Beware of EU Antitrust Risks When Exchanging Information with Competitors – Q&A

5 February 2020

In the EU, the exchange of competitively sensitive information between competitors carries a high antitrust risk. The threshold for establishing an infringement is relatively low and, in some cases, the fines imposed on companies for participating in anticompetitive information exchanges reach levels which are just as high as those found in classic price-fixing cartel cases.

The scope of what qualifies as illegal information exchanges under EU law is potentially very broad. As in other jurisdictions, information exchanges between competitors of individualized data regarding their intended future prices or quantities carry the highest risk. This also applies where competitors exchange information on the prices at which they purchase from their suppliers, as illustrated by recent EU enforcement against purchasing cartels. However, other types of information exchanges may give rise to EU antitrust concerns as well, for example those relating to individualized data on current prices, which may increase market transparency and facilitate coordination among competitors. While existing EU guidelines dealing with information exchanges are currently under review, businesses are well-advised to adopt a cautious approach pending any clarifications which may follow from the updated guidance.

1. Can companies incur liability for merely exchanging information, in the absence of an actual agreement to fix prices or where they do not act on the information exchanged?

Yes. In the EU, the mere exchange of information between competitors can infringe antitrust rules. There is no need for the antitrust authorities to establish that the exchange forms part of a broader cartel-type arrangement (e.g. to fix prices or share customers). Moreover, the EU antitrust rules which prohibit anticompetitive coordinated conduct (Article 101 TFEU) apply not only to fully-fledged agreements, but also to "concerted practices", a looser form of coordination by which companies, without having reached a formal agreement on a course of action, engage in contacts with competitors with a view to influencing their market conduct. As a result, any information exchange can thus be prohibited whenever the following two main conditions are met:[i]

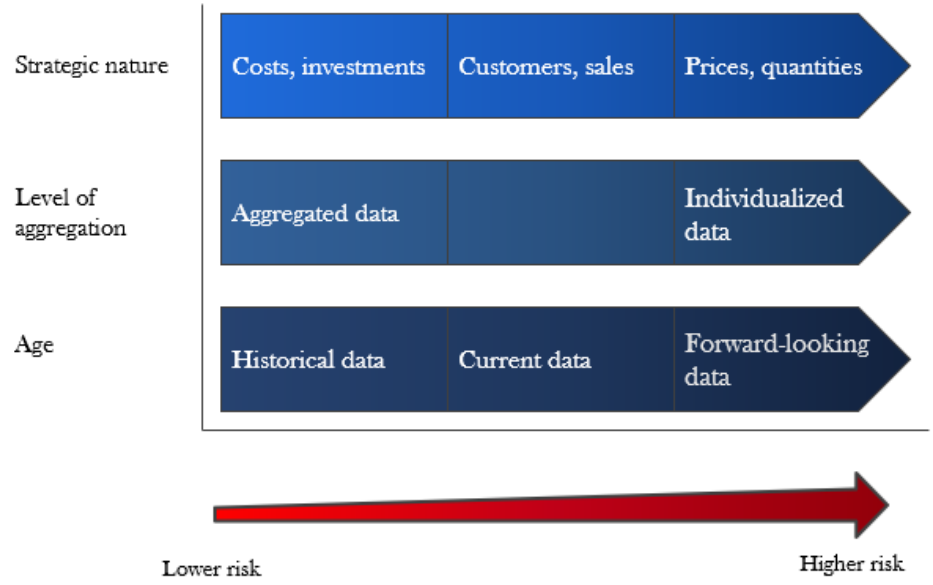
(i) A company is involved in direct or indirect contact with an actual or potential competitor whereby it may influence that competitor's market conduct or disclose to it its decisions or intentions concerning its own market conduct; and

(ii) The object or effect of such contact is to create anticompetitive market conditions.[ii]

It is generally not decisive whether the information exchanged was acted upon, as it is presumed that companies active in a market *will* take account of the information exchanged with their competitors in determining their own market conduct. Moreover, it is irrelevant whether the information disclosed is accurate or truthful.[iii]

2. Are certain types of information exchanges regarded as more problematic than others?

Yes. There is a sliding scale of EU antitrust risk which varies, in particular, according to the characteristics of the information exchanged. As a general rule, the more competitively sensitive, the more individualized, and the more forward-looking the information is, the higher the risk.



High-risk information exchanges

The highest risk is associated with information exchanges that reduce or remove uncertainty as regards the timing, extent, and details of a company's future market conduct.[iv] These types of exchanges are regarded as pursuing an anticompetitive object which means that the EU antitrust authorities can find an infringement without establishing that the conduct had anticompetitive effects. Guidelines and precedents clearly establish that information exchanges between competitors of individualized data regarding their intended future prices or quantities (such as production or capacity) fall within this category. The European Commission (the Commission) considers that such information exchanges should be treated and fined as cartel conduct[v] (with penalties reaching several hundred million euros or more).

Examples of information exchanges classified as a restriction of competition by object

- Banana price-setting factors, price trends and future quotation (i.e. reference) prices (Commission, *Bananas* cartel, 2008: EUR 60 million fines in total)[vi]
- Detailed and individualized information on current and future production capacities and prices (Commission, *Smart card chips* cartel, 2014: EUR 138 million fines in total)[vii]
- Current and future quantities and prices, including interest rates, vehicle prices and sales volumes (Italian Competition Authority, *Car Finance*, 2018: EUR 678 million fines in total)[viii]
- Detailed information (including future spreads) on retail banking credit offers, such as mortgages, consumer and small and medium enterprises credit products (Portuguese Competition Authority, *Portuguese Banks*, 2019: EUR 225 million fines in total)[ix]

- Bidding information on intended prices and volumes (UK FCA, *Anti-competitive conduct in the asset management sector*, 2019: GBP 414,900 fines in total)[x]

Medium-risk information exchanges

Most information exchanges found in breach of EU antitrust rules have so far fallen within the "high-risk" category above. However, even exchanges that do not relate to companies' future market conduct may still infringe Article 101 TFEU if they can be shown to produce anticompetitive effects. This requires a much more detailed assessment by the authorities of all relevant circumstances of the case, which must take into account, in particular:

(i) the characteristics of the market (e.g. is it transparent, concentrated, stable?);

(ii) the frequency and market coverage of the information exchanges; and

(iii) the characteristics of the information being exchanged, notably its age (e.g. current or historical), its aggregated or individualized nature, and its strategic nature.[xi]

The Commission's guidelines indicate that strategic information can be related, among other things, to prices (e.g. prices, discounts, or rebates), output and production costs, capacity, customer lists, turnovers, sales, marketing plans, investments, technologies and R&D programs and their results.[xii]

Bearing in mind all of the above factors, information exchanges that reduce or distort the normal conditions of competition in a market (for example by artificially increasing its transparency and stability) could be held illegal.

Examples of information exchanges classified as a restriction of competition by effect

- Information on luxury hotels' activities (including past and projected occupation rates and average prices per room), the geographic origins of customers, and other elements necessary to prepare marketing plans (French Competition Authority, *Parisian Palaces*, 2005: EUR 710,000 fines in total)[xiii]

- Use by tobacco manufacturers of a software managed by the sole wholesale distributor of tobacco products in Spain, allowing them access to daily information disaggregated by brands and territories on sales from the distributor to authorized tobacco retailers (Spanish Competition Authority, *Spanish Tobacconists*, 2019: EUR 57 million fines in total)[xiv]

Low-risk information exchanges

Obviously, there are also legitimate information exchanges between competitors which are typically unproblematic under Article 101 TFEU, provided that adequate safeguards are in place. This includes, for example, (i) information exchanges in the context of benchmarking exercises, (ii) those that are strictly necessary to the implementation of a legitimate collaboration (such as an R&D or production cooperation) or (iii) due diligence exchanges in the context of a planned merger (with proper confidentiality agreements and "clean-teams" put in place).

3. Can companies incur liability for one-way disclosure/passive information exchanges?

Yes. A two-way information flow is not necessary. A company which merely receives unsolicited information, without providing itself any information, may still infringe Article 101 TFEU simply by accepting the information at issue.[xv] More generally, a passive participation in an infringement gives rise to EU antitrust liability unless the company publicly distances itself from the conduct or reports it to the relevant antitrust authorities.[xvi] Conversely, a company that provides sensitive information without receiving or expecting any similar information in return may also be held liable.

Example of unilateral information disclosure/receipt

In 2011, the UK antitrust authority imposed a fine of approx. GBP 29 million on Royal Bank of Scotland (RBS) for unilaterally disclosing between October 2007 and February/March 2008 specific confidential and commercially sensitive future pricing information to a competitor, Barclays. The disclosures by RBS took place through a number of contacts on the fringes of social, client or industry events or through telephone conversations. Barclays brought the matter to the attention of the UK antitrust authority and thereby escaped a fine.[xvii]

4. Can companies incur liability for sporadic/one-off information exchanges?

Yes. There is no minimum number or level of frequency required. However, sporadic information exchanges are likely to attract less severe fines than more sustained exchanges.

Examples of fines imposed for single instances of information exchanges

- In 2011, the Dutch competition authority imposed fines exceeding EUR 16 million on three mobile telephony operators for exchanging information about dealer remuneration levels at a single meeting.[xviii]

- In 2016, the UK antitrust authority imposed a fine of GBP 130,000 on Balmoral for taking part in a single meeting during which information regarding current pricing and future pricing intentions were exchanged with other competitors.[xix]

5. Can publicly exchanging information constitute an infringement?

Yes. The Commission's guidelines note that it cannot be excluded that publicly exchanging information may facilitate a collusive outcome.[xx]

Example

In the *Container Shipping* case, the Commission accepted commitments from container liner shipping companies to change the way in which they made future price announcements. The Commission was concerned that these announcements allowed carriers to be aware of each other's pricing intentions and might have made it possible for them to coordinate their conduct (so-called price signaling).[xxi]

6. Can you share information freely with companies that are not competitors?

Exchanges of information between non-competitors are generally viewed as less likely to give rise to competition concerns than those between competitors. In particular, there is no presumption that such information exchanges are anticompetitive by their object or effects.[xxii] However, concerns may arise in particular situations, for example in the case of indirect exchanges ("hub-and-spoke") where competitors exchange sensitive information through a professional association or a third party, such as a common supplier/customer.

Example

In 2011, the UK antitrust authority found that some UK supermarkets and dairy processors engaged in the exchange of sensitive information with a view to fixing the retail price of dairy products in 2002 and 2003. The supermarkets, instead of directly coordinating their behavior, exchanged their pricing intentions through common suppliers (the dairy processors).[xxiii]

7. What can companies do to mitigate the risks?

Given the very strict approach adopted by EU antitrust authorities in relation to information exchange, the best companies can do to mitigate risks is to seek to prevent such conduct from occurring in the first place, by implementing an adequate compliance program. As a general rule, companies should always use caution in relation to information exchanges involving competitors by following these basic instructions:

Basic Do's and Don'ts of Information Exchange

- **AVOID** any exchange of forward-looking data on sensitive issues such as prices and quantities
- **CONSULT** with counsel before engaging in any other exchange of sensitive data
- **RECORD** your opposition and immediately bring the matter to the attention of your in-house counsel whenever you become inadvertently implicated in an exchange of high-risk data (for example if you receive unsolicited competitively sensitive information from a competitor)

Catriona Hatton
Partner
T: +32.2.891.7310
catriona.hatton@bakerbotts.com

Daniel Vasbeck
Senior Associate
T: +32.2.891.7314
daniel.vasbeck@bakerbotts.com

Yves Comtois
Legal Consultant
T: +32.2.891.7339
yves.comtois@bakerbotts.com

[i] EU Court of Justice, judgment of 19 March 2015, Case C-286/13 P, *Dole Food Company and Dole Fresh Fruit Europe v Commission*, ECLI:EU:C:2015:184, in particular paras. 120 and 126-127.

[ii] Where the above conditions are met, companies may still argue that the information exchanges are justified by efficiency gains. However, this defense has so far not played any significant role in information exchange cases in the EU.

[iii] EU General Court, judgment of 15 December 2016, Case T-762/14, *Philips and Philips France v Commission*, ECLI:EU:T:2016:738, para. 91.

[iv] EU Court of Justice, judgment of 19 March 2015, Case C-286/13 P, *Dole Food Company and Dole Fresh Fruit Europe v Commission*, ECLI:EU:C:2015:184, in particular paras. 121-122; EU General Court, judgment of 15 December 2016, Case T-762/14, *Philips and Philips France v Commission*, ECLI:EU:T:2016:738, para. 63.

[v] Commission, Guidelines on horizontal cooperation agreements, paras. 72-74.

[vi] Commission, decision of 15 October 2008, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39188/39188_2291_1.pdf; EU Court of Justice, judgment of 19 March 2015, Case C-286/13 P, *Dole Food Company and Dole Fresh Fruit Europe v Commission*, ECLI:EU:C:2015:184, paras. 14 and 129-135.

[vii] EU General Court, judgment of 15 December 2016, Case T-762/14, *Philips and Philips France v Commission*, ECLI:EU:T:2016:738, paras. 84-85 and 104 and EU Court of Justice, judgment of 26 September 2018, Case C-98/17 P, *Philips and Philips France v Commission*, ECLI:EU:C:2018:774, paras. 33-46; EU Court of Justice, judgment of 26 September 2018, Case C-99/17 P, *Infineon Technologies v Commission*, ECLI:EU:C:2018:773, paras. 157-162 (part of this case is still pending before the EU courts, after part of the judgment of the General Court was set aside by the EU Court of Justice).

[viii] Italian Competition Authority, *Finanziamenti Auto*, decision of 20 December 2018, press release available at https://en.agcm.it/en/media/press-releases/2019/1/Car-sales-through-financing-ICA-sanctions-cartel-among-leading-operators-imposing-fines-of-over-670-million-euros; see also https://www.concurrences.com/en/bulletin/news-issues/december-2018/the-italian-competition-authority-finds-a-cartel-in-the-market-for-car-hire; https://globalcompetitionreview.com/article/1178894/italian-enforcer-issues-largest-ever-cartel-fine.

[ix] Portuguese Competition Authority, *BBVA, BIC, BPI, BCP, BES, BANIF, Barclays, CGD, Caixa de Crédito Agrícola, Montepio, Santander, Deutsche Bank and UCI*, decision of 9 September 2019, press release available at http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201917.aspx.

[x] UK Financial Conduct Authority, *Anti-competitive conduct in the asset management sector*, decision of 21 February 2019, press release available at https://www.fca.org.uk/news/press-releases/fca-issues-its-first-decision-under-competition-law and decision available at https://www.fca.org.uk/publication/notices-and-decisions/anti-competitive-conduct-in-asset-management-sector.pdf; see also https://www.concurrences.com/en/bulletin/news-issues/february-2019/the-uk-financial-conduct-authority-fines-companies-sharing-strategic.

[xi] Commission, Guidelines on horizontal cooperation agreements, paras. 75-94.

[xii] Commission, Guidelines on horizontal cooperation agreements, para. 86.

[xiii] French Competition Authority, Decision n° 05-D-64, *Palaces Parisiens*, 25 November 2005, press release available at https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/28th-november-2005-anticompetitive-agreement-luxury-hotel-sector and decision available at https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//05d64.pdf.

[xiv] Spanish National Markets and Competition Commission, *Philip Morris, Altadis, JT International Iberia and Logista*, S/DC/0607/17: TABACOS, 10 April 2019, available at: https://www.cnmc.es/expedientes/sdc060717; see also https://www.concurrences.com/en/bulletin/news-issues/april-2019/the-spanish-competition-commission-fines-tobacco-manufacturers-for-an.

[xv] EU General Court, judgment of 8 July 2008, Case T-53/03, *BPB v Commission*, ECLI:EU:T:2008:254, paras. 153 and 182-183; EU General Court, judgment of 12 July 2001, Joined Cases T-202/98, T-204/98 and T-207/98, *Tate & Lyle v Commission*, ECLI:EU:T:2001:185, para. 54.

[xvi] EU Court of Justice, judgment of 21 January 2016, Case C-74/14, *"Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba*, ECLI:EU:C:2016:42, para. 28.

[xvii] See case overview available at https://www.gov.uk/cma-cases/loan-products-to-professional-service-firms-investigation-into-anti-competitive-practices.

[xviii] See EU Court of Justice, judgment of 4 June 2009, Case C-8/08, *T-Mobile Netherlands and Others*, ECLI:EU:C:2009:343, paras. 9-21; NMa, press release of 27 October 2011, available at https://www.acm.nl/en/publications/publication/6710/NMa-confirms-Dutch-mobile-operators-engaged-in-cartel-activities-in-2001 and ECN Brief of February 2012, page 7, available at http://ec.europa.eu/competition/ecn/brief/01_2012/brief_01_2012.pdf.

[xix] UK CMA, decision of 19 December 2016, press release available at https://www.gov.uk/government/news/cma-fines-water-tank-firms-over-27-million.

[xx] Commission, Guidelines on horizontal cooperation agreements, para. 94.

[xxi] Commission, decision of 7 July 2016, press release available at http://europa.eu/rapid/press-release_IP-16-2446_en.htm.

[xxii] EU General Court, judgment of 16 September 2013, Case T-380/10, *Wabco Europe and Others v Commission*, ECLI:EU:T:2013:449, para. 79.

[xxiii] UK OFT, decision of 26 July 2011, decision available at https://webarchive.nationalarchives.gov.uk/20140403003913/http://www.oft.gov.uk/shared_oft/ca-and-cartels/dairy-decision.pdf; UK Competition Appeal Tribunal, judgment of 20 December 2012, available at https://www.catribunal.org.uk/sites/default/files/1188_Tesco_Judgment_CAT_31_201212.pdf.