



**FACULTY OF LAW**

Lund University

Maritzemia A. Boloboski L.

## **Cartels, Pro or Anti-competition**

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Supervisor: Jörgen Hettne

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**Table of content:**

Cartels, Pro or Anti competition. .... 1

1.Research question:..... 4

2.Material and Method:..... 4

3.Material and outline: ..... 4

4.Introduction: ..... 5

5.Case COMP/39406 – marine hoses outline: ..... 6

6.Cartels prohibition within the European Union:..... 8

7.Motives behind cartels:..... 14

8.Consequences of cartels vs. possible benefits from the horizontal cooperation: ..... 15

8.1Possible pro-competitive effects of information exchanges:..... 16

8.2Information exchanges in the insurance sector:..... 17

8.3Information exchanges in the banking industry: ..... 18

8.4Potential benefits for consumers:..... 19

9.Possible anti-competitive effects of information exchanges: ..... 20

10.Efficiency savings from horizontal cooperation: ..... 22

10.1General aspects of the Horizontal Cooperation Guidelines: ..... 23

10.2Evaluation criteria under paragraph 1 of Article 101 TFEU ..... 24

10.3Evaluation criteria under paragraph 3 of Article 101 TFEU ..... 26

11.Types of cooperation agreements: ..... 27

11.1Information Sharing Agreements..... 27

11.2Agreements on Research and Development (R&D):..... 28

11.3Production Agreements: ..... 29

11.4Purchasing Agreements: ..... 30

11.5Commercialization Agreements:..... 31

11.6Standardization Agreements:..... 32

12.Conclusion:..... 34

## **1. Research question:**

Topic: Cartels and competition Law.

Thesis: Cartels, Pro or Anti Competition?

1. What are cartels and why is it a controversial issue?
  - a. History within the European Union
  - b. Cases
2. What background information is necessary to understand each point of view?
  - a. Definition of Cartels
  - b. Motives behind cartels
3. What arguments are laid out to support cartels?
4. What arguments are laid out to support the anti-competition perspective of cartels?
5. Based on my research, what is my position about cartels? Why?

## **2. Material and Method:**

From the legal perspective, a traditional assertive scheme of analyzing case law, legal texts and doctrine is applied. Moreover throughout present thesis the different elements and experimental findings shall be illustrated through different case studies. The reason for using case studies to exemplify and backup different essential and practical findings is that it reflects the everyday application.

The material used comprises mainly of a considerable number of articles, books, primary and secondary legislation and relevant cases.

## **3. Material and outline:**

The material used consists mainly in a significant number of scientific articles, books, primary and secondary legislation and relevant cases. The thesis aims at establishing the present state of competition law in the European Union, but we shall critically analyze the legal situation and

recommend different approaches. The method is legal dogmatic. Results from commercial research shall be used for the evaluation of the law and as a base for arguments regarding possible new advances of the law. A case study consisting of the Commission's Decision in Case COMP/39406 – marine hoses shall be used as an outline and to exemplify how competition law works today in the European Union. The motives for choosing this Judgment, remains that from a legal perspective the marine hoses cartel is a fairly fresh Decision, which means it mirrors current legislation, moreover it contains essentials which are innovative to some degree.

#### **4. Introduction:**

Through the present paper we shall take a close look at the framework of cartels and create a debate to determine if indeed the same promote and increase competition, or on the contrary cartels could be seen as a direct assault to the principles of competition and therefore recognized as one of the most harmful anticompetitive conducts.

We should take under consideration that competition itself is a basic mechanism of the market economy and is considered an important factor for the development of proper conditions for economic growth and prosperity. It is well known that competition aims to increase productivity and reduce costs so that individual firms and individual sectors and the economy as a whole operates more efficiently; and to stimulate innovation, to use the contest to obtain the favour of consumers, both consumers of intermediate industrial goods or end users of goods and services, to use the contest to serve those consumers as a stimulant to provide new products and to provide better ways of supplying services.

Over the years the battle on cartels has become more and more powerful. Anti-Trust authorities around the world have strengthened their fight against cartels, consequently we shall carry out an analysis of the horizontal cooperation agreements and we shall seek to determine if in fact the same serve as a tool to engage a disguised cartel.

## 5. Case COMP/39406 – marine hoses outline:

On 28 January 2009, the Commission adopted a decision relating to proceedings under Article 101 of the EC Treaty imposing a fine of over EUR 131 million(1) on six producers of marine hoses.

There was a key novelty in the marine hoses case: it was the first to involve a search in a private home. The arrangement between the companies was a classic cartel with price-fixing and quotas, which the case team dealt with in little more than two years<sup>1</sup>.

The investigation by the Commission uncovered evidence that during the relevant period the parties concerned by the decision had been participating in anticompetitive arrangements which consisted of:

- a) Allocating tenders,
- b) Fixing prices,
- c) Fixing quotas,
- d) Fixing sales conditions,
- e) Sharing the market geographically, and
- f) Exchanging sensitive information on prices, sales volumes and procurement tenders.

Evidence uncovered revealed that, at least since 1986, members of the marine hoses cartel had been running a scheme to share out amongst themselves the tenders awarded by their customers. Under the scheme, any member of the cartel who received an inquiry from a customer would report it to the cartel coordinator, who, in turn, would allocate the customer to a 'champion', which means the member of the cartel who was supposed to win the tender. To make sure that the tender was awarded to the 'champion, in the tendering procedure the cartel agreed on the prices that each of them should quote so that all their bids would be above the price quoted by the champion.

Moreover the cartel members agreed on a number of measures to facilitate the implementation of the cartel: reference prices, quotas and sales conditions backed up by penalties to compensate any cartel members who lost tenders which the cartel had allocated to them to another member of the

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<sup>1</sup>Competition Policy Newsletter, The Marine Hoses cartel, Maurits Pino. Number 2, 53

cartel.

The marine hoses cartel was, therefore, in many ways a textbook example. In one important sense, however, it was different. An ex-employee of one of the undertakings involved in the cartel performed the role of coordinator. Cartel members communicated with the coordinator regularly by fax, e-mail and, sometimes, telephone for each new tender. The coordinator gave members market share reports, market development reports and specific instructions on their bids. In addition, the coordinator selected a 'champion' for each contract. This 'champion' would win the tender, while other members of the cartel would submit 'cover bids' so as not to give away the cartel<sup>2</sup>.

### **Remedies:**

Under the 2006 Guidelines on fines (4), when determining the basic amount of the fine to be imposed, the Commission starts from the value of the undertaking's sales of the goods or services to which the infringement relates in the relevant geographic area within the EEA.

The Commission calculates the fines to be imposed on each undertaking concerned on the basis of the value of sales of each. As this was a worldwide cartel and EEA sales do not reflect the strength of the different parties, it is appropriate, in line with Point 18 of the Guidelines on fines, to apply the world market share of each undertaking to the total sales within the EEA. The criteria that were considered to determine the percentage of the undertakings' sales were the nature of the infringement, the combined market share of the cartel members, the geographic scope of the cartel and the degree to which the cartel was implemented. On this basis, the percentage for the variable amount and the additional amount ('entry fee') was set.

Although the cartel lasted from April 1986 to May 2007, a period of two years of only limited activity on the part of the cartel was excluded when calculating the fines. Therefore, for the purpose of setting the fines, the cartel was considered to have operated for more than 19 years, so the variable amount was multiplied by up to 19. There were no mitigating circumstances and no aggravating circumstances (such as recidivism) other than leadership. The fines of two undertakings were increased because they played the leading role. Yokohama was the first undertaking to submit information and evidence

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<sup>2</sup>Competition Policy Newsletter, The Marine Hoses cartel, Maurits Pino. Number 2 54.

which opened the door for the Commission to carry out a targeted inspection in connection with the alleged cartel. The fine imposed on Yokohama was reduced by 100 %. Manuli was granted a 30 % reduction. Parker ITR's and Bridgestone's contributions were not considered as being of 'significant added value'. Therefore the Commission did not grant these two companies any reduction of their fine<sup>3</sup>.

#### **Decision:**

The following fines were imposed (with the duration of the infringement indicated in brackets):

- Bridgestone Corporation (1 April 1986 to 2 May 2007): EUR 58.5 million, of which EUR 48.1 million jointly and severally with Bridgestone Industrial Limited (19 December 1989 to 2 May 2007).
- Yokohama Rubber Company Limited, immunity applicant (from 1 April 1986 to 1 June 2006): EUR 0.
- Dunlop Oil & Marine Ltd (12 December 1997 to 2 May 2007): EUR 18 million, of which EUR 16 million jointly and severally with ContiTech AG (28 July 2000 to 2 May 2007), of which EUR 7.1 million jointly and severally with Continental AG (9 March 2005 to 2 May 2007).
- Trelleborg Industrie SAS (1 April 1986 to 2 May 2007): EUR 24.5 million, of which EUR 12.2 million jointly and severally with Trelleborg AB (28 March 1996 to 2 May 2007).
- Parker ITR Srl (1 April 1986 to 2 May 2007): EUR 25.61 million, of which EUR 8.32 million jointly and severally with Parker Hannifin Corporation (31 January 2002 to 2 May 2007).
- Manuli Rubber Industries SpA (1 April 1986 to 1 August 1992 and 3 September 1996 to 2 May 2007): EUR 4.9 million<sup>4</sup>.

#### **6. Cartels prohibition within the European Union:**

The definition of cartels in accordance to the Oxford dictionary is; an association of manufacturers or suppliers with the purpose of maintaining prices at a high level and restricting competition<sup>5</sup>.

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<sup>3</sup> Competition Policy Newsletter, The Marine Hoses cartel, Maurits Pino. Number 2 54

<sup>4</sup> Competition Policy Newsletter, The Marine Hoses cartel, Maurits Pino. Number 2 54.

<sup>5</sup> <http://www.oxforddictionaries.com/definition/english/cartel>



The legal rule prohibiting cartels are found mainly in Article 101(1) in the Treaty of the functioning of the European Union, which stipulates that:

*“The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices 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, in particular the direct or indirect fixing of purchase or selling prices or any other trading conditions, the limitation and control of production, markets, technical development, or investment and the allocation of markets or sources of supply are prohibited.”*<sup>6</sup>

In order for collusive behaviour to be considered illegal under Article 101(1) three distinct components must be present: (i) a legal component; (ii) an economic component; (iii) a jurisdictional component.<sup>78</sup> The necessary present of a legal component means that some form (agreement or concerted practice) of cooperation must be entered into between undertakings.<sup>9</sup> The necessary present of an economic component means that there must be a restraint of competition (prevention, restriction or distortion of competition). The necessary present of a jurisdictional component means that agreement must be capable of affecting trade between Member States.

Even though an agreement or concerted practice might fall under the scope of Article 101(1) it still has the possibility to be cleared by the Block exemptions. The Block exemptions fall into three categories, Article 101(3), agreements of minor importance and block exemptions.

The first category is Article 101(3). Article 101 (3) creates an exemption where the agreement is beneficial to consumers. In order to satisfy the criteria and obtain a Block exemption four conditions

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<sup>6</sup>Article 101(1) Treaty of the function of the European Union

<sup>7</sup>The jurisdictional component will not be further elaborated on.

<sup>8</sup>Iversen, Bent et al. *“Regulating competition in the EU”*, 2008 p. 29

<sup>9</sup>Article 101(1) does not define the term undertaking and instead it has been developed through a number of cases before the ECJ. In *Höfner and Elser v. Macotron*, the ECJ established that *“the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.”* See Case C-41/90, *Höfner and Elser v. Macotron GmbH*, para 21. The term will not be further elaborated on

must be fulfilled; the conditions are cumulative, meaning that all conditions must be satisfied before obtaining an exemption. To give some guidance the Commission has issued a comprehensive notice on the application of Article 101(3).<sup>10</sup> The first two conditions that have to be fulfilled are positive meaning that they must be present and the last two conditions are negative, meaning that they must not be present. First of all, the agreement must lead to an improvement in the production or distribution of goods or the promotion of technical or economic progress. Secondly, it must allow consumers a fair share of the resulting benefit. Third, the agreement may not contain any indispensable restraints and finally, the agreement may not eliminate competition in respect of a substantial part of the products in question.<sup>11</sup>

All agreements may, in theory, meet the conditions in Article 101(3). In practice however, the Commission and the European Courts have made it clear that prices, outputs or market fixing agreements will rarely benefit from the exceptions, as they are considered restrictive of competition by their object (as explained below). Thus cartels are “almost” *per se* prohibited;<sup>12</sup> however some exceptions have been made over time to this general view. For instance, the Commission has granted exemptions from competition rules for so-called Crisis cartels.

The term "crisis cartels" is misleading as it may create expectations that competition authorities might envisage to allow cartels in order to protect industry from an economic crisis in general. However, the discussion of industrial restructuring agreements should not be related to the current, or any other, cyclical economic crisis and the recession induced fall in demand. In a properly functioning market economy it should normally be price that influences the changing relationship between supply and demand, and when demand falls it is likely that price would follow as well. If the consequence of a recession is that some undertakings go bankrupt, it would normally be those least adapted to the crisis for a number of reasons. Hence, it can be generally assumed that competition would correct the problem of overcapacity available in the market and, over time, it would bring the market back to equilibrium. Therefore, until this adjustment takes place prices must not be artificially maintained at a high level by means of a cartel. In line with this fundamental economic law of supply and demand, the

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<sup>10</sup>Guidelines on the application of Article 81(3) of the Treaty

<sup>11</sup>Iversen, Bent et al. “*Regulating competition in the EU*”, 2008 p. 58-62

<sup>12</sup>Massimo Motta, “*Cartels in the European Union: Economics, Law, Practice*”, 2007 p. 14

case law of the Court of Justice of the European Union ("ECJ") generally concludes that a cyclical overcapacity in principle cannot justify the formation of cartels<sup>13</sup>.

Prior to 1 May 2004, when the new notification system<sup>14</sup> was introduced, an exemption under Article 101(3) was only possible after notification to the Commission and the Commission's approval. Regulation No 1/2003 abandoned the old notification system, the consequence of the abolishment of the old notification system (Regulation No 17) is that the restrictive practices which are prohibited by Article 101(1) but meet the trade-off contained in Article 101(3) is lawful without the need for any prior decision, therefore undertakings must themselves assess whether they are covered by the prohibition, and if so, assess whether they fulfil the conditions for exemption.<sup>15</sup>

The second category is agreements of minor importance. The Commission has agreed to exempt 'Agreements of minor importance'<sup>16</sup> from Article 101 in cases where the deleterious effects on competition are found to be insignificant. The requirement that there was to be an appreciable restriction was first accepted by the ECJ in *Völk*.<sup>17</sup> According to the above mentioned Notice<sup>18</sup> agreements between competitors do not appreciably restrict competition, where the aggregate market share held by the participants does not exceed ten (10%) percent. However, these thresholds do not apply to agreements which have as their object to fix prices, limit output or sales, or allocate markets or customers.<sup>19</sup>

In this specific point we would like to refer to Case C-226/11 Expedia Inc. v Autorité de la concurrence and Others, judgment of the Court of Justice of the European Union, 13 December 2012, where in reference to what the French Supreme Court indicated, the European Court of Justice agreed that "An agreement that may affect trade between Member States and which has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable

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<sup>13</sup> Organisation de Coopération et de Développement Économiques " Global Forum on Competition CRISIS CARTELS Contribution from the European Union" , 2011 p. 3

<sup>14</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

<sup>15</sup> Iversen, Bent et al. "Regulating competition in the EU", 2008 p. 57

<sup>16</sup> Commission Notice on agreement of minor importance (2001) OJ C368/13

<sup>17</sup> Case 5/69, *Völk v. Vervaecke*

<sup>18</sup> Commission Notice on agreement of minor importance (2001) OJ C368/13, para 7

<sup>19</sup> Commission Notice on agreement of minor importance (2001) OJ C368/13, para 11

restriction on competition (para 37). This, in essence, means that when an agreement between undertakings has an anti-competitive object and is capable of appreciably affecting trade between Member States, it is assumed that this agreement is also capable of appreciably restricting, distorting or preventing competition.

According to the previous case law (see in that regard *Völck/Vervaeke*) an agreement restricting competition by object or by effect, falls outside the cartel prohibition when it “has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question”. It seems that the Court in paragraph 37 has now made a clear distinction between “object” and “effect”, in essence simplifying the test by assuming appreciable effect on competition with regard to agreements that fall within the “object” category. It can be argued that this will make proving the existence of an infringement easier for the National Competition Authorities and Courts. Nevertheless, appreciable effect on trade between Member States still needs to be identified.

The Notice is accompanied by a Commission Staff Working Document that aims to help companies assess whether or not the notice applies to their agreement. The Staff Working Document acts as a checklist, outlining the types of restrictions that have already been categorized as object of hardcore restrictions such as price fixing, market sharing, output restrictions, bid rigging and information sharing are listed. In agreements between non-competitors, examples include sales restrictions on buyers and licensees and resale price maintenance.

The Commission will update this document to reflect any development vis-à-vis object or hardcore restrictions, but is also keen to emphasize that it will not be prevented from finding object restrictions in the future that are not listed in the guidance paper.

The notice does not represent a significant change from the original framework for assessing agreements of minor importance between companies with low market shares. Instead it represents a codification of the European Court of Justice decision in *Expedia*, clarifying that any agreement containing an object or hardcore restriction will be automatically deemed to appreciably restrict

competition and therefore cannot benefit from the safe harbor. It should be noted, however, that such agreements still need to affect trade between Member states in order to trigger the Commission's jurisdiction to assess them under Article 101 TFEU<sup>20</sup>.

The third category is the block exemptions. The Commission has also introduced a collection of block Exemptions for different types of contracts. These include a list of contract terms which will be permitted and a list of those which are banned from these exemptions. For instance Regulation 2658/2000, which applies to specialisations agreement and Regulation 2659/2000, which applies to Research and Developments agreements.

Severe consequences may result for the members of a cartel agreement. The immediate consequence of the agreement is that the agreement or concerted practice is according to Article 101 (2), declared void. In other words, it has no legal effect.<sup>21</sup> However the sanction of invalidity would not be much of a threat to cartel members as they are unlikely to be concerned about their inability to enforce the agreement in court.<sup>22</sup> Because, as discussed previously, one of the factors to the operation of a successful cartel is that a proper punishments mechanisms is put in place within the cartel. The cartel members' concern is instead on the risk of investigation by the Commission and the likelihood of a huge fine if breach is detected.

Retaliation or punishment is a means by which members of a cartel can ensure that other members do not deviate from the agreed price or output. The existence of such a mechanism is critical if the cartel is to be sustained over time. The harsher the punishment (with other factors remaining constant), the less the firms are to deviate from the collusive outcome.

This holds for both for explicit cartels, those normally outlawed by competition law, and for "tacit" collusion or coordination. Coordinated behaviour is usually note prohibited as such under competition rules if no explicit communication is involves (with some exceptions, i.e. Spain), but is of relevance to the assessment of the degree of competition in other contexts, particularly merger control.

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<sup>20</sup> <http://www.slaughterandmay.com/media/2175890/eu-competition-and-regulatory-newsletter-27-june-03-july-2014.pdf>

<sup>21</sup> Iversen, Bent et al. "Regulating competition in the EU", 2008 p. 63 p. 63

<sup>22</sup> A. Jones and B. Sufrin, "EC Competition law: Text, Cases, and Materials", 2008 p. 125

Coordinated behaviour is one criterion under the “substantial impediment to effective competition” (SIEC) test under the 2004 Merger Regulation (139/2004), i.e. a merger can be prohibited if it is deemed to lead to a market structure that is conducive to coordinated effects<sup>23</sup>.

The standard of proof for the existence of a retaliation mechanism within the European Union merger control rules was unclear until 2002. The legal precedent was set in the context of the merger of tour operators Air-tours and First Choice. As part of the merger assessment in 1999, the European Commission argued that it was not necessary for it to consider the existence of a retaliation mechanism to assess the possibility of coordination post-merger.<sup>24</sup>

However, the Court of First Instance (CFI) revisited the commission’s decision in 2002 and disagreed with this conclusion, ruling that assessment of the possibility of retaliation is important when analysing the possibility of retaliation is important when analysing the stability of coordination

From this general introduction it can be seen that the Commission has a strict view on price, output and market fixing agreements, as they are excluded from all three categories of exemptions.

## **7. Motives behind cartels:**

The legal concept of Cartel requires co-ordination between undertakings in the form of an agreement or concerted practice, together with the object or effect of distortion, prevention or restriction of competition. Thus the legal definition of Cartels naturally focuses mostly on more observable behaviour than on the outcome. Even though collusion from an economic perspective coincides with an outcome, it can occur both when firms act through an organized cartel (explicit collusion), and when they act in a purely non-cooperative way (tacit collusion). Understanding the difference between the legal and economic concept of cartels and their interactions, it is necessary to briefly examine some of the most common motives behind them, to get an understanding of why firms are willing to join a cartel. Here, it must also be emphasized that the same entails several risks on the participants.

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<sup>23</sup> AGENDA Advancing Economics in Business 2008 p. 1

<sup>24</sup> Case No. IV/M.1524 . Airtours/First Choice, September 22nd 1999.

1. Ability to Control Market/Industry Operations;
2. Increasing Barriers of market Entry;
3. *Developing Alliances;*
4. *Exchange of information;*
5. *Unsatisfactory financial performance.*

#### **8. Consequences of cartels vs. possible benefits from the horizontal cooperation:**

As can be seen from above, there are many motives and reasons why undertakings may opt to form part of a cartel, however in this section we shall examine the economic consequences of cartels and attempt to understand why the same may have a deleterious effect on welfare. Furthermore its comparison with the efficiency savings from the horizontal cooperation's shall also be examined.

We shall take under consideration in the progress of this analysis that cartels allow undertakings to utilize this market power and therefore, possibly misallocate resources, and redistribute income from consumers to producers, and to reduce the economic welfare.

The question then is whether all colluding firms are able to raise prices and profit relative to the situation absent the cartel? Apparently the effect a cartel has on prices depends on the specific cartel, some cartels have succeeded in raising prices and profits and some haven't. Some cross-section studies found that some did and Ecklos study<sup>25</sup> of fifty-one cartels showed that in nineteen cases the cartels were able to raise prices 200 percent above the unit cost of production and distributing. An interesting observation in both Griffin (1989) and Eckbo (1976) studies<sup>26</sup> is that cartels are more successful at increasing prices, when some of the structural factors, discussed above, which facilitate collusion, such as seller concentration, small number of firms, homogeneity in cost and size is present. Thus there is an indication that factors facilitating collusion also have a positive effect on the ability of the cartel to increase prices. Other cross-section study also confirms that cartels are likely to increase prices.<sup>27</sup>

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<sup>25</sup>Levenstein and Suslow, " *What determines cartel success*", 2006 p. 80

<sup>26</sup>Levenstein and Suslow, " *What determines cartel success*", 2006 p. 80

<sup>27</sup>Levenstein and Suslow, " *What determines cartel success*", 2006 p. 81

It is difficult to estimate the effect of the marine hose cartel, but if we assume that the indication above is true, the marine hose cartel would have been successful at raising prices. Furthermore the cartel participants also indicate this in the Decision.<sup>28</sup>

Particularly cartels harm consumers in urbanised society, as well as in the emerging countries. In adding together, cartelised industrial sectors lack competition which certainly reduces competitiveness in the long run and may have a negative impact on the overall performance of a country's economy. Widespread shapes of cartels conduct are: price fixing, market sharing, bid rigging and output control.

Price fixing take places when competing businesses make an agreement that has the purpose or effect of fixing, controlling or maintaining the price of goods or services prices. This may be in the form of agreed selling or buying; agreed minimum prices; agreed formula for pricing or discounting goods and services; agreed rebates, and allowances or credit terms.

### **8.1 Possible pro-competitive effects of information exchanges:**

If information exchange does not give rise to the competition concerns which will be discussed further below, it will almost always be positive to welfare. Indeed, the benefits from information exchange can be significant both for suppliers and customers.

Information exchange can improve product positioning, particularly in industries with product differentiation or in multimarket industries. Experimental evidence indicates that lack of information may induce firms to position their products in a way that neither maximises their profits nor consumer welfare.<sup>29</sup> Allowing information exchange in these settings can therefore improve consumer surplus and welfare.

Although there is little empirical evidence in the economic literature on this, information exchange

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<sup>28</sup>Case COMP/39406, *Marine Hoses*, 2008 p. 53

<sup>29</sup> See Kruse and Schenk, 2000.



may also improve companies' investment decisions.<sup>30</sup> As Hovenkamp points out: *"firms respond to uncertainty by being less aggressive. If the manufacturer has no idea about future demand for its product, it will hedge its bets, which in this case means building a smaller plant or making fewer purchases of inputs. By contrast, good market information reduces uncertainty and gives sellers more confidence about their investment and, accordingly, more incentive to invest" and "generalised pricing, output and inventory data can be useful in guiding firms to make intelligent decisions about how much to invest in plant and equipment, how much to plan on producing the following year, and the like."*<sup>31</sup>

There are industry sectors where a certain degree of transparency is required for the industry to work effectively. For example, in the banking and insurance industries, information sharing on individual consumers' risks can reduce the problems of adverse selection (where firms cannot tell good consumers from bad consumers) and moral hazard (where a consumer who is protected from risk may behave differently than if fully exposed to the risk). In these circumstances, information sharing mechanisms fill an asymmetry of information about customers and thus allow the industry to operate efficiently.<sup>32</sup>

## **8.2 Information exchanges in the insurance sector:**

It is recognized that in the insurance sector a certain degree of cooperation between competitors is necessary to the correct functioning of the industry itself and, furthermore, it leads to an increase of competition between the insurance companies. For this reason, the European Commission has adopted a Block Exemption Regulation to exempt categories of horizontal agreements between insurance companies.<sup>33</sup> The rationale for block exempting certain information flows within the insurance sector is that calculations, tables and studies make it possible to improve the knowledge of

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<sup>30</sup> Christiansen and Caves (1997) have looked at the impact of the exchange of information on capacity expansion in the pulp and paper industry and at its effect on the investment rivalry. They note that if markets are not too concentrated, non-binding information exchange ("cheap talk") can solve the strategic uncertainty about rivals' investment decisions and may therefore improve economic efficiency overall.

<sup>31</sup> See, Hovenkamp, 1999, p. 43 et seq. It has also been argued that "neglecting the role of information exchange on investment decisions implies neglecting potentially large costs for consumers leading to distortions with respect to product quality, product variety, location and the future ability to respond to demand changes" (see Nitsche and von Hinten-Reed, 2004).

<sup>32</sup> See Padilla and Pagano, 1999.

<sup>33</sup> See Regulation 267/2010 on the application of Article 101(3) of the TFEU.

risks and facilitate the rating of risks for individual companies. This can in turn facilitate market entry and thus ultimately benefit consumers. However, no unnecessary restrictions of competition are covered by the block exemption. For instance, agreements on commercial premiums are not exempted; and calculations, tables or studies are only exempted if they (a) do not identify the insurance companies concerned or any insured party; (b) when compiled and distributed, include a statement that they are non-binding; and (c) are made available on reasonable and non-discriminatory terms, to any insurance undertaking which requests a copy of them, including insurance undertakings which are not active on the geographical or product market to which those calculations, tables or study results refer.

### **8.3 Information exchanges in the banking industry:**

A similar rationale in the banking industry lead to the creation of public and private credit registers across the EU between 1997 and 2007. The establishment of these registers can facilitate direct entry through a reduction of information asymmetries, which in turn intensifies competition.<sup>34</sup> In the *Asnef-Equifax* case,<sup>35</sup> the Court of Justice for the European Union (the 'CJEU') was asked to review the compatibility with the European competition rules of an online register set up by the Spanish association of financial institutions. The register contained sensitive information on existing and potential borrowers, such as past credit history, failures to pay, outstanding credit balances etc. The purpose of the register was to better inform lenders as to risks connected with granting loans, leading to greater and more efficient availability of credit. The Court of Justice for the European Union concluded that the information exchanged on the creditworthiness of potential borrowers served to reduce the risk of lending by reducing the disparity between the information available to credit institutions and that held by potential borrowers. Therefore, the information exchange was capable of reducing the number of borrowers who default on repayments, and hence improved the functioning of the credit supply system as a whole, leading to a more efficient market outcome. As the credit register was designed to limit risks of credit institutions in granting loans, the Court concluded that the exchange of information did not have the object of restricting or distorting competition.

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<sup>34</sup> See Gianetti, Jentzsch and Spagnolo, 2010.

<sup>35</sup> Case C-238/05 of 23 November 2006.

Banking regulation originates from microeconomic concerns over the ability of bank creditors (depositors) to monitor the risks originating on the lending side and from micro and macroeconomic concerns over the stability of the banking system in the case of a bank crisis. In addition to statutory and administrative regulatory provisions, the banking sector has been subject to widespread “informal” regulation, i.e., the government’s use of its discretion, outside formalized legislation, to influence banking sector outcomes (for example, to bail out insolvent banks, decide on bank mergers or maintain significant State ownership)<sup>36</sup>.

#### **8.4 Potential benefits for consumers:**

Increased transparency and better knowledge of market conditions may also benefit consumers. In 1961, Stigler emphasised the importance of search costs for consumers.<sup>27</sup> Buyers need to identify sellers and their prices, customers need to search for knowledge on the quality of goods. The more information available on the market, i.e., on the products and services and their suppliers, the better placed consumers are to choose between competing products, as they will have a greater understanding of the product characteristics. Consumers can knowledgeably compare terms and conditions of the various offerings and freely choose the most suitable one for their needs. In these circumstances, enhanced transparency can benefit consumers by lowering consumers’ search costs. Behavioural economics has shown that better informed consumers can be instrumental in developing vigorous competition between suppliers.<sup>37</sup>

Economic literature has also shown that information asymmetries and absence of information may not only distort consumer behaviour but may also adversely impact competition and competitive outcomes.<sup>38</sup> In these circumstances, artificially increased transparency may improve consumer welfare.<sup>39</sup>

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<sup>36</sup> INTERNATIONAL COMPETITION NETWORK ANTITRUST ENFORCEMENT IN REGULATED SECTORS SUBGROUP 1, Darryl Biggar, pp 2

<sup>37</sup> For a further discussion of this, see Bennett, Fingleton, Fletcher, Hurley and Ruck, 2010.

<sup>38</sup> See Klemperer, 1995, according to which high switching cost allow firms to maintain higher prices and earn higher profits.

<sup>39</sup> Bennett and Collins (2010).

## 9. Possible anti-competitive effects of information exchanges:

Despite the many pro-competitive aspects of information sharing between competitors, the literature also points out that such schemes may substantially harm consumers. The main way in which information exchanges can harm consumers is by facilitating collusion. Artificially increased transparency can allow firms to engage in, and sustain coordinated behaviour over time. However, whilst the primary concern is coordination, there are other non-coordinated theories of harm.

To achieve and maintain over time a successful collusive equilibrium, three conditions must be cumulatively present.<sup>40</sup>

First, the colluding parties must be able to agree on a “common policy” and to monitor whether the other firms are adopting this common policy. It is not enough for each participant to be aware that interdependent market conduct is profitable for all of them; each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. In order to reach terms of coordination and to monitor adherence to them, market transparency is essential.

Second, coordination must be sustainable – i.e., firms need to have an incentive not to depart from the agreed common policy. This in turn requires an effective retaliation mechanism. Thus, collusion is viable in the long-term only if there are adequate credible deterrence and punishment mechanisms that the cartel can put in place to ensure that no one departs from the common policy.

Third, the foreseeable reactions of both customers and competitors must not be such as to undermine the common policy. If the jointly achieved price increase is likely to attract new firms in the market, or if customers are sufficiently strong or sophisticated to resist any attempt to jointly raise prices, it is unlikely that a collusive outcome can be achieved. Thus, reactions of current and future competitors, as well as of consumers, can jeopardize the results expected from the common policy.

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<sup>40</sup> For further details, see Stigler, 1964; Carlton and Perloff, 1990; Philips, 1995; Ivaldi, Rey, and Tirole, 2003; Scherer and Ross, 1990 and the extensive literature cited in these texts.

Various factors may facilitate the formation of collusive outcomes. Such factors include the concentrated structure of the market, the homogeneous nature of the product, costs symmetry, high entry/exit barriers, stability of demand and supply conditions, repeated interaction between the firms and multi-market contacts. But collusion can be reached and sustained if firms have complete and perfect information on the main variables of competition, such as the structure of the market, costs of the participants, their market strategies, etc. In this respect, market transparency is therefore a key factor that allows firms to align their strategy more easily and to promptly detect and punish any deviation from the agreed collusive terms. It follows that an information exchange may facilitate collusion if (i) it facilitates the reaching of a common understanding on the terms of coordination; (ii) it helps monitoring whether the terms of coordination are being followed; and (iii) it improves the ability or reduces the cost of punishing deviations from the terms of coordination.

Reaching terms of coordination on prices or volumes may not be easy, particularly when a number of different collusive equilibria are possible. Information sharing arrangements artificially increase market transparency and thus are one of the facilitating factors for collusion.<sup>41</sup> Information exchanges can facilitate this exercise as they offer firms points of coordination or focal points.<sup>42</sup> In this way, it can help firms to coordinate their behaviour even in the absence of an explicit anti-competitive agreement.

(ii) Artificially increased transparency allows firms to monitor adherence to the collusive arrangement, and provides better information on when and how to punish firms when they deviate.<sup>43</sup> For collusion to be sustainable it is necessary that firms can detect deviations from the collusive equilibrium. The sharing of information may therefore support the internal stability of the collusive arrangement through greater precision in punishments of deviations. Firms will be in a better position to identify which firm has deviated and on what product, if they have access to precise and individualised information on their competitors.

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<sup>41</sup> Albaek et al. 1997, for example, discusses the 1993 decision of the Danish competition authority in the concrete market, where firms decided to gather and publish firm-specific transactions prices for two grades of ready-mixed concrete in three regions of Denmark. Following initial publication, average prices of reported grades increased by 15-20% within one year. The authors investigate whether this was due to a business upturn and/or capacity constraints, but argue that a better explanation is that publication of prices allowed firms to reduce the intensity of oligopoly price competition and, hence, led to increased prices.

<sup>42</sup> See Levenstein and Suslow, 2006

<sup>43</sup> See Genesove and Mullin, 2001.

(iii) Artificially increased transparency also allows existing firms to better identify opportunities for new entrants to enter the market and coordinate a response. This will increase the stability of the collusive understanding.

In light of the above, information exchanges between competing firms can be expected to facilitate collusion when they diminish an existing information asymmetry, improve the accuracy in observing rival behaviour and improve transparency about future strategic intention of rivals.

#### **10. Efficiency savings from horizontal cooperation:**

As suggested by many economist, horizontal cooperation can be motivated by goals other than joint profit maximization which aim is to restrict competition, these other motivations goals are beneficial to societal welfare, thus it is necessary that competition law take these efficiencies into account, rather than focusing solely on the anti-competitive effects of cooperation.<sup>44</sup>

The efficiency goals that can derive from horizontal cooperation can take the form of economies of scale and scope, advantages in marketing and distribution, and in research and development. Economic of scale refers to decrease in the firms average cost per unit, as the scale of output increases. Economic of scope refers to lowering average cost for a firm when producing two or more products. Advantages in marketing and distribution refer to the pooling and streamlining, the ability to offer distributors a broader product line and the sharing of advertising cost. Research and development refers to substantial cost savings through knowledge-transfer and innovation.<sup>45</sup>

As can be seen from above several efficiencies can be derived from cooperation and the competition law needs to take these into consideration.

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<sup>44</sup>Roger J. Van den Berg and Peter D. Camesasca *"European competition law and economics – a comparative perspective"* 2001 p. 182

<sup>45</sup>Roger J. Van den Berg and Peter D. Camesasca *"European competition law and economics – a comparative perspective"* 2001 pp. 182-191

In December 2010 the European Commission (The Commission) approved two important regulations. In the first place, regulation (UE) 1217/2010 related to article 101 (3) of the Treaty of the Functioning of the European Union (TFEU) to certain Research and Development agreements (R&D) and in second place, the regulation (EU) 1218/2010 related to article 101 (3) of the Treaty of the Functioning of the European Union (TFEU) related to the specialization agreements. The regulations substitute the regulation of each of these areas that were previously approved in the year 2000.

### **10.1 General aspects of the Horizontal Cooperation Guidelines:**

With the new guidelines the Commission seeks to give clarity about what agreements of cooperation can be considered anti-competitive and which are considered exempted from the scope of art. 101 TFEU, as its development is estimated positive for competition in general and consumers in particular. In this sense, the Commission has stated that the guidelines complement the Block Exemption regulations, the provide a framework for analysis to companies that have a duty to assess their Horizontal agreements in order to establish whether or not fall within the standard Prohibition 101 TFEU (arts. 1 and 2 of Reg. 1/2003).

Pursuant to Art. 50 of the Guidelines, the combination of activities, assets and technical knowledge within the framework of the Research and Development and specialization agreements, generally produce efficiencies that justify these behaviours, which fall outside the prohibition in art. 101 TFEU. However, except in cases covered by the Block Exemption regulations, it may be in the advance of efficiencies in the development of horizontal cooperation agreements, whose value in consequence should be made in light of the new guidelines of 2011 which replace the ones approved by the Commission in 2001.

Cooperation is of "horizontal nature" if it is the subject of an agreement or concerted practice concluded between actual or potential competitors. These guidelines also cover horizontal cooperation agreements between non-competitors (for example, between two companies active in the same product markets), but in different geographic markets without being potential competitors. Horizontal cooperation often leads to substantial economic benefits when it is the means to share risk,

save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster. On the other hand, horizontal cooperation can create competition problems when doing so causes negative effects on prices, output, innovation or the variety and quality of products. These guidelines provide an analytical framework for the most common types of horizontal cooperation agreements, in order to verify whether they are compatible with Article 101 of the Treaty on the Functioning of the European Union (TFEU).

These guidelines only apply to the most common types of cooperation: research and development agreements, production agreements, purchasing agreements, commercialization agreements, standardization agreements and information exchange. The agreements between companies at different levels of the production or distribution chain (vertical agreements) are in principle treated the Block Exemption Regulation on Vertical Restraints and the Guidelines on vertical restraints. However, to the extent that they could be held vertical agreements between competitors, they must be assessed according to the principles applicable to horizontal agreements. When, in addition to horizontal agreements affect concentration, the regulation on the control of concentrations applies.

These lines are intended to set out the evaluation criteria for the application of the competition rules under Article 101 TFEU. Paragraph 1 of Article 101 TFEU is used to assess whether an agreement is capable of affecting trade between countries of the European Union (EU) has an anti-competitive object or actual or potential restrictive effects on competition. In the event that an agreement restricts competition, paragraph 3 of Article 101 TFEU determine if the benefits for competition outweigh the restrictive effects on competition.

## **10.2 Evaluation criteria under paragraph 1 of Article 101 TFEU**

Paragraph 1 of Article 101 of the TFEU prohibits agreements which have as their object or effect the restriction of competition. For the purposes of these guidelines, the "restriction of competition" includes the prevention and distortion of competition. If the object of an agreement is to restrict competition, that is, by its very nature have the potential to restrict competition within the meaning of paragraph 1 of Article 101 TFEU, it is not necessary to examine the actual or potential effects of the



agreement. If, however, horizontal co-operation agreement does not restrict competition by object must be analyzed actual and potential effects to determine if there are appreciable restrictive effects on competition. To have restrictive effects on competition within the meaning of paragraph 1 of Article 101 TFEU, the agreement must or should have an appreciable adverse impact on at least one of the parameters of competition on the market such as prices, production, quality and product variety or innovation. Such restrictive effects assessment should be made taking into account the actual legal and economic context in which competition without the existing agreement would.

The **nature** of an agreement is defined by elements such as the scope and objective of cooperation, competition between the parties and the scope of the combination of their activities. These factors determine which kind of possible problems of competences may arise. Horizontal cooperation agreements may limit competition in several ways. For example, production agreements may lead to a direct limitation of competition with lower production parts. The main competition problem of the agreements marketing is price fixing.

**Market power** is the ability to profitably maintain a higher level of competition for some time or profitably maintain output in terms of quantity, quality and variety of products and innovation at a lower level price for certain time. The market power can sometimes result from reduced competition between the parties.

The starting point of the analysis of market power is the position of the parties in the markets affected by cooperation. To analyze the position of the parties, it is necessary to define the relevant markets, using the Communication from the Commission on the definition of relevant market and calculate the cumulative market share of the parties. If the combined market share is small, it is unlikely that horizontal cooperation produce restrictive effects. Given the variety of cooperation agreements and the different effects they may cause in the markets according to the conditions prevailing in them, it is impossible to define a general market share threshold above which one might assume the existence of a power sufficient to cause restrictive effects market.

Depending on the position of the parties and the concentration in the market, they may be taken into

account other factors such as the stability of market shares over time, entry barriers, and the likelihood of other entries in the market and the possibility of buyers / suppliers to counter the market power.

### 10.3 Evaluation criteria under paragraph 3 of Article 101 TFEU

When the presence of a restriction of competition within the meaning of paragraph 1 of Article 101 is established, the exception referred to in paragraph 3 of Article 101. Regulation (EC) No 1/2003 puts the burden of proof in the company that invokes the benefit of this provision. Therefore, there are four cumulative conditions must be met for cooperation agreements to be exempted:

- The restrictive agreement must produce **economic benefits** such as improving the production or distribution of goods or to promoting technical and economic progress i.e., the efficiency gains;
- The restrictions must be **indispensable** to achieve efficiency improvements;
- **Consumers** must receive a **fair share** of the resulting benefit achieved by indispensable restrictions;
- The agreement must not afford **the parties the possibility of eliminating competition** in respect of a substance part of the products in question

When these four criteria are met, it is considered that the efficiency gains generated by an agreement outweigh the competition generated.

The guidelines provide general principles on the competitive assessment of information exchange, including assessment subject to paragraphs 1 and 3 of Article 101 TFEU which apply to all types of horizontal cooperation agreements that include the exchange of information. Information exchange can take various forms: competitors can share data directly, and data can be shared indirectly through a common agency or a third party suppliers or through companies or retailers. Information exchange can be beneficial for companies (e.g., helping companies save costs by reducing their inventories) or directly to consumers (for example, reducing their search costs and improving choice). However,

information exchange may also lead, in certain cases, to restrictive effects on competition, especially when you can make it possible for undertakings to be aware of market strategies of their competitors. Communication of information among competitors may constitute an agreement, concerted practice or decision in order to fix prices or quantities. These types of exchanges of information are considered signs and, as such, will be fined. Outside the field of cartels, information exchange is only considered to restrict competition by object where competitors exchange information individually relating to expected future prices or quantities. Exchanges of other types of information, including prices, are not treated as restrictions by object and evaluated in terms of their restrictive effect on competition.

## **11. Types of cooperation agreements:**

These guidelines also define the characteristics of certain types of cooperation agreements and applied the analytical framework described above under paragraphs 1 and 3 of Article 101 TFEU to each of the following types of agreements:

### **11.1 Information Sharing Agreements**

Although there were already rules on information exchanges in the Guidelines on the application of art. 101 TFEU for the shipping sector, Commission addresses in detail the study of the exchange of information which may be considered adjusted to the competition rules and to eliminate the uncertainty about the strategic variables of competition are illegal.

From the point of view of competition law, the first thing that indicates is that exchanges can take place in different contexts and can be tabled in different forms (par. 55 and 56). From the perspective of its legality or illegality, Guidelines indicate that necessary to evaluate not only the structure and characteristics of the market, but the kind of information exchanged.

In order to determine whether the exchange of information is anticompetitive is necessary to examine the market conditions in which it takes place and determine to what extent the exchange modifies these conditions. In concrete terms, those agreements that create greater transparency in the markets

have greater potential to be anticompetitive to the extent that removes uncertainty about the key factors of competition between entrepreneurs.

As for the characteristics of the information, the Commission indicates that there is greater restrictive potential in the exchange of strategic information. Such information may concern prices, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, plans marketing, risks, investments, technologies and research programs and Development and their results. Additionally, it is necessary to establish whether the data exchanged is individualized or is added, the antiquity of the exchanged data, the frequency with which companies exchange information, the public or private nature of the data exchanged and its public or private character itself considered.

For the agreement to be subject to sanctions is required in addition to the companies involved in the agreement to cover a substantial part of the market, which cannot be defined a priori as far as it depends on the circumstances and the structure itself.

Established the anti-competitive nature, Section 95 to 104 of the Guidelines, address the assessment of information exchange agreements in light of the provisions of Section. 3 Art. 101 TFEU. In these sections the Commission carefully analyses the efficiencies that can generate this type of agreement, the need for it to be transferred to consumers in order that those who have contributed to its implementation may be waived and the need for said efficiencies are not achieved through a least restrictive means.

## **11.2 Agreements on Research and Development (R&D):**

This kind of agreement is referred to the creation of improved products or improvement on existing product creation technologies or completely new technology. The regulation of the Research and Development also comprehends subcontracting agreements and accessory contract manufacturing or commercialization of the obtained results of the Research and Development.

In order to assess the anti-competitive nature of these agreements it provides for the need to consider other aspects such as the credible competitors, the affected product market and calculation

of market shares (whether the proposal is to improve an existing product, as the development of a completely new one that will replace those present on the market).

It is indicated that the Research and Development agreements can generate competition concerns when reduce or delay the development and access to new products; they reduce competition between parties outside the agreement or encourage coordination behavior between competitors. The risk of exclusion only occurs in these cases when one of the operators involved in the conduct has significant market power.

In order to ensure that the agreement remains outside the scope of the prohibition It will be necessary to demonstrate that the efficiencies are passed on to consumers, which are necessary to the extent that cannot be obtained on a means less restrictive and do not eliminate competition for a substantial part of the products or technologies in question.

### **11.3 Production Agreements:**

Through such agreements one party or two or more parties agree performing the production. It is possible as stipulated in par. 150 of the Guidelines companies to produce through a joint venture or that it so through subcontracting agreements where one party (the "Contractor") entrusts to another party (the "subcontractor") the production of a good or service.

Horizontal subcontracting agreements include agreements unilateral and reciprocal specialization as well as subcontracting agreements in order to expand production.

From the perspective of par. 1 of Art. 101 TFEU production agreements they may limit competition between the parties which through its implementation manage to align their behavior, prices, exchange relevant information and other essential factors of competition. Such agreements may also lead to collusion regarding the provision of products, allowing supply reduction, lower quality and higher prices. Eventually this kind of agreements may create crowding third business when for example the production agreement allows participating companies increase the value of a necessary input for companies established in the markets "downstream".

The anti-competitive effects will depend as in other cooperation agreements we mentioned earlier, of the characteristics of the market in which it applies, the nature of the cooperation, its coverage and the nature of the product concerned. Also it depends on the market power that companies acquire which are part of the agreement. In any case it is necessary to consider if the potential restrictive effects will be greater if the production agreement entails distribution activities and joint marketing.

In light of the provisions of par 3 on art. 101 TFEU production agreements can generate efficiencies on cost reduction and improvements in production processes. As in previous cases the company claiming exemption must demonstrate that the efficiencies are passed on to consumers, that there is no less restrictive means of achieving them and that the agreement does not eliminate full competition in the market for the products concerned.

#### **11.4 Purchasing Agreements:**

Par. 194 of the Guidelines provides that the joint purchasing agreements have aim to achieve a considerable bargaining power that may lead to lower prices or better quality of goods and services. The joint purchase can be performed by a jointly controlled company in which many other companies hold minority stakes, by contractual arrangement or by even less strict forms of cooperation called "joint purchasing arrangements".

Purchasing agreements can generate their anti-competitive effects both buying market and the downstream market for the sale. Restrictions may be reflected in higher prices, reduced output, quality, innovation and product variety, problems in terms of market sharing or the exclusion of other potential buyers.

Thus, in effect, those who attend the celebration of the purchase agreement have increased incentives to coordinate their behavior on the downstream market sale, can also demand their suppliers to reduce the quality of the goods supplied to him, diversity and generally innovations. The development of the agreements may also involve the exchange of business information essential that can facilitate coordination of prices and purchase volumes.

Purchase agreements may also exclude other companies that wish purchase a particular product and do not have the market power, that the companies that have enter the agreement acquired at the celebration of the agreement.

In the extent of par. 3 Art. 101 TFEU purchase agreements can generate as noted in par. 217 of the guidelines, the efficiencies are represented in cost savings due to lower purchase prices and lower transaction costs, transport and storage. Additionally, these agreements may give rise to qualitative efficiency gains that encourage providers to innovate and launch market new or improved products.

As in previous cases, the application of the exemption requires that whoever invokes have to prove all requirements under par. 3 art. 101 TFEU.

#### **11.5 Commercialization Agreements:**

In accordance to what is established in par. 225 of the Guidelines, this type of agreements held with the objective that two or more companies cooperate in the sale, promotion and distribution of its substituted products. The scope of these agreements may be higher as covering all distribution activities, or it can be much lower if only involves e.g. distribution, advertising and after sales service.

Such agreements can generate among other restrictive effects setting prices, production constraints, the exchange of strategic information and segmentation and market sharing. The harmful effects on competition will depend on the extent of agreement on activities and power Market parties within them.

It is likely that such resolutions are not restrictive of competition when needed so that one of the parties can be introduced into a market which would not been able to enter if it wasn't for the agreement.

As for the economic efficiencies that could lead to the exemption of the agreement if it meets the requirements of par. 3 art. 101 TFEU; the guidelines state that they cannot consist only of an

elimination of costs associated with competition, but they must result in benefits of integration economic activities. It also points out that pricing can only exceptionally justified to the extent that it is essential for the integration of other marketing functions, and this integration will generate substantial improvements. For its part, he notes par. 246 of the Guidelines; joint distribution agreements may generate economies of scale and scope particularly for small producers.

As in previous cases, the efficiencies must be transferable to consumers, must be indispensable and that under no circumstances should allow that competition is completely eliminated within the market for products or services concerned.

#### **11.6 Standardization Agreements:**

The guidelines attempt to create a proper balance between the rules of free competition and adequate protection of intellectual property rules. The guidelines recognize as general rule standardization agreements and involving intellectual property rights, they are pro-competitive and only exceptionally they may be considered incorporated into the scope of Article 101 TFEU.

Par. 257 of the Guidelines states that "The primary objective of the agreements standardization is to define the technical or quality requirements that products must meet or procedures and methods of current and future production."

Meanwhile par. 259 referring to the standard terms points out that "In certain industries companies use standard terms and conditions of sale or purchase elaborated by a trade association or directly by the competing companies ('standard terms') (4). Such standard terms are covered by these guidelines to the extent that they establish standard conditions of sale or purchase of goods or services between competitors and consumers (and not the conditions of sale or purchase between competitors) for substitute products. When such standard terms are widely used within an industry, the conditions of purchase or sale used in the industry may become de facto aligned (5). Examples of industries in which standard terms play an important role are the banking (for example, bank account terms) and



insurance sectors.<sup>46</sup>

From the point of view of competition, standardization agreements may restrict competition where they promote price agreements, limit or control production, innovation and development of technical markets. They may also have restrictive effects when preventing the entry of new competitors in a market by limiting their access to technology standardized set overcharges for such access or just unreasonably delay the entry of new competitors and the development of new technological developments.

Within the set of standardization agreements, the Guidelines place special emphasis on agreements relating to Intellectual Property Rights distinguishing three sectors in this area. The sector for developers and technology sellers and therefore has a special interest in the costs of Intellectual Property Rights; the technology companies that acquire and sell, whose interest is to reduce the costs paid by Intellectual Property Rights, and the sector of vertically integrated companies that they are present both in the level of sales as in the Intellectual Property Rights distribution products developed with technology derived from the Intellectual Property Rights.

As the Guidelines require, if the standard reference on Intellectual Property Rights exist, is possible that unjustified restrictions of competition arise, when for example the Intellectual Property Rights holder does not allow access to standard technology, do not access your licensing or what makes excessive costs, which not only prevent access of consumers but also the development of competition in the particular market where the standard applies. To avoid such restrictions the Guidelines establish that in order to ensure effective access to the standard, should be required to Intellectual Property Rights holders who are concerned that their rights are included in the standard, that promise in writing and in a irrevocable license to provide their essential Intellectual Property Rights to all third parties under fair conditions, reasonable and non-discriminatory agreement they are called FRAND (fair, reasonable, and non-discriminatory terms) commitment covered in detail in paras. 287-291 of the Guidelines.

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<sup>46</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements 14.1.2011, Art 259

In the case of the standard terms of their restrictive effects may occur when they limit the range of products or innovation, such effects are only likely if the standard terms define the scope of the final product. In particular such agreements could affect price competition and this also may have harmful effects if the standard terms become frequently in a market and therefore can restrict access to it.

As for the benefits derived from the standard terms par. 312 of the Guidelines emphasizes that this kind of agreements can facilitate customers comparison of the conditions offered and thus, changing a company another. Additionally, they may lead to efficiency gains in savings in transaction costs and may facilitate market entry in certain sectors which legal forms are complex. In these cases, the person who invokes the Application of par. 3 Art. 101 TFEU, is further proof that the arrangements are essential, that is, the efficiencies are not invoked could be obtained through less restrictive means that the efficiency gains you can pass on to consumers and that the agreements do not eliminate the Competition for full respect of the products or services concerned.

*312. The use of standard terms can entail economic benefits such as making it easier for customers to compare the conditions offered and thus facilitate switching between companies. Standard terms might also lead to efficiency gains in the form of savings in transaction costs and, in certain sectors (in particular where the contracts are of a complex legal structure), facilitate entry. Standard terms may also increase legal certainty for the contract parties<sup>47</sup>.*

## **12. Conclusion:**

Following George Stigler (1964), many economists assume that incentive problems undermine attempts by firms to collude to raise prices and restrict output. But the potential profits from collusion can create a powerful incentive as well. Theory cannot tell us, a priori, which effect will dominate: whether or when cartels succeed is thus an empirical question. We conclude that many cartels do survive, and that the distribution of duration is bimodal. While the average duration of cartels across a range of studies is about five years, many cartels break up very quickly (i.e., in less than a year). But

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<sup>47</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements 14.1.2011, Art 312

there are many others that last between five and ten years, and some that last decades. Limited evidence suggests that cartels are able to increase prices and profits, to varying degrees. Cartels can also affect other non-price variables, including advertising, innovation, investment, barriers to entry, and concentration. Cartels break up occasionally because of cheating or lack of effective monitoring, but the biggest challenges cartels face are entry and adjustment of the collusive agreement in response to changing economic conditions. Cartels that develop organizational structures that allow them the flexibility to respond to these changing conditions are more likely to survive. Price wars that erupt are often the result of bargaining issues that arise in such circumstances. Sophisticated cartel organizations are also able to develop multipronged strategies to monitor one another to deter cheating and a variety of interventions to increase barriers to entry<sup>48</sup>.

Part of the difficulty in studying cartel success is that it depends on a wide variety of variables, and these variables are often not independent of one another. These include traditional structural variables, such as the variance in and concentration of demand, the structure and homogeneity of costs, and the rate of technological change. Cartel success also depends on organizational factors, such as the distribution of power within the cartel, its voting structure, the sophistication of mechanisms for detecting and deterring cheating, and the ability of the cartel itself to create barriers to entry. Cartel success depends as well on factors that are exogenous to the particular industry, such as government regulation and antitrust enforcement. Finally, cartel success depends on such idiosyncratic and history dependent determinants as how quickly the organization learns about cartel design, the startup costs of creating a cartel, and the reputation of cartel members<sup>49</sup>.

In consistence with the objectives of present paper and the analysis of cartels and if in fact they may be considered pro or anti-competitive; the answer still seems to be relatively ambiguous. The exchange of information between competitors is a complex area of competition law. The economic and legal debate on the pro and anti-competitive effects of transparency on competition and firms' incentives to collusion is likely to continue to affect the antitrust enforcement activities in this field.

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<sup>48</sup> What Determines Cartel Success? Margaret C. Levenstein and Valerie Y. Suslow, *Journal of Economic Literature*, Vol. 44, No. 1 (Mar., 2006), pp. 43.

<sup>49</sup> How Cartels Endure and how They Fail: Studies of Industrial Collusion, edited b Peter Z. Grossman, pp. 43.

This is an area of law which is deeply affected by the economic theories on implicit collusion, and where compliance with competition rules is therefore difficult. For this reason, companies are looking for legal certainties as to what kind of communications are allowed under competition law and as to which factors they should consider when entering into exchange of information systems with competitors. The distinction between exchanges of information within a traditional cartel context, exchanges of information as stand-alone infringements of competition rules, and pro-competitive exchanges of information will certainly benefit from clear guidance from antitrust enforcers.

It is difficult to elaborate general and theoretical rules to distinguish a restrictive exchange of information from an exchange of information which is at least neutral. The approach must be on a case-by-case basis and we cannot ignore the economic context in which the participants to the information exchange are active, however it is right to say that although for years cartels have been seen as harmful to the market the same may in fact, when managed for the benefit of the consumer, can turn in a positive effect to the market, the consumer and of course the corresponding undertakings.

As a recommendation we would suggest the different authorities to promote an open, competitive, environment without groundless restrictions on entry, ownership or exit, resulting either from the rules to be applied or from enforcement practices; ensure that there is a proper separation between the enforcement of sensible regulation and of the general competition rules; and apply in enforcement the usual tools of antitrust analysis, including market definition, market power/dominance, remedies.