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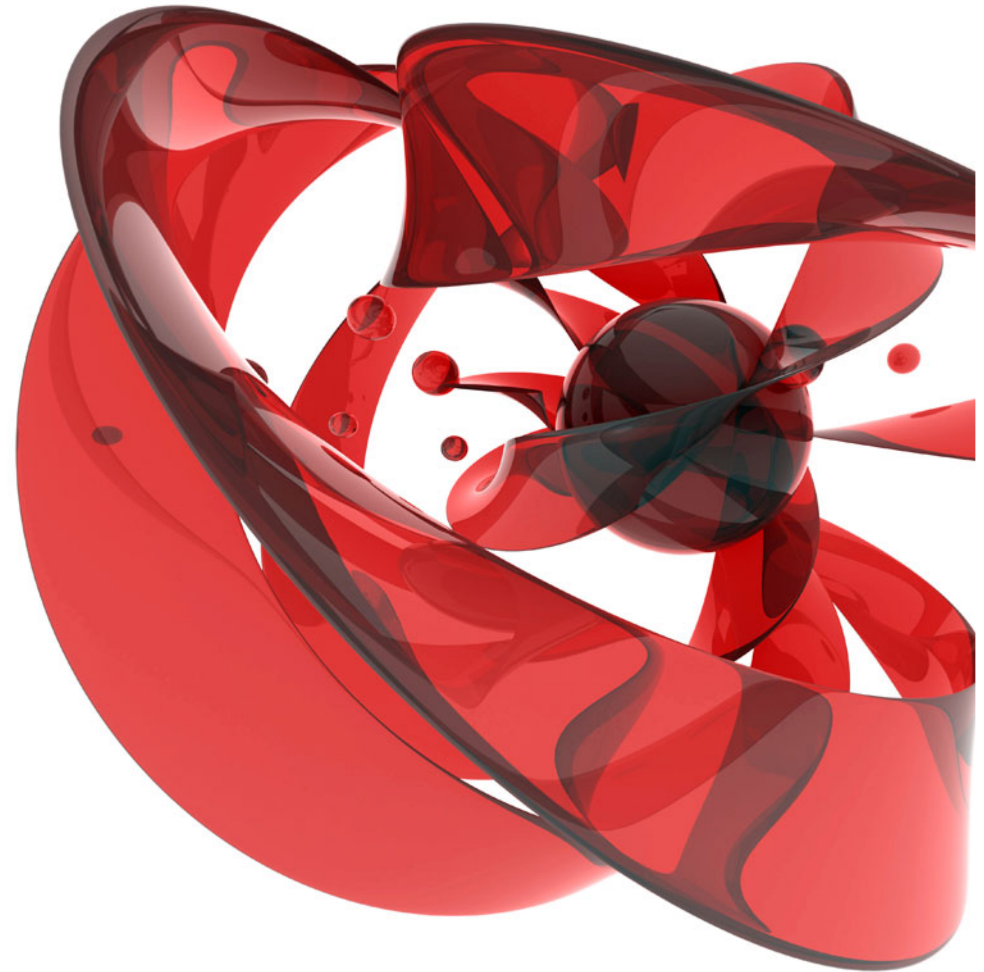
Sofia Seminar, 16 March 2011

Information exchange, associations and agreements between competitors: what changed in 2010



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Setting the stage – what is this presentation about?

- December 2010: Revised rules for the assessment of co-operation agreements between competitors (=> *horizontal agreements*)

- Modifications mainly concern
  - clearer, simpler (?) rules
  - new (?) chapter on information exchange
  - new rules on standardisation

- Overall legal framework for horizontal co-operation agreements
  - Article 101 of the Treaty on the Functioning of the European Union (**TFEU**)
    - §1 and 2 – prohibition of anticompetitive agreements
    - §3 – individual exemption
  - Commission Regulations (Block Exemption Regulations on specialisation and on R&D)
  - Commissions Guidelines (Horizontal Guidelines)

- Division line between EU and Bulgarian competition rules: **effect on trade** (EU/Bulgaria) – see new CPC Block Exemption Decision of 20 January 2011
  - *Решение на КЗК № 55 за групово освобождаване от забраната по чл. 15, ал. 1 от ЗЗК на определени категории забранени споразумения, решения или съгласувани практики - 20 януари 2011 г*

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Structure of this presentation

- **Legal framework for horizontal agreements**
  - Definitions
  - Impact on competition
  - Why have specific rules and how to use them?
- **EU Commission's Specialisation BER**
  - Agreements covered
  - Restrictions covered/excluded
  - Safe harbour
- **EU Commission's Horizontal Guidelines**
  - General presentation
  - Assessment framework (restriction/exemption)
- **Information Exchange & the Horizontal Guidelines**
  - Competition issues with info exchange
  - Assessing the restriction (object/effects + red flags)
  - Exemption rules
  - 2 Case studies
- **The main horizontal agreements & the Horizontal Guidelines** [optional]
  - Agreements covered
  - Assessing restrictions (object/effect + red flags)
  - Exemption rules

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New overall legal framework applying to horizontal co-operation agreements – applicable from 1 January 2011

- **Commission Regulation (EU) n°1217/2010** of 14 December 2010 on the application of Article 101(3) of the TFEU to categories of **R&D agreements**
  (OJ L 335, 18.12.2010, p. 36)

- **Commission Regulation (EU) n°1218/2010** of 14 December 2010 on the application of Article 101(3) of the TFEU to categories of **specialisation agreements**
  (OJ L 335, 18.12.2010, p. 43)

- **Communication from the Commission** - Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements (=> Horizontal Guidelines)
  (OJ C11, 14.1.2011, p. 1)

- РЕГЛАМЕНТ (ЕС) № 1217/2010 НА КОМИСИЯТА от 14 декември 2010 година относно прилагането на член 101, параграф 3 от Договора за функционирането на Европейския съюз за някои категории **споразумения за изследвания и разработки**

- РЕГЛАМЕНТ (ЕС) № 1218/2010 НА КОМИСИЯТА от 14 декември 2010 година относно прилагането на член 101, параграф 3 от Договора за функционирането на Европейския съюз за някои категории **споразумения за специализация**

- **СЪОБЩЕНИЕ НА КОМИСИЯТА** – Насоки относно приложимостта на член 101 от Договора за функционирането на Европейския съюз по отношение на споразуменията за хоризонтално сътрудничество

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What are horizontal co-operation agreements?

– Different types of co-operation agreements

- research and development (R&D) agreements → *изследвания и разработки*
- joint production or specialisation agreements → *съвместно производство, специализация*
- joint purchasing → *съвместно закупуване*
- joint commercialisation, marketing… → *съвместно търгуване, предлагане на пазара*
- standardisation (standard-setting) agreements → *стандартизация*

– Agreements entered into **between actual or potential competitors**

actual competitor - undertaking that is active on the same relevant market	**действителен конкурент** - предприятие, което извършва дейност на същия съответен пазар
potential competitor - undertaking that, in the absence of the agreement, would, on realistic grounds and *not just as a mere theoretical possibility*, in case of a small but permanent increase in relative prices be likely to undertake, *within not more than 3 years*, the necessary additional investments or other necessary switching costs to enter the relevant market	**потенциален конкурент** - предприятие, което при отсъствие на споразумение за специализация, в случай на малко, но постоянно увеличение на относителните цени, е вероятно да предприеме *в рамките на не повече от три години* необходимите допълнителни инвестиции или други необходими разходи, за да навлезе на съответния пазар, *като това е реална, а не само теоретична възможност*

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What impact on competition?

Various competition concerns => Article 101(1)

- fixing prices or output
- sharing markets or clients
- maintain, gain or increase market power and thereby give rise to negative market effects with respect to prices, output, product quality, product variety or innovation
- limiting the possibility for the parties to compete against each other (specific concerns arising from exclusive arrangements between competitors)
- disclosure of strategic information => increasing the likelihood of coordination among the parties
- achieve significant commonality of costs (i.e., the proportion of variable costs which the parties have in common) => easier coordination of market prices and output.

- *фиксиране на цени, ограничаване на продукцията*
- *споделяне на пазари или клиенти*
- *дава възможност на страните да запазят, да придобият или да засилят пазарната си мощ => отрицателни пазарни последици по отношение на цените, продукцията, качеството на продуктите, разнообразието на продуктите или иновациите*
- *ограничава възможности за ефективна конкуренция*
- *разкриване на стратегическа информация*
- *значително уеднакяване на разходите*

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Why have specific competition rules on co-operation agreements between competitors?

Not all agreements give rise to competition issues => Article 101(3)

- improving the production or distribution of goods
- promoting technical or economic progress + allowing consumers a fair share of the resulting benefit
- efficiencies or other economic benefits
  - enabling competitors to combine complementary skills or assets and engage in activities they would not be able to do alone
  - allowing cost savings or better technologies
  - reduced marginal costs
  - improved quality and increased product variety

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Rationale of the Block Exemption Framework

- Benefit of the exemption limited to those agreements, for which it can be assumed **with sufficient certainty** that they satisfy the conditions of Article 101(3)
- The Block Exemption Regulations (**BER**) are based on the premise that the combination of complementary skills or assets can be the **source of substantial efficiencies** in R&D and specialisation agreements
- The analysis of the efficiencies of an agreement under Article 101(3) is therefore to a large extent a question of:
  - identifying the **complementary skills and assets** that each of the parties brings to the agreement and
  - evaluating whether the **resulting efficiencies** are such that the conditions of Article 101(3) are fulfilled
- The automatic exemption only applies on the double condition that:
  - the **combined market share of the parties** does not exceed a certain percentage on any relevant market
  - the agreement does not contain **hard-core** restrictions

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BER for specialisation agreements

How does it work?

- Agreements covered
- Restrictions covered/excluded
- Safe harbour (market share threshold)

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Specialisation agreements – definitions

- Under the BER, a **specialisation agreement may be:**
  - "**unilateral specialisation agreement**": an agreement between two parties which are active on the same product market by virtue of which one party agrees to *fully or partly cease production of certain products or to refrain from producing those products* and to purchase them from the other party, who agrees to produce and supply those products
  - A "**reciprocal specialisation agreement**": an agreement between two or more parties which are active on the same product market, by virtue of which two or more parties on a reciprocal basis agree to *fully or partly cease or refrain from producing certain but different products* and to purchase these products from the other parties, who agree to produce and supply them
  - A "**joint production agreement**": two or more parties agree to produce certain products jointly *(may include joint distribution, or distribution through a third party distributor, provided that the third party is not a competing undertaking)*

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Specialisation BER - scope

– Restrictions covered

- agreement on the amount of products (unilateral and reciprocal agreements only)
- setting of capacity and production volume (joint production agreements only)
- sales targets and price fixing that the joint venture charges to its **immediate customers** only
- joint production and distribution (or distribution through a third party who is not a competitor)

– Restrictions NOT covered (*hard-core restrictions*)

- Price fixing vis-à-vis third parties
- Limitation of output or sales
- Allocation of markets or customers

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Specialisation BER – market share threshold

- **How much?** – Cumulated market share of all participating undertakings should not exceed **20% of any relevant market** on the basis of the data relating to the previous calendar year
  - Remember: where the products manufactured under the agreement are intermediary products, which one or more of the parties use captively for the production of downstream products, the 20% combined market share threshold **applies to both the upstream and downstream product markets** *(main change as compared to the BER's 2001 version - Reason: ensure that the parties are unable to reduce output or foreclose input)*

- **For how long?** – If the conditions of the BER are met, the exemption will apply **for the duration of the specialisation agreement**, provided that the combined market share remains less that 20%

- **What if the market share subsequently rises above 20%?**
  - if up to 25% - the exemption will continue to apply for a period of **two consecutive calendar years** following the year in which the 20% threshold was first exceeded
  - if above 25% - the exemption will continue to apply for **one calendar year** following the year in which the level of 25% was first exceeded

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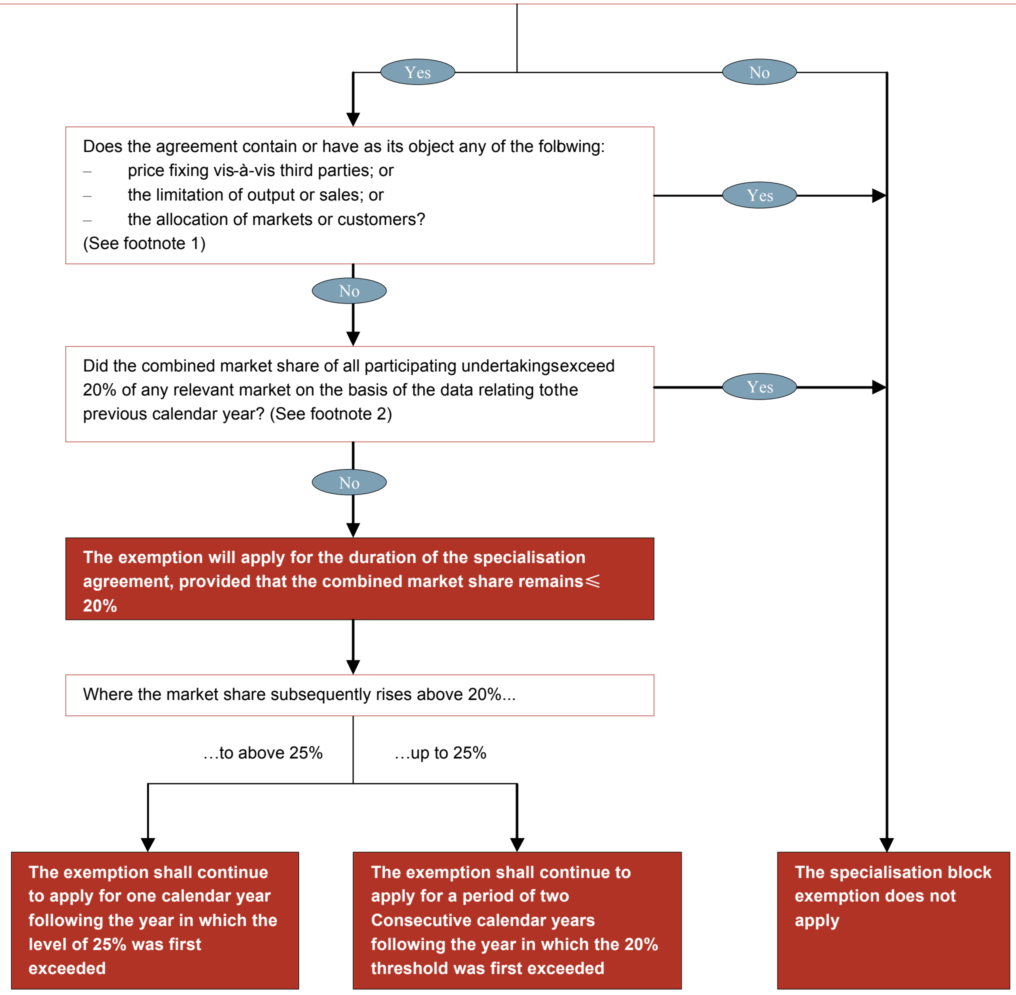
Does the agreement fall into one of the following categories:
(a) Unilateral specialisation agreement: one party agrees to fully or partly cease production of certainproducts or to refrain from producing those products and to purchase them from a competing undertaking, while the competing undertaking agrees to produce and supply those products;
(b) Reciprocal specialisation agreement: two or more competing parties on a reciprocal basis agree to fuly or partly cease or refrain from producing certain but different products and to purchaser theseproducts from the other parties, who agree to supply them;
(c) Joint production agreement: two or more parties agree to produce certain products jointly (which may include joint distribution, or distribution through a third party distributor, provided that the third partyis not a competing undertaking)?
Yes
No
Does the agreement contain or have as its object any of the folbwing:
– price fixing vis-à-vis third parties; or
– the limitation of output or sales; or
– the allocation of markets or customers?
(See footnote 1)
Yes
No
Did the combined market share of all participating undertakingsexceed 20% of any relevant market on the basis of the data relating tothe previous calendar year? (See footnote 2)
Yes
No
The exemption will apply for the duration of the specialisation agreement, provided that the combined market share remains ≤ 20%
Where the market share subsequently rises above 20%...
…to above 25%
…up to 25%
The exemption shall continue to apply for one calendar year following the year in which the level of 25% was first exceeded
The exemption shall continue to apply for a period of two Consecutive calendar years following the year in which the 20% threshold was first exceeded
The specialisation block exemption does not apply

What happens if the agreement falls outside the Block Exemption Regulation?

Further assessment under Article 101(3) – the Commission's Horizontal Guidelines

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The Commission's new Horizontal Guidelines – General presentation

- Replace the 2001 Horizontal Guidelines

- Complement the R&D and the Specialisation Block Exemption Regulations

- Provide an analytical framework for the most common types of horizontal co-operation agreements – and a valuable chapter on exchange of information

- Bound to assist businesses in assessing the compatibility of an individual co-operation agreement with Article 101 – in particular where the agreement falls outside the BERs

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How to use the Horizontal Guidelines?

- Balanced assessment taking into account both adverse effects on competition and pro-competitive effects
- Two step approach
  - **first step -** under **Article 101(1):** does the agreement have an anti-competitive object or actual or potential restrictive effects on competition?
  - **second step -** under **Article 101(3):** determine the pro-competitive benefits
    - when making an **individual assessment** of the conditions under Article 101(3), **the parties bear the burden of proving** that an individual Article 101(3) exemption applies and that the 4 conditions are met
    - where in an individual case a restriction of competition within the meaning of Article 101(1) has been proven, **Article 101(3) can be invoked as a defence**

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First step: Is there a restriction of competition by object or effect?

- The agreement must:
  - have, or be likely to have, an appreciable **adverse impact** on at least one of the parameters of competition on the market
    - e.g. price, output, product quality, product variety or innovation
  - reduce the **parties' decision-making independence**
- Interestingly, the Commission has added a **subjective element** to assessing whether a horizontal co-operation agreement has an anti-competitive object
  - "*although **the parties' intention** is not a necessary factor in determining whether an agreement has an anti-competitive object, **the Commission may nevertheless take this aspect into account** in its analysis*".
  - may create problems for the Commission in enforcing the competition rules against anticompetitive horizontal co-operation agreements

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Second step: How to meet the exception rule of article 101(3) TFEU?

Four cumulative conditions:

1. the agreement must contribute to improving the production or distribution of products or to promoting technical or economic progress (“**efficiency gains**”) – *Повишена ефективност*
2. the restrictions must be indispensable to the attainment of those objectives (“**indispensability**”) – *Необходимост*
3. consumers must receive a fair share of the resulting benefits, i.e., the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers so that they are at least compensated for the restrictive effects of the agreement; hence, efficiencies only accruing to the parties to the agreement will not suffice (“**pass-on to consumer**”) – *Прехвърляне на ползи към потребителите*
4. the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question (“**no elimination of competition**”) – *Липса на премахване на конкуренцията*

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Applying the Commission's Guidelines to the main types of horizontal agreements

Exchanges of information

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Information exchange – setting the stage

- **Information exchange can take place in different contexts**
  - agreements, decisions by associations of undertakings, or concerted practices, where the main economic function lies in the exchange of information itself
  - information exchange can be part of another type of horizontal co-operation agreement (e.g., the parties to a production agreement share certain information on costs)
- Key principle: **each company must independently determine its policy** on the market (*John Deere*, T-35/92).
  - Recent ECJ ruling (*T-Mobile Netherlands, Case C-8/08*) took a strict and formalistic approach to information exchange:
  - *"an exchange of information which is capable of removing uncertainties between participants as regards the timing, extend and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anticompetitive object"* (§41)

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Why is information exchange potentially problematic?

- **Primary concerns** - exchange of strategic information can:
  - lead to the ***alignment of competitive behaviour***
  - increase the ***stability of a collusive market structure*** (e.g. when companies use sensitive information to align their prices)
  - 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. This may have a detrimental impact on competition and ultimately consumers.
- **Information exchange can be pro-competitive**
  - E.g. when it enables companies to gather market data that allow them to become more efficient and better serve customers (*Asnef-Equifax*, C-238/05)

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Assessing information exchange

First step - 3 questions to ask:

– Is there information exchange?

– If so, is there a restriction of competition by *object*?

– If no restriction by object, does the exchange give rise to actual or potential anticompetitive *effects*? (look for red flags)

Second step – 4 exemption conditions

Article 101(3)

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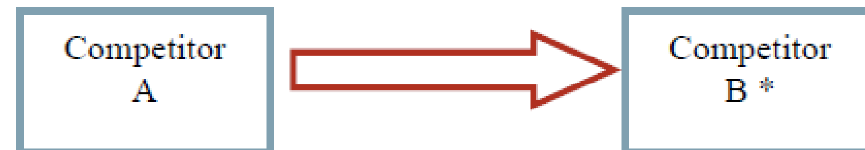
Which types of information exchange are caught?

– **Direct exchange**

– **Unilateral disclosure:** where data is imparted only by one company, this could be enough to trigger the competition rules



– The Guidelines are clear that the recipient will be *presumed* to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement in reply that it does not wish to receive such data.

* Where B does not respond with a clear statement in reply that it does not wish to receive such data

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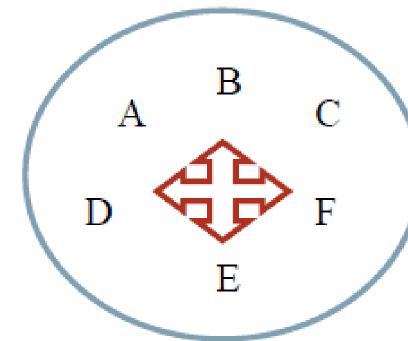
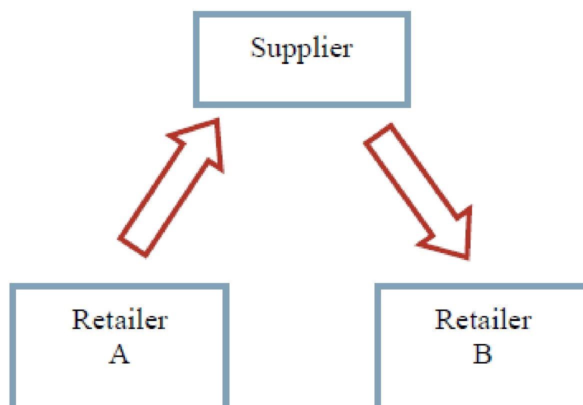
Which types of information exchanges are caught?

– Indirect exchange

- via a common agency – e.g. trade association
- via a third party
  - e.g. market research organisation
  - e.g. through the companies' suppliers or retailers (so called "*hub-and spoke*" arrangements).





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Is there a restriction of competition “by object”?

– Some types of information exchange will *always* be problematic because by their very nature they lead to a restriction of competition

  – Companies should be particularly vigilant to avoid exchanging information setting out ***individualised*** (as opposed to aggregated) intentions concerning future conduct regarding ***prices*** or ***quantities*** (e.g. sales, market shares, territories)
  – these are likely to be considered as **cartels**

– exchanging ***intentions*** regarding ***future*** conduct is less likely to be done for pro-competitive reasons than exchanging ***actual data***

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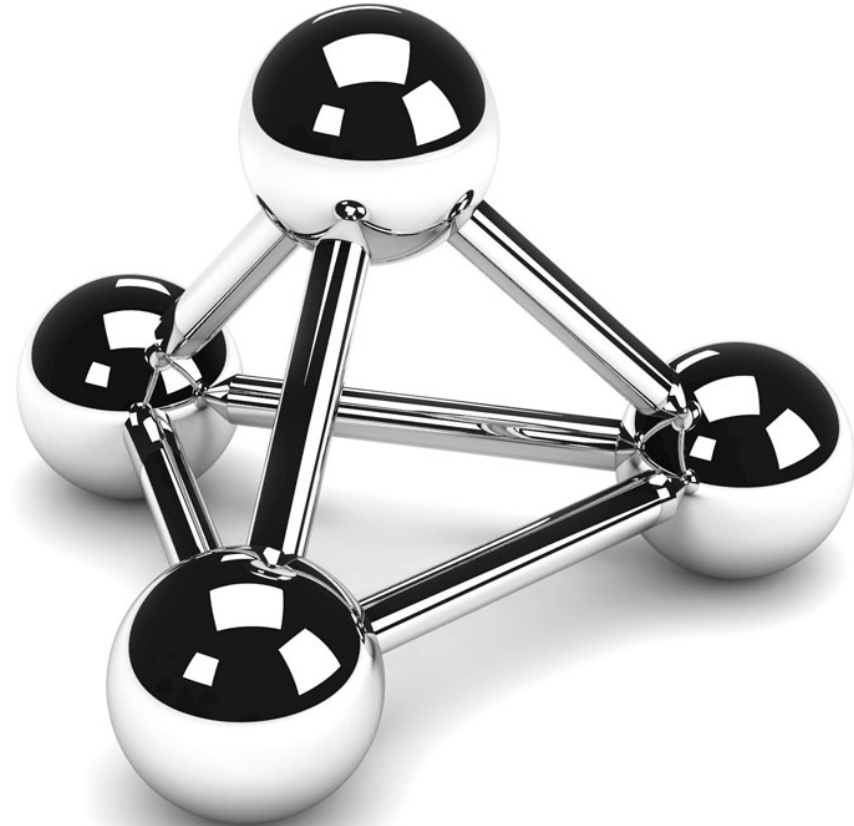
If there is no restriction by object – does the exchange give rise to anticompetitive effects?

- The majority of information exchanges will fall within this category *(no restriction by object, but potentially by effect)*
  - e.g. exchanges for statistical or benchmarking purposes
- Assessment on a case-by-case basis
- Red flags *(indicate that an information exchange between competitors will give rise to competition concerns)*
  - Type of information
  - Market characteristics
  - Frequency
  - Market coverage



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Red flags (1) – characteristics of the information exchanged

- Is the information exchanged **highly strategic**?
  - (*high risk*) information on **prices, quantities, costs/demand, customer lists, production costs** – most likely to give rise to competition issues
  - (*lower, but existing risk*) information on **capacity, quality, marketing plans, investments, technologies and R&D** – less likely to be found anticompetitive
- Does the information exchanged **reveal future intentions** *(as opposed to historic information)*?
  - historic = no pre-determined threshold, but rule of thumb: data older than one year has been found to be historic (depends on the pace of change in the market)
- Is the information **individualised** *(as opposed to aggregated)*?
  - genuinely aggregated data = can't be deconstructed (unless the market is highly concentrated)
- Is the information **confidential, non-public** *(as opposed to public information)*?
  - genuinely public data = not only public, but also effortless to get, which is equally easy to access for everyone (in terms of costs of access)

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Red flags (2) – market characteristics

- Is the market **transparent**?
  - e.g. as a result of transactions being public
- Is the market **concentrated**?
  - e.g. oligopoly, few market players
- Is the market **complex** or not?
  - It is easier to coordinate on a non-complex market, such as one carrying a single **homogeneous product**, as opposed to coordination on complex markets, such as those involving hundreds of differentiated products.
- Is the market **stable** in terms of supply and demand?
- Are market characteristics **symmetric**?
  - i.e. do companies have similar cost structures, product ranges, capacities etc.

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Red flags (3) – characteristics of the exchange

- **Market coverage**: Does the exchanged information cover a important part of the market?
  - no rule of thumb: must be assessed based on the facts of the case and the nature of the information (relevant market definition would be very important)
- **Frequency**: Is the exchange of information frequent?
  - If frequent, the exchange of information is more likely to give raise to competition concerns
  - Warning: an isolated exchange may sometimes be enough (*T-Mobile Netherlands BV*, case C-8/08)

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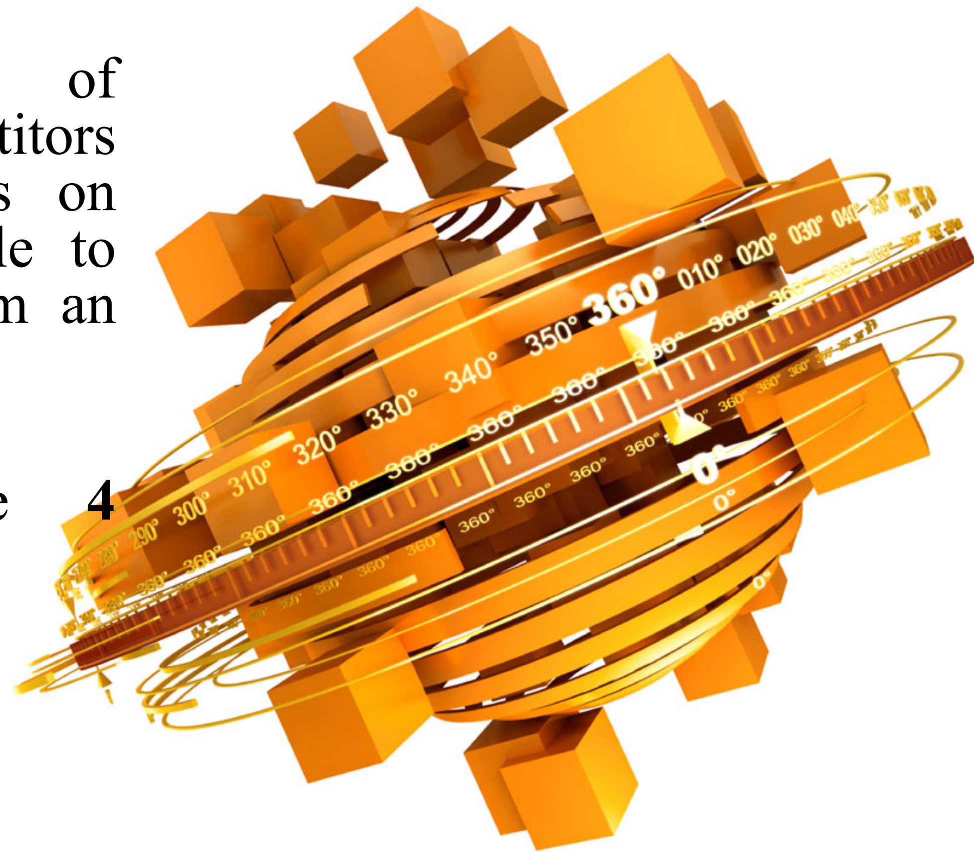
Assessment of information exchange under Article 101(3)

- Even where an exchange of information between competitors potentially has adverse effects on competition, it may be possible to justify it, and thus benefit from an exemption under Article 101(3)

- Requires fulfilment of the **4 conditions**:
  - Efficiency gains
  - Indispensability
  - Pass-on to consumers
  - No elimination of competition



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Efficiency gains

- solving problems of information asymmetries or dealing with unstable demand
- when information is genuinely public, benefiting consumers by helping them to make a more informed choice (and reducing their search costs).
- when exchanging past and present data related to market shares, providing benefits to both companies and consumers by allowing companies to announce it as a signal of quality of their products to consumers.
- providing an incentive for consumers to limit their risk exposure by keeping track of the past behaviour of customers in terms of accidents or credit default

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Indispensability

– How to show that the restrictions do not go beyond what is necessary to achieve the efficiency gains generated by an information exchange? *(very case-specific…)*

  – prove that the data's subject matter, aggregation, age, confidentiality and frequency, as well as coverage, of the exchange are of the kind that carries the **lowest risks indispensable for creating the claimed efficiency gains**

  – it is generally unlikely that the sharing of individualised data on future intentions is indispensable, especially if it is related to prices and quantities

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Pass-on to consumers

– Efficiency gains attained by indispensable restrictions must be passed on to consumers **to an extent that outweighs the restrictive effects** on competition caused by an information exchange

– The lower is the **market power** of the parties involved in the information exchange, the more likely it is that the efficiency gains would be passed on to consumers to an extent that outweighs the restrictive effects on competition

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No elimination of competition

- The criteria of Article 101(3) cannot be met if the companies involved in the information exchange are afforded the possibility of eliminating competition in respect of a substantial part of the products concerned
- Importance of the relevant market definition

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Examples of prohibited information exchanges

Case studies

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Information exchange – Case study 1

– Situation

- A trade association of coach companies in country X disseminates **individualised information** on **intended future prices** only to the member coach companies

– Collusive outcome

- the companies are **free to change their own intended prices as announced within the association** at any time if they learn that their competitors intend to charge higher prices
- can reach a **common higher price level without incurring the cost** of losing market share
- information exchange is only confined to competitors: **customers** of the coach companies **do not directly benefit** from it

– Compare

- Decision 43/2002 of the CPC on Sofia public taxi-coach transport (no evidence of collusion found)

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Information exchange – Case study 2

– Situation

- the luxury hotels in the capital of country A operate in a tight, non-complex and stable oligopoly
- high barriers to entry
- largely homogenous cost structures
- separate relevant market from other hotels
- directly exchange of individual information about current occupancy rates and revenues

– Risk to competition

- parties can directly deduce their actual current prices from the information exchanged
- knowing competitors' actual current prices is likely to facilitate coordination (alignment) of companies' competitive behaviour
- unlikely the parties would be able to demonstrate any efficiency gains stemming from the information exchange that would be passed on to consumers

– Compare

- Decision 05-D-64 of the French Competition Authority – fines imposed
  - Crillon: €248,000 — Ritz: €104,000
  - George V: €115,000 — Bristol: €81,000
  - Plaza Athénée: €106,000 — Meurice: €55,000

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Applying the Commission's Guidelines to the main types of horizontal agreements

The example of general production, purchasing and commercialisation agreements

[Optional]

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Definitions

- **Production agreements:** provide that a production will be carried out by only one party or by two or more parties
  - Companies can produce jointly by way of a **joint venture** (a jointly controlled company operating one or several production facilities) or by **looser forms of co-operation** in production (e.g. **subcontracting agreements**)
- **Purchasing agreements:** concern the joint purchase of products
  - Joint purchasing can also be carried out by a JV, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation.
- **Commercialisation agreements:** involve co-operation between competitors in the selling, distribution or promotion of their substitute products
  - e.g. joint marketing, advertising…

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General principle – may be good, but beware of hardcore restrictions

- The Guidelines recognise that many production, purchasing and commercialisation agreements are **pro-competitive**

- Nevertheless, companies must ensure that the terms of their production, purchasing or commercialisation **agreements with competitors do not have either the object or effect of restricting competition, e.g. by fixing or aligning prices, limiting output or sharing markets**

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Assessment of the restrictions of competition

Does your agreement **have as its *object* or *effect* the restriction of competition**?

- **Production agreements**, and in particular production JVs may
  - lead the parties to directly align output levels and quality, the price at which the JV sells on its products, or other competitively important parameters
  - lead to anti-competitive foreclosure of third parties in a related market
- **Joint purchasing arrangements** may
  - lead to restrictive effects on competition on the purchasing and/or downstream selling market or markets, e.g. increased prices, reduced output, product quality or variety, or innovation, market allocation, or anti-competitive foreclosure of other possible purchasers
  - If downstream competitors purchase a significant part of their products together, their incentives for price competition on the selling market or markets may be considerably reduced
- **Commercialisation agreements** can lead to: price fixing, output limitation, market sharing and exchange of strategic information

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Red flags (1) – Risk due to market power

- **Production agreements** – unlikely to lead to restrictive effects on competition if the parties to the agreement do not have market power in the market on which a restriction of competition is assessed.
  - starting point for the analysis of market power: market share of the parties
  - then: concentration ratio and number of players
  - other dynamic factors: potential entry, changing market shares
- **Joint purchasing arrangements**
  - no absolute threshold above which it can be presumed that the parties have market power so that the joint purchasing arrangement is likely to give rise to restrictive effects on competition
  - However, in most cases: unlikely that market power exists if
    - the parties to the joint purchasing arrangement have a combined market share not exceeding 15 % on the *purchasing market* or markets AND
    - a combined market share not exceeding 15 % on the *selling market* or markets
- **Commercial agreements**
  - unlikely that market power exists if the parties' combined market share does not exceed 15 %

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Red flags (2) – Risk of collusion

- In **production agreements**, a collusive outcome can result in particular (but not only) from
  - commonality of costs
  - exchange of information brought about by the production agreement
- **Joint purchasing arrangements** may lead to a collusive outcome if they
  - facilitate the coordination of the parties' behaviour on the selling market
  - e.g. if the parties achieve a high degree of commonality of costs through joint purchasing, provided the parties have market power and the market characteristics are conducive to coordination.
  - Restrictive effects on competition more likely if the parties to the joint purchasing arrangement have a significant proportion of their variable costs in the relevant downstream market in common
- A **joint commercialisation agreement** that does not involve price fixing is also likely to give rise to restrictive effects on competition
  - if it increases the parties' commonality of variable costs to a level which is likely to lead to a collusive outcome

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Assessment under Article 101(3)

– Efficiency gains
– Indispensability
– Pass-on to consumers
– No elimination of competition

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Efficiency gains

- By **producing** together companies can
  - save costs that otherwise they would duplicate
  - produce at lower costs if the co-operation enables them to increase production where marginal costs decline with output, i.e., by economies of scale
  - improve product quality if they put together their complementary skills and know-how.
  - enable companies to increase product variety
- **Purchasing** agreements
  - lead to cost savings such as lower purchase prices or reduced transaction, transportation and storage costs
  - may lead suppliers to innovate and introduce new or improved products on the markets
- **Commercialisation** agreement's efficiency gains
  - depend on the nature of the activity and the parties
  - must not be savings which result only from the elimination of costs that are inherently part of competition
  - must result from the integration of economic activities

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Indispensability

- **Production agreements**
  - Restrictions imposed on the parties' competitive conduct with regard to *output outside the co-operation* will normally not be considered to be indispensable
  - *Setting prices jointly* will not be considered indispensable if the production agreement does not also involve joint commercialisation
- **Purchasing agreements**
  - an obligation to purchase exclusively through the co-operation may, in certain cases, be indispensable to *achieve the necessary volume* for the realisation of economies of scale
- **Commercialisation agreements**
  - the question of indispensability is especially important for those agreements involving *price fixing or market allocation*, which can *only under exceptional circumstances* be considered indispensable

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Pass-on to consumers

- lower prices or better product quality or variety
- introduction of new or improved products on the market

- Remember: cost savings or other efficiencies that only benefit the parties to the joint purchasing arrangement will not suffice

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No elimination of competition

- Possibility of eliminating competition in respect of a *substantial part of the products* in question
- Has to be analysed both:
  - in the relevant market to which the products subject to the co-operation belong and
  - in any possible *spill-over* markets (upstream, downstream…)
- For purchasing agreements:
  - assessment has to cover both purchasing and selling markets

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Questions?

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