied too much on the theoretical model and had neglected to examine the actual market conditions.[241]

The conclusion is that if undertakings can prove that there is practically no hidden competition in their industry because all or almost all competitive measures become rapidly known to their competitors, an information exchange does not add any "artificial" transparency to the market and cannot serve as a monitoring tool for tacit collusion.

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[240] Marknadsdomstolen, Beslut Dnr A 35/98, Konkurrensverket/Svenska Petroleuminstitutet och medlemsföretagen i SPI, 26 October 1999.

[241] Sandin, *Avancerad ekonomisk analys*, p. 25; Nilsson, *When is Transparency Good for Competition?*, p. 160.

7 Type of infringement: By object? By effect? *Per se*?

The extensive lists of criteria presented in section 5 might indicate that information exchange agreements can easily be assessed by just going through and ticking off the single characteristics. However, this would be misguided: As I mentioned above, the area of law is still on the move, and many open questions remain. One question that has not been answered satisfactorily yet is whether information exchange agreements, seen as an independent infringement of Art. 81 (1) EC, are prohibited because it is their object to prevent, restrict or distort competition or whether it rather is their anti-competitive effect which makes them unlawful.

7.1 Anti-competitive object or effect

Agreements or concerted practices whose object is to restrict competition are those that "by their nature" or "of themselves" constitute such a restriction. It is their natural tendency, irrespective of any intention on the part of the undertakings or of any conceivable positive effects on competition.[242]
Whish explains that if an agreement is qualified as having an anti-competitive object, the parties cannot claim that it does not restrict competition, because the law has decided that it obviously does, and only an exemption according to Art. 81 (3) EC or the proof that the restriction of competition or the effect on trade between Member States is not appreciable can save it.[243] Examples are the classical cartel practices of price fixing, market sharing or sales or output limitation. There is consequently no scope for a "rule of reason" type of review within Art. 81 (1) EC if an agreement is judged to have an anti-competitive object. There is no need to provide evidence for negative market effects because such effects are presumed.[244]
In that respect, a comparison can be drawn to *per se* infringements of section 1 of the Sherman Act under US antitrust law, but it has to be kept in mind that the Sherman Act does not contain a provision equivalent to Art. 81 (3) EC.[245]
In cases that do not fall in this category, an extensive analysis of their actual or potential and appreciable effect on the relevant market has to be carried out before an infringement of Art. 81 (1) EC can be established. This is

[242] Faull/Nikpay, *The EC Law of Competition*, para. 2.61.
[243] Whish, *Competition Law*, p. 111.
[244] Cf. Commission Notice - Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 2001 OJ C 3/2, para. 25.
[245] Ibid., p. 112. Grillo, *Collusion and Facilitating Practices*, pp. 7/8, and Van den Bergh/Camesasca, *European Competition Law*, p. 193, also assume that the concepts are identical.

done by comparing the current competitive situation with the competition that would occur in the absence of the agreement or concerted practice.[246]

7.2 Which category do information exchange agreements fall in?

So what do the relevant Commission decisions, court judgments and case annotations say about this matter? The answer is that they are rather contradictory and confusing. In the very first case on a pure information exchange, *Fatty Acids*, the Commission held that the agreement had as its "object and effect" the restriction or distortion of competition.[247] In the litigation following the *Tractor* case, the Commission emphatically rejected the applicants' contention that it had applied a *per se* rule, pointing to the comprehensive market analysis it had conducted. The Court of First Instance equally noted that the Commission had based its decision by no means on the object, but exclusively on the potential anti-competitive effects of the information exchange.[248] However, several authors[249] seem to concur with the applicants in these cases and believe that the Commission has indeed created the *per se* offence of "exchanging information in a highly concentrated market prone to tacit collusion". *Kühn/Vives* also claim that such conduct should be regarded as a restriction of competition "in itself", i.e. as a *per se* infringement.[250]

7.3 Questions raised by the *Plasterboard* decision

The *Plasterboard* cartel decision sheds a new light on the problem in so far as it evidently constitutes a departure from the Commission's former approach to information exchange agreements. Of course, some caution is appropriate, because the *Plasterboard* case does not deal with a pure information exchange, but in my opinion, the relevant statement made there is of a general nature and comprehends pure information exchanges. The

[246] Faull/Nikpay, *The EC Law of Competition*, para. 2.71, referring to Judgment of the European Court of Justice of 30 June 1966, Case 56/65, Société Technique Minière v Maschinenbau Ulm GmbH, 1966 ECR 235, at paras. 249 and 250.
[247] Commission Decision of 2 December 1986, Case IV/31.128, *Fatty Acids*, para. 33.
[248] Judgment of the Court of First Instance of 27 October 1994, Case T-35/92, John Deere v Commission of the European Communities, 1994 ECR II-957, paras. 46, 47 and 92; Judgment of the Court of First Instance of 24 October 1994, Case T-34/92, Fiatagri and New Holland Ford v Commission of the European Commuities, 1994 ECR II-905, para. 49; see also Commission Decision of 17 February 1992, Cases IV/31.379 and 31.446, *UK Agricultural Tractor Registration Exchange*, para. 51 – "potential anticompetitive effects", similarly Commission Decision of 26 November 1997, Case IV/36.069, *Wirtschaftsvereinigung Stahl*, para. 53.
[249] Whish, *Competition Law*, p. 446; Bissocoli, *Trade Associations*, p. 101; Seabright/Halliday, *Networks Good, Cartels Bad*, p. 92. I agree with Bissocoli's view that the line between rule of reason cases and per se infringements becomes rather blurred where agreements are condemned because of their purely potential anti-competitive effects.
[250] Kühn/Vives, *Information Exchanges*, p. 116.

overarching complex and continuous agreement that constituted the framework for the several information exchanges and meetings was deemed to have as its *object* the restriction of competition on the plasterboard market,[251] and in para. 449, we read:

> "… An information exchange constitutes *per se* an infringement of Article 81 (1) of the Treaty if the requirement of independence according to which each trader must determine independently his conduct on the market is undermined as a result. This requirement of independence will without a doubt be affected if the exchange takes place in a highly concentrated market and if it reduces the risk of uncertainty for the trader."[252]

The Commission's statement is somewhat quizzical. If a *per se* infringement is indeed identical with a restriction of competition by object, as suggested by *Whish*, then the Commission's approach appears illogical: According to the *Plasterboard* excerpt, an information exchange as a *per se* infringement could only be established after the market has been analysed in order to determine whether it is highly concentrated, and after an examination of its effects has been carried out, in order to find out whether it reduced the risk of uncertainty for the undertakings in question. The latter is precisely the reason why the Commission condemned the *Tractor* exchange, relying on its anti-competitive effect: It eliminated uncertainty and therefore prevented hidden competition. It does not make sense at all to require the proof of a certain effect in order to establish the anti-competitive object.
If this is the correct reading, then nothing is won by calling information exchanges *per se* infringements only under certain circumstances, because both a market analysis and an estimation of the agreement's effects would still be required in order to bring them within the scope of Art. 81 (1) EC.

7.4 Conclusion

The conclusion must be that it is still a wise strategy for undertakings to try and challenge the Commission's charges both under Art. 81 (1) EC, by contending that the agreement in question did not take place on a highly concentrated market and that uncertainty was not reduced as a consequence of their conduct, and under Art. 81 (3) EC, with the aim of having the agreement exempted because of the legitimate business purposes it pursues or the efficiencies it creates. As we have seen, there is little chance of success for the latter strategy once it is established that the information exchange covers recent and individual data and takes place in a market prone to tacit collusion. Insofar, apart from some terminological confusion, the *Plasterboard* decision seems not to have changed the state of affairs after all.

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[251] Ibid., para. 461.
[252] Commission Decision of 27 November 2002, Case COMP/E-1/37.152, *Plasterboard*, para. 449.

8 Conclusion and outlook

The aim of this work was to examine the European case law on information exchanges, with an open mind to what is going on in this area in the Member States and to what economic scientists have to say on the matter.
I would like to recall here that several national competition authorities have relied on the findings in the leading *Tractor* case, even though the issue before them was dealt with under national competition rules. I have, however, not come across national decisions that refer to cases from other Member States. Of course, I am aware that such references could only be used as additional supportive arguments or as an inspiring source and that language barriers constitute important obstacles. Still I am convinced that a heightened awareness of the fact that one's neighbours deal with exactly the same problems, based on principally identical laws, can only further the development of more concise rules of assessment. This work wants to encourage legal practitioners and competition law enforcers from all Member States to look across the borders and be inspired by foreign case law, not only when information exchanges are at issue.

Finally, as it would certainly not be particularly open-minded to ignore the legal developments happening on the other side of the Atlantic, I would like to conclude with a very short account of one aspect of information exchanges which has not made an appearance on the European stage yet: The Federal Trade Commission in the United States has repeatedly dealt with cases of information exchange in the course of due diligence proceedings preceding a merger. Until the transaction is closed, the companies are legally separate and are supposed to compete as aggressively as usual. On the other hand, they undeniably have a need to share sensitive information for a thorough due diligence and for the planning of efficient integration.
Three dangers have been identified: First, the merger negotiations could actually be just a cover-up for an unlawful information exchange, second, a firm may enter into merger negotiations with predatory purposes, and third, even the exchange of information during legitimate merger discussions might entail anti-competitive consequences. If the transaction never takes place, the would-be merging companies will have had access to highly sensitive business information, which could subsequently be used for unlawful coordination of business conduct.[253] In order to escape antitrust liability, companies are advised to exchange aggregate information rather than detailed data and to keep a low frequency of exchange, to postpone the exchange of sensitive information (like costs, pricing, marketing or product development plans) as far as possible and to make it accessible only to those who are involved in the negotiations. Most importantly, they must make sure that waterproof confidentiality agreements are in place, i.e. erect a kind of "firewall" between the employees that have access to sensitive

[253] Morse, *Mergers and Acquisitions*, p. 1479; Balto/Sher, *Navigating Troubled Waters*, pp. 20/21.

information and the departments which could make anti-competitive use of it.[254]

It remains to be seen when (for it is probably only a question of time) this type of case attracts the Commission's attention. The exchange of information in the course of due diligence, an issue situated where anti-competitive conduct under Art. 81 EC and law of mergers meet, is undoubtedly a fruitful field for future studies.

[254] Morse, *Mergers and Acquisitions*, pp. 1481/1482; Balto/Sher, *Navigating Troubled Waters*, pp. 23/24.

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