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Summary

Both consumers and firms need information to make good choices - whether it regards buying the best product in relation to price or quality or making strategic business decisions. Some transparency is beneficial for competition, whereas some creates a risk for collusive behaviour among firms. What information exchange is good and what is bad and how do we tell the difference?

From a traditional consumer protection point of view, market transparency allows consumers to make informed choices. Demand becomes more sensitive to price, which sharpens competition and brings essentially positive effects. The traditional antitrust view, on the other hand, is that a liberal flow of information between firms has mainly coordinating or collusive effects. When competing undertakings have access to information about each other's sales figures or investment plans, the scope for hidden competition such as secret price-cutting may be eliminated.

To distinguish between a "good" and a "bad" information exchange, different types of information and the means by which it is exchanged, are determining. Generally, information relating to future behaviour and especially to future prices or quantities, is very likely to have a negative impact on competition, since it enables firms to coordinate their actions. Historic information has a lower collusive effect. Likewise, aggregated data normally affects competition in positive ways, whereas individualised data more likely facilitates collusion.

The positive or negative effects of an information agreement depend not only on the nature of the exchanged information but also on the economic context in which it is exercised. The number of firms and product substitutability are two important factors. Thus, it is easier to restrict or distort competition in an oligopolistic market where firms are interdependent and products are homogeneous. Consequently, even aggregated information may infringe competition law, since the low number of firms allows the identification of individual market actors.

This was established by the ECJ in the *UK Tractors* case, in which an exchange of aggregated information between tractor suppliers in an oligopolistic market was found to infringe EC competition law. The numerous breakdowns, in combination with the few market actors (four actors held together 77 % and eight actors held together 88 %) enabled the identification of the quantities and market shares of individual market actors. This, the ECJ stated was a violation of Article 81(1) EC. *UK Tractors* was the first case, in which an information agreement was found to infringe competition law *by object* and not by its anti-competitive effects.

In relation to *UK Tractors*, I argue that the exchange of future price information in any market should be subject to a *per se* prohibition in European Competition Law. Moreover, in oligopolies, any exchange of price information, not older than one year, should be prohibited since the potentially beneficial effects of such exchanges are negligible whereas they create an imminent risk of collusion. However, undertakings will still have the possibility of recourse to an individual exemption in accordance with Article 81(3) EC.

Sammanfattning

Både konsumenter och företag behöver information för att ta kloka beslut vare sig det handlar om att välja den bästa produkten i förhållande till pris eller kvalitet, eller att ta goda, strategiska beslut i affärslivet. Viss transparens på marknaden är bra för konkurrensen medan annan skapar utrymme för otillåten samordning mellan företag. Vilken information är ”bra” och vilken är ”dålig” och hur skiljer man den ena från den andra?

Ur ett traditionellt konsumentperspektiv underlättar marknadstransparens för konsumenter att ta upplysta beslut. Efterfrågan blir mer priskänslig och konkurrensen ökar, vilket i sin tur får positiva konsekvenser för konsumenter i form av lägre priser och större utbud. Ur ett traditionellt konkurrensrättsligt perspektiv å andra sidan, ger ett fritt flöde av information incitament för företag att samordna sitt uppträdande på marknaden. När konkurrerande företag har tillgång till information om varandras försäljningssiffror eller investeringsplaner minskar utrymmet för t.ex. dold priskonkurrens.

För att kunna skilja ”bra” informationsutbyten från ”dåliga” är typen av information och sättet på vilket den utväxlas, avgörande. Utbyte av information om framtida agerande, i synnerhet avseende framtida priser eller kvantiteter, har med stor sannolikhet en negativ inverkan på konkurrensen eftersom det underlättar för företag att koordinera sitt agerande. På samma sätt har sammanställd information positiv inverkan på konkurrensen medan individualiserad information oftare underlättar konkurrensbegränsande samordning mellan företag.

De positiva eller negativa effekterna av informationsutbyten beror inte bara på informationens beskaffenhet, utan lika mycket på den ekonomiska kontext i vilken informationssamarbetet sker. Antalet företag och utbytbarheten mellan produkterna är två viktiga faktorer. Av den anledningen är det lättare att begränsa och snedvrída konkurrensen i oligopol där företagen präglas av ett ömsesidigt beroende och produkterna i stor grad är homogena. Följaktligen kan även ett utbyte av aggregerad information bryta mot konkurrenslagstiftningen om det låga antalet företag leder till att individuella marknadsaktörer kan identifieras.

Detta fastställde EG-domstolen i *UK Tractors*-fallet, i vilket ett informationssamarbete mellan traktorförsäljare ansågs strida mot EU:s konkurrensrätt. Det stora antalet uppdelningar av informationen i mindre enheter som kunde göras, i kombination med det låga antalet marknadsaktörer (fyra företag kontrollerade tillsammans 77 % och åtta företag kontrollerade tillsammans 88 %), gjorde att försäljningssiffror och marknadsandelar för enskilda företag kunde utläsas. Detta menade EG-domstolen, stred mot Artikel 81(1) i EG-fördraget. *UK Tractors*-fallet var det första i vilket EG-domstolen fann att ett informationssamarbete hade ett

konkurrensbegränsande syfte och inte bara en konkurrensbegränsande effekt.

Med hänvisning till utfallet i *UK Tractors*, argumenterar jag för ett *per se* -förbud i Europeisk konkurrensrätt mot utbyten av framtida prisinformation mellan företag på alla marknader. Dessutom, föreslår jag att alla informationsutbyten som rör prisinformation som inte är äldre än ett år, bör förbjudas när de sker på marknader som är oligopol. Anledningen är att informationsarbetenas positiva effekter är försumbara inom oligopol samtidigt som risken för en snedvridning av konkurrensen är överhängande. Emellertid bör möjligheten till individuellt undantag i enlighet med Artikel 81(3) EG-fördraget kvarstå.

Abbreviations

CFI	The Court of First Instance
EC	The Treaty establishing the European Communities
ECJ	The Court of Justice of the European Communities
ECSC	The Treaty establishing the European Coal and Steel Community

1 Introduction

Competition law is the core of the European Union. The creation of the European Communities in 1957 was primarily the creation of a single European market, which could only be realized with a common competition policy. Article 4.1 of the EC Treaty (EC) establishes that free competition in an open market economy is the principle upon which the economic policy of the Community shall be based. The objectives of European competition law are to promote a competitive market economy and to prevent barriers to integration of the single market.¹

In a market economy, the consumer is king and the most profitable firm is the one that attracts the most consumers. However, in order to make the right choices, consumers need to be well informed of different suppliers, prices, product qualities etc. Transparency on the consumer side benefits competition because it enables consumers to make good choices, which in turn creates incentives for firms to lower their prices, increase product quality etc.² Transparency on the firm side is more problematic. Firms need information about competing businesses in order to make strategic decisions and price their products competitively.³ However, full transparency is not necessarily desired since it is likely to harm competition. When competing firms have detailed information about the business, market strategy or prices of each individual competitor, this is very likely to remove natural competition.⁴

With a view to increasing transparency and hence, improving business, firms may agree to exchange information. An agreement to exchange information is defined as:

“An arrangement whereby undertakings organise themselves in such a way that they can gather and exchange certain information between them or supply such information to a common agency responsible for centralising, compiling and processing this information.”⁵

Such agreements between competing firms may fall under Article 81(1) EC if they have as their object or effect the restriction of competition. Some of those agreements will not harm competition while others will. How do we tell the difference? How is transparency on the consumer side related to transparency on the firm side and is it possible to keep one but not the other?

¹ Van den Bergh and Camesasca, 2001, pp. 1-2

² Møllgaard and Overgaard, “*Market Transparency: A Mixed Blessing?*”, 2000, pp. 4-5

³ Whish, “*Information agreements*”, *The Pros and Cons of Information Sharing*, 2006, p. 19

⁴ Møllgaard and Overgaard, “*Information Exchange, Market Transparency and Dynamic Oligopoly*”, 2005, *Issues in Competition Law and Policy* (Ed. 2007), p. 3

⁵ Faull and Nikpay, 2007, p. 731

Agreements to exchange information are often used as a means to monitor the members of a cartel. Through the exchange of information, the cartel members can keep an eye on each other's behaviour and any "cheating" will be detected and punished. Without the information exchange, there would be only a minimal threat of retaliation and collusion would be more difficult to sustain.⁶

However, undertakings may also exchange information without actually entering into an explicit agreement or concerted practice to rig the market. When the information exchange is independent of any cartel behaviour, it is referred to as a *pure information agreement*⁷. Even though there is no underlying cartel, a pure information agreement could still lead to an infringement of competition law if it makes it easier for the parties to align their behaviour.⁸

In this thesis, I will discuss the competitive implications of pure information agreements in oligopolistic markets. The special characteristics of oligopolies make information sharing in such markets more problematic since the likelihood of identifying individual undertakings increases when there are fewer market actors. An oligopoly is characterised by few market actors with good knowledge of each other's businesses. The more transparent the market, the less is the need for increased transparency. Thus, it is questionable whether there is in fact a need for information agreements in oligopolistic markets, since they are likely to do more harm than good.

1.1 Purpose and delimitations

The purpose of this thesis is to analyse the competitive impact of information exchange in oligopolistic markets. I will try to distinguish harmless or even competitively beneficial information exchanges from those resulting in a restriction of competition. The particular market characteristics of an oligopoly provide a natural limitation to my research. Moreover, oligopolies have been the subject of many decisive competition cases on information exchange from the European institutions, which is why I find this to be a due delimitation. This thesis treats exclusively information exchanges that are independent from any other anti-competitive agreement, i.e. pure information agreements. I have limited my research to the legislation and case law of the European Communities.

⁶ Vives, "*Information sharing: economics and antitrust*", The Pros and Cons of Information Sharing, 2006, p. 88

⁷ The expression is borrowed from Lévêque, "*UK Tractors, Paris luxury hotels and French mobile telephony operators: are all oligopoly information exchanges bad for competition?*" World Competition, 2007, vol. 30, number 2

⁸ Whish, "*Information agreements*", The Pros and Cons of Information Sharing, 2006, p. 20

My analysis revolves around Article 81(1) EC. Therefore, I will not discuss the EC Merger Regulation or any voluntary commitments that can be made by undertakings.

1.2 Method and material

To this thesis, I apply a legal, dogmatic method, which means a description and analysis of the traditional sources of law. My research revolves around EC legislation, Commission decisions, case law from the Court of First Instance and the European Court of Justice (hereinafter jointly referred to as the Courts), reports and, of course, many books and articles. Regarding the legal literature, I only rely on sources from either well renowned authors or articles published in reliable, scholarly periodicals.

Information exchange and information sharing are used synonymously and an information agreement has the same meaning as an agreement to exchange information.

1.3 Outline

I start in Chapter 2 by providing a general background to information exchange. The concept of market transparency is explained as well as the incentives for and features of information sharing among firms. This introductory part is then followed by a chapter on the oligopolistic market and its particular characteristics. Here I discuss a few models of oligopolistic market behaviour, which are useful to the later analysis. Chapter 4 provides a review of relevant EC legislation on information exchange. In Chapter 5, I review the major cases and decisions on information exchange from the European Institutions. Focus will be on the *UK Tractors* case⁹, which has been decisive of the Commission's policy on information exchange. In Chapter 6 I weigh the pros and cons of a *per se* prohibition of agreements to exchange information, both in general and in oligopolistic markets.

In Chapter 7, I analyse the facts previously presented and try to establish when an information exchange in an oligopolistic market becomes anti-competitive and what characterises it. Lastly, I sum up the results of my analysis with a general conclusion in Chapter 8.

⁹ *UK Agricultural Tractor Registration Exchange* decision, OJ 1992 L 68/19, T-35/92 *John Deere Ltd v Commission*, C-7/95 *John Deere Ltd v Commission*

2 General aspects of information exchange

2.1 Market transparency

First, the concept of market transparency needs to be defined. Let us take price transparency, which is often the main element when discussing market transparency, as an example. Price transparency can be described with reference to the costs in time and money required to discover real transaction prices. The lower the costs of finding out, the more transparent the market.¹⁰ It has been suggested that the Internet provides the ideal example of full transparency and would therefore be a market of perfect competition.¹¹ Internet search engines and shop-bots¹² allow customers to search for prices and product characteristics from online retailers, requiring only a minimum of effort and cost.¹³

Only if the market is perfectly competitive, i.e. there are many buyers and sellers, homogenous goods, no barriers to entry and full transparency, the welfare improvements of increased transparency can be certain.¹⁴ In all other situations, market transparency, with certainty, cannot be judged to neither increase nor reduce welfare. Consequently, there are different views on whether the effects of market transparency are mainly positive or negative, which explains why the definition of market transparency is considered somewhat vague.¹⁵ In the following, I present the two key opposing views on market transparency.

From a traditional consumer protection point of view, market transparency allows consumers to make informed choices, which protects them from being exploited by unscrupulous firms. Consumers with good knowledge of differences in price and characteristics can make good comparisons and are more inclined to switch from one supplier to another as a reaction to changes. Demand will become more sensitive to price, which will sharpen competition and give mainly positive effects.¹⁶

¹⁰ OECD Policy Roundtables on Price Transparency, 2001, p. 9

¹¹ See e.g. “*E-Commerce and Its Implications for Competition Policy*” Frontier Economics (2002) and Møllgaard and Overgaard, “*Transparency and Competition Policy*”, The Pros and Cons of Information Sharing, 2006

¹² Shopbot is an abbreviation for shopping robot, which is an online tool for product comparison and purchasing.

¹³ Smith, “*The Impact of Shopbots on Electronic Markets*”, Journal of the Academy of Marketing Science, 2002, p. 446

¹⁴ Møllgaard and Overgaard, “*Transparency and competition policy*”, The Pros and Cons of Information Sharing, 2006, p. 104

¹⁵ Møllgaard and Overgaard, “*Market Transparency: A Mixed Blessing?*”, 2000, p.1

¹⁶ Ibid. pp. 4-5

Another important aspect of transparency, from a consumer's perspective, is that it can facilitate for new actors to enter a particular market. Easy access to information can help spreading for example technological knowledge, which in turn can increase the number of firms capable of operating in the market. This is beneficial for undertakings trying to enter a new market, and for consumers, since more actors means more competition and hopefully better products and lower prices.¹⁷

However, Møllgaard and Overgaard¹⁸ point out that it is difficult to improve information to customers without also improving the information to companies active in the same market. When competing undertakings have access to information about each other's sales figures or investment plans, they are able to make strategic decisions and price their products competitively.¹⁹ More and better information would therefore eliminate the scope for hidden competition such as secret price-cutting.²⁰ As a result, increased market transparency could make the market more collusive by raising the general price level or reducing product quality, rather than helping consumers making the right choices.²¹ This represents the traditional antitrust view, that a liberal flow of information between firms has mainly a coordinating or collusive effect.²²

Put this way, it seems rather simplistic. However, other factors need to be taken into account. Møllgaard and Overgaard suggest that the two different views on information exchange might focus on different kind of information. Information of great value to consumers regards prices, product characteristics, guarantee terms etc. and is information that flows from firms to potential customers. From an antitrust perspective, it is the exchange of information such as prices (past, present and future), competition clauses, quantities, capacities, buyer identities and investment plans, that is crucial. Thus, Møllgaard and Overgaard propose that with the proper interpretation, both views might be right. Consumer protection and free competition are not necessarily opposing each other, but could exist parallelly.²³ This emphasises that the pros and cons of market transparency need to be weighed carefully taking the circumstances of the specific market situation into account and that it is essential to distinguish between different kinds of information exchange.

¹⁷ Whish, "Information agreements", The Pros and Cons of Information Sharing, 2006, p. 20

¹⁸ Møllgaard and Overgaard, "Market Transparency: A Mixed Blessing?", 2000, p. 2

¹⁹ Bergman, "Introduction", The Pros and Cons of Information Sharing, 2006, p. 11

²⁰ Møllgaard and Overgaard, "Market Transparency: A Mixed Blessing?", 2000, p. 4

²¹ Bergman, "Introduction", The Pros and cons of information sharing, 2006, p. 11

²² Møllgaard and Overgaard, "Information Exchange, Market Transparency and Dynamic Oligopoly", 2005, Issues in Competition Law and Policy (Ed. 2007), p. 3

²³ Ibid. p. 4

2.2 Incentives for undertakings to exchange information

“The incentive to share information for a firm is the increased precision of information obtained, from the pooled information of rivals, about common value uncertain payoff relevant parameters.”²⁴

The perfectly competitive market with full transparency is merely an ideal. In reality, firms only have incomplete information and in order to become more profitable they need to attain further and more accurate information. The more precise knowledge an undertaking has about market conditions, its competitors’ volume of demand or investment plans etc., the more rational and effective decisions on marketing strategies it can make.²⁵ This is called the *precision-effect*.²⁶

A beneficial effect is *“the output adjustment that follows after information is exchanged”²⁷*. Output adjustment means that a well-informed firm will produce more if demand is high and less if demand is low. Without an exchange of information, there could be an uncertainty on actual demand leading to a miscorrelated output. Prices would then have to adjust to clear the market leading to potential economic losses. Thus, information exchange allows undertakings to adjust their output to the true demand of the market, which is likely to make them more profitable. The greater the uncertainty, the greater is the gain from an information exchange.²⁸

In addition to the output adjustment, production rationalisation can be very large due to cost information exchange. Information sharing can also improve economic efficiency by eliminating strategic uncertainties about rivals’ investments plans.²⁹ This leads to improvement of the economic efficiency since *“non-binding information exchange (‘cheap talk’) can help to create an environment in which more uncertain projects are likely to expire”³⁰*. Another positive aspect of information sharing is, according to Halliday and Seabright, that *“the capacity of firms to innovate depends not just on their own skills and capacities but on those that characterise other firms in their vicinity”³¹*. It is disputed whether these effects are due entirely

²⁴ Vives, *“Information sharing: economics and antitrust”*, The Pros and Cons of Information Sharing, 2006, p. 85

²⁵ Whish, *“Information agreements”*, The Pros and Cons of Information Sharing, 2006, p. 19

²⁶ Grillo, *“Collusion and Facilitating Practices: A New Perspective in Antitrust Analysis”*, European Journal of Law and Economics, 2002, p. 163

²⁷ Nitsche and Hinten-Reed, *“Competitive Impacts of Information Exchange”*, 2004, p. 12

²⁸ Ibid. pp. 12-13

²⁹ Vives, *“Information sharing: economics and antitrust”*, The Pros and Cons of Information Sharing, 2006, p. 87

³⁰ Nitsche and Hinten-Reed, *“Competitive Impacts of Information Exchange”*, 2004, p. 11

³¹ Halliday and Seabright, *“Networks good, cartels bad: but how could anyone tell the difference?”*, Fighting Cartels: Why and How?, 2001, p.78

to the presence of markets for skills and other scarce inputs, or whether there are direct spill-overs between firms that are not mediated by market transactions. I believe that the success of one competitor is an incentive for other market actors to become stronger and develop better products, even without an information exchange.

In conclusion, the incentive for firms to exchange information is, simply put, that they benefit from being better informed. An agreement to exchange information is a straightforward way for competing undertakings to make use of each other to become more profitable.

However, the very nature of an information exchange implies that an undertaking not only attains useful information, but also gives information away. Certainly not all undertakings are happy to improve the information of its competitors if they are not convinced that the exchange will have predominantly positive effects. The fact that the information exchange provides rivals with the same knowledge leads to a secondary effect that might mitigate the principal beneficial effect. When all market actors have the same information, it takes the edge off the primary advantage created by the information exchange.³²

2.3 The nature of the information exchanged

Information is described as “*facts or details that tell you something about a situation, person, event etc.*”³³ This is a fuzzy, broad concept that can include a wide variety of notions and to be able to discuss the impact of information exchange on competition, it is necessary to clarify its meaning. There are different kinds of information with different characteristics and with varying impacts on competition. This is emphasised by Nitsche and Hinten-Reed who state that:

*“Both the expected beneficial effect on consumers and the potential harmful effects for competition depend on the type and characteristics of the information that is exchanged.”*³⁴

In order to explain and identify the different features of the exchanged information, I will divide it into two categories. Firstly, I will discuss the content of the information and secondly, the means by which it is exchanged.³⁵

³² Nitsche and Hinten-Reed, “*Competitive Impacts of Information Exchange*”, 2004, p. 12

³³ Longman Dictionary of Contemporary English, 2001

³⁴ Nitsche and Hinten-Reed, “*Competitive Impacts of Information Exchange*”, 2004, p. 8

³⁵ Whish, 2003, p. 487-488

2.3.1 The content of the information

The content of the information refers to not only the communicated facts but also to how recent the information is and whether it contains individualised or aggregated data. Kühn³⁶ discusses the time aspect and states that there are two very different types of information exchange. First, there is communication about planned future market conduct. This could consist of information about planned prices, production, launching of new products and capacity expansions. Since this information, by its very nature, is not verifiable when communicated or at the time of decision-making, it is called *soft information*. The second type of information exchange involves information about undertakings' past and current situations and is called *hard information*, since it can be verified. *Hard information* deals with, for instance, information about customers, orders, input prices or past decisions.³⁷

Sharing information about future conduct has generally a more restrictive impact on competition since it creates a good base for synchronised market actions. This is established, not only by Kühn³⁸, but also by Whish³⁹ and Møllgaard and Overgaard⁴⁰. Exchange of "hard information", where firms simply pass on information on actions that have already been taken, will not increase the likelihood of collusion to any serious extent. Still, one has to bear in mind that the more recent the historic information is, the more likely it is to have a negative impact on competition.⁴¹

Peeperkorn, argues that communication between competitors on future pricing, production volumes or capacity changes "*is just 'cheap talk' without influence on the likelihood of collusion*"⁴². It is not until the information reaches consumers that it may increase the likelihood of collusion. The reason, according to Peeperkorn, is that when companies publish information on future prices, it normally has a committing effect. "*What was 'cheap talk' when kept between competitors becomes less 'cheap', with a higher competition distorting potential*"⁴³. This idea is upheld by Vives⁴⁴, who says that the consumer benefits gained from price announcements that represent a commitment possibly countervail the coordinating potential of communication of future plans.

³⁶ Kühn, "*Fighting collusion by regulating communication between firms*", Economic Policy, 2001, p. 170

³⁷ Ibid.

³⁸ Ibid.

³⁹ Whish, 2003, p. 487

⁴⁰ Møllgaard and Overgaard, "*Information Exchange, Market Transparency and Dynamic Oligopoly*", 2005, Issues in Competition Law and Policy (Ed. 2007), p. 17

⁴¹ Whish, "*Information agreements*", The Pros and Cons of Information Sharing, 2006, p. 23

⁴² Peeperkorn, "*Competition Policy Implications from Game Theory: An Evaluation of the Commission's Policy on Information Exchange*", 1996, p. 6

⁴³ Ibid. p. 7

⁴⁴ Vives, "*Information sharing: economics and antitrust*", The Pros and Cons of Information Sharing, 2006, p.90

Very interestingly, and in relation to public access to price information, the Danish Competition Council decided in 1993 to improve market transparency by gathering and publishing price information of individual firms producing ready-mixed concrete. The purpose was to strengthen competition and counter any oligopolistic collusion through the largest possible transparency. The underlying premise of the Competition Council was that more firm-specific price information always benefits consumers and puts pressure on oligopolists to lower their prices. The result, however, was that prices increased sharply in short time and converged across firms. In other words, the opposite of what had been envisaged.⁴⁵ This shows that improved market transparency, also when communicated publicly, may lead to collusion.

Another important aspect of consideration is the level of anonymity and aggregation of the exchanged information. Information can be “*completely aggregated, aggregated by market/product category, disaggregated and anonymous [or] disaggregated and individualised*”⁴⁶. Individual information relates to a designated or identifiable undertaking whereas aggregated information combines the data from a sufficient number of undertakings to make any individual information impossible to distinguish. Statistical information of a general nature allows firms to build up an overall picture of the levels of demand or output in a particular market. Exchange of such information is mostly accepted and often needed for the advance of an industry.⁴⁷ The exchange of individualised information, however, is usually not necessary to achieve the same results. Instead, it is a precise instrument to monitor the behaviour of competitors, and is as such, deemed more likely to incite collusion.⁴⁸ A general conclusion is that the more general the information, the more likely it is to have solely positive impacts on competition.

Closely related, is the question of specificity. This means distinguishing between information that relates to common or “industry specific” values and information communicating private or “firm specific” values. Common values “*relate to information from which others could learn about their own estimates of, for instance, industry demand or common input parameters*”⁴⁹. Private values, on the other hand, imply that the information does not convey values of common interest. As an example, firm-specific production costs and demand shocks can be mentioned.⁵⁰

⁴⁵ Albæk et al., “*Government-assisted oligopoly coordination? A concrete case*”, The Journal of Industrial Economics, vol. 45, 1997, pp. 429-430

⁴⁶ Nitsche and Hinter-Reed, “*Competitive Impacts of Information Exchange*”, 2004, p. 8

⁴⁷ Whish, “*Information agreements*”, The Pros and Cons of Information Sharing, 2006, p. 19

⁴⁸ Peeperkorn, “*Competition Policy Implications from Game Theory: An Evaluation of the Commission’s Policy on Information Exchange*”, 1996, p. 6

⁴⁹ Nitsche and Hinten-Reed, “*Competitive Impacts of Information Exchange*”, 2004, p. 8

⁵⁰ Ibid.

2.3.2 The means by which information is exchanged

Firms can share information through a variety of ways and what method is chosen depends on the needs of the industry. The simplest way is for firms to agree to exchange information with one another on a regular basis.⁵¹ This, for example, can be carried out through face-to-face meetings, telephone calls or through the endless opportunities of communication offered on the Internet.⁵² Moreover, there is information sharing through advertising, through dynamic competition in which production levels are observable or via the exchange of sales reports.⁵³ In addition, companies can exchange information through an independent intermediary like a trade organisation. This third party collects and aggregates information from an entire industry, which it provides as a service for the actors in that market. As mentioned previously, there is usually no objection to this kind of information sharing as long as it provides only a general picture of the relevant industry without identifying individual undertakings.⁵⁴

Furthermore, *“the effects of information exchange differ depending on whether information is made public or kept private within the group of firms that exchange information”*⁵⁵. This is referred to as availability. Grillo argues that raising transparency among firms is in fact the crucial element in an agreement to share information: *“No care is taken that information extends down-stream to consumer, a result that, on the contrary, is sometimes carefully avoided”*⁵⁶. This is confirmed by Whish⁵⁷, who declares that asymmetric availability and enhanced market transparency between competitors in particular, is more likely to infringe Article 81(1) EC. Private sharing of confidential information exclusively between competing undertakings is very likely to have anti-competitive effects.⁵⁸ On the other hand, when information is exchanged publicly, it *“decreases the informational advantage of the incumbent firms over customers and possible entrants. Buyer power and possible entry may now work more effectively as a constraint on collusion”*⁵⁹.

Finally, the frequency of an information exchange also affects competition. A general rule is that the more frequent the exchange of information the higher is the likelihood of collusion. A frequent exchange of information

⁵¹ Whish, 2003, p. 488

⁵² Halliday and Seabright, *Networks good, cartels bad: but how could anyone tell the difference?*, Fighting Cartels: Why and How?, 2001, p. 78

⁵³ Vives, *“Information sharing: economics and antitrust”*, The Pros and Cons of Information Sharing, 2006, pp. 86-87

⁵⁴ Bellamy and Child, 2008, p. 358

⁵⁵ Nitsche and Hinten-Reed, *“Competitive Impacts of Information Exchange”*, 2004, p. 9

⁵⁶ Grillo, *“Collusion and Facilitating Practices: A New Perspective in Antitrust Analysis”*, European Journal of Law and Economics, 2002, p. 163

⁵⁷ *“Information agreements”*, The Pros and Cons of Information Sharing, 2006, p. 32

⁵⁸ Bellamy and Child, 2008, p. 359

⁵⁹ Peeperkorn, *“Competition Policy Implications from Game Theory: an Evaluation of the Commission’s Policy on Information Exchange”*, 1996, p. 6

facilitates observation of the market and makes it easier to discover competitors' changes in behaviour or new entrants.⁶⁰ Frequency is also related to the age of the exchanged information since "*frequent exchange of data normally implies that the most recent information is being exchanged*"⁶¹. This may well have a strengthening impact on collusion.

2.4 Information exchange and competition

As we have seen, exchange of information and increased transparency are likely to have both positive and negative effects on competition. On the one hand, information sharing between firms, allows "*independent actors to plan and conduct their economic activity to the benefit of the whole society*"⁶². Every firm benefits from being better informed; the so-called *precision effect*.⁶³ On the other hand, "*such arrangements can also give rise to anticompetitive information-sharing among actual or potential competitors*"⁶⁴. We have also seen that transparency on the consumer side potentially can increase competition, since well-informed consumers are more likely to react to price changes. Whish discusses this ambiguity of information exchange and states:

*"The problem in competition law is to distinguish those exchanges of information which have a neutral or a beneficial effect upon efficiency from those which seriously threaten the competitive process by facilitating collusive behaviour."*⁶⁵

To make this distinction between "good" and "bad" information exchange, it is not enough to distinguish only between agreements that increase transparency between firms or between consumers. As shown above, different kind of information and the means by which it is exchanged, are also determining for the impact on competition. Generally, information relating to future behaviour and especially to future prices or quantities, is very likely to have a negative impact on competition, since it enables firms to coordinate their actions. Historic information has a much lower collusive effect. Likewise, aggregated data normally affects competition in only positive ways, whereas individualised data more likely facilitates collusion.

Moreover, exclusive sharing is more damaging to competition than sharing of information that is also available to the public. However, Whish⁶⁶ argues

⁶⁰ Peeperkorn, "*Competition Policy Implications from Game Theory: an Evaluation of the Commission's Policy on Information Exchange*", 1996, p. 7

⁶¹ Faull and Nikpay, 2007, p. 736

⁶² Nitsche and Hinten-Reed, "*Competitive Impacts of Information Exchange*", 2004, p. 10

⁶³ Grillo, "*Collusion and Facilitating Practices: A New Perspective in Antitrust Analysis*", European Journal of Law and Economics, 2002, p. 163

⁶⁴ Speech by Orson Swindle available at

<http://www.ftc.gov/speeches/swindle/princetonclub2k.shtm>

⁶⁵ Whish, "*Information agreements*", The Pros and Cons of Information Sharing, 2006, p.

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⁶⁶ Whish, 2003, p. 488

that the method of exchange is not in principle determining for the purpose of competition law. He claims that the important question is whether the agreement impairs competition or enhances efficiency and not what form the practice takes.

Thus, many different aspects need to be taken into account when determining the benefit or detriment of an information agreement, but how do we know which is more important than the other? Halliday and Seabright⁶⁷ suggest that since information today is exchanged rapidly and to a very low cost over the internet, it is extremely difficult to control the content of the information. Thus, distinguishing between “good” and “bad” information will lose importance in competition regulation. They argue that the only way for authorities to limit the use of information exchange for anti-competitive purposes is to control the access to information and the means of exchange. They draw the conclusion that access is far more important than content and summarise their position by stating:

“The value of information for market transparency means that it is more important for competition authorities to increase access to information shared by a few than to restrict the ability of those few to share it in the first place.”⁶⁸

I have now established that the nature of the information is of great importance for an information exchange’s possibly positive or negative impacts on competition. Moreover, we have seen that there are many different parameters of an information exchange and that each of them affects the outcome. However, *“the likelihood of collusion is not only influenced by the nature of the exchanged information but also by the market structure within which the exchange takes place”⁶⁹*. Thus, there are two sides to the legal analysis of an agreement to exchange information. It is, in fact, the combination of the nature of the information and the market structure, which determines if an information agreement will have a restrictive impact on competition.

I will now move on to discuss the impact of market structure in general and present the features of an oligopolistic market.

⁶⁷ Halliday and Seabright, *“Networks good, cartels bad: but how could anyone tell the difference?”*, Fighting Cartels- Why and How?, 2001, p. 99

⁶⁸ Ibid.

⁶⁹ Peeperkorn, *“Competition Policy Implications from Game Theory: an Evaluation of the Commission’s Policy on Information Exchange”*, 1996, p. 7

3 Oligopolistic markets

3.1 Market structure and information exchange

The beneficial effects of an information agreement depend not only on the nature of the exchanged information but also on industry characteristics, such as the number of firms and the substitutability of products.⁷⁰ General economic theory teaches that it is often more difficult for firms to collude when certain factors increase: the number of firms in the market, the variety of products offered, inequality between firms regarding costs and demand, uncertainty about costs and demand and the number of potential entrants. The reason is that the existence of many market actors will diminish each actor's individual market share and thereby the interest to collude. Moreover, the greater the differences between companies and their products, the more divergent are the interests of the firms.⁷¹ This suggests that information agreements should be considered in their economic context and that it is easier to restrict or distort competition in an oligopolistic market where products are homogeneous. As we will see below, an oligopolistic market is characterised by a few powerful actors providing the same products or services. For this reason, Whish argues that information exchanges "*should be particularly carefully scrutinised in oligopolistic markets, and that scarce enforcement resources would be most beneficially concentrated on such areas*"⁷².

3.2 General characteristics of oligopolies

*"An oligopolistic market is one characterized by the presence of a few competitors, none of which is, individually in a position of market dominance, but each of which is relatively large."*⁷³

As well as being few and powerful, undertakings in an oligopoly usually have very good knowledge of each other's business and provide similar products or services. Competition cases have been disproportionately concentrated to industries with little room for product differentiation such as carton board, steel, wood pulp and flat glass. This may be because the

⁷⁰ Grillo, "Collusion and Facilitating Practices: A New Perspective in Antitrust Analysis", European Journal of Law and Economics, 2002, p.163

⁷¹ Peepkorn, "Competition Policy Implication from game Theory: an Evaluation of the Commission's Policy on Information exchange", 1996, p. 7

⁷² Whish, "Information agreements", The Pros and Cons of Information Sharing, 2006, p.

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⁷³ Stroux, 2004, p. 1

incentives to collude are objectively greater in such industries, but also because it is where the Commission keeps a strict watch for cartels.⁷⁴

Firms in oligopolies are interdependent, which means that each undertaking's profit is related to the profits of the other undertakings. To be successful, companies need to adjust their actions to the effects they will have on their competitors' behaviour.⁷⁵ Hence, a firm faces a choice between cooperating and competing and in choosing one of the alternatives, an oligopolist will have to consider the plausible reactions of his competitors.⁷⁶ In oligopolistic markets, undertakings are unlikely to compete in ways that competitors can quickly imitate. Therefore, price competition is likely to take the form of secret discounts given to large buyers who can be relied on to keep quiet.⁷⁷

The existence of oligopolies is not in itself a problem since such markets can function competitively. The competitive outcome of such markets lies somewhere between perfect competition and monopoly. The main problem with oligopolies is that firms can exercise market power without using explicit agreements and thus escape the scope of antitrust law. Because of their interdependence, oligopolists can charge supra-competitive prices.⁷⁸

3.3 Static models of oligopoly

In the model of perfect competition, every undertaking is so small that its output does not affect the market price. Thus, an undertaking in a perfectly competitive market needs not to worry about the market strategies of other undertakings when planning its business. The market price is something that the undertaking cannot affect. In reality, however, firms need to take the actions of others into account when formulating their commercial strategies, since changes in one firm's plans are likely to affect the decisions of others. To analyse and predict oligopolistic, interdependent behaviour, economic models that consider this interaction, have been developed.⁷⁹

3.3.1 Static oligopoly and the prisoner's dilemma

The static oligopoly is a model based on the assumption that each market actor can move only once. Moreover, all actors are assumed to move at the same time so that none of them knows the moves of the others.⁸⁰ Focus in

⁷⁴ Halliday and Seabright, "*Networks good, cartels bad: but how could anyone tell the difference?*", *Fighting cartels: Why and How?*, 2004, pp. 82-83

⁷⁵ Bernitz, 2005, p. 52

⁷⁶ Van den Bergh and Camesasca, 2006, p. 157

⁷⁷ Korah, 2007, p. 487

⁷⁸ Stroux, 2004, p. 8

⁷⁹ Bishop, 2002, p. 27

⁸⁰ Stroux, 2004, p. 13

static models lies on quantities and prices; in particular price competition between firms.⁸¹

With regard to prices or quantities, a model called *the prisoner's dilemma* can illustrate the choices that undertakings encounter in an oligopoly. Two firms (A and B) need to choose whether to charge a high price or a low price (or quantities). Consequently, there are four different outcomes: both can charge a high price, both can charge a low price and one can charge a high price while the other charges a low price, and vice versa. The most profitable choice for e.g. firm A, is to charge a low price while firm B charges a high price. In that scenario, firm A makes a big profit, while firm B does not make any. The second best choice for firm A is if they both charge a high price. The profit will then be smaller than in the first scenario, but will still be rather big. If, on the other hand, they both charge the low price, the profit will be even smaller, but will still be bigger than nothing, which is what firm A will get if it charges a high price while firm B charges a low.⁸²

In this game, both firms would prefer an outcome in which they charged a high price instead of a low. However, if firm B chooses a high price, the most profitable choice for firm A is to charge a low price. If firm B chooses a low price, the best strategy for firm A is still to charge a low price, even though it would result in a lower profit than the first option. Hence, the incentive to make the big profit will result in both undertakings charging a low price, although they would both be more profitable if both of them chose a high price. This outcome is a so-called Nash-equilibrium, which means that given the behaviour of the other firms in the market, no firm wishes to change its behaviour (i.e. each firm maximises profit given the behaviour of all other firms).⁸³

I will now present two models of static oligopoly that build on *the prisoner's dilemma*: the Cournot model and the Bertrand model.

3.3.2 The Cournot model of oligopoly

The Cournot⁸⁴ model of oligopoly assumes that each firm competes by choosing its output to maximise the profits given the output of the other firms in the market. In this model, there are only two firms present (A and B) and they can set their quantities only once. For every level of output made by firm A there is a specific level that firm B can set to maximise its profits, and vice versa. The point where the two output curves meet, which is called the "Cournot (Nash-) equilibrium", determines the price level.⁸⁵ Prices in a Cournot equilibrium, and accordingly the consumer benefit, are

⁸¹ Bishop, 2002, p. 36

⁸² Ibid. pp. 28-29

⁸³ Ibid. pp. 28-29

⁸⁴ Named after the French mathematician Augustin Cournot who presented his theory in "*Recherches sur les Principes Mathématiques de la Théorie des Richesses*", 1838

⁸⁵ Stroux, 2004, p. 9

lower than a monopoly price but higher than they would be in a market of perfect competition. In the Cournot model, prices decrease and consumer welfare increases, with the increasing number of firms. Thus, consumer benefit is greater the more firms operate the market and as the number becomes very large, the Cournot equilibrium comes very close to a perfect competition equilibrium.⁸⁶

3.3.3 The Bertrand model of oligopoly

The Cournot model of oligopoly was reviewed by Joseph Bertrand⁸⁷, who assumed that oligopolists compete by means of setting prices instead of quantities. Also in the Bertrand model, firms can set their prices only once. The outcome of this model does not change with the number of firms active in the market, but for explanatory purposes, I will assume that there are only two firms. For any price set by firm A, firm B can slightly undercut this price and take over the whole market demand. Firm A can of course do the same. The limit is reached when a firm charges a price equal to marginal costs, since undercutting this price no longer is profitable. The result of this model is therefore that prices in an oligopolistic market are similar to those in a market of perfect competition.⁸⁸

Although it seems more realistic that firms compete by setting prices rather than quantities, the Bertrand model is based on many assumptions that in reality do not hold true. It implies, for example, that goods are homogeneous, marginal costs are constant and equal for both firms, and that firms are not subject to any capacity restraints, i.e. firms are supposed to have capacity to supply the whole market. In a more realistic setting, firm A whose price is undercut, will continue to make some profit since firm B does not have the capacity to meet the demands of the entire market. This can radically change the outcome of competition.⁸⁹

3.3.4 Information exchange in Cournot and Bertrand oligopoly

Vives says that although the welfare impact of an information exchange depends on many factors, it *“tends to be positive with Cournot/quantity competition and negative with Bertrand/price competition”*⁹⁰. Thus, he concludes that competition authorities should be lenient with information exchange in Cournot oligopolies and tough in Bertrand oligopolies. In reality, however, it is very difficult to distinguish between a market characterised by price competition or quantity competition. However, according to Vives it is not impossible. In relation to aggregated information, Vives claims that it most often raises profits in static games.

⁸⁶ Bishop, 2002, pp. 29-30

⁸⁷ *“Revue of Recherches sur le Principe Mathematique de la Théorie des Richesses”*, 1883

⁸⁸ Stroux, 2004, pp. 9-10

⁸⁹ Bishop, 2002, p. 32

⁹⁰ Vives, *“Information sharing: economics and antitrust”*, The Pros and Cons of Information Sharing, 2006, p. 88

This implicates that “*information sharing cannot be taken as prima facie evidence of collusion since it often raises profits under one-shot market interaction*”⁹¹.

The consumer perspective on information exchange usually has a static model of oligopoly in mind. An assumption from this position is that competing firms are fully informed of each other’s strategies. The purpose of enabling a more liberal flow of information is therefore principally to benefit weak consumers and potential entrants. From this point of view, internet and shop-bots form a good example since they provide consumers with a tool to compare a multitude of different market offerings at low cost. This “*allows customers to shop around easily, turning competition between suppliers of close substitutes into something akin to intensive Bertrand-style competition*”.⁹²

3.4 Dynamic oligopoly

Static models depart from the assumption that a market actor will make only one decision and stick with it. However, an oligopoly is a dynamic environment in which the market actors will play repeatedly with the same competitors. As a result, firms can base their current decisions on their competitors’ previous moves.⁹³ Moreover, firms not only compete by setting a lower price than their rivals’, but also by developing better products and rationalising costs. To do this, firms invest in research and development. In environments of this kind, it does not make sense for competition policy to focus only on price or quantity competition. A dynamic model of oligopoly therefore, takes into account that the game is played repeatedly and that this affects its outcome.⁹⁴

According to Møllgaard and Overgaard, the antitrust view on information exchange, is based on a model of dynamic oligopoly; i.e. that the market is influenced by a variety of factors. In such a model,

*“it is relatively well-established /.../ that horizontal coordination/ collusion (whether tacit or explicit) is made difficult - if not impossible - if firms compete under a veil of ignorance concerning the action of rivals.”*⁹⁵

Hence, it is the common interest of firms to reduce uncertainty by improving the information flows between themselves. Immediate access to accurate information about individual past transactions and future intentions

⁹¹ Vives, “*Information sharing: economics and antitrust*”, The Pros and Cons of Information Sharing, 2006, p. 86

⁹² Møllgaard and Overgaard, “*Information Exchange, Market Transparency and Dynamic Oligopoly*”, 2005, p. 3

⁹³ Stroux, 2004, p. 15

⁹⁴ Bishop, 2002, p. 36

⁹⁵ Møllgaard and Overgaard, “*Information Exchange, Market Transparency and Dynamic Oligopoly*”, 2005, p. 3

of rivals will generally have a strong coordinating potential. Because of this, history has shown many examples of rival oligopolists creating institutions (both legal and illegal) for the purpose of exchanging statistically sensitive, firm-specific information.⁹⁶

In relation to the different factors of market structure, Peeperkorn argues that it is disappointing that neither game theory nor economic theory in general can provide a detailed and quantitative answer that considers all factors. Usually, one or two factors are analysed and rigid assumptions are applied to the remaining.⁹⁷ The number of firms or the market concentration are very important factors in competition policy analysis. However, most models assume a two-person game. The only conclusion drawn in this field, is that *"when there are four firms or less in a market the likelihood of collusion will be 1 while this likelihood drops to close to 0 when the number of firms becomes six or more"*⁹⁸.

3.5 Parallel behaviour or concerted practice

Firms in a dynamic oligopoly may act similarly regarding for example pricing because they can base their decisions on their competitors' previous actions. This is not collusive behaviour, but is called parallel behaviour and is common in oligopolistic markets. The strongest undertaking on the market is usually the leader and competitors follow its behaviour. If the market leader raises prices on certain products, the other undertakings will normally raise their prices accordingly. The fewer the market actors, the faster and easier any such behaviour can be copied. It can be difficult however to distinguish this kind of legally accepted parallel behaviour from a prohibited concerted practice.⁹⁹

A concerted practice occurs when two or more undertakings act in collusion without having an underlying agreement.¹⁰⁰ The ECJ has provided the following definition of a concerted practice:

*"A form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition."*¹⁰¹

⁹⁶ Møllgaard and Overgaard, *"Information Exchange, Market Transparency and Dynamic Oligopoly"*, 2005, p. 3

⁹⁷ Peeperkorn, *"Competition Policy Implications from Game Theory: an Evaluation of the Commission's Policy on Information Exchange"*, 1996, p. 7

⁹⁸ Ibid. p. 8

⁹⁹ Bernitz, 2005, p. 103

¹⁰⁰ Ibid. p. 103

¹⁰¹ C- 48/69, *ICI v. Commission*, para. 64, often referred to as the *Dyestuffs* case

However, the meaning of knowing where an agreement ends and a concerted practice begins, is negligible. Whether it is one or the other makes no difference legally.¹⁰² The concept of concerted practice was developed by the Commission and the Courts in order to broaden the scope of Article 81(1) EC, which only covers *agreements* that restrict competition. Far from all cartels are based on an explicit agreement.

Korah raises the question whether there is a real difference between a concerted practice and parallel behaviour that is not collusive but still has a price fixing effect. If the market leader raises prices hoping that its competitors will follow, should this not then infringe Article 81(1) EC? The difficulty, she says, is that it would be silly to put a general ban on parallel behaviour.¹⁰³

In the end, it comes down to a question of evidence. How can one prove that a certain conduct is a concerted practice and not parallel behaviour?¹⁰⁴ The Commission has the burden to prove the existence of a concerted practice and the Courts have annulled in some cases the Commission's decisions due to insufficient evidence. The ECJ has established that although parallel behaviour can be circumstantial evidence of a concerted practice, it is not sufficient evidence thereof if there are other plausible explanations to the actions.¹⁰⁵

¹⁰² Whish, "*Fighting cartels: The legal meaning of conspiracy*", *Fighting Cartels: Why and How*, 2001, p. 103

¹⁰³ Korah, 2007, p. 60

¹⁰⁴ Bernitz, 2005, p. 103

¹⁰⁵ Joined cases 29 and 30/83, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*, para. 16

4 Legislative framework on information exchange

4.1 Article 81 EC

The most important provision in European Competition law is Article 81(1) EC.¹⁰⁶ It reaches all agreements “*which may affect trade between Member States and which have as their object or effect the prevention restriction or distortion of competition within the common market*”¹⁰⁷. These agreements, whether they are horizontal, vertical or concerted practices, are automatically void unless subject to an individual exemption because of the agreement’s positive qualities.¹⁰⁸

The initial requirement for an infringement of Article 81(1) EC is that there is an agreement or an equivalent to an agreement.¹⁰⁹ A contract is clearly included in this concept, but is not the only kind of agreement covered.¹¹⁰ An agreement does not have to be legally binding and it is sufficient that the undertakings “*have expressed their joint intention to conduct themselves on the market in a specific way*”¹¹¹. Furthermore, the ECJ has established that even when there is no agreement, undertakings may act in collusion and infringe Article 81(1) EC.¹¹² When firms act in collusion without an underlying agreement, there is a so-called concerted practice. As previously discussed, it is sometimes difficult to distinguish between legal parallel behaviour, which often occurs in oligopolistic markets, and anti-competitive concerted practices.¹¹³

Applied to the subject of this thesis, undertakings must have agreed to exchange information. It is not sufficient that an undertaking obtains information about its competitors’ actions or figures through publicly available sources. Consequently, a third party that independently collects and compiles information to customers does not infringe Article 81(1) EC. However, if an intermediary is used merely as means to circumvent Article 81(1) EC there may be an infringement if the parties have agreed to act similarly or there is a concerted practice.¹¹⁴

¹⁰⁶ Bernitz, 2005, p. 95

¹⁰⁷ Article 81(1) EC

¹⁰⁸ See Articles 81(2) and 81(3) EC

¹⁰⁹ Bernitz, 2005, p. 96

¹¹⁰ Korah, 2007, p. 51

¹¹¹ T-7/89, SA Hercules Chemicals v. Commission

¹¹² Craig and de Burca, 2008, p. 957

¹¹³ For a discussion of concerted practice and parallel behaviour see Chapter 3.5 above

¹¹⁴ Whish, “*Information agreements*”, The Pros and Cons of Information Sharing, 2006, p.

The second criterion set out in Article 81(1) EC, is that there must be an anti-competitive object or effect. Most agreements on information exchange between undertakings do not explicitly have the object to distort competition. Thus, they cannot be prohibited *per se*. To decide whether there has been an anti-competitive behaviour, the Courts must analyse the effects of the shared information and weigh the beneficial consequences against those that have a restrictive impact on competition.¹¹⁵ According to Whish, “*it would appear to be the case that exchanges of information about future prices will be considered to restrict competition by object*”¹¹⁶. A price information agreement restricts competition and infringes Article 81(1) EC, if the exchange of information is made in advance and is not shared with customers. This is because the uncertainty and risk-taking that competing undertakings normally encounter are eliminated and replaced by co-operation.¹¹⁷ In such cases, it is impossible to distinguish the exchange of information from explicit collusion.¹¹⁸

The third and last criterion set out in Article 81(1) EC is that the agreement, or equivalent to an agreement, must affect trade between member states. Otherwise, the matter will stay within the jurisdiction of the concerned Member State. “*Effect on trade between Member States*” is a very broad concept that is easily satisfied. Proof of an actual impact on trade between Member States is not necessary, nor do the parties to the agreement have to be established in different Member States. An agreement restricting competition in one Member State will most likely affect competition also in others.¹¹⁹

4.2 The European Commission’s Notice on Cooperation Agreements

The European Commission’s view on information exchange was first set out in the 1968 Notice on Cooperation Agreements¹²⁰. The Commission recognised that information exchange may have competitive benefits due to improved transparency and tried in its Notice to define the beneficial agreements that would fall outside the scope of Article 81(1) EC. Thus, the Commission made it clear that an agreement to exchange information in itself, can constitute a restrictive practice.¹²¹

The agreements covered by Article 81(1) EC were those, whose sole purpose was to exchange opinions or experiences, conduct joint market

¹¹⁵ Whish, “*Information agreements*”, The Pros and Cons of Information Sharing, 2006 p. 37

¹¹⁶ Ibid.

¹¹⁷ Bellamy and Child, 2008, p. 355

¹¹⁸ Whish, “*Information agreements*”, The Pros and Cons of Information Sharing, 2006, p. 38

¹¹⁹ Craig and de Burca, 2008, p. 975

¹²⁰ JO [1968] C 75/3

¹²¹ Halliday and Seabright, “*Networks good, cartels bad: but how could anyone tell the difference?*”, Fighting Cartels: Why and How?, 2001, p. 87

research or comparative studies and the preparation of statistics. However, the Commission emphasised that despite the agreements' beneficial character and presumed unlikelihood to infringe Article 81(1) EC, they could still distort competition if they limited the undertakings' freedom of action or if they lead to a coordination of the undertakings' behaviour on the market, explicit or through concerted practices.¹²²

The Commission also mentioned the difficulty in distinguishing between neutral information and information leading to anti-competitive behaviour, when collected by a third party. As stated above, information sharing through an independent intermediary does not fall within the scope of Article 81(1) EC due to the lack of an agreement. The Commission points out that, generally, Article 81(1) EC is not applicable to independent collection of orders or investment figures, but that such information sharing, under certain circumstances, can restrict competition. This is notably the case in oligopolistic markets of homogenous products.¹²³ Hence, not only the kind of information matters, but also conditions of the market in which it is exchanged.

The Notice on Cooperation Agreements expired in 2004 and was replaced by the Commission's Guidelines on Horizontal Cooperation Agreements¹²⁴. These new guidelines, however, do not deal with agreements to exchange information. Then again, they do not say anything to cast doubt on the views expressed in the 1968 Notice on Cooperation Agreements, which is why they are still relevant to this discussion.¹²⁵

4.3 Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services

The Commission issued in 2007 Draft Guidelines to the maritime transport sector¹²⁶, which is a market characterised by extensive cooperation agreements between competing carriers. The Draft Guidelines do not address information agreements used to monitor the members of a cartel. Instead, they focus solely on the kind of information exchange that may constitute an infringement of Article 81(1) EC on its own right, i.e. *pure information agreements*.¹²⁷ The Draft Guidelines are initially valid for five

¹²² JO [1968] C 75/3

¹²³ Ibid.

¹²⁴ OJ [2001] C 2/3

¹²⁵ Whish, "*Information agreements*", The Pros and Cons of information sharing, 2006, p. 28

¹²⁶ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ [2007] C 215/3, para. 5

¹²⁷ Ibid. para. 40-41

years.¹²⁸ Although written only for the transport sector, they include a general part on information exchange, which is of value to this thesis.

The Commission defines an information exchange as:

*“An arrangement on the basis of which undertakings exchange information amongst themselves or supply it to a common agency responsible for centralizing, compiling and processing it before returning it to the participants in the form and at the frequency agreed.”*¹²⁹

In relation to the nature of the exchanged information, the Commission makes a number of statements. Firstly, it establishes that the exchange of historical or “hard” information *“is generally not regarded as falling within Article 81(1) of the Treaty because it cannot have any real impact on the undertaking’s future behaviour”*¹³⁰. Any information more than one year old should be regarded as historical. More problematic is the exchange of future information revealing the undertaking’s view on market development or market strategy. Especially the exchange of future information on prices or output is expected to reduce rivalry between the parties and thus potentially restrict competition.¹³¹ The Commission does not however ascertain that such information exchange infringes Article 81(1) EC, but states that:

*“Information which is not historic and relates to parameters of competition, such as price, capacity or costs will be considered commercially sensitive. The exchange of such data between competitors is more likely to be caught by Article 81(1) of the Treaty than the exchange of information that is commercially less sensitive.”*¹³²

Secondly, there is the aspect of aggregated versus individualised information. The Commission establishes that aggregate statistics and general market information are good means to increase market transparency and consumer knowledge.¹³³ Hence, this kind of information exchange benefits the market since it may produce efficiencies. However, the level of aggregation is determining and only information that cannot be disaggregated; i.e. enabling undertakings directly or indirectly to identify the competitive strategies of their competitors, is considered harmless. Consequently, exchange of information with an individualised character is more likely to violate Article 81(1) EC.¹³⁴

¹²⁸ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ [2007] C 215/3 para. 8

¹²⁹ Ibid. para. 36

¹³⁰ Ibid. para. 53

¹³¹ Ibid. para. 53

¹³² Ibid. para. 51

¹³³ Ibid. para. 37

¹³⁴ Ibid. para. 52

Thirdly, there is the aspect of availability. The Commission states that “*the more the information is shared with customers, the less likely it is to be problematic*”¹³⁵. Therefore, the exchange of public information is not, generally, a violation of Article 81(1) EC. On the other hand, if transparency is improved only to the benefit of suppliers, the hidden competition may decrease, to the detriment of consumers. Moreover, an exchange between suppliers can constitute a barrier to entry for potential competitors.¹³⁶

The frequency with which information is exchanged should also be taken into account. The Commission claims that if competitors often exchange information, they can react faster to every move made by their competitors. This facilitates retaliation and lowers, in the end, the incentives for competition.¹³⁷

The Draft Guidelines establish that, in addition to the nature of the information, the market structure is decisive of whether an information agreement is harmful to competition, and particularly relevant is the level of concentration of the market.¹³⁸ In highly concentrated oligopolistic markets, restrictive effects are more likely to occur and are more likely to be sustainable than in less concentrated markets. Transparency may strengthen the undertakings’ interdependence and reduce the incentives for competition. Moreover, the Commission emphasises the importance of the supply and demand structure on the market and suggests that the number of competing undertakings and the symmetry and stability of their market shares have significant impact on the intensity of competition.¹³⁹ Other relevant factors are homogeneity of services and the overall transparency of the market.

To emphasise the importance of market structure, the Commission points out a particular situation when the exchange of precise information on individual sale, in itself, is considered likely to impair competition. This occurs when there is a regular and frequent exchange of information on a highly concentrated oligopolistic market, in which competition is already greatly reduced. Information sharing in this situation leads to a periodic disclosure to all competitors of the market positions and strategies of the various individual competitors.¹⁴⁰

¹³⁵ Draft Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ [2007] C 215/3, para. 59

¹³⁶ Ibid. para. 59

¹³⁷ Ibid. para. 54

¹³⁸ Ibid. para. 48

¹³⁹ Ibid. para. 49

¹⁴⁰ Ibid. para. 44

5 European case law on information exchange

5.1 General case discussion on the nature of the information

*Suiker Unie*¹⁴¹ is one of the earlier cases dealing with information exchange, but like in all early cases, the information exchange was only part of a greater cartel. The ECJ stated on appeal that any player on the market must act independently but that this requirement did not “*deprive economic operators of their right to adapt themselves intelligently to the existing and anticipated conduct of their competitors*”¹⁴². However, the ECJ stated, any direct or indirect contact between competitors is strictly precluded when the object or effect is either to influence the conduct of a competitor or to disclose to such competitor the course of conduct which the undertaking itself has decided to adopt.¹⁴³

Since the *Suiker Unie* case, the Commission has repeatedly objected to the disclosure of “confidential” information. In *COBELPA/VNP*¹⁴⁴ it stated that it is contrary to Article 81(1) EC for firms to provide competitors with detailed information about matters that would normally be regarded as confidential. In this case, monthly output and sales figures broken down by product type “*resulted in the establishment of a system of solidarity and mutual influence designed to coordinate business activities*”, which created “*conditions of competition differing from those obtaining in a normal market situation*”¹⁴⁵. However, the exchange of general statistical information that could give a picture of aggregate sales and output figures of the relevant industry without identifying individual companies, was permissible.¹⁴⁶

The Commission clarified in *Vegetable Parchment* that it did not object to trade associations organising “*the exchange of statistical information giving a picture of the output and sales of the relevant industry without identifying individual undertakings*”¹⁴⁷. However, in this particular case, the information agreement allowed the parties to identify export deliveries of each competitor, which amounted to a disclosure of trade secrets.¹⁴⁸ Likewise, in *Associated Lead Manufacturers*¹⁴⁹ an information agreement

¹⁴¹ Joined cases 40-48/73 *Suiker Unie and others v Commission*

¹⁴² *Ibid.* para. 174

¹⁴³ *Ibid.*

¹⁴⁴ *COBELPA/VNP* decision, OJ 1977 L 242/10

¹⁴⁵ *Ibid.* para. 27

¹⁴⁶ *Ibid.* para. 25

¹⁴⁷ *Vegetable Parchment* decision, OJ 1978 L 70/54, para. 63

¹⁴⁸ *Ibid.* para. 65

¹⁴⁹ *Associated Lead Manufacturers* decision, OJ 1979 L 21/16, para. 26

regarding individual exports provided, in the Commission's view, the undertakings with knowledge that was both too accurate and too systematic.

Also in *CEPI/Cartonboard*¹⁵⁰, an information exchange identifying individual market shares and sales prices was deemed to infringe Article 81(1) EC. The Commission however indicated that it was willing to approve the exchange once it had been amended so that it involved only aggregated and historical data.

Among all confidential data, the Commission has objected the most strongly to the exchange of future price information. In *IFTRA Rules on Glass Containers*¹⁵¹, the Commission decided on the anti-competitive effects of an extensive agreement between producers of glass bottles and cans. The producers had agreed to keep the same low prices but had also an extensive information exchange agreement according to which they were obliged to share information on future pricing. In relation to the information part of the agreement, the Commission made this explicit statement:

*"It is contrary to the provisions of Article 81(1) 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, the rates and dates of change to them and the special exceptions he grants to specific customers."*¹⁵²

In *Vegetable Parchment*, the Commission drew the same conclusions, stating that *"the only possible explanation for the exchange of information as to selling prices is the desire to coordinate market strategies"*¹⁵³. Moreover, the Commission has found communication of price lists to competitors to have a restrictive impact on competition.¹⁵⁴

Although the case *Wood Pulp*¹⁵⁵ concerned an exchange of information on future prices, the outcome was different from the cases mentioned previously. Forty or so wood pulp producers appealed a Commission decision by which they were alleged to infringe competition law. Very interestingly, the ECJ discussed if the quarterly price announcements made available to the public and accordingly to competitors, by themselves could infringe Article 81(1) EC. However, the Court found that the price announcements constituted market behaviour and that they did not lessen each undertaking's uncertainty about the future conduct of its competitors. When an undertaking announced its future prices, it could not be sure of the future conduct of its rivals.¹⁵⁶ The real question in this case, however, was

¹⁵⁰ XXVI report on Competition Policy, 1996, p. 127

¹⁵¹ *IFTRA Rules on Glass Containers* decision, OJ 1974 L 160/1

¹⁵² *Ibid.* para. 43

¹⁵³ *Vegetable Parchment* decision, OJ 1978 L 70/54, para. 67

¹⁵⁴ *Flat Glass* decision, OJ 1989 L 33/44, para. 58

¹⁵⁵ Joined cases C-89, 104, 114, 116, 117, 125-129/85, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*

¹⁵⁶ *Ibid.* para. 64

whether the price announcements and the parallel pricing were evidence of a concerted practice. In this matter, the ECJ found that a concerted practice was not the only possible explanation to the rise of parallel pricing.

According to Vives, the fact that the announcements were public was important to the outcome of *Wood Pulp*. As previously discussed, a public price announcement may constitute a commitment, and may not always be detrimental to competition. Regarding the price announcements in *Wood Pulp*, Vives says, “buyers considered them a commitment to maximal prices providing insurance and price protection”¹⁵⁷. The European case law states that an improvement of market transparency exclusively between undertakings is likely to impair competition.¹⁵⁸

In *Fatty Acids*¹⁵⁹, the Commission disapproved of an information exchange concerning historic, individual sales figures. Normally, the exchange of historic information is considered not to have a restrictive impact on competition. However, in this case the Commission decided that the quarterly exchange of total volume sales enabled the parties to determine their traditional respective position on a given market, which was likely to have a restrictive effect on competition.¹⁶⁰

5.2 General case discussion on market structure

The important role of market structure has been emphasised in several cases. In *Non-ferrous Semi Manufacturers*¹⁶¹, the Commission referred to the oligopolistic structure of the market and concluded that an agreement between semi manufacturers of copper to exchange information on research and development, production, sales promotion, raw material and business strategy “might have led the parties to act in a manner incompatible with Article 85(1)”¹⁶². Also in *International Energy Program*¹⁶³, the oligopolistic structure of the market was decisive.

In *Eudim*¹⁶⁴, the Commission examined an information exchange between wholesalers of plumbing, heating and sanitary materials. The exchanged information, of which some was of the kind that would normally be regarded as confidential, related to both the selling side and the purchasing side. The Commission did not object at all to the information exchange on the purchasing side of the market, since it was very competitive, and considered that since there was no oligopoly on the selling side, there could

¹⁵⁷ Vives, “*Information sharing: economics and antitrust*”, The Pros and Cons of Information Sharing, 2006, p. 90

¹⁵⁸ See for example *COBELPA/VNP* decision and *Vegetable Parchment* decision

¹⁵⁹ *Fatty Acids* decision, OJ 1987 L 3/17

¹⁶⁰ *Ibid.* para. 36

¹⁶¹ Commission’s V Report on Competition Policy (1975), point 39

¹⁶² *Ibid.* point 39

¹⁶³ *International Energy Program* decision, OJ 1983 L 376/30

¹⁶⁴ *Eudim* decision, OJ 1996 C 111/8

be no appreciable effect on competition.¹⁶⁵ Halliday and Seabright¹⁶⁶ find it curious that although the information concerned prices, the Commission was appeased by the fact that the purpose of the exchange of purchase price was to reduce prices.

Faull and Nikpay¹⁶⁷ claim that *Fatty Acids*¹⁶⁸ was the first case in which an information exchange was prohibited because of its own characteristics and not because it belonged to an underlying illegal practice. As mentioned above, the case concerned a quarterly exchange of the total sales volume between three major Community producers of oleo chemicals.¹⁶⁹ The Commission stressed the importance of market concentration and made a thorough analysis of the market shares of the parties. It found that although the market as such was in decline, the combined share of the parties increased during the time of the information sharing. Two years after the exchange was initiated, the combined market share of the parties had increased from 52 % to 80 %.¹⁷⁰ In the Commission's view, the information exchange enabled the participants to compare, in detail, their market shares and thus identify the competitive behaviour of the others quickly and more easily than would have been possible without an agreement. Hence, the agreement removed an important element of uncertainty.¹⁷¹

5.3 UK Agricultural Tractor Registration Exchange

5.3.1 Background

The *UK Agricultural Tractor Registration Exchange*¹⁷² (*UK Tractors*) is the first Commission decision in which a pure information exchange agreement was judged to infringe Article 81(1) EC. Until then, no information exchange had been declared unlawful only because of its own alleged illegality without the Courts, at the same time, establishing the existence of a cartel or concerted practice.¹⁷³ The Commission decision in *UK Tractors* was upheld on appeal by both the CFI and the ECJ.¹⁷⁴

The UK Agricultural Tractor Registration Exchange (the Exchange) was an information exchange agreement of which the majority of the tractor suppliers in the UK were part. The aim of the Exchange was to identify the

¹⁶⁵ Whish, 2003, p. 491

¹⁶⁶ Halliday and Seabright, "Networks good, cartels bad: but how could anyone tell the difference?", *Fighting Cartels: Why and How?*, 2001, p. 93

¹⁶⁷ Faull and Nikpay, 2007, p. 731

¹⁶⁸ *Fatty Acids* decision, OJ 1987 L 3/17

¹⁶⁹ *Ibid.* para. 19

¹⁷⁰ *Ibid.* para. 28

¹⁷¹ *Ibid.* para. 37

¹⁷² *UK Agricultural Tractor Registration Exchange* decision, OJ 1992 L 68/19

¹⁷³ Halliday and Seabright, "Networks good, cartels bad: but how could anyone tell the difference?", *Fighting Cartels: Why and How?*, 2001, p. 90

¹⁷⁴ See T-35/92 *John Deere Ltd v Commission* and C-7/95 *John Deere Ltd v Commission*

retail sales and market shares of each member of the market with detailed breakdowns by product, territory and time periods.¹⁷⁵ The collection of information was managed by the United Kingdom trade association of manufacturers and importers of agricultural machinery; the Agricultural Engineers Association Ltd (AEA).¹⁷⁶

5.3.2 The nature of the information

The exchanged information was taken from forms used for the registration of tractors with the United Kingdom Department of Transport.¹⁷⁷ These forms contained information on the manufacturer of the vehicle, its model number, its serial number, the name of the original dealer and the selling dealer (including code number, name, address and postcode) and the postcode of the registered keeper.¹⁷⁸ The information collected from the forms allowed the members of the agreement to obtain information on aggregate industry sales with or without a breakdown by horsepower grouping, by driveline or by very detailed geographical areas. This information was made available for yearly, quarterly, monthly and weekly time periods.¹⁷⁹ Moreover, they could obtain information on the volume of retail sales and market shares of each individual member. This information too was available with the same detailed breakdowns as the aggregated data.¹⁸⁰

The exchange also provided each member with aggregate data on the retail sales and market shares of non-members. The information was not individualised but provided the members with access to up-to-date information about changes in the market shares of non-members.¹⁸¹

5.3.3 The structure of the UK tractor market

The Commission found that the UK market for agricultural tractors was characterised by a highly concentrated structure of supply. Four suppliers held around 77 % of the market and together with the four other members of the Exchange they controlled 88 %.¹⁸² This high market concentration was further increased by the fact that not all suppliers were active in all geographic areas.¹⁸³ In addition, only three or four suppliers provided tractors in the upper horsepower categories, which in combination with the unequal geographical representation lead to situations with only two or three competing suppliers. An important aspect was also that the market concerned a relatively homogeneous product with little room for product differentiation.

¹⁷⁵ *UK Agricultural Tractor Registration Exchange* decision OJ 1992 L 68/19 para. 10

¹⁷⁶ *Ibid.* para. 1

¹⁷⁷ *Ibid.* para. 12

¹⁷⁸ *Ibid.* para. 14

¹⁷⁹ *Ibid.* para. 16

¹⁸⁰ *Ibid.* para. 17

¹⁸¹ *Ibid.* para. 21

¹⁸² *Ibid.* para. 5

¹⁸³ *Ibid.* para. 6

In addition to the high market concentration, the Commission found that there were high barriers to entry the UK market. Firstly, to cover the UK market a tractor manufacturer would need about 120 sales outlets to supply farmers with regular and instant service and repair. The smaller the sales volume, the more difficult it would be to finance this distribution network and to set it up would create a significant financial risk for a newcomer.¹⁸⁴

Secondly, the tractor market was in decline and was characterised by low sales volumes and a general overcapacity, in which new investment was unlikely. In addition, consumers were loyal to the established brands and all members of the Exchange were producers enjoying a high brand reputation. For a newcomer to acquire an equivalent reputation, it would take a long time and require substantial investment. Thirdly, unlike the car market, the tractor market in the UK, as well as in the European Community, did not face any significant price or quality competition from extra-community imports.¹⁸⁵ Moreover, the suppliers in the UK market were also suppliers in other community markets, which meant that imports from these markets were controlled largely by the same suppliers.¹⁸⁶

5.3.4 The Commission's legal assessment

The Commission did not object, in principle, to the availability of the exchange of aggregate industry data, since it did not allow the identification of individual members of the Exchange. However, the Commission objected to some particular cases where the combination of specific geographic areas with product breakdowns or time periods, led to a report containing less than ten tractor units sold. The Commission stated that below this minimum number of total sales “*there is a high risk that even aggregate data will allow, directly or indirectly, the identification of the exact sales volume of individual competitors*”¹⁸⁷.

With respect to the individual sales data, the Commission found that the exchange of information regarding “*the exact quantities of the retail sales and the exact market shares which are trade secrets between genuine competitors in a highly concentrated market*” constituted an infringement of Article 81(1) EC.¹⁸⁸ The assessment was based on the individual nature and detail of the information allowed by the variety of breakdowns, as well as the market structure and the absence of significant imports from outside the community. The frequency and regularity of the AEA Committee meetings also contributed since it provided the members with a forum of contacts.¹⁸⁹ The Commission concluded that the Exchange led to restrictions of competition for two reasons: Firstly, it prevented hidden competition on a

¹⁸⁴ UK Agricultural Tractor Registration Exchange decision, OJ 1992 L 68/19, para. 8

¹⁸⁵ Ibid. para. 9

¹⁸⁶ Ibid. para. 7

¹⁸⁷ Ibid. para. 16

¹⁸⁸ Ibid. para. 35

¹⁸⁹ Ibid. para. 35

highly concentrated market and secondly, it increased the barriers to entry for non-members.¹⁹⁰ Both reasons were closely linked to the oligopolistic structure of the UK Tractor market.

With respect to the first reason, the Commission asserted that on a highly concentrated market “*hidden competition is essentially that element of uncertainty and secrecy between the main suppliers regarding market conditions without which none of them has the necessary scope of action to compete efficiently*”¹⁹¹. Hence, the Exchange was judged to restrict competition “*because it creates a degree of market transparency between the suppliers in a highly concentrated market which is likely to destroy what hidden competition there remains*”¹⁹². When hidden competition is removed it results in taking “*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*”¹⁹³. All competitive actions can be noticed immediately and the other undertakings can react fast and thus eliminate any advantage of the initiator. This was, in the Commission’s view likely to occur because there were no “*external competitive pressures on the members of the Exchange except parallel imports which are however also monitored*”¹⁹⁴. This neutralised and therefore stabilised the market positions of the oligopolists to the detriment of independent competitive action.

On appeal, the ECJ made a comparison to *Wood Pulp* in which quarterly price announcements were not found to infringe Article 81(1) EC. The difference was that in *Wood Pulp* price information was communicated to any purchasers whereas the information in *UK Tractors* was communicated exclusively between the member firms of the Exchange.¹⁹⁵

The Commission’s second reason was the increased barriers to entry, created by the Exchange. The Commission argued that any supplier trying to enter the market would be disadvantaged vis-à-vis members of the Exchange whether he chose to join the Exchange or not. Not becoming a member would be disadvantageous because of “*the fact that he does not have available the detailed and accurate market information about other suppliers which is available to members of the Exchange*”¹⁹⁶. Detailed knowledge about the market improves the ability for a supplier to defend itself against non-members. On the other hand, by joining the Exchange, a newcomer would have to reveal his exact retail sales with detailed product and geographic breakdowns to the already established suppliers on the market. This would be detrimental to any new member since it permitted

¹⁹⁰ *UK Agricultural Tractor Registration Exchange* decision, OJ 1992 L 68/19, para. 35

¹⁹¹ *Ibid.* para. 37

¹⁹² *Ibid.* para. 37

¹⁹³ *Ibid.* para. 37

¹⁹⁴ *Ibid.* para. 37

¹⁹⁵ Case 7/95, *John Deere Ltd v Commission*, para. 91

¹⁹⁶ *UK Agricultural Tractor Registration Exchange* decision, OJ 1992 L 68/19, para. 45

*“the established suppliers to defend their acquired positions by placing selective actions designed to contain the new member”*¹⁹⁷.

Thus, in both cases the Exchange gave an advantage to the already established suppliers in providing them with a tool to prevent new actors from entering the market.¹⁹⁸ This said the Commission:

*“Constitutes a serious restriction on the development of new competition in a highly concentrated market which is already characterized by high barriers to entry with the result that the members of the Exchange can jointly maximize profits to the detriment of farmers.”*¹⁹⁹

As a proof, the Commission referred to the fact that *“the market share of non-members has shown no substantial change over the entire period of the existence of the Exchange”*²⁰⁰.

The Commission pointed out that its decision did not undermine the positive effects that transparency can have on competition in market with low concentration.²⁰¹ On appeal, the CFI also acknowledged that *“on a truly competitive market transparency between traders is in principle likely to lead to the intensification of competition between suppliers”*²⁰². However, the CFI agreed with the Commission that the general use of information exchange to the sole benefit of suppliers was *“on a highly concentrated oligopolistic market such as the market in question /.../ likely to impair substantially the competition which exists between traders”*²⁰³. To conclude the CFI stated that in this particular situation *“the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all the competitors the market positions and strategies of the various individual competitors”*²⁰⁴.

5.3.5 Per-se-violation of competition law?

The Commission made its analysis of the Exchange solely from the point of view of the agreement’s effects.²⁰⁵ As discussed above, the Commission concluded that the combination of detailed information creating high transparency in a highly concentrated market restricted competition.²⁰⁶ Hence, the Commission asserted that no allegation or evidence of anti-competitive behaviour was necessary. In fact, *“account must be taken not only of the immediate visible effects on an agreement but also of its*

¹⁹⁷ UK Agricultural Tractor Registration Exchange decision, OJ 1992 L68/19, para. 46

¹⁹⁸ Ibid. para. 47

¹⁹⁹ Ibid. para. 48

²⁰⁰ Ibid. para. 8

²⁰¹ Ibid. para. 35

²⁰² T-35/92 *John Deere Ltd v Commission*, para. 51

²⁰³ Ibid. para. 51

²⁰⁴ Ibid. para. 51

²⁰⁵ Ibid. para. 47

²⁰⁶ UK Agricultural Tractor Registration Exchange decision, OJ 1992 68/19, para. 51

*potential effects*²⁰⁷. The objective of Article 81(1) EC is the maintenance of effective competition, and as such, it should be interpreted as including potential anti-competitive effects. This objective, the Commission stated, “*is particularly material in a highly concentrated market where an information exchange creates a structure of transparency which prevents hidden competition and increases barriers to entry for non-members*”²⁰⁸.

Thus, the Commission concluded that the Exchange necessarily restricted competition or at least, had potential to do so under the market conditions at hand, which was enough to infringe Article 81(1) EC. This was the first time the Commission adopted a principle of *per se* violation for an information exchange.²⁰⁹ However, in a press release short after the CFI judgment, the Commission somewhat narrowed the scope of the decision by stating that the same outcome was not certain in the car industry, where imports from third countries were far more important and the products were less homogeneous.²¹⁰

5.4 Case law in the wake of *UK Tractors*

Whish²¹¹, says that a *per se* judgment similar to the one in *UK Tractors* is unlikely to be repeated. This, he claims, is supported by the Commission’s press release following the CFI ruling, and the only exception would be for exchange of information on future pricing. Halliday and Seabright on the other hand, claim that “*there is a very high probability that an information exchange will fall within the prohibition of Article 81(1) where the market structure in which it functions is oligopolistic*”²¹².

The judgment in *UK Tractors* is strongly criticised by Lévêque, who argues that the conditions set up by the Commission and the Courts are “*not sufficiently conclusive standard of proof of tacit collusion*”²¹³. Both the criteria of the nature of the information and of the structure of the market are insufficient. From an economic standpoint, Lévêque questions whether a small number of producers, high entry barriers and relatively stable positions are the relevant criteria when establishing an oligopoly. He claims that firms in a close and stable oligopoly not always collude and that, on the other hand, collusion may well occur in an open oligopoly. Moreover, although precise information and frequent exchange are criteria that facilitate collusion, “*these conditions are neither necessary nor sufficient*

²⁰⁷ *UK Agricultural Tractor Registration Exchange* decision, OJ 1992 68/19, para. 51

²⁰⁸ *Ibid.*, para. 51

²⁰⁹ Halliday and Seabright, “*Networks good, cartels bad: but how could anyone tell the difference?*”, *Fighting Cartels: Why and How?*, 2001, p. 92

²¹⁰ Commission Press release IP/92/148 4 March 1992

²¹¹ Whish, “*Information agreements*”, *The Pros and Cons of Information Sharing*, 2006, p. 30

²¹² Halliday and Seabright, “*Networks good, cartels bad: but how could anyone tell the difference?*”, *Fighting Cartels: Why and How?*, 2001, p. 92

²¹³ Lévêque, “*UK Tractors, Paris luxury hotels and French mobile telephony operators: are all oligopoly information exchanges bad for competition?*”, *World Competition*, 2007, vol. 30, number 2, p. 237

from an economic standpoint”. These “poor” criteria, Lévêque suggests, “lead competition authorities to make erroneous decisions, and consumers foot the bill”²¹⁴.

From his point of view, an analysis of the potential collusive effects of an information exchange should be carried out in two steps. First, competition authorities need to determine whether the conditions for collusion are present. To do so, they shall use the test established by the CFI in the *Airtours* case²¹⁵: The Commission must show that the market is transparent enough to detect defection from a common policy and that an instrument for retaliation can be set up. If the result is positive, the information exchange is anti-competitive and should be prohibited. If the result is negative, the Commission should do a static analysis of the anti-competitive effects, i.e. investigate the nature of the information exchanged and the market structure. In this investigation, Lévêque points out that a distinction should be made between price information and information on cost and demand as well as between information that is common or private.²¹⁶

In *Thyssen Stahl*²¹⁷, an information exchange regarding participants’ orders and deliveries on the main Community markets, broken down by undertaking and Member State, was condemned to infringe competition law. The market was highly concentrated and products were homogenous. The information was recent, exchanged frequently and intended only for suppliers to the exclusion of consumers, which enabled the participants to detect the market position and strategies of their competitors. Even though the market in question was not an oligopoly, the CFI referred to *UK Tractors* and on appeal, the ECJ stated that “an information exchange system may constitute a breach of competition rules even where the relevant market is not a highly concentrated oligopolistic market”²¹⁸. Since *Thyssen Stahl* concerned the steel market, the alleged infringement regarded Article 65 of the Treaty establishing the European Coal and Steel Community (ECSC) and not Article 81(1) EC. However, the ECJ established that the findings in *UK Tractors* were applicable also to this case.²¹⁹

*Wirtschaftsvereinigung Stahl*²²⁰ is a second case regarding Article 65 ECSC, in which the Commission condemned an information agreement between German steel producers. The Commission took account of the high concentration of the German steel market, the homogeneous products and the individual character and detail of the exchanged information and judged

²¹⁴ Lévêque, “*UK Tractors, Paris luxury hotels and French mobile telephony operators: are all oligopoly information exchanges bad for competition?*”, *World Competition*, 2007, vol. 30, number 2, p. 236

²¹⁵ Case T- 342/99, *Airtours plc v. Commission*

²¹⁶ Lévêque, “*UK Tractors, Paris luxury hotels and French mobile telephony operators: are all oligopoly information exchanges bad for competition?*”, *World Competition*, 2007, vol. 30, number 2, p. 237-238

²¹⁷ C-194/99 *Thyssen Stahl AG v Commission*, often referred to as “Steel beams”

²¹⁸ *Ibid.* para. 86

²¹⁹ *Ibid.* para. 81

²²⁰ *Wirtschaftsvereinigung Stahl* decision, OJ 1998 L 1/10

it significantly deterrent to competitive market behaviour.²²¹ To support its decision the Commission referred to the *UK Tractors* by saying:

*“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.”*²²²

The CFI however, annulled the Commission’s decision because of substantial errors of fact. The exchanged information was neither as extensive nor as specific as the Commission had concluded. The CFI asserted that there was no general prohibition to exchange information. Since the information only enabled the parties to make approximate and indirect calculations of their overall market shares, the exchange could not be said to restrict competition despite the concentrated market.²²³

In the preliminary ruling in *ASNEF*²²⁴, the ECJ referred both to *UK Tractors* and to *Thyssen stahl*. The case concerned a credit information exchange system, which made available to credit providers, information about borrowers and in particular their ability to honour their debts. Such information exchange, the ECJ stated, in principal, improves the supply of credits and does not have as its object the distortion of competition within the meaning of Article 81(1) EC. Thus, an examination of the effects of the information exchange is required.²²⁵ This assessment, the ECJ stated:

*“Depends on the economic conditions on the relevant markets and on the specific characteristics of the system concerted, such as, in particular, its purpose and the conditions of access to it and participation in it, as well as the type of information exchanged.”*²²⁶

Having said this, the Commission concluded that the relevant market was not highly concentrated and that the information exchange, therefore, did not reduce uncertainty as to the risks of competition.²²⁷

²²¹ Bellamy and Child, 2008, pp. 356-357

²²² *Wirtschaftsvereinigung Stahl* decision, OJ 1998 L 1/10, para. 39

²²³ T-16/98 *Wirtschaftsvereinigung Stahl v Commission*, para. 44

²²⁴ C-238/05 *Asnef-Equifax v Ausbanc*

²²⁵ *Ibid.* para. 46-48

²²⁶ *Ibid.* para. 54

²²⁷ *Ibid.* para. 61-62

6 *Per se* prohibition of information exchange?

*“To restrict communication we must be sure that it has significant effects on sustaining collusion and, at the same time, that the efficiency losses from such a policy are small enough.”*²²⁸

It has been established that the exchange of certain kind of information or in certain situations, does not bring any substantial positive effects to competition. On the other hand, *“certain types of communication are so highly correlated with collusion and have such a small likelihood of efficiency benefits that they are good targets for anti-trust enforcement”*²²⁹. According to Kühn, a provision in EU law restricting certain types of information agreements could create a legal environment in which it is difficult for firms to sustain collusion. This gives rise to the question whether the exchange of certain information should be classified as a measure that restricts competition by object along with horizontal price fixing and market sharing. Moreover, it is appropriate to discuss the possible introduction of special restrictions on information sharing in oligopolies.

Møllgaard and Overgaard put forward two questions that an antitrust authority should ask when presented with an information agreement: *“What is the potential of the communication with respect to facilitating coordination or collusion?”* and *“what are the possible efficiency enhancing effects of the communication and are there ways in which these can be realized without the communication?”*²³⁰ If the answer to the first question is that a certain kind of information exchange has a coordinating effect, Møllgaard and Overgaard state that a ban on this kind of information exchange should be considered. If, in addition, the answer to the second question is that the communication has no possible or probable beneficial effects on competition, or that those benefits could be obtained through other means, competition authorities should place a ban on the information exchange.²³¹

If we apply this model to the exchange of future price information in any market, the general answer would be that it has a coordinating effect. The efficiency enhancing effect would be that the information, if made available also to the public, improves transparency on the consumer side. However, if the information is exchanged exclusively between firms, the committing

²²⁸ Kühn, *“Fighting collusion by regulating communication between firms”*, Economic Policy, 2001, p. 171

²²⁹ Ibid.

²³⁰ Møllgaard and Overgaard, *“Information Exchange, Market Transparency and Dynamic Oligopoly”*, 2005, Issues in Competition Law and Policy (Ed. 2007), p. 16

²³¹ Ibid.

effect that the publishing of future price information would have on the firms, fails to appear. Moreover, the *Danish ready-mixed concrete case*²³² indicates that in concentrated markets the exchange of future price information may have a collusive effect, even when exchanged publicly.

According to Whish, information exchange about future prices “*would appear to /.../ be considered to restrict competition by object*”²³³. He claims that in the case of future prices, it is impossible to distinguish information exchange from explicit collusion, and therefore they should be treated equally. However, Whish points out, there are other cases where an effects analysis is much more appropriate. Unfortunately, he does not specify which cases he has in mind.²³⁴ Whish’s judgment is not based on information exchange in a certain market but on information exchange in general. With the special market characteristics of oligopolies in mind, I would argue that the incentives for a prohibition of agreements to exchange future price information are bigger in those markets. The risk for collusion increases the fewer the market actors. Thus in an oligopoly, the beneficial effects of exchanged price information, if any, are likely to be insignificantly small.

I believe that agreements to exchange future price information should be prohibited in any market, since the possibly beneficial effects do not even remotely counterbalance the risks for collusion associated with such exchange. Such a prohibition would be a useful tool in fighting anti-competitive behaviour in the EU and a manifest way to take a stand against the sharing of future price information. I am willing to move one step further and encourage a prohibition of the exchange of any price information with the exception of historic information, i.e. older than one year, in oligopolistic markets. If we, again, apply the model of Møllgaard and Overgaard²³⁵, the answer to the first question would be that the sharing of price information in oligopolies has a coordinating effect, mostly because of the concentration of the market. In oligopolies, market actors have very good knowledge of the businesses of their competitors and by getting access to each other’s recent, current or future prices, almost all natural competition will disappear. This is extremely likely to impair competition.

The answer to the second question would be that there are no, or insignificant, efficiency enhancing effects. Oligopolies are inherently transparent, and the possibly enhancing effects, which normally are improved transparency, are unlikely to appear when the market is already very transparent. It is true that transparency on the consumer side benefits competition but in order to be of use for consumers, information sharing on

²³² See Albæk et al., *Government-Assisted Oligopoly Coordination? A Concrete Case*, 1997, *Journal of Industrial Economics*, Vol. 45, Issue 4, pp. 429-443

²³³ Whish, “*Information agreements*”, *The Pros and Cons of Information Sharing*, 2006, p. 37

²³⁴ *Ibid.* p. 38

²³⁵ Møllgaard and Overgaard, “*Information Exchange, Market Transparency and Dynamic Oligopoly*”, 2005, *Issues in Competition Law and Policy* (Ed. 2007), p. 16

the firm side needs to be public. However, even public price sharing is more likely to impair competition than increase consumer knowledge or having a committing effect on the firms. Once again, I find it appropriate to remind of the *Danish ready-mixed concrete* case.²³⁶

Vives too discusses a possible ban or restriction on certain types of information exchange. According to him “*it is arguable whether /.../ the exchange of individual price and quantity data should be considered a restriction of competition and infringement of Article 81(1) by object (i.e. in itself), at least in concentrated markets*”²³⁷. There would be, in such cases, a presumption that the information agreement infringes Article 81(1) EC because of its form. Vives mentions individual price and quantity data as information that could perhaps be subject of a restriction. The same conclusions are drawn by Kühn, who states that private communication about future prices or quantities should be taken as sufficient evidence for collusion. On the other hand, he points out that “*the commitment effects of public price announcements are potentially too important to generally forbid them*”²³⁸. I have so far only focused on price information, but I agree with Vives that also the exchange of individual quantity data, in certain situations, is likely to have a coordinating effect.

However, I do not believe that only the exchange of individual price information may impair competition. In concentrated markets, such as oligopolies, I estimate the risk of aggregated data enabling the identifying of individual competitors to be of such importance that even the exchange of aggregated price information should be prohibited. As we have seen in *UK Tractors*²³⁹, aggregated information may allow the identification of individual market actors. Based upon *UK Tractors* I believe that the fact that information is aggregated is no guarantee that individual market actors cannot be identified. Thus, in oligopolies, where the number of market actors is limited, there is a great risk that the exchange of aggregated information enables the identification of individual competitors. Consequently, I believe that the exchange of aggregated price information, not older than one year, should be prohibited in concentrated markets.

Very importantly, Vives points out, there will always be the possibility for an information exchange to be exempted according to Article 81(3) EC if the competitive efficiencies associated with it outweigh its anti-competitive effects. Firms have the burden of proof to show that the efficiencies are real and that they could not be obtained through other means.²⁴⁰

²³⁶ See note 232 above

²³⁷ Vives, “*Information Sharing: Economics and Antitrust*”, The Pros and Cons of Information Sharing, 2006, p. 96

²³⁸ Kühn, “*Fighting collusion by regulating communication between firms*”, Economic Policy, 2001, p. 171

²³⁹ *UK Agricultural Tractor Registration Exchange* decision, OJ 1992 L 68/19, T-35/92
John Deere Ltd v Commission, C-7/95 *John Deere Ltd v Commission*

²⁴⁰ Vives, “*Information Sharing: Economics and Antitrust*”, The Pros and Cons of Information Sharing, 2006, p. 96

7 Information exchange in oligopolies – analysis

Both consumers and firms need information to make good choices - whether it regards buying the best product in relation to price or quality or making strategic business decisions. Some transparency is beneficial for competition but when does it create a risk for collusive behaviour among firms? What information exchange is good and what is bad, and how do we tell the difference?

There are many features of the information subject to an exchange and therefore many different combinations of those features appear. The most harmless combination is the exchange of aggregate, historic, public information on sales and output. This information exchange has all the features of a “good” exchange that promotes industrial development, consumer knowledge and thus, competition. On the other extreme, we find an information agreement regarding the exchange of individual, future price information communicated exclusively between firms. This information exchange is, or is on the verge of becoming, a concerted practice since it allows firms to coordinate their behaviour.

Although it is tempting to rely on the two extreme examples of information exchange, most information exchanges, as we have seen, are situated somewhere in between and cannot easily be classified as neither good nor bad. Even a “good” exchange in certain situations may provide competitors with too much information that will enable them to identify their rivals’ individual actions. On the other hand, the “bad” exchange, in some situations, may not restrict competition.

The effect of an information exchange is, as we have seen, most often dependent on the structure of the market in which it takes place. The more concentrated the market and the more homogeneous the products, the more likely an information exchange is to have a restrictive impact on competition. Not even the example of the “good” exchange is necessarily good in every market. This makes studying the competitive impact of information exchanges both interesting and complex.

An oligopoly is characterised by few and powerful, interdependent firms with good knowledge of the market strategies and actions of their competitors. However, if undertakings already have good knowledge about each other’s behaviour, do they truly need to share information? It has been established that the competitive benefits of increased transparency are bigger when transparency is very low or non-existent. When the market is already relatively transparent, the beneficial effects of increased transparency brought by an information exchange, will fail to appear. Since an oligopoly is inherently transparent to some degree, the beneficial effects

of an information exchange are, in my view, likely to be very small in such markets. Depending on the existing market transparency, is there a certain point when there will be no beneficial impacts of an information exchange?

I believe it is possible that, in some markets, there is no need to improve further market transparency. Improved market transparency benefits above all consumers and potential entrants and if the needs of those groups are already met, I cannot see the good effects of increased transparency. However, as Møllgaard and Overgaard point out, for the beneficial effects to appear, market transparency in all areas is not needed. From a consumer perspective, transparency regarding price, product characteristics, warranty terms etc. promotes competition. These findings, lead up to the conclusion that the exchange of information that does not improve consumer knowledge, e.g. information relating to capacities, quantities, investment plans etc. will be less likely to advance competition. Improved transparency in those fields lies primarily in the interest of firms and thus has more collusive than competitive effects.

7.1 Price information

The most delicate information is price information, which is equally important to consumers and firms. Consumers need price information to make good choices from the supply of goods or services. Undertakings need price information because it allows them to know the strategies of their competitors and to price their products competitively. Improved price transparency is therefore an ambiguous matter since it most likely will both benefit and impair competition. This raises the question whether the “good” effect will level out the “bad” or whether one will dominate the other.

I believe that if improved price information enables firms to align their prices, which they most likely will in an oligopoly, consumer knowledge will make no difference. A consumer, who has information of product prices, will still not have an advantage if all firms in the market apply the same prices. The beneficial effects that increased price transparency may create in other markets because it enables consumers to make good choices, will fail to appear in an oligopoly because firms are interdependent and tend to adopt parallel behaviour. There is no use in having price information if there is in fact no real choice to make.

There is however a difference between the sharing of historic or future price information and whether such information is aggregated or individual. The European institutions have accepted, in oligopolistic markets, the exchange of price information that is both historic and aggregated, as long as the aggregation does not allow the identification of individual market actors. This, in turn, most often depends on the structure of the market. The fewer the market actors the easier it is to identify each actor’s behaviour. An oligopoly inherently consists of a limited number of undertakings and thus even aggregated data may allow the identification of individual firms. This was the case in *UK Tractors*, where the many breakdowns in the aggregate

information made it very close to becoming individualised, which led the ECJ to the conclusion that the exchange restricted competition. The fact that information is aggregated is therefore not an assurance of its consistency with competition law.

There is no decision regarding the exchange of aggregated, future price information, but I think, in an oligopoly, it is likely to be found to infringe competition law. Although aggregated, the information would in combination with the market structure provide firms with information enabling them to predict their competitors' behaviour. In a market with few and interdependent actors, there is only a small difference between a calculated average price and the real price. Thus, the "bad" feature of exchanging future prices would outweigh the "good" feature; the aggregation. Such exchange in an oligopoly would therefore be likely to infringe competition. As stated previously, it may well be subject to prohibition by European competition law.

The exchange of individual price information has been, in most cases, regarded by the European institutions as a clear infringement of Article 81(1) EC. Only once, in *Wood Pulp*²⁴¹, has the exchange of individual price information been judged as normal market behaviour. In this case, which concerned the oligopolistic market of wood pulp, firms communicated their future prices by publishing price lists in trade journals. Surprisingly, the ECJ found this to be normal market behaviour and not, as it would seem an infringement of competition law. The reason behind the ECJ's findings was presumably that the information was made available also to consumers. This leads us to discussing the difference between public and individual information exchanges.

7.2 Public or private information exchange

Vives and Peeperkorn argue that publicly exchanged information constitutes a commitment and is not only "cheap talk", which can be said about information shared only between firms. This makes public exchange of information, even on future prices, less collusive because consumers will assume that they can rely on the accuracy of the information. Once a firm has announced a price, it will not be able to change it, because of the committing effects of publicity. Consequently, firms will have fewer possibilities to coordinate their prices (or behaviour). This argument, I would say, relies on a model of static oligopoly, where the game is played only once. By public sharing of price information, a static game is created, where firms undercut each other's prices, to the benefit of consumers. However, Vives claims that, in general, information exchange has a negative impact on competition in Bertrand oligopolies. When an

²⁴¹ Joined Cases 89, 104, 114, 116, 117, and 125-129/85, *A. Ahlström Osakeyhtiö and others v Commission*

undertaking knows the price charged by its competitor, it will adjust its own price to make the undercutting difference negligible. Consequently, consumer benefit will be minimal despite the committing effect of public information exchange. Thus, I do not believe that public information exchange has such beneficial effects on competition as suggested by Vives and Peeperkorn. A possible argument however, would be that when price difference between competing products (or services) is negligible, one cannot be certain that consumers will choose the product with the lowest price. Thus, a firm may need to undercut the price of its competitor to an appreciable extent in order to be certain of attracting a majority of the consumers. This, in turn, would lead to a decrease in prices to the benefit of consumers.

Halliday and Seabright uphold a similar theory, arguing that what matters is access to information and not content. As long as consumers have the same knowledge as firms, there is no risk for anti-competitive effects of increased transparency. As discussed above, this may be the case in static models, but in my view, does not apply to dynamic models, where firms adjust their prices or output to the market repeatedly. In dynamic oligopoly, collusion is difficult when there is no transparency. Thus, firms want to exchange information and the more transparent the market the greater the risk for collusion. I do not believe that transparency on the consumer side will level out the incentives for collusion created by an overall increase in transparency. Firms in a dynamic oligopoly with good knowledge of the behaviour of their competitors will most likely coordinate their prices. For consumers, there is no value in having information that allows them to compare prices, if all products are priced similarly. In oligopolies firms tend to charge similar prices even without exchanging information just because of the market structure and their interdependence. I cannot see why prices would not become even more homogeneous if undertakings also shared information. I must acknowledge that consumers may have an interest in comparing other qualities besides price, such as product characteristics or warranty terms. However, in an oligopoly, products are most often homogeneous and there is little or no room for product differentiation.

If transparency increased exclusively on the consumer side, the result would not be the same. However, this is, I would say, impossible in reality since consumer information is public and thus available to undertakings as well. Possibly, as put forward by Møllgaard and Overgaard, consumers and firms need different kind of information and if transparency would increase only regarding information of consumer interest, it may have a beneficial effect on competition. This argument is however problematic since the information of greatest interest to consumers is price information, which is equally important for firms.

In relation to the possible benefits of public information exchange in oligopolies, I would find it interesting to know how Vives, Peeperkorn and Halliday and Seabright explain the *Danish ready-mixed concrete* case. In an attempt to improve competition, Danish competition authorities decided to

publish the individual price policies of the undertakings active in the oligopolistic market of ready-mixed concrete. Just like Vives, Peeperkorn and Halliday and Seabright, the competition authorities believed that increased transparency on the consumer side would increase competition and benefit consumers. The measure, however, resulted in a less competitive market characterised by rising and converging prices. This case supports my point of view that although transparency is increased also on the consumer side, it will not benefit competition in oligopolistic markets. What is troubling, I must admit, is the ECJ's reasoning in *Wood Pulp*, when public sharing of price information, was considered normal market behaviour. Why did the market of wood pulp not react the same way as the market of ready-mixed concrete? When is published information detrimental to competition and when is it not?

I can only speculate upon why the same kind of information exchange turned out to impair competition in the Danish market of ready-mixed concrete and not in the European market of wood pulp. In both cases future prices were published in the trade press, products were homogeneous and the market was oligopolistic. However, I believe that the difference lies in the market structure and that the market of wood pulp, although an oligopoly, was more competitive. Above all, some 40 % of the wood pulp consumption in the European market came from producers outside the Community.²⁴² The Danish market of ready-mixed concrete was local and there was no outside competition or no possible entrants. Moreover, we must not forget that the *Danish ready-mixed concrete* case has not been tried in a court and will not be, since the Danish competition authority created the information exchange. Thus, it may be misleading to compare the two cases. However, I find it fascinating that two information exchanges that, to all appearance, are similar have so different outcomes. No matter the findings of a comparison with *Wood Pulp*, the *Danish ready-mixed concrete* case shows that even published information can impair competition; at least in a tight oligopoly.

My conclusion on the exchange of public information versus private, is that information exchange exclusively between firms is more often detrimental to competition. However, this does not mean that information exchanges are safe only because they are public. As we have seen, and with the *Danish ready-mixed concrete* case as a good example, public information sharing in oligopolies, at least regarding future prices, is very likely to impair competition. I do not agree with Vives, Peeperkorn and Halliday and Seabright who argue that access to information is what will decide the anti-competitiveness of an information exchange. I am more inclined to agree with Whish who claims that the method of information sharing is not decisive but whether the exchanged information affects competition.

²⁴² Joined Cases 89, 104, 114, 116, 117, and 125-129/85, *A. Ahlström Osakeyhtiö and others v Commission*, para. 116

7.3 UK Agricultural Tractor Registration Exchange

Since the *UK Tractors* case is the leading decision on information exchange, I think it is appropriate to comment on it separately. I agree with the Courts in *UK Tractors* that the information exchanged allowed firms to know more than was necessary for the conduct of their businesses. Statistic information of an industry is important, but at some critical point, the aggregated information becomes more than just statistics. When the many breakdowns allow the identification of individual market actors, I believe that information sharing becomes a tool for collusion rather than a tool for independent market behaviour. From my point of view, the ECJ made the right decision and I think it is important to restrict information exchanges that create a collusive environment. What I find interesting with *UK Tractors* is that the exchange did not in particular concern future prices and still it was found to impair competition. I would have guessed that the first case, in which an information exchange, by itself, was found to infringe competition law, would be a case regarding the exchange of future price information, since that is the inherently “bad” information to share. *UK Tractors* was rather “bad” by the way the breakdowns were combined with the individualised information of exact quantities of retail sales and exact market shares. This shows that competition authorities not only should keep an eye on agreements regarding the exchange of future price information.

Lévêque criticises the *UK Tractors* case and the reference that has been made to it in following cases like *Thyssen stahl*²⁴³ and *Wirtschaftsvereinigung stahl*²⁴⁴. He claims that information exchange in oligopolistic markets will not always impair competition, or that, at least, not all oligopolies should be treated alike. I agree with Lévêque on that point, because every market and every case is different. However, I think that the difference between various information exchanges is greater than between different oligopolies. Since an information exchange has so many features, there are numerous combinations of such exchanges. From my point of view, the kind of information exchange has greater impact on competition than the kind of oligopoly. A good example is *UK Tractors* in which the ECJ found that the exchange of aggregated information did not harm competition whereas the exchange of individual information did. Both information exchanges took place in the exact same kind of oligopoly, but resulted in different legal assessments.

Lévêque claims that *UK Tractors* did not lend enough weight to the conclusion that information exchange in oligopolies infringes competition. I agree that the conclusion drawn from *UK Tractors* should not be that all information exchanges in all oligopolies infringe competition. Moreover, I do not believe that the Courts have referred to *UK Tractors* to support such

²⁴³ C-194/99 *Thyssen Stahl AG v Commission*, often referred to as “Steel beams”

²⁴⁴ *Wirtschaftsvereinigung Stahl* decision, OJ 1998 L 1/10

an argument in neither *Thyssen stahl* nor *Wirtschaftsvereinigung stahl*. However, by arguing that the conclusion is that simplistic and superficial, Lévêque can easily criticise the *UK Tractors* judgment, without having any substantial arguments. From my point of view, the conclusion that can be drawn from *UK Tractors* is that an information exchange, which enables the participating firms to identify the individual actions or figures of their competitors, may infringe competition. Because of the oligopolistic market structure in *UK Tractors*, the individual information, with the numerous combinations of breakdowns, allowed the identification of individual firms, and thus infringed Article 81(1) EC.

8 Conclusions

- At least in theory, the most “harmless” combination of an information agreement is the exchange of aggregate, historic, public information on sales and output.
- Theoretically, the most “dangerous” information agreement regards the exchange of individual, future, price information communicated exclusively between firms. This information exchange is, or is on the verge of becoming, a concerted practice.
- The more concentrated the market and the more homogeneous the products, the more likely an information exchange is to have a restrictive impact on competition.
- The exchange of information on future prices and quantities in oligopolistic markets is likely to impair competition.
- Therefore, agreements to exchange price information, in oligopolistic markets, should be prohibited by object.
- The exchange of future price information should be prohibited by object also in other markets since the negative effects of such information exchanges are greater than the positive.
- The exchange of aggregated information is expected to impair competition if it allows the identification of individual market actors, which is likely to happen in oligopolistic markets.
- The exchange of information that does not improve consumer knowledge, e.g. information relating to capacities, quantities, investment plans etc. is less likely to advance competition. Improved transparency in those fields lies primarily in the interest of firms and thus has more collusive than competitive effects.
- Publicly exchanged information may have predominantly positive effects in markets that are characterised by heterogeneous products and many players.
- In oligopolies, the beneficial effects of publicly exchanged information are negligible.

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