THE EXCHANGE OF INFORMATION BETWEEN COMPETITORS AND THE ANTITRUST RULES

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Abstract: *The exchange of information between market competitors has been analyzed from multiple economic perspectives. Taking into account the competition policy and its antitrust rules it is important that the exchange is evaluated exactly by the people who participate in discussions and meetings, because there is a real danger that the exchange of economic information might turn into a cartel. Thus, companies represented at meetings where such discussions take place are exposed to serious sanctions from the competition authorities, which can affect not only their commercial reputation but also the solidity of their market position. Cartels represent illegal agreements between undertakings and are one of the most pernicious anti-competitive practices, being targeted by competition authorities around the world. They create allocation inefficiency and reduce companies' incentives to provide new or better products and services at competitive prices. The companies involved in a cartel are sanctioned in all European jurisdictions with fines up to 10% of their turnovers. The information exchanged may consist in future prices or future quantities, individual data about costs and demand, statistical data, aggregated data. The analysis of the competition risks over the collusive potential of information exchanged has to be done on a case by case basis and the undertakings should take into account factors like the market's concentration degree, the elasticity of the demand on the market, the age of information exchanged, the public/non-public character of the data and the frequency of the information exchange. Sometimes it is difficult to draw a clear line between the legitimate exchanges of information on the market and the illegitimate exchanges. This paper analyzes the good practices in the field, as well as concrete examples of information exchanges to be avoided by companies, based on the enforcement activities of the European Commission and of the Romanian Competition Authority. The impact of COVID-19 outbreak over the antitrust rules on exchange of information is tackled in the paper as well, as unprecedented approaches are put into practice by the European Commission. The paper concludes with practical recommendations for the business environment, presenting the do's and don'ts framework in a concise manner. Compliance with the antitrust rules regarding the exchange of information is a need for most of the undertakings, regardless of size, especially for those that are part of trade associations and / or professional organisations.*

Keywords: *exchange of information; competition; antitrust; cartel; compliance.*

JEL Classification: *K21; L41.*

1. Competition policy and anti-cartel enforcement

1.1. Competition Policy

The first modern competition rules can be identified in the United States in 1890, when the Sherman Antitrust Act was adopted. The law was intended to prevent the restriction of competition by large United States companies which cooperated to establish prices, production levels or market shares.

At the European Union (EU) level, competition policy is one of the first common policies adopted and is having a fundamental role in creating and strengthening the common market (Prisecaru, 2004). EU competition rules were originally inserted in the European Coal and Steel Community Agreement in 1951. Art. 65 of the agreement prohibited cartels and art. 66 made provisions for economic concentrations, or mergers, and the abuse of a dominant position by companies (Papadopoulos, 2010). Afterwards, the 1957 Treaty of Rome, or the EC Treaty, which established the European Economic Community, included these competition rules at art. 85 and art. 86.

Today, art. 101 and art. 102 of the Treaty on the Functioning of the European Union are the community provisions that establish the principles of the economic activities based on fair competition mechanisms, by identifying the types of prohibited unilateral agreements and practices that restrict, impede or distort competition in the common market. These provisions also indicate the situations in which certain types of agreements that may raise competition preoccupations can be exempted from the application of antitrust rules. These are the agreements between companies which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: *(i)* impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; *(ii)* afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The competition rules laid down in the Treaty on the Functioning of the European Union are enforced by the European Commission and at the level of each EU Member State the competition authorities apply the national competition rules. Competition rules at the national level are congruent with those at community level.

The objective of the common competition policy is to stimulate competitive markets to ensure the optimal functioning of the common market, an intrinsic condition for the competitiveness of the European economy. In the end, competition policy puts consumers at the center of its concerns and protects their interests. By strengthening and supervising pro-competitive mechanisms it is stimulated the efficient allocation of resources from the economy and the intensification of competition between companies. This leads to the relief of honest economic forces that aim to sell goods and services, through price reductions in order to increase or protect market shares or through the intensification of innovation.

1.2. Anti-cartel enforcement

In most jurisdictions cartels are considered to be one of the most ruinous anti-competitive practices.

According to Berinde (2008), the cartel definition consists in an agreement whereby a group of producers or distributors of the same product set the prices or shares the market and is considered to be synonymous to an explicit form of secret arrangement; the analysis of the economic effects of cartels is based on the theory of cooperative oligopoly. Cartels may consist as well in practices limiting production or sales, or agreements for customers' allocation.

European Commission (2019) clarifies that even if the undertakings are supposed to compete on the market, "*cartel members rely on each others' agreed course of action, which reduces their incentives to provide new or better products and services at competitive prices. As a consequence, their clients - consumers or other businesses - end up paying more for less quality*".

Cartels, as horizontal agreements, are considered to be one of the most harmful types of anti-competitive practices due to the major impact they have on the welfare of consumers and the economic environment. They create allocation inefficiency, for example by reducing production in order to increase prices, and encourage productive inefficiency by protecting inefficient producers, which can increase average production costs in a given industry (Leslie, 2006).

The attitude towards cartels in most jurisdictions is reflected in the view of OECD: "*hard core cartels are the most egregious violations of competition law and they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others*". Hard core cartels "*create market power, waste, and inefficiency in countries whose markets would otherwise be competitive*" (OECD, 2002).

Because of those economic negative effects, cartels are considered illegal under EU and national competition laws. The companies involved in a cartel are sanctioned in all European jurisdictions with fines up to 10% of their turnovers.

Regarding the anti-competitive agreements, which include cartels, the EU legislation, as well as the legal provisions of the Member States, including Romania, provide that are prohibited all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect the markets/the trade and which have as their object or effect the prevention, restriction or distortion of competition.

The difference between the practices that have as *object* and the practices that have as *effect* the restriction of the competition is to be noted. While some horizontal agreements (at the same level of production/distribution) and vertical agreements (at different levels of production/distribution chain) are not prohibited *per se*, being analized the potential anti-competitive effect, other types of practices, respectively the cartels, are considered so harmful to the economic environment, that they are prohibited *per se*, when the object of the respective practice is identified. In these cases, the competition authorities no longer have the obligation to analyze the economic effects of the anti-competitive agreement, the practice being prohibited

and sanctioned when identifying the anti-competitive object - e.g. setting prices, dividing markets.
However, even for cartel type agreements companies benefit from the legal right to argue the possible exemption from applying the competition rules, by proving the positive effects of the agreement. In such cases, however, the possibilities of an undertaking to highlight positive economic effects that are able to remove concerns of a competitive nature are extremely unlikely.

1.3. Certain factors might facilitate the occurrence of cartels

Cartels tend to primarily occur in oligopoly markets, due to the small number of companies, which might facilitate cooperation and might lead to the implementation of secret arrangements. In an oligopoly market, there can be strong interdependencies between the actions of the companies, thus being easier to observe if the members of the cartel respect the terms of the secret agreement.
There can be two types of factors that facilitate cartels: *(i)* supply and demand factors and *(ii)* behavioral factors - *(i)* factors related to the demand and supply that facilitate the emergence of such agreements can consist in: the existence of a homogeneous product, the existence of mature or very young markets, the existence of markets characterized by a low degree of technical advance, demand that is stagnant or declining, inelastic demand; *(ii)* behavioral factors that facilitate the appearance of cartels can consist in: the existence of trade associations, organisations and unions on the market, exchanges of information, publication of list prices, pre-notification of price changes or various contacts.

2. Exchange of information between competitors and the risk of establishing a cartel

2.1. Horizontal agreements

Antitrust rules try to remove certain types of anti-competitive agreements between the companies active on the market.
Generally, the agreements between the companies can be horizontal or vertical agreements. Horizontal agreements take place between companies at the same level of the production or distribution chain (e.g. agreement between cement producers, agreement between drug distributors). Vertical agreements take place between undertakings at different levels of the production-distribution chain (e.g. agreement between a drug manufacturer and its distributors).
In terms of horizontal agreements, these agreements have the highest potential to turn into real cartels, with special negative economic effects. As Adam Smith observed back in 1776, "*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices*". Even if at the time Smith did not advocate legal measures to combat cartels, his observations and the work of other major economists who followed him eventually led to the adoption of antitrust rules in Western societies.
Horizontal agreements can consist in mere exchange of information or can take the form of co-operation agreements like research and development agreements,

production agreements, purchasing agreements, agreements on commercialisation and standardisation agreements. The exchange of information between competitors might appear at a first glance as a benign type of economic co-operation, but depending on the type of information exchanged, it may lead to practices contrary to competition law.

2.2. Exchange of information between competitors

The exchange of information between competitors is well addressed by the European Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (EC Guidelines) and the EU antitrust cases, which provide a helpful approach; the following section draws upon European Commission's regulations and enforcement activity, as well as on the Romanian Competition Authority's practice.

2.2.1. Legitimate exchange of information

EC Guidelines provides that information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries, thereby making markets more efficient. Moreover, companies may improve their internal efficiency through benchmarking against each other's best practices. Sharing information may also help companies to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand etc. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice.

Cases of pro-consumer information exchange between competitors are to be found e.g. in Greece and Romania, where the competition authorities in co-operation with governmental structures implemented on-line price comparisons platforms of food items - in addition, in Romania the platform is also comparing the pump fuel prices. According to the Romanian Competition Authority (2019), consumers are able to identify through the platform the stores available in the area of their location, the stores where the products they want to buy are available, as well as their prices. The web site compares various consumer baskets in major cities of the country, on chain stores, in order to inform the consumers when making the purchase decision. Thus, consumers make a motivated choice between the offers of several stores, which helps to increase competition in the retail market food. The Romanian Competition Authority manages the platform and the data is loaded in application by the national level partner companies. According to the representatives of the Romanian Competition Authority one of the models for setting the food items price platform was Greece. The Southern European country implemented such a platform in 2009, with a result of 7% decrease in prices in the first three months of the implementation.

The examples above offer the possibility to acknowledge the modalities of legitimate exchange of information, in the sense that, practically, through online platforms but in the interest of the final consumers the companies have in the end the possibility to find out the competitors' final products prices. As long as the transparency of the information at the competition level concerns only the final prices, to the benefit of the clients, such practices do not harm the competitive environment. This is

especially the case when the market is characterized by the existence of many buyers and sellers.

2.2.2. Anti-competitive exchange of information

Exchange of information between competitors and the creation of a transparent market is also able to harm the competitive structure of the market. Dissemination of information, especially on an oligopolistic market, may increase the transparency of a framework that is already characterized by limited and insufficient competition.

EC Guidelines provide that the exchange of market information may also lead to restrictions of competition in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors. The competitive outcome of information exchange depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity etc.) as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination. Moreover, communication of information among competitors may constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing, in particular, prices or quantities. Those types of information exchanges are normally considered and fined as cartels. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms. Those types of exchanges of information are assessed as part of the cartel.

In 2018, the Romanian Competition Authority sanctioned nine insurance companies and the National Union of Insurance and Reinsurance Companies of Romania (UNSAR) with fines amounting to ca. € 53 million for violating the national and European competition regulations, because they coordinated the behavior on the market in order to increase the tariffs of compulsory civil liability insurances (RCA insurances).

The Romanian Competition Authority established that the RCA insurance market in Romania was defined by the following characteristics: inelastic demand related to price, limited number of competitors, the market was characterized by high barriers to entry, competitors frequently interacted with each other, there was a high transparency on the market and an increased demand, the market was not an innovative one, insurance products were homogeneous, consumers had no bargaining power. On this market, the companies had a few series of direct and indirect contacts, expressed their future intentions to raise the RCA insurances' prices between 2012 and 2016 and also announced in mass-media the rates of the future price increases, along with UNSAR. These practices accounted for an anti-competitive concerted practice, facilitated by UNSAR, because the insurance companies no longer independently set their tariffs.

It is worth noting that in this case the Romanian Competition Authority incriminated a concerted practice of the insurance companies and not an actual agreement. If economists do not have a particular interest in distinguishing between a real agreement and a concerted practice, because the economic effects of such anticompetitive practices are the same, regardless of the legal framework, for legalists this differentiation is important. The concept of concerted practice was

created in order to prevent situations where companies circumvent the application of competition rules through an anticompetitive practice that does not fall within the scope of an actual agreement, even if the notion of understanding in competition law has a wider scope than the will agreement in civil law or commercial law. In ICI vs. The Commission (1972), the European Court of Justice has ruled that "*the object is to bring within the prohibition […] a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition*".

In Methylglucamine case (2004), the undertakings Rhône-Poulenc Biochimie SA, Aventis Pharma SA and Merck KgaA were fined with 2,85 million euro by the European Commission. The anti-competitive agreement took place in regard with the product methylglucamine of pharmaceutical quality used as an intermediate chemical product for the synthesis of x-ray media, pharmaceuticals and colourings. Beginning in November 1990 and continuing until December 1999 the main producers of methylglucamine formed a clandestine cartel, by which they fixed market shares for the product, agreed on price targets for the product, agreed on price lists for the product and agreed on how to share the largest customers. The cartel meetings started with an exchange of information and views on the worldwide demand for the product, referring to the volumes sold to the respective main clients during the previous year. However, in respect with the exchange of information, the European Commission concluded that the practice had not materialized into a full systematic exchange of sales data (Jones; Sufrin, 2004).

According to Jones and Sufrin (2004), in such cases the difficulty is to distinguish between legitimate and anti-competitive exchanges of information. Two issues, in particular, are crucial to the making of such a determination: the market structure – with a special attention for the oligopolistic markets, as mentioned above – and the type of information exchanged.

2.2.2.1. Types of information exchanged

Related to the characteristics of the information exchanged between competitors, the European Commission and the national competition authorities classify these information as follows:

- Strategic information

Generally, the dissemination of information between competing companies regarding future prices or future quantities are most likely to be anti-competitive. Knowing in advance strategic data of the competition, and replying by sharing the same type of information, may allow competitors to arrive at a common higher price level without incurring the risk of losing market share. Individual data about costs and demand represent as well strategic information very likely to be regarded as anti-competitive. Other data exchanged that are susceptible to fall under the antitrust rules are information about capacity increases, investment plans, research projects, or individual output and sales figures. By contrast, statistical data which enables undertakings to assess the level of demand or the level of output in the industry may be beneficial and are not from start objectionable (Jones; Sufrin, 2004).

- Aggregated/individualised data

EC Guidelines provide that dissemination of aggregated market data (such as sales data, data on capacities or data on costs of inputs and components) by a trade organisation may benefit suppliers and customers alike by allowing them to get a clearer picture of the economic situation of a sector. On the other hand, when the market structure is of tight oligopoly, even the aggregated data could represent a competition problem. If the oligopoly acts unitarily, as a result of an agreement, and the aggregate data indicate an average market price lower than in the past, the conclusion may be that one of the members of the oligopoly has lowered prices. Retaliation measures could be taken in the case against the respective company.

- Age of data

As older the data base that is exchanged is the less competition issues might occur.

- Frequency of the information exchange

Frequent exchanges of information between competitors might lead to a superior common understanding of the market and to a deviations' monitoring system which increase the risks of a collusive result. However, the potential anti-competitive effect depends on the type of data disseminated, the age of these data and the degree of aggregation involved.

- Public/non-public exchange of information

EC Guidelines provide that the fact the information is exchanged in public may decrease to a certain extent the likelihood of a collusive outcome on the market to the extent that non-coordinating companies, potential competitors, as well as clients may be able to constrain potential restrictive effect on competition.

2.2.2.2. A new approach on the exchange of information in the context of urgency stemming from COVID-19 outbreak

On the 8th of April 2020, the European Commission issued a Communication regarding the Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the COVID-19 outbreak.

As presented above, certain exchanges of information between competing companies normally raise competition preocupations and are susceptable of altering the economic environment. In the context of the health crisis related to COVID-19 - the World Health Organization declared the pandemic status in March 2020 - and taking into account the exceptional situation of the emergency regarding public health (global lack of sanitary protection disposals, disinfectants, drugs or mechanical ventilators), it is for the first time in its history when the European Commission provides clarifications and initiates temporary approaches regarding the exchange of information between companies, from the antitrust rules' perspective.

In essence, the European Commission's Communication provides:

- The Commission understands that cooperation between undertakings might help in more efficiently addressing the shortage of essential products and services during the COVID-19 outbreak;
- Cooperation in the health sector might need to extend to coordinating the reorganisation of production with a view to increasing and optimising output so that not all firms focus on one or a few medicines, and other medicines remain in underproduction;

- Measures to adapt production, stock management and, potentially, distribution in the industry may require exchanges of commercially sensitive information and a certain coordination; such exchanges and coordination between undertakings are in normal circumstances problematic under EU competition rules;
- Nevertheless, taking into account the exceptional circumstances, such measures would not be problematic under EU competition law or – in view of the emergency situation and temporary nature – they would not give rise to an enforcement priority for the Commission, to the extent that such measures would be: *(i)* designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat COVID-19 patients; *(ii)* temporary in nature (i.e. to be applied only as long there is a risk of shortage or in any event during the COVID-19 outbreak); and *(iii)* not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply;
- The Commission will not tolerate conduct by undertakings that opportunistically seek to exploit the crisis as a cover for anti-competitive collusion;
- The Communication shall remain applicable until the Commission withdraws it (once it considers that the exceptional circumstances are no longer present).

3. Conclusion

Information exchanges between companies represent a normal working situation, up to a certain degree. The economic activity itself, which means the sale of goods and services to consumers, involves contacts between companies, either vertically or horizontally, in order to deliver raw materials, to establish general qualitative conditions for carrying out the activity in an economic branch, to achieve cooperation agreements when production or research in a particular sector can be improved.
The exchange of information between companies presents a higher risk for the competitive environment when the companies involved are current or potential competitors. Even in this situation, horizontal cooperation can be an efficient mean of risk sharing, cost savings, increased investment, shared know-how, increased quality and variety of products and faster launch of innovations.
However, from a certain level, the discussions and exchanges of information between competitors may attract the legal responsibility for establishing a cartel or a concerted practice that is not in line with antitrust rules. This risk is relevant for absolutely all businesses, regardless of size, as long as they are part of trade associations or professional organisations. Meetings within the frame of such bodies can turn into agreements or concerted practices that go beyond the legal framework, as they produce negative effects on the economy, such as rising prices or lowering economic efficiency. Basically, such exchanges of information could have the potential effect of diminishing competition between companies, with negative effects on final consumers.

Extended meetings and discussions within the branch associations / bodies can lead to the dissemination of strategic information, thereby increasing the likelihood of coordination between undertakings within or outside the field of cooperation.
From a business perspective, complying with the competition rules in the field of information exchange involves assessing the risks the undertakings are exposed to when attending meetings where such exchanges / debates / evaluations take place. When the competition authorities intervene in the equation, the following actions of the companies may already be late and the costs incurred will consist in important sanctions that can reach 10% of the turnover of the company.
In summary, the risk assessment of the collusive potential of information exchange could be done taking into account the table below.

Table 1: The risk assessment of the collusive potential of information exchange

Collusive potential	Information exchanged
High	Private communications of future commercial or strategic plans
	Exchange of individual data on prices and quantities
Medium / High	Exchange of individual data on demand and costs
Low / Medium	Exchange of aggregate data
Low	Public exchange of old aggregate data

The analysis of the competition risks still has to be done on a case by case basis and the undertakings should take into account factors like the market's concentration degree, the elasticity of the demand on the market, the age of information exchanged, the public/non-public character of the data and the frequency of the information exchange.
In the context of exceptional circumstances like the COVID-19 pandemic, it is to be noted that the general competition rules regarding exchange of information are not being suspended, at least not for the vast majority of the undertakings. The approach of the European Commission towards the present sanitary crisis is to temporarily allow companies involved in the health care effort to increase cooperation and even exchange sensitive information in order to better face the enormous demand for life-saving medical instruments. It is a rapid response from the European Commission to the economic environment transformed realities and it comes with the warning that the anti-competitive agreements of companies that only use the crisis as a cover will continue to be pursued. Competition policy must be applied continuously as an instrument for economic recovery after the sanitary crises will end.

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