Article 101 TFEU
Exchange of Information

LLM Paper
by Joakim Johansson
Student number : 01510581

Promoter : Jacques Bourgeis
Abstract

With the necessity to make the EU internal market grow, to make it strong and compatible globally, the competition on the market plays a big role. To protect its customers it is important to have competition and knowledge about products and services from different undertakings on the market. To be able to have that knowledge, it is important for undertakings to exchange information with each other. However, it is not only for the good sake undertakings exchanges information. Exchange of information also has a close relationship with art 101(1) TFEU which regulates anti-competitive restrictions of EU competition law. The article shows different outcomes that can harm the competition in the EU, and exchange of certain information falls within the scope. The concept is not itself mentioned in the article and has therefore been developed through case law and guidelines.

With the uncertainty of what type of information that is allowed to exchange, undertakings are facing a big greyzone in this matter. The study has shown that undertakings are allowed to exchange information that is not of commercial sensitive character, public information that is equal easy accessible for both customers and undertakings and information that does not end up in a collusive outcome. The information exchanged can have different effects of the market, which undertakings need to take into consideration. If the undertaking is operating on a small market, the information will probably have a bigger effect on the market compared to a big and complex market.

This study will examine the close relationship between exchange of information and art 101 TFEU, how big impact the characteristics of the market has on the outcome after an exchange of information, what type of situations the exchange can occur in and what type of information that is allowed to exchange under EU competition law.
## Abbreviations

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<tr>
<td>European Union</td>
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<td>Member State(s)</td>
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<td>European Commission</td>
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<td>Treaty on the Functioning of the European Union</td>
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<td>Treaty of the European Union</td>
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<td>The European Court of Justice</td>
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1. Introduction

The internal market of the European Union (hereafter ‘EU’) and EU competition law has always been integrated. The EU is today one of the biggest markets in the world and are therefore a very attractive market for consumers and companies. The integration between them are also established within the Lisbon Treaty. In the Treaty of the European Union (hereafter ‘TEU’) art 3(3) it is stated:

"The Union shall establish an internal market. It shall work for the sustainable development of Europe based on economic growth and price stability, a highly competitive social market economy,..."\(^2\)

As one can see, the internal market shall work for a highly competitive social market economy which one could argue that competition between companies creates. Competition law is regulated in the Treaty of the Functioning of the European Union (hereafter ‘TFEU’\(^3\)) and exist to encourage companies to create qualatitively products and services forced to a low price as possible for the customers.\(^4\) The aim of competition law is, through well-developed and effective competition rules, to help and ensure that the internal market functions and are working properly and not distorted. It forces companies to be more innovative and effective in its production and requires companies to act independently of each other.\(^5\) If companies know how to develop its products and is forced to do so, it will benefit the market.\(^6\) It will create a better quality on the products, that will lead to lower prices for the customers but with an improved quality on their products and services. Automatically, this will lead to increased purchase from customers, which will strengthen the internal market. One could therefore argue that no matter how much market shares a company has, it is competing on the same prerequisites as small and medium enterprises. Some companies has such a big market share so they become dominant on the market, and some of this companies tends to abuse this

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\(^1\) Commission, ‘Trade Policy EU Position in World Trade’.
\(^5\) Commission, ‘Antitrust overview’.
dominant position, which is regulated in art 102 TFEU. However, companies normally wants more. Some companies tries to control the market by enter agreements with their competitors so they can effectively increase their sales or market share. This is called anti-competitive agreements and are, briefly, covering any kind of agreement that are or might infringe the competition within the EU and is regulated in art 101 TFEU. Sometimes an actual agreement does not even has to exist to infringe the competition. Instead, companies exchange information with each other. The most problematic with exchange of information is that there are two concerns. The first concern is that information normally feeds the competition, without information between competitors, a market cannot expand and grow. It is also well known that information, which includes the exchange, can be very beneficial for customers and the markets. The second concern is when companies exchanges information to control or restrict the market, which can exists in various forms, such as in an agreement, verbally exchange of information or just the intention to act upon each others interests. This is very problematic for companies since the concept of exchange of information is not explicit mentioned in art 101 TFEU but still falls within the scope of the article. Therefore companies sometimes does not know that they had exchanged information that is harmful to the competition within the EU. The concept has instead been well developed through case law by the European Court of Justice (hereafter ‘CJEU’) and guidelines by the European Commission (hereafter ‘Commission’). Exchange of information can both restrict competition by object, which is a hard core restriction and not possible to justify, and it can also restrict competition by effect, wich could potentially effect the competition within the EU.

It is commonly known when competitors are not allowed to exchange information but this study seeks to provide the reader with not only that information, but also the information of when companies can exchange information, and what type of information they can exchange without breaching competition law. In order to that, it is also necessary to go through art

11 Case C- 8/08, T-mobile and others v Nederlandse Mededingingauriteit, [2009] ECLI: EU:C:2009:343, para 35 and 43.
101(1) TFEU to provide the reader with a comprehensive understanding of when exchange of information might be caught by EU competition law.

1.1. Legal Question and Purpose

With the existing greyzone regarding exchange of information and EU competition law, the paper search to find the answer, if there is one, to the question of what type of information that is allowed to exchanged under EU competition law. Automatically, the type of information needs to be complemented with in what type of situations information can be exchanged. The author also seeks to examine how the exchanged information affects the characteristics of a market.

The thesis has two main purposes. The first purpose is to examine the relationship between art 101 TFEU and exchange of information. It is important to examine the relationship to understand how exchanged information could harm competition on the market. It is also important to know when it is forbidden to exchange information, which has to be examined.

The second purpose is to find the general threshold for exchange of information between competitors. Today, companies can struggle to figure out when they are allowed to exchange information with competitors, and what type of information they are allowed to exchange.

Information exchange that harms competition law can take place in many different areas or levels within a company, and therefore it is a need to clarify the condition regarding legal exchanging of information.

1.2. Method and Material

To fulfil the purpose and to answer the legal question of the thesis a legal dogmatic method has been used and applied for the purpose of establishing the law, namely art 101(1) TFEU. The legal dogmatic method normally concentrates on describing and interpreting the applicable law, which in this thesis namely consists of TFEU.13

As the main source and material, the author has used EU primary law, which is the Lisbon Treaty. The Treaty that has been used is the TFEU in order to fulfil the purpose of the thesis. Secondary legislation such as the Commissions guidelines on the application on horizontal

agreements of art 101(1) TFEU has also been very useful when examining detailed legal arguments for exchange of information. Case law from the CJEU and the General Court (also referred to the ‘Court of First Instance’) is frequently used as sources to build up arguments for when it is allowed to exchange information and also to establish situations when it is forbidden.

1.3. Delimitations
The study has limited the market situation to different situations and the characteristics of the market, and will not discuss how to establish a relevant market under art 102 TFEU. Further, the study will not do any comparative studies to determine the differences between MS legislation regarding competition law and exchange of information.

1.4. Disposition
For the paper to have a good structure and a good argumentation, a short background to the problem is described under the introduction in the first chapter. The purpose of the first chapter is therefore to briefly describe the purpose of EU competition law and to collect a first introduction to the “greyzone” within the scope of exchange of information. In the second chapter, a short history of competition law and exchange of information are examined together with some basic concepts. The third chapter examines exchange of information with the only applicable provision in the EU treaty, art 101(1) TFEU. The purpose is to give the reader a proper understanding of which rules that are applicable to exchange of information and to understand how art 101(1) TFEU is structured. The fourth chapter is one of the two main chapters of the paper. In this chapter the author aims to mention what the main concerns are when it comes to exchange of information. The chapter examines details of different characteristics that information can have and when it causes harm to competition law and when it is allowed to exchange. In its fifth chapter the market situations are examined. It will show that the characteristic of the market is an important factor when it comes to exchange of information. In the sixth chapter, which is the second main chapter of the paper, the exemption to exchange of information is examined. This is the chapter that will examine when it is possible to justify exchanged information by undertakings competing to each other on the same market. The information from chapter one until chapter six will then be examined under chapter seven, where the conclusion is presented.

2. History, Concepts and Restrictions of Exchange of Information

As an issue within EU competition law, exchange of information has been on the agenda by the Commission since year 1968 and the Commission notice on cooperation agreements and subsequent policy statements, stated that the scope of exchange of information was to fall under then art 81 EC. The Commission had already at the time pointed out that if the information was exchanged with the intentions to restrict EU competition law it shall be caught by art 101(1) TFEU. However, debates were still ongoing until 1990 on whether exchange of information per se should be able to fall within art 101(1) TFEU. The CJEU stated in the landmark case Suiker, that prima facie there was no direct link between exchange of information and competition law thus, it had to be examined on case to case basis. In other words, exchange of information is not always a hardcore restriction meaning that it directly falls under art 101(1) TFEU but rather that the consequences of it might result in a breach of competition law. The Commission further developed in 1977 three key criterias that the examination shall follow. Firstly, the nature and the scope of the information exchanged has an important role to restrict EU competition law. Secondly, the structure of the market has to be examined. Thirdly, the Commission also takes into account whether the information exchanged is of a private matter. The Commission argues that private information only improves the seller knowledge of the market and has a broad impact on the customer as well.

In order to determine a possible breach of EU competition law under art 101(1) TFEU and exchange of information, it is important to understand the definition of an undertaking. As the CJEU stated in its landmark case regarding undertakings, the Höfner case, an undertaking is defined as “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”. However, this is of course too vague to define such a broad concept as undertaking. The CJEU has further stated in the case Commission v

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Italy, that if a company is offering services or goods on the internal market, it is considered to be an economic activity and falls within the scope of an undertaking.\textsuperscript{21} The CJEU has also ruled that lawyers fall within the scope of undertaking in the case \textit{Wouters}.\textsuperscript{22} Both legal and natural persons are covered under art 101(1) TFEU and therefore the article itself has a very wide scope of its application. Therefore it can be summarized that the scope of undertaking depends on the economic activity and the offering of services or products on the internal market within the EU.

\subsection*{2.1. Exchange of Information}

Under agreements regarding exchange of information, undertakings works together on quantities, prices and other terms to control the market or with the intention to restrict the competition within the EU.\textsuperscript{23} As mentioned in the introduction, exchange of information can have two different purposes and it is hard to satisfy which of them that possible could harm the competition. Exchange of information can take various forms such as direct sharing, indirect sharing through third parties or by publishing certain information.\textsuperscript{24}

\subsubsection*{2.1.1. The Concept of Exchange}

\textit{Prima facie}, one might think that the concept of exchange can be easily defined. However, it is not. As soon as an undertaking has reached other competitors with sensitive information it can be considered as exchanged.\textsuperscript{25} This means as soon an undertaking receives any type of information through any kind of channel, it is considered as exchanged.\textsuperscript{26} Information can be exchanged indirect which normally is through a third party, or direct between the competitors themselves.\textsuperscript{27} Exchange of information can also happen through a single occasion between competitors where undertakings discuss sensitive information, which was established in the \textit{T-Mobile case}.\textsuperscript{28} Consequently, the Commission has to follow this established path since

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exchange of information is also about the intention with the exchange, and not only the
frequency of it. Another way to exchange information is when one party gives information to
another competitor when requested that information, or accepts such exchanged
information.29 One could argue that it is possible to divide the concept of exchange in two
different paths. The first one is when one competitor request sensitive commercial
information from another competitor and also receives it. This means that it is forbidden to
ask for sensitive commercial information from a competitor since it would most probably
restrict competition by object and end up in a cartel.30 The second one is when a competitor
accepts sensitive commercial information from another competitor. The CJEU has established
that if an undertaking receives information, it can be seen as accepted.31 One can therefore not
argue as an undertaking that you did not participate in the exchange, no matter if was by
purpose or by accident. A third way that defines exchange of information is when an
undertaking attends meetings with a competitor to disclose strategic data.32 When it comes to
exchange of information and art 101(1) TFEU, the restriction of competition can be restricted
by object or restricted by effect. In the case Société, the CJEU established that the two
restrictions must be read disjunctively.33

2.1.2. Restriction by Object

Information that is exchanged between undertaking with the object to restrict competition
through prices, sharing markets or customers is strictly forbidden.34 It is not possible to
justify, and can end up being fined as a cartel.35 Normally, the Commission will bring
proceedings against undertakings that are supposedly violating EU competition law and
harming the competition by exchange of information as such. The burden of proof is then put

29 Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation
agreements’, (COM) 2011, C 11/01, para. 81-86.
30 Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation
agreements’, (COM) 2011, C 11/01, para. 59. See also: Christa, Tobler, and others, ‘Essential EU Competition
Law in Charts’, [2011] HVG-ORAG, p. 74, which defines Cartels as two or more undertakings
that interplay with each other.
32 Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation
33 Case C-56/65, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.) [1966]
34 Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation
35 OECD, ‘Roundtable on Information Exchanges Between Competitors under Competition Law: Note by the
on the undertakings to demonstrate that the information exchanged was not a breach by object under art 101(1) TFEU.\footnote{Case C- 8/08, T-mobile and others v Nederlandse Mededingingauriteit, [2009] ECLI: EU:C:2009:343, para. 4.} Information that is exchanged, and is considered as a breach by object, can consist of future intentions by undertakings of pricing or quantities of an undertakings service or product.\footnote{OECD, ‘Roundtable on Information Exchanges Between Competitors under Competition Law: Note by the delegation of the European Union’, DAF/COMP/WD(2010)118, para. 18.} The reason why the pricing or quantities of products or services is mention as an example of a restriction by object in EU competition law, is that sensitive commercial information is strictly forbidden to exchange to competitors according to the Commissions horizontal guidelines. Therefore, if exchanged, such information is more likely to end up in a collusive outcome or even in a cartel.\footnote{Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 81.} A collusive outcome is when two or more undertakings coordination could lead to a restriction on the market.\footnote{Swedish Competition Authority, The Pros and cons of information sharing, (Leanders Grafiska AB 2006) p. 14.}

The characteristics of the information exchanged needs to have the objectives to restrict competition, and to see the economic and the legal context it forms a part of.\footnote{Joined cases C-501/06 P, Case C-513/06, Case C-515/06 and C-519/06, GlaxoSmithKline Services Unlimited v Commission of the European Communities, [2009] ECLI:EU:C:2009:610, para 58. See also: Case C- 209/07 Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd, [2008] ECLI:EU:C:2008:643, para. 15.} The CJEU therefore has to look at the agreement itself and the information that has been exchanged to see if it by its very nature will restrict the competition by object, which has to be examining in a case to case approach. If the information exchange has been proved to restrict EU competition law with the object to control prices, it will be a restriction by object.

\subsection*{2.1.3. Restriction by Effect}

Exchange of information cannot only breach EU competition law by object, the information can also restrict EU competition law by effect. Restrictions by effect within the meaning of art 101(1) TFEU must have an appreciable impact on one or several constraints such as price, innovation, product quality to mention a few examples.\footnote{Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 69.} In order to determine whether an
agreement is to be considered as a restriction by effect, the information in question should be assessed within the actual context in which it would occur in the absence of the agreement.\footnote{Case C-56/65, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.) [1966] ECLI:EU:C:1966:38, para. 8.}

The interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking and it might therefore be justified for these reasons.\footnote{Case T – 35/92 John Deere Ltd v Commission, [1994] ECLI:EU:T:1994:259, para 84, where new undertakings could establish themselves on the market because of the exchanged information.} However, to assess the full effect by a harm of EU competition law that might exists after undertakings has exchanged information, a full market analysis is required.\footnote{This is will not be examined in the paper, since that is not the purpose.} However, even if it is found to be a restriction by effect it will, contrary to a restriction by object, not automatically be a breach of EU competition law. Generally, one has to look at the appreciable affect of the restriction which by itself has to be taken into consideration when applying it to a case. This was established in the European Night Service case, where the Court of First Instance stated “[…] but also on potential competition […]”.\footnote{Joined Cases T-374-75, 384 and 188/94, European Night Services and others v Commission, [1998] ECLI:EU:T:1998:198, para. 136-137.}

The Commission has noticed that an appreciable affect will probably not affect the outcome if the competitors have less than 10% together after the market share on the relevant market.\footnote{Commission, ‘Notice, on agreements with minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty establishing the European Community (De Minimis Notice)’, OJ C 291, 30.8.2014, para. 8(a).}

When talking about appreciable affect and De Minimis Notice of an agreement there are a lot of different conditions that has to be taken into consideration such as prices, outputs, product, quality or innovation to mention a few of them.\footnote{OECD, ‘Roundtable on Information Exchanges Between Competitors under Competition Law: Note by the delegation of the European Union’, DAF/COMP/WD(2010)118, para. 20.} Thereafter it depends on the economical effect of these conditions and not to the characteristics of the information that has been exchanged.
3. Assessments of Article 101(1) TFEU and its Relationship to Exchange of Information

To determine whether or not a breach under competition law has occurred one need to return to art 101(1) TFEU. Before examining what type of information that is allowed to exchange under art 101(1) TFEU one has to examining what scope it can be caught under and why it can be forbidden. To apply art 101(1) TFEU, the exchanged information also has to be a part of an agreement, a concerted practice or a decision of an association of undertakings. While studying the article it can be seen that exchange of information is not explicit mentioned in the article, which could cause some problems when undertakings are trying to comply with EU competition law and what type of information that is allowed to be exchanged. Under art 101(1) TFEU the definition of agreement has a wide conceptual scope. In the case Brasserie it was established that an agreement has to affect trade between member states (hereafter ‘MS’) to trigger EU competition law. If the agreement shows any kind of collusion to restrict competition between MS, the agreement is unlawful. Art 101(1) TFEU states following regarding agreements:

“1. The following shall be prohibited as incompatible with the internal 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 internal market[...].”

As seen in the article, all agreements between undertakings that by object or by effect, affects the trade between MS is illegal and a breach of art 101(1) TFEU. According to the Commission’s guidelines on horizontal cooperation, the assessment of art 101 TFEU lies in two steps. The first step is stated in art 101(1) TFEU and states if an agreement between undertakings are having an anti-competitive object or potentially restrict competition between

MS on a relevant market, it is a breach of EU competition law. The second step, which is under art 101(3) TFEU, is to determine the competitive benefits produced by the agreement and to figure out how these effects actually affect the competition between MS. There are many ways to breach EU competition law, and art 101(1) TFEU has covered them in three different collusions. To fulfill the purpose of the paper, it is important to examine this collusions with the concept of exchange of information.

3.1. First Collusion: Horizontal and Vertical agreements

Information could be exchanged in two types of levels, vertical and horizontal agreements. Vertical agreement is agreements between a distributor and a producer, which are between businesses operating on different levels of the commercial chain. After the judgment in Consten and Grundig, vertical agreements falls within the scope of art 101(1) TFEU. The CJEU ruled that vertical agreements may increase efficiency but might be harmful for consumers. Built on different levels in the commercial chain, a vertical agreement has an impact on exchange of information between distributors and suppliers.

Horizontal agreement is agreements between undertakings that are operating on the same venue of business. Exchange of information on a horizontal level can lead to substantial economic benefits, in particular if it is to save costs, increase investments and launch innovation faster. However, agreements or actions between undertakings that are competitors tend to end up in cartel behaviour. This shows that information that is exchanged by undertakings in cartels, can control prices in a certain market, divide the market or reduce the quantity of a product so the prices will be increased for a short or long period of time. Exchanged information on a horizontal level tends to decrease the independency for the undertakings, which is a restriction by EU competition law. Regarding the co-operation on a

59 European Commission, ‘Competition Delivering for Consumers’.
60 Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 35.
horizontal level, it is important to point out that independently determined behaviour will not be a breach of EU competition law and art 101(1) TFEU.\textsuperscript{61}

3.2. Second Collusion: Tacit Collusion

The second collusion is the tacit acquiescence. If an agreement shall enter into force, it has to be a concurrence of two wills and also under consensus between the parties.\textsuperscript{62} If undertakings want to exchange information with each other, they normally want some kind of guarantee that their partner will act in the same way as them. This is called a tacit collusion between undertakings. The Grand Chamber has established that a tacit collusion between undertakings is based on three main obstacles.\textsuperscript{63} Firstly, undertakings should find a mutual counterbalance for their exchange of information, a common path on how the coordination should work. Secondly, undertakings have to monitor their competitors’ action, because they need to have knowledge about new undertakings entering their market. Thirdly, undertakings normally agree on a kind of mechanism to punish the undertaking that might fail to comply with what they agreed upon, or if one of the undertakings is detected.\textsuperscript{64} Tacit collusion is with other words undertakings that enjoy the benefits of a relevant market without entering an agreement.\textsuperscript{65}

3.3. Third Collusion: Concerted Practices

The third collusion is concerted practices. The concept of concerted practices means that even if a party is not included in an agreement, it could cause infringement to art 101(1) TFEU.\textsuperscript{66} The CJEU has through its jurisprudence defined concerted practice as a form of coordination between undertakings, which has reached such a level that it could be considered as an agreement, without being an actual agreement, but rather practical co-operation that interferes with EU competition.\textsuperscript{67} The information exchanged just need to have the intention to restrict

\begin{footnotesize}
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\item \textsuperscript{61} Alan, Dashwood and others, \textit{Wyatt and Dashwood’s European Union Law}, (6\textsuperscript{th} edn, Hart publishing c/o International Specialized Book Services, 2011) p. 734.
\item \textsuperscript{62} Robert, Schütze, \textit{An Introduction to European Law}, (Cambridge University Press, 2012) p. 263.
\item \textsuperscript{64} Case C- 413/06, P. Bertelsman AG and Sony Corporation of America v Impala, [2008] ECLI:EU:C:2008:392, para. 123.
\item \textsuperscript{65} Richard, Wish, David, Bailey, \textit{Competition Law}, (8\textsuperscript{th} edn, Oxford University Press, 2015) p. 562.
\item \textsuperscript{66} Richard, Wish, David, Bailey, \textit{Competition Law}, (8\textsuperscript{th} edn, Oxford University Press, 2015) p. 117.
\item \textsuperscript{67} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, p. 16.
\end{itemize}
\end{footnotesize}
EU competition law. 68 The CJEU has given a broad definition of concerted practices to catch looser forms of arrangements or co-operation, which is why a concerted practice could be argued as the most common breach of competition law regarding exchange of information. 69 The landmark case T-Mobile established that a casual link between the cooperation and the final price to customer does not need to exist to be caught as a concerted practice. 70 The co-operation only needs to have an influence on the market, which was established in the case Suiker Unie. 71 However, the first case of importance concerning concerted practices was the Dyestuffs case. 72 In the case there was a lot of evidence, such as increasing of prices, showing that the undertakings acted in similarity on the market. Instructions were sent out vertically to distributors, and there had been an informal contact between the undertakings to arrange the increasing of prices. So even though there was no official agreement between the undertakings, their behaviour reached the level that the undertakings “knowingly substitutes practical cooperation between them for the risks of competition”, 73 and therefore an infringement of competition law took place. If there is sufficient evidence that operators have been in contact before action, with the aim of reducing uncertainties by them, it will fall within the scope of concerted practice. 74 In the case T-mobile, the CJEU established that both an agreement and a concerted practice, due to that sensitive information has been exchanged, searched to prevent, restrict or distort competition. 75

One can therefore argue to make exchange of information prohibited under art 101(1) TFEU in a given case, there has to be 1) an undertaking 2) an agreement, vertical or horizontal or an intention to an agreement from one undertaking or between undertakings 3) a concerted practices between undertakings. 76

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75 Case C- 8/08, T-mobile and others v Nederlandse Mededingingautoriteit, [2009] ECLI: EU:C:2009:343, para. 23.
4. Main Competition Concerns

When competitors exchange information it tends to increase the transparency of that relevant market, which can lead to efficiency enhancing benefits for undertakings and the market, but it may also present competition risks. The potential for anti-competitive effects depends on a number of key issues such as what kind of information is exchanged and in what type of situation it is exchanged.\(^77\) In order to prevent collusive outcome and cartels when exchanging information, there are different aspects that have to be considered.\(^78\) The characteristics of the market, the age of the information that is exchanged and the frequency of the shared information are some of the considerations that has to be examined on a case to case basis. It is a clear greyzone for competitors and can cause big damages for involved parties in forms of fines and lower reputation.

4.1. Characteristics of the Information Exchanged

The broad scope of what falls under exchange of information and further the broad characteristics of it has resulted in a grey zone area. Consequently, the practice of exchange of information for undertakings must be seen as a complex issue. The Commission guidelines on horizontal agreements under art 101 TFEU is a document that gives a guide through the complex area of exchange of information and it also characterises a few different types of information. One of them is commercial sensitive information.\(^79\)

4.1.1. Commercial Sensitive Information

To fulfil the purpose of the thesis, commercial sensitive information has to be defined and analysed to see what information an undertaking is allowed to exchange. Commercial sensitive information is usually caught under art 101(1) TFEU as an infringement of EU competition law. Commercial sensitive information consists of, according to the Commission, strategically useful data and it increases the chances of harming EU competition for customers and competitors if exchanged. The information could reduce undertakings

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\(^77\) Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 73 and 81.


\(^79\) Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 81.
independency when they take decisions for their products or business.\(^{80}\) The Commission refers to, and defines, different intentions of undertakings prices of products or services, such as discounts, price increase or reductions and rebates.\(^{81}\) Moreover the Commission also adds the total production costs, customer lists, marketing plans, investment, turnovers and quantities to the list of strategically useful data.\(^{82}\) It is a very exhausted list of information that the Commission has defined as strategically useful data and needs to be examined in order to understand what information that is not possible to exchange.

One could argue that all exchanged information between undertakings always is of commercial sensitive character, which benefits their business. If not, there would be no point for undertakings to exchange the information and no reason to put money and time to meet with competitors. This can be seen as a very robust argument so it has to be set into perspective. When competitors meet they normally discuss their market and products, which one could argue is the only legitimate reason for the meeting. Of course, they could be old colleagues, where one of them changed job to a competitor, and exchange the information during a friendly occasion. However, meetings in private can also raise a danger within the field of exchange of information since if one undertaking receives information, it is seen as accepted.\(^{83}\)

If look at the Commission’s definition of strategically useful data, an undertaking’s planned pricing is within its scope.\(^{84}\) This means that, on a horizontal level approach, if two or more competitors meet and exchange pricing plans for the next year or the next two years, they could thereafter enhance that information and act up on it. To have one competitor’s information could, as mentioned earlier, affect the independency of an undertaking’s decision making. If the parties that discussed this price will act after the information provided, they can decide on how and when their product or service increases its prices, which can affect the relevant market. Hence, it will affect the freedom to chose product or service for consumers

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\(^{80}\) Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 81.

\(^{81}\) Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 81.

\(^{82}\) Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 81.


\(^{84}\) Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 81.
and therefore, together with the purpose of competition law, it will be an infringement of competition law. From this perspective, undertakings are not allowed to exchange information about their future business. However, it seems that they are allowed to exchange information that is not of commercial sensitive character in the future. This means that undertakings can exchange information about their total turnover where competitors still can see how their sales has been and also probably see what type of pricing they used to have.

Information that involves undertakings customer lists can affect the competition if exchanged, and the concept falls within the scope of sensitive commercial information. To exchange a list of customers is almost every time a breach of competition law. It can be argued to be clear why such actions would affect the competition within the EU since it will give undertakings a better control of their customers and the market. Hence, it can be argued that the only reason why an undertaking would share its consumer list with its competitors is to divide the market. Such sharing of customer list can end up increasing the sales for the undertakings. Contradicted, undertakings will increase their chances of losing their customers if they give that type of information away to its competitors. A fictive example could be that undertaking A sells in zone C and D, while undertaking B sells in zone G and H. If the information that is exchanged leads a division of customers like in the example, undertaking B could end up trying contact customers in zone C and D, which could lead to that undertaking A loses its customer. However, it would also infringe art 101(1) TFEU and competition law if they divide the market. The main point of this is that every customer shall be free to chose what and from who they want purchase from. If such freedom is guaranteed, there will be no breach of EU competition law. Again, one can see that there is a strong link between competition, the internal market and protection of customers within the EU. One can argue that undertaking can easily find out which customers a competitor has, therefore there is no point to exchange this type of information since it can harm the competition. Instead an undertaking can exchange information or do more advertisement of their products or services to customers of their competitors in order to create a more competitive market.

85 Commission, ‘Antitrust overview’.
87 European Commission, ‘Competition Delivering for consumers’.
One can summarize that sensitive commercial information data is information that could be strategically useful for an undertakings competitor. It is therefore prohibited to share such information to its competitors. Undertakings has to be very careful when discussing or sharing this kind of information with each other, otherwise it can be easy to infringe competition law. Usually, this information is only shared between competitors on a commercial plane, *inter alia* showed to customers. However, to answer the question of what type of information undertakings are allowed to exchange when it comes to sensitive commercial information, it is a more complex question to answer. The mentioned definition of sensitive commercial information, which included information about price strategies, customary list or marketing plans, does not give any remarks about already existing price lists etc. One can therefore argue that the pricing that is set now and is available for the public, is allowed to be exchange, but no information about future promotions or planned changes. Current price list is normally public since customers want to know how much to pay for a certain product or service. Therefore one can argue that already existing prices are legal to act up on.

### 4.1.2. Public Information

Public information is frequently used by undertakings in the EU. It could be different ads in newspapers, TV-commercials or items in shopping windows that gives information about prices to customers and competitors, with the aim to encourage them to buy their products. There is normally no harm of competition law to exchange this kind of information, which was established in the *Atlantic Container* case.\(^\text{88}\) However, public information within competition law is more known as genuine public information. When talking about genuine public information the definition is that the information should be accessible for everyone without any differences in price. From the definition stated there are two different views that have to be taken into consideration. Firstly, the price has to be considered. When talking about price in public information, the term is meaning ‘equally easy’, which was introduced in the Commission guidelines.\(^\text{89}\) However, if it would be more costly for an undertaking to get the information than it is for a natural person, it is not caught under the scope of genuine public information.\(^\text{90}\) This shows that it has to be the same information and price to everyone.


\(^{89}\) Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 82.

\(^{90}\) Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 82.
if the information shall be legally exchanged in public. One can say it means that if an undertaking has a different price for undertakings compared to what they have for natural persons, they have to announce both prices on the place where they decide to publish the information. Secondly, it gives the thoughts that it is not only the price that has to be taken into consideration when determining if exchanged information is of public value or not. It is also the question on how the information can help customers to make an informed choice before purchasing a product or service by the undertaking. Except from what was established in the *Atlantic container* case, the Commission has established that information that helps consumers to reduce their search cost falls within the scope of genuine public information.\(^9\)

However, in order to demonstrate that it will reduce the search cost for both undertakings and customers, the undertaking has to commit and show true values of their intentions of reducing their search cost.\(^2\)

Another important aspect is the accessibility to genuine public information. If all undertakings on the relevant market have the same access to the information exchanged, it can be considered to be genuine public information. For instance, in the case of *Atlantic Container* there was contracts that was disclosed to all companies within the shipping organisation TACA, and it was only possible to negotiate the contracts within TACA.\(^3\) The Commission therefore argued that this set of voting within the TACA to approve the outcome of the negotiation, exchanged information formed a cartel, which infringes EU competition law and is strictly forbidden. The Court of First Instance ruled otherwise. Even if the information was of sensitive commercial information, the Court of First Instance established that it had a genuine public information character because the most essential terms of the contracts were published to everyone they negotiated with, which is a system of exchanged information which does not infringe EU competition law.\(^4\) This means that if essential terms is public accessible to everyone, it will not infringe EU competition law. However, one can argue that the Court of First Instance reasoning is very similar to how a cartel is formed, which was the

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Commission holding. If these kinds of essential terms are leaked to competitors, it should ring a bell from the perspective of cartel behaviour. One can therefore argue that there is a very thin line between genuine public information and exchanged information within cartels, regarding facts similar to the Atlantic Container case. The decision shows that it is important that the public information is equal easy and easy to access for everyone, both customers and competitors.

The Commission argues that if exchanged information is genuine public information it might decrease a collusive outcome on the relevant market because it will not affect potential entrants on the market. It means that all buyers and competitors will have the same access at the same time. The idea to gain information from the market by undertakings could create problems. The reasoning is that there are no guarantees that such information will be equally easy to benefit from its competitor, and therefore cannot always be constituted as genuine public information. However, it seems to be that it is always possible to act upon already existing information as long the genuine public information criteria’s is fulfilled. It is not legal to use public information as a way to announce future strategies as can be considered as sensitive commercial information, since it could infringe the competition, even though it is equal access to everyone. In the Wood Pulp case the CJEU ruled that the fact that pulp producers announced price rises to users before the rises came into effect was not, in itself, a sufficient infringement of art 101(1) TFEU (then art 81(1)). The Wood Pulp case gives further strong arguments that undertakings are allowed to exchange such genuine public information to its customer or competitors, such as planned sales in clothes-shops, as long it not containing sensitive commercial data.

4.1.3. Old Information (data)

As established previously, information concerning strategically useful information concerns in general future information, but old information has been proved to be harmful for EU

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95 Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 84.
96 Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 84.
97 Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 82.
competition law as well. Even if the Commission in its guidelines states that old information is “[..]unlikely to lead to a collusive outcome[...]”\(^{100}\), old data could be used by competitors to establish future actions. The Commission has established that information over a year old will normally not be taken into consideration and hence not be considered to be very useful for competitors on the relevant market.\(^{101}\) Contradictory, if the information is less than one year old, it could be considered as useful for competitors and affect the independent decision making procedure and their future actions. In the *John Deere* case, where the information exchanged did not contain any intentions for future sales, the General Court established that the exchanged information could still be useful for competitors in their future actions. In this case, it was shown that the exchanged information through notes and emails displayed previous transactions that was characteristics of business secrets and could indicate the future actions from the competitors. The conclusion of the question if the age of the data matters, is that old data can indicate future actions of a competitor, even though in general only future data is relevant for breach of competition law and exchange of information.

Even if the Commission has put the threshold to one year old information, one could argue that through exchange of older data undertakings could gain knowledge of their competitors future actions. As established in the *John Deere* case, the exchanged information is also depending on its frequency.\(^{103}\) However, information exchanged could still have happened frequently in the past. One could argue that such exchange could be taken into account when a competitor sets its prices. The reason is that an undertaking could see a common path of the price changing. However, it is just calculations and assumption that an undertaking could calculate from, therefore it does not give any certainty. A fictive scenario could be if one imagines that Company A, followed a certain path during the last ten years with increasing prices, and then gives away this information to Company B, this could give company B a good and safe platform to act from. So according to the received information from Company A, Company B can predict how Company A will act in the future, and Company B’s independent decision-making is affected. This may lead to infringement of competition law

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\(^{100}\) Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 86.


and art 101(1) TFEU. However, this can be very hard to prove, and the argument against this fictive scenario is that the information is just too old, and cannot be harming the competition. If switch side of the argument, and take the side of the Commission, information that is more than one year old, is allowed to be exchange between competitors. Imagine instead Company A exchanges information on how their prices were 20 years ago, it would probably not affect the competition. The frequency can have effects of how competitors control the market through their close cooperation. One can therefore argue that the frequency of exchanging information is still important but it cannot be dismissed that just one meeting where undertakings exchanges information, can breach EU competition law.\textsuperscript{104}

Since the Commission has argued in its guidelines that one year old information could restrict competition, the conclusion can be drawn that information older than one year, is allowed to exchange. The reason is that the market has probably switched a lot during the years, and that the undertakings prices already happened in the past. Therefore it will not be a restriction of EU competition law if an undertaking exchanges information that is more than one year old.

### 4.1.4. Price Signalling

Another type of exchange of information is when undertakings announce a price signalling. Price signalling is similar to public information in the sense that an undertaking makes a price public to other competitors and customers.\textsuperscript{105} A price signalling may benefit customers by helping them to choose the best product or price that suits them the most.\textsuperscript{106} Contradicted, one can therefore argue that there is a significant risk that it can harm competition law, especially if the market is small and normally more predictable and instable for changes. A good example of undertakings that normally do price signalling are mobile operators. Mobile operators are frequently doing public announcement and advertisements of their prices for different subscriptions or phones in newspapers or on TV-commercials.

Recently, the Commission started formal proceedings regarding 15 liner shipping companies to investigate if they had participated in a concerted practice which, according to the

\textsuperscript{104} Case C- 8/08, T-mobile and others v Nederlandse Mededingingautoriteit, [2009] ECLI: EU:C:2009:343, para. 61.
Commission, would be in breach of EU competition law. The Commission had noticed that since 2009, the 15 liner shipping companies had made regular public announcements of price signalling, only showing the change of prices in percentage, and not by its total amount. The price signalling had occurred through their websites and press releases, several times during a year. The concerns of the Commission can be stated as clear. It suspected the 15 shipping line companies to explore their competitors intentions of price settings which will lead to situations where the competitors thereafter coordinate and adapt their behaviour after the intentions. The Commission and the liner shipping companies reached a settlement namely, that the 15 companies would decrease the frequency of public price announcements and change how they announces their price. Hence, the shipping companies guaranteed to demonstrate their prices in a total amount instead of percentage. Subsequently, it lays in the Commissions’ interest that it should be more complex for undertakings to push the prices through coordinated increases. One can argue that there is a very thin and blurred line between giving competitors a hint of what will happen next and to decrease their announcements. As the public facts of the case, it does not give any type of indication on the content of the price signalling. One can argue that it still has to be of genuine public information, but the Commission seems to leave this out in their claims. Therefore, further arguments to this case are that this will give old precedent a turn. In this kind of settlements, the companies are given a “free ticket” to decrease and change their announcement, without being fined for the breach itself. If a similar case would come up for the Commission in the future, undertakings that normally are signalling prices can just reduce their prices and the frequency of signalling their prices in the future, based on this settlement. This could be criticised when looking at old precedents, such as in the John Deere case or the T-mobile case, even though it is in a different industry. The similar cartel behaviour as in the two cases is a blurred line to the shipping line container case. The two cases both eliminated competition by the exchanged information since it also was a low amount of undertakings.

111 Mlex market insight, ‘Comment: EU price-signalling case break could set tricky precedent’, 16 February 2016.
operating on the market.\(^\text{112}\) Hence in the shipping liner case, they were allowed to just decrease their signalling, which one could argue the other undertakings would rather do then getting fined. Although this settlement just considers the shipping industry, there are a lot of other industries that are having the same situations of price signalling on regular basis. A practical example of this can be in an industry with a small number of enterprises, where enterprises announce publicly in many occasions, such as previous mentioned mobile operators who normally advertise on TV-commercials or in newspapers, which is very easy to follow. One could argue that this settlement proves that the Commission will accept a more open discussion with competitors and also give them opportunities to change their announcement instead of give the undertakings a fine. In the end, this could lead further cases into a danger zone for competition law issues in the future. If companies who might be in a similar position, can exchange the information in the future while not harming competition law because they all agreed on reducing the times they are announcing their prices, which otherwise would lead them into a cartel behaviour. This settlement is giving the indications on that undertakings are allowed just to adapt to a settlement instead of being caught by EU competition law. According to this settlement, it is allowed to exchange information in signalling situations, as long as it is the exactly price amount to the increase, and not to frequently. However, it can after this analyse be concluded that an undertaking can act upon signalling cases, with other words already announces of information.

4.1.5. Establishment of Terms and Conditions

As mentioned in the introduction, exchange of information can also lead to improvement of the competition and consumers could gain from it. One of the main purposes of competition law is to protect the consumers.\(^\text{113}\) If consumers would not have the possibility to recognize their products or the norms of a specific product or service, it would be very hard for consumers to buy anything that is familiar to them. It could therefore be argued that it is common sense that there should be unilateral terms or condition of products or services that are on the same market. That will give the consumers a chance to recognize the product and give them a better understanding of the market, they will also be able to compare the product


or the service. In this aspect, trade associations play out their power.\textsuperscript{114} If an undertaking by itself on a relevant market wants to set a common term or condition, it will meet resistance when negotiating a set of terms suitable for their product or service. A trade association may therefore have that power or legal expertise to set a specific standard of products or services on that relevant market. Undertakings would be able to meet and exchange information regarding terms and conditions within a trade association. So exchange of information between competitors could create a safer market and protect the customers since they would know what general conditions and terms are applied on a relevant market. However, it can be caught under art 101(1) TFEU and the Commission usually keeps a close eye on trade associations when they discussing terms and conditions.\textsuperscript{115} This was shown in the previous mentioned \textit{Atlantic Container} case, where the negotiations were confirmed or denied within the TACA, and the members were not independent in its decision making. The Commission argued that to only discuss prices within the organisation and not allow an open negotiation with customer would put higher barriers to enter the market for other undertakings, but was denied by the Court of First Instance.\textsuperscript{116} One could therefore argue that as long as the terms or conditions are negotiated independently and the information has the purpose of create terms or condition, it is allowed to exchange. The Commission also thought this was an infringement when they brought proceedings in the \textit{Marine Hoses} case, where the undertakings were using the information exchanged to create sales conditions to be able to control competitors’ sales or prices in the future.\textsuperscript{117} Even if the General Court later declined this,\textsuperscript{118} it still proves that the Commission is paying attention to such kind of situations and therefore undertakings should be careful when they exchange this kind of information. What can be examined from the case law is that sales condition and certain price condition is not legal to exchange, but rather the conditions and terms of the products or services as such. So terms and conditions are not, if looking at the Commission’s guidelines and case law by the General Court, established as sensitive commercial information. Information about terms and conditions regarding the product or service it self could therefore been seen as allowed to exchange since it is rather to protect and support consumers on the EU internal market.

4.2. What Situations

When exchange of information might be a breach of competition law, it is important to consider in what situation the information was exchanged. The reason is that undertakings shall know in what situations they might harm competition through exchange of information.\(^\text{119}\) There are numerous situations where exchange of information can occur and has as mentioned before in this study, to be examined on a case by case basis. It could happen through email conversations, meetings, and during a dinner with former colleagues to mention a few examples and to show the complexity of situations where information can be exchanged. Sometimes, the undertakings might be able to exchange information through their retailers to another competitor.

4.2.1. Hub and Spoke Situation

A typical situation when it comes to exchange of information is the so called hub-and-spoke situation.\(^\text{120}\) The hub and spoke situation exists when there are three or more parties involved in an exchange of information.\(^\text{121}\) The procedure is between two distributors and a producer where the distributors normally want information about another competitor on how the same product or service is priced or sold. The distributor then asks the producer for information about the other distributor to know how their products or services are priced or sold, or maybe why the product is a lot cheaper than what the asking distributor has on its own products. It is a way for the distributor to control the market, or a zone that is specifically important to them. The distributors are using the good will of the producers, who will give information to them so they can be the leading distributor in that area. The reason it is forbidden is that hub and spoke agreement will affect the independency of the undertakings decision making, which the CJEU has stated is necessary for undertakings to be in order to protect the competition.\(^\text{122}\) As the example has shown, it is very easy to fall into a hub and spoke situation and breach EU competition law under art 101(1) TFEU. Undertakings therefore has to be very careful with what kind of information they are exchanging to producers when it comes to the sensitive commercial information and is only allowed to exchange information about their own

\(^{119}\) Alan, Dashwood and others, *Wyatt and Dashwood’s European Union Law*, (6\(^{th}\) edn, Hart publishing c/o International Specialized Book Services, 2011) p. 328. It is not possible to justify the action with not being aware of that it was a breach.


products or services. If the producers are not careful of what information they give about other distributors, they might be infringing EU competition law and art 101(1) TFEU. One can therefore argue that undertakings are not allowed to exchange any kind of information about their consumers, and only give information about their own products. The undertakings should lay their focus to compete hard instead of give information about other customers.

4.2.2. Trade Associations

As seen in the chapter of the characteristics of information that is exchanged, sensitive commercial information such as future pricing cannot be exchanged, not even in a trade association. A trade association consists of representatives of a group of undertakings or other organisations on a common market with the same interest.\textsuperscript{123} A trade association normally gives undertakings a better way to negotiate on different aspects that are important for the relevant product or service. It is known to be characteristic in three ways.\textsuperscript{124} Firstly, there has to be a common interest between the undertakings to be able to create a trade association. Secondly, the members must be businesses and not individuals to participate in a trade association. Thirdly, the members are more generally involved in the decision-making. The purpose of a trade association is to represent the relevant interest for the industry of the business, which could guide them through innovations and to create different norms for that specific market. As established under the chapter of terms and condition it is allowed to create common terms and conditions to protect consumers on the internal market. However, one can imagine that meetings in a trade association sometimes could lead to intense discussions among competitors. In those scenarios it is possible that one of the undertakings may throw out something that could fall within the scope of sensitive commercial information. Suddenly, all undertakings, based on what the paper has explained, participating in a cartel and breaching EU competition law. The blurred, divided line between exchange of information and what is allowed to exchange puts the EU competition law on its strength. This is obviously hard to prevent for competitors and the only advice to undertakings is to immediately express distance to the received information.\textsuperscript{125} One could argue that this is the only way to protect themselves from breaching EU competition law if they are protesting against that decisions and make sure that they are not acting on the received information in

\textsuperscript{125} Maverick Advocaten NV, Martijn, van de Hel, and others, ‘Beware when exchanging information: latest developments & tips’, October 1, 2015.
the future. As in the case *T-mobile*, the CJEU established that only one meeting without an official agreement might be a breach of EU competition law.\(^{126}\) So even in trade associations, undertakings have to keep their independency when it comes to their decision making, and even after and during a meeting with the trade associations. One can therefore conclude that undertakings who are participating in a trade association is not allowed to exchange commercial sensitive information about their business, but they are allowed to discuss the general terms and conditions for their relevant market.

### 4.2.3. Digital Communication

Digital communication such as emails or text message, are today a normal way to communicate for undertakings. Everyone has email and most competitors also use their emails to have contact with each other and other competitors, when not participate in a meeting etc. It could also be used to do follow up or exchanging certain information, and sometimes also confidential information. The problem with digital communication and exchange of information is that the CJEU has established that when an undertaking receives strategic data from competitors, it will normally be presumed that the information has been accepted.\(^{127}\) In the same scenario, it is also established that the only way to not accept this information is to reply to this email and clearly state that the undertaking does not wish to receive such data.\(^{128}\) An employee or an undertaking responding immediately in this way when receiving such sensitive commercial information would most likely not breach EU competition law. In a more and more digitalised world, emails or text message are the quickest ways to communicate or to get the information you are searching for. A scenario to strengthen the argument could be that an employee of an undertaking receives an email from a competitor by accident. That email contains information about the competitors’ future plans regarding their prices or marketing and how they might change. In this scenario, even if the email was sent by accident, the receiver of the email has to reply and state clearly that they not want to receive such information. If not doing so, and it should be done quickly after reading the email, they may end up breaching EU competition law under art 101(1) TFEU. Hence, it is still allowed to exchange information through digital communication. Thus,


undertakings are not allowed to exchange commercial sensitive information to competitors through digital mediums.

4.2.4. Commercial Cooperation

Another interesting factor that could be harming competition law is when there is an existing commercial cooperation, more famously called franchising. Franchising means that there is one main operator that shares the brand, the layouts, the price intervals and documents on how the brand shall be running.\(^\text{129}\) This is permitted even if those companies are competitors, since they are the same franchisee. One advice to undertakings in these situations is that they should only exchange that information that the cooperation requires, and always have to be careful before the information is exchanged to their competitors. Another good advice to franchises could be that the main undertaking, founder of the franchisee, is making sure that everyone who wants to start a franchise has to sign a confidentiality agreement, and also for the employees, to make sure that this information is not being used for other purposes. One can therefore conclude that undertakings are allowed to exchange sensitive commercial information through a commercial cooperation, since it is the same franchise.

4.3. Third Parties Involvement

Undertakings that want to have information about their market could turn to third parties to gain such information. When third parties are involved it means that undertakings use another party to exchange information.\(^\text{130}\) Gaining information from third parties can be a good thing for undertakings. There might be an undertaking that wants to enter a market and therefore needs information about that market. In such situations, it is a valid reason for undertakings to receive this information from a third party. One could also argue that it is necessary that the information comes from an independent party. If an already established undertaking exchanges the information, one could argue that they do not want to let the new undertaking have too much impact on the market. Even though they exchange the information with good faith, they could infringe competition law. To not know that the information is infringing competition law cannot be a legitimate reason to escape fines for breach of competition

\(^{129}\) International Franchise Association, ‘What is a Franchise’.

Therefore this is not a valid argument as a defence, if for example the information exchange happens by accident. If the CJEU established such reasoning in case law, undertakings would have an easy way to escape from punishment. However, there has to be some way for competitors to have access to competitors market activity. As been mentioned several times in the paper, competition exists to improve the products and protect the market and customers and therefore it is important with high competition. The market would be too uncertain otherwise and therefore it has to be developed in some way. If it would not be possible, researchers would not have a chance to investigate the markets, see future indications on where the internal market of the EU is heading etc. The Commission has established that information that is exchanged through a third party is an “[...]indirect exchange of information through a market research organisation or through parties’ suppliers or retailers”132. One could therefore argue that an undertaking could therefore share its information indirectly between different market research organisations. An organisation who works to collect information to investigate a market is of course very engaged to gain as much information as possible about the undertakings, and that is something that has to be taken very carefully by the undertakings. The reason for carefulness is that they are not allowed to exchange sensitive commercial information to anyone. For market researcher to fulfill their job they want as much information as possible and therefore one could argue that they want to do inspections about undertakings and gain as much information as possible. However, one could argue that undertakings are allowed to exchange information for example on total turnovers or sales result to third parties, since it probably would not affect the independency of an undertaking.

Third parties could end up be the hub in a hub and spoke situation. It is not legal for undertakings to use third parties to exchange information about sensitive commercial information. However, one could argue that undertakings still have the responsibility towards other competitors and consumers to not use them as a source. With the information examined, it could be argued that the CJEU would act towards the line that if an undertaking are actively seeking information from third parties about competitors, it could be seen as a breach of exchange of information and art 101(1) TFEU. Contrary to this argument, if undertakings

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does not actively seeking information through third parties, it is not illegal as such, but it is important to remember that undertakings has to state clearly that they do not want to receive certain information.\footnote{Case C-49/92 P, Commission v Anic Partecipazioni Sp.A, [1999] ECLI:EU:C:1999:356, para. 121.} Undertakings do have an interest on how the market is developing, and it is therefore a legitimate reason for undertakings to receive such information from third parties, in order to follow the development. Undertakings also tends to use newspapers or other magazines to exchange sensitive commercial information through interviews. One could argue that this is not legal for undertakings to use this channel since it seeks to infringe the competition within the EU. However, undertakings are allowed to do interviews about their business.

Information can be exchanged in a lot of different situations, through third parties or in trade association. The information that is allowed to be exchanged cannot affect competitors’ independency in its decision making. Information about terms and condition in order to strength the knowledge of the market is legal to be exchanged. However, it cannot be of sensitive commercial character and if the exchange does not restrict the market by effect of by object, it can be exchanged.
5. Characteristics of the Market

In order to determine weather information that is exchanged is in breach of competition law, the structure of the market has to be considered.\textsuperscript{134} The characteristics of the market do affect the seriousness of the harm on the market the exchanged information fuels, and can also be affected depending on the gravity of the information. One example of when exchange of information does not affect the market could be if a brewery exchange information with an undertaking in the TV-sector. One could argue that such exchange would most likely not harm competition, since they are on different markets and not affecting each other in a coherent way. An example of when it is a relevant market is if two breweries exchange information about prices on their beers. Such situations would have an affect on the characteristics of the market.

5.1. Market Coverage and its Characteristics

For the exchanged of information to harm the competition, the Commission has established that a sufficient large part of the market has to be covered by the undertaking.\textsuperscript{135} To establish the market coverage the research has to be precise and also has the affect so it actually harms the competition on the market. The Commission has not been able to establish a general threshold of significant market coverage since it is depending on the specific facts of the case.\textsuperscript{136} However, the Commission have established \textit{De Minimis Notice}.\textsuperscript{137} It is a notice about agreements with minor importance. It requires a minimum threshold of 10\%, no matter if it is a vertical or a horizontal agreement.\textsuperscript{138} The reason they have established this is because any exchanged of information that does not has a significant market coverage of 10\% together after the agreement, or 15\% each on the relevant market, will not harm the competition within EU law. The Commission also gives an indication of this in its guidelines when its stated that

\textsuperscript{134} Alison, Jones, Brenda, Sufrin, \textit{EU Competition Law, Text, Cases and Materials}, (5\textsuperscript{th} edn, Oxford University Press, 2014) p. 704.
\textsuperscript{135} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 71.
\textsuperscript{136} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 72.
\textsuperscript{137} Commission, ‘Notice, on agreements with minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty establishing the European Community (De Minimis Notice)’, OJ C 291, 30.8.2014.
\textsuperscript{138} Commission, ‘Notice, on agreements with minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty establishing the European Community (De Minimis Notice)’, OJ C 291, 30.8.2014,art 8(a)(b).
agreement below the threshold "will usually not be large enough..." to harm competition law. It could be argued that an agreement still can be an infringement for EU competition law if it has market coverage below 5%. What has to be taken into consideration when establishing market coverage and compare it to De Minimis Notice is that it is not a regulation, it is only a notice from the Commission and not legally binding upon the MS. So if a regulation is applicable in a situation with exchange of information, an undertaking should try to comply with the regulation instead of the notice to be secured from not harming competition. However, since it is binding upon the Commission the notice should be taken seriously for business that exchanges information between MS. Hence, it will not be applicable if the action is a breach by object, since such actions falls within the scope of art 101(1). The Commission will also have to comply with their notice because of upholding legal certainty under art 17 TEU. The most important thing regarding De Minimis Notice for an undertaking to know is that undertakings cannot to fully rely on it if brought before court within a MS. Therefore the market threshold does not matter in such situations. However, if undertakings are below the threshold of De Minimis Notice and exercising trade between MS, they can rely on the notice and exchange the information. One could therefore argue that even if the market coverage is below the threshold set out in the De Minimis Notice, undertakings can rely on the notice.

5.1.1. The Effect Exchanged Information has on the Market Characteristics and Collusive Outcome

The effect the information exchanged has, also depends on how the market is structured. If there would be no effect on the market after the exchanged information, the information will not infringe competition. Another factor of exchange of information regarding to establishing the market coverage and its characteristics, is if it will turn out to be a collusive outcome. Collusive outcome between competitors can lead to coordination of competitors behaviour to each other and restrict EU competition law under art 101(1) TFEU. A collusive outcomes

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140 Case C-226/11, Expedia Inc. v Autorité de la concurrence and Others, [2012] ECLI:EU:C:2012:795, para. 27.
141 However, it can be counterbalanced with the principle of legal certainty and the good government clause in the Charter of fundamental rights.
aim is for the undertakings to have a better collaboration between them and its competitor.\footnote{Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 75.} This would give the undertakings better options and a better chance to act in an affective and a better way for their own conduct, but depending on their competitors.\footnote{Alison, Jones, Brenda, Sufrin, EU Competition Law, Text, Cases and Materials, (5th edn, Oxford University Press, 2014) p. 704.}

The effect of exchanged information can be divided in two main groups. The first group is a small and more transparent market. If it is a smaller market, it is more likely for undertakings to harm the competition within the market and to find a coherent change in the undertakings outcome.\footnote{Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 75.} It is also harder to establish a collusive outcome where the information exchange normally happens through a public ordination.\footnote{Alison, Jones, Brenda, Sufrin, EU Competition Law, Text, Cases and Materials, (5th edn, Oxford University Press, 2014) p. 704.} A transparent market is a market that is stable and few undertakings are operating on the market. It is therefore easier to find a collusive outcome coherent to exchange of information. The reason is mainly because it is easier for fewer companies do reach a common understanding on the terms of coordination to monitor deviations. This was established by the CJEU in the case John Deere, where demand and supply conditions were relative stable because of a low amount of undertakings.\footnote{Case T – 35/92 John Deere Ltd v Commission, [1994] ECLI:EU:T:1994:259, para. 78.}

Further more in the UK Agricultural Tractor Registration Exchange case, the CJEU established that a small market with high barriers to entry, the exchange of information could affect the market even if the market seemed to be stable when the exchange took place.\footnote{Commission Decision, 'UK Agricultural Tractor Registration Exchange', IV/31.370, 92/157/ECC, [1992] OJ L 68, para. 51.} The Commission held that the exchange of information prevented hidden competition by the creation of a transparent market, where the past transactions played a vital role.\footnote{Alison, Jones, Brenda, Sufrin, EU Competition Law, Text, Cases and Materials, (5th edn, Oxford University Press, 2014) p. 705.} On a market that was highly concentrated with only eight operators that had approximately 88% of the market, the exchanged of past transactions record could generate and determine a path for future transactions for the competing undertakings.\footnote{Commission Decision, 'UK Agricultural Tractor Registration Exchange', IV/31.370, 92/157/ECC, [1992] OJ L 68, para. 5.} This means that even though it is old information, it can still infringe the competition in the future. However, the Commission also found that the information exchanged regarding the transactions are more effective for the

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\footnote{144 Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 75.}
\footnote{145 Alison, Jones, Brenda, Sufrin, EU Competition Law, Text, Cases and Materials, (5th edn, Oxford University Press, 2014) p. 704.}
\footnote{146 Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 75.}
\footnote{147 Alison, Jones, Brenda, Sufrin, EU Competition Law, Text, Cases and Materials, (5th edn, Oxford University Press, 2014) p. 704.}
\footnote{150 Alison, Jones, Brenda, Sufrin, EU Competition Law, Text, Cases and Materials, (5th edn, Oxford University Press, 2014) p. 705.}
forecast in the future comparing to past information, even though past transactions was a crucial point at this case.\textsuperscript{152} The Commission and the CJEU gives indications of that future information are more liable to infringe EU competition law than old information on a stable market.\textsuperscript{153} For instance if there are a small amount of operators on a relevant market, called oligopoly,\textsuperscript{154} a small change of an undertakings behaviour might cause a serious breach of competition. If one operator exchanges some of its sensitive information to its competitor, it would be very easy for them to know how they will act in the future. The General Court also established in the case \textit{Thyssen Stahl}, that if a market is of an oligopolistic character, it is important to prove that the independent decision making of an undertaking is not affected.\textsuperscript{155} A uniform market in form of fixed pricing, demands and market shares is more reliable to end up harming EU competition law.\textsuperscript{156} That has also been taken into consideration when undertakings are operation on a uniform market because those kinds of aspects are something that gives competitors the knowledge if they will be competing with each other for a long time or not. If so, there is more likely that a collusive outcome will exist between the competitors, which will lead to an infringement of competition law.

The second group consider a market that is big and uncertain with a broad amount of undertakings operating on the market.\textsuperscript{157} In such market, it is in general harder to establish an infringement of competition law.\textsuperscript{158} It is harder to establish the effect because undertakings have more difficulties to know about the competitors demand or supply conditions, establishing competitive prices and to know competitor’s outcome since there are many undertakings operates on the market.\textsuperscript{159} An unstable market is also a complex market. Constantly new undertakings that enter the markets and substantial internal growth are

\begin{itemize}
\item\textsuperscript{154} Alan, Dashwood and others, \textit{Wyatt and Dashwood’s European Union Law}, (6\textsuperscript{th} edn, Hart publishing c/o International Specialized Book Services, 2011) p. 738. Oligopoly markets are typically characteristics by roughly equal shares and mutual dependence inviting parallel conduct.
\item\textsuperscript{156} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 77.
\item\textsuperscript{157} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 76.
\item\textsuperscript{158} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 76.
\item\textsuperscript{159} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 76-77.
\end{itemize}
activities that prove that a market is complex and unstable.\textsuperscript{160} Therefore, in a complex and unstable market, it would be more difficult for undertakings to reach a collusive outcome than on a stable market.\textsuperscript{161} The problem with a complex market is that in such environment there is sometimes a need to exchange information to create a more stable market for customers. One could argue that an unstable market would make customers unsure about prices and qualities, which would refrain them from purchasing. That demonstrates a problem and might be a bit contradicted to what the study previously established. Since it seems that it is possible in a complex market to establish simple pricing rules between undertakings, one could argue that it is essential to exchange certain information to create a stable market. It could be linked to norms or specifications, which the thesis has established is not a breach of competition law. In these situations there is a need for exchange of information to make the market more stable. Without the exchange of information, a complex market will most probably not become a stable market in the future either. However, it is legal to exchange information in the sense that the information will create norms or specifications about the products or services on a relevant market.

However, even if it is possible to imagine that it has to be a stable market to make exchange of information a breach of competition, that imagination is not true. The Commission has established that the market does not need to be an absolute stability within the relevant market for the information exchanged to harm the competition.\textsuperscript{162} Due to the circumstances that it is tougher to breach competition law on complex market, one have to accept that information that is exchanged between competitors on an unstable market, is more likely to be legal to exchange. However, undertakings are still not allowed to exchange sensitive commercial information. If companies have a certain amount of the market share on an unstable market, it can still affect the market and harm the competition if information is exchanged. If companies have exchanged information between each other, one of the companies could also use this information to have a collusive outcome on another market where they normally do not have

\textsuperscript{160} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 77.
\textsuperscript{161} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 76.
\textsuperscript{162} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, footnote 54.
that possibility.\textsuperscript{163} It is therefore important to see how the information exchanged actually affect the characteristics of the market. It has been argued that the lower the pre-existing transparency of a market is, the more power the information that is exchanged has for the undertakings in that market. There can complex situations where this might happen, especially for undertakings that are operating in different markets with its different products. An example could be an undertaking, which have products of phones, computers and TV-screens, are operating in different markets. If looking at the demand and supply request, with todays technique, it would probably affect that undertakings computers sales if some information was exchanged to the attributes on their phones, even if they were operating on different markets. So even if information is exchanged on one market, one always has to look at the effects on the other markets. A real threat of a sufficiently credible and prompt retaliation has to be established before a collusive outcome can be determined. The reason is because on markets where the consequences of deviation are not affecting the collusive outcome for undertakings because it is not in their interest to do so. If the collusive outcome does not affect the market enough, there is no collusive outcome.\textsuperscript{164}

Information exchange can also harm the characteristics of the market if it ends up in a collusive outcome.\textsuperscript{165} This could happen if there is an increased transparency in the market where the exchange of strategic information could together end up in the same outcome. Based on the competitors’ behaviour and their result, it could end up infringing competition law. The Commissions guidelines on horizontal agreements state that a collusive outcome can be created through three different channels.\textsuperscript{166} The first channel is when the undertakings intention of the exchanged information is about future conducts, such as agree on a mutual and common understanding in terms of coordination.\textsuperscript{167} That kind of information could give them a clear understanding on how to act in the future. The commission has also established that current conducts of an undertaking that could anticipates to a future intention of an undertakings action, could be useful to harm competition in the context of exchange of

\textsuperscript{166} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 61-64.
\textsuperscript{167} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 62.
information. The second channel that could lead to a collusive outcome is the increase of internal stability. This is an outcome that happens when the market gets transparent and undertakings decide to monitor deviations in their intentions for their future business. In such cases one could argue that information exchanged can give the intentions that an undertaking will divide the market. Competitors to that undertaking can see the intentions and will be deviate from the market, maybe even decides in someway to retaliate to this action. This could give the market an increased internal stability since the market is divided between competitors. The third channel is the increasing of the external stability of a collusive outcome. This is also, just as the second channel, an outcome when the market is transparent. External stability is targeting new undertakings that want to enter the relevant market compared to internal stability, which is targeting undertakings that already exists on the market. It could lead to undertakings on the market target a new undertaking that wants to enter the market whereby the collusive outcome aims to exclude the new undertaking through creating barriers for them to enter the market.
6. Exemptions under Article 101(3) TFEU and Block Exemptions

In order to fulfil the purpose of the paper the exemptions is important to examining. The exemptions under art 101(3) TFEU and the block exemption regulation\textsuperscript{168} can be argued as the most common ways where exemptions can occur. The exemptions give undertaking the right to justify their actions, which also includes the concept of exchange of information. One can assume that the Commission will ask the question of why the undertakings wanted to exchange the information. It is therefore important to be able to answer that argument and to justify the information exchanged under art 101(3) TFEU or the block exemption regulation. In the past art 101(3) somehow gave a vague interpretation, or more of a very wide scope of interpretation in justifying a potential harm of competition, since it lacked legal certainty.\textsuperscript{169}

For 101(3) TFEU to be applicable, the information exchanged has to have harmed to competition under art 101(1) TFEU. Even if the information exchanged is caught by the art 101(1) TFEU and is in breach of competition law, it can be justified under the art 101(3) TFEU in certain circumstances. The article itself states that art 101(1) TFEU are inapplicable if any agreement, decision, concerted practice or category of agreements, decisions or concerted practices leads to an improving of the production or distribution of the goods or to promote technical or economic progress when its benefits the consumers in the end.\textsuperscript{170} Once again it can be established that competition law exists to protect customers benefit and to have good qualitative products and services. Briefly, art 101(3) TFEU states that undertakings are allowed to exchange information with its competitor as long it is to benefit the consumers and to support innovation of products and services on the market. This, obviously, is the line the Commission is taking when they established its guidelines on horizontal cooperation.\textsuperscript{171} More than just art 101(3) TFEU, the Commission has established a few block exemption regulations, which also is a way of justify an action between competitors. The most common one is the block exemption regulation 330/2010.\textsuperscript{172} It gives the undertakings a chance to


\textsuperscript{169} See: Richard, Wish, David, Bailey, \textit{Competition Law}, (8th edn, Oxford University Press, 2015) p. 649-650, where it is explained that previous regulations was much broader in scope and applied to all vertical agreements and more economic based.

\textsuperscript{170} Article 101(3) Treaty of the Functioning of the European Union.

\textsuperscript{171} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 89.

justify their behaviour on vertical agreements, as long they can show that it was more positive than negative aspects from the information exchanged.\textsuperscript{173}

To make the competition market more efficient, information exchange could play a big role for the market to grow. As the Commission states in its guidelines on horizontal agreements, information about a competitors costs of their products could make companies more efficient in developing its products.\textsuperscript{174}

6.1. Block Exemption Regulation

Under art 101(3) TFEU an undertaking could do an individual assessment to see if their action outweighed an anti competitive behaviour.\textsuperscript{175} This can itself create an error when apply the article since they are not aware of all the criteria. The Commission therefore created a regulation to establish more legal certainty. The \textit{block exemption regulation} is the regulation that could be applicable when competitors have exchanged information and want to justify their actions in vertical agreements. The information exchanged has to fall within the scope of art 101(1) TFEU to be applicable, unless there has been a breach by object, which is established in art 2(1) of the regulation. Vertical agreements has therefore been defined as agreements between competing undertakings, agreements to other block exemptions and agreements made by associations of retailers under art 2(2), 2(4) and 2(5).\textsuperscript{176} One could argue that this could occur in hub and spoke agreements or when an undertaking tries to force distributors to only use their products. It shall be stressed that if a vertical agreement under the scope art 2(4) of the regulation is not within the scope of vertical agreements, the agreement should be considered to be under the scope of horizontal agreements and the \textit{block exemption regulation} is not applicable. However, as been shown in this paper, an actual agreement does not has to exist to harm the competition within the EU, and especially when it comes to exchange of information.\textsuperscript{177}

Just as \textit{De Minimis Notice} has a threshold to be applicable, the \textit{block exemption regulation} also has a threshold that needs to be satisfied in order to be able to apply the regulation. In art

\textsuperscript{173} European Commission, ‘Competition Delivering for consumers’.
\textsuperscript{174} Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 88.
\textsuperscript{175} Charles, Gheur, Nicolas, Petit, \textit{Vertical Restraints and Distribution Agreements under EU Competition Law}, (Groupe De Boeck s.a., Editions Bruylant, 2011) p. 80.
3 of the *block exemption regulation* it is stated that the market shares of the undertakings that exchanges the information cannot exceed 30% of the relevant market, which are applicable to both the buyer and supplier in vertical agreements.\(^\text{178}\) However, if the market threshold exceeds 30% within two calendar years, the block exemption is not applicable, according to art 7 of the regulation. The Commission has establishing this reasoning, probably, because market share less than 40% could be defined as a dominant position.\(^\text{179}\) The market threshold criteria also apply for exchange of information in vertical agreements where undertakings do not exceed the limit of 30% in market shares.

The *block exemption regulation* cannot be applied in so called hard-core restrictions. Those restrictions are established in art 4 of the *block exemption regulation*. Hard core restrictions are restrictions that remove the benefit from *block exemption regulation* when it comes to vertical agreements. According to art 4(a) of the block exemption regulation, hard-core restriction is for instance of the buyer’s own ability to determine its sale price. It states as following:

\[\text{“The restriction of the buyers ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommended a sale price, provided that they do not amount to a fixed or a minimum sale price as a result of pressure from, or incentives offered by, any of the parties;”}\]\(^\text{180}\)

This can be examined together with the previous mention independent decision making procedure. If information is exchanged between undertakings on the same market and that information exchanged is affecting the ability to set its own prices, it will fall within the hard-core restrictions and be an infringement to EU competition law. In the case *Suiker* the Commission argued that the sugar companies had restricted competition law by quantity and by price agreement to its suppliers.\(^\text{181}\) Therefore there was no possibility to do exemptions for the outcome in the judgment under the *block exemption regulation*.


According to art 4(b) of the block exemption regulation, any kind of restriction of a territory is considered as a hard-core restriction. If information is exchanged about territories, it cannot benefit from the regulation. However, there is an exemption to this. The exemption stated in art 4(b)(i) states that when an undertaking does active sale into an exclusive territory that is reserved for the supplier, the exemption applies. This is for new undertakings to be able to get more established at the market. In order to make this article applicable to exchange of information, the first step is that the information has to be a breach of art 101(1) TFEU and in a vertical agreement. As long as the information has been exchanged in line with the scopes that been examined in the paper, there is a connection to exchange of information and the exchange can therefore be justified.

6.2. Exemptions Under Article 101(3) TFEU

It is not only the block exemption regulation that is applicable when it comes to justification for art 101(1) TFEU and actions of exchange of information that may harm competition law. If an undertaking cannot apply the block exemption regulation, the undertaking could try to apply art 101(3) TFEU to do an individual exemption. This is an important aspect when examining what type of information that is allowed to exchange between competitors. As mentioned, if the exchange of information is exchanged to improve products or to promoting technical innovation for products or services, the exchanged information is legal to act up on that received information under art 101(3) TFEU. It could be argued that justification under art 101(3) TFEU is obvious, seen to the importance for the development of the internal market, and the global aspect of the EU to have a strong and innovative market. It does not mean that sensitive commercial information is allowed to exchange. For instance, sensitive commercial information is consisting of shared customer lists or fixed prices and has nothing to do with the improvement of the competition and products on the internal market. ¹⁸²

However, to be able to apply art 101(3) TFEU, the undertaking has to meet four conditions to have their action justified. ¹⁸³ First, the exchanged information has to be an economic benefit for the market and the undertakings. The agreement, decision or concerted practice must contribute to improvement of the production and distribution of goods, or to promote technical and economic progress. With information that could lead to that one undertaking

¹⁸² Since it is a breach by object, and cannot be justified, see chapter 3.
saves money or improves their efficiency for developing their own or new products, the information can be seen as acceptable by the Commission and the CJEU to exchange.\(^{184}\) The second condition is that consumers must receive a fair share of the benefit resulting from the identified information exchanged in the first condition.\(^{185}\) One could therefore argue that the exchanged information is to protect customers and the competition in general. If there is no advantage for the consumers, the information cannot be justified under art 101(3) TFEU. The third condition sets out that an agreement, decision or concerted practice must be indispensable to accomplish the aforementioned benefits. This was exemplified in the case \textit{Nungesser}, where the CJEU stated if an agreement shall be exempted, it has to provide improvement of goods or promote technical progress.\(^{186}\) The fourth condition establishes that the exchange of information cannot eliminate competition in respect of a substantial part of the relevant product market. Since all of the four conditions has to be satisfied, it is not easy justify exchanged information that has been caught by art 101(1) TFEU.\(^{187}\) As one can see, different from \textit{De Minimis Notice} and the \textit{block exemption regulation}, there is no general threshold of market shares to apply art 101(3) TFEU. One could argue that the Commission puts a high threshold to justify exchange of information and any type of infringement between undertakings on a relevant market. This argument gives strength to the coherence between the internal market and competition law within the EU. Information exchanged between undertakings that are competitors cannot lead to reducing our controlling the competition. In reality, all these conditions are very difficult to satisfy. However, the Commission can allow undertakings to cooperate in developing technical standards for the market as a whole.\(^{188}\) Remarkably, research and development agreements are generally compatible with competition law because some new products require expensive research that would be too costly and time consuming for one undertaking working alone.\(^{189}\) This is the same as one of the justification grounds. One could argue that if an agreement can be made between undertakings to cooperate in developing technical standards, exchange of information could also be allowed for the same reason. For instance, an exchange including information that

develops new standards gives undertakings with a much smaller market share of the relevant market a better chance to compete with the bigger undertakings with a bigger share. With the analyses stated before, that an agreement does not actual be present to breach competition law, it can be seen as logical for exchange of information to fall under the scope of developing technical standards or to save capital for undertakings.

In general, one could find exemptions to exchanged information in certain business and markets. For instance, the insurances market where it could be justified that information about previous accidents to set a valid insurance for a person, or in the bank sector where the banks need information to secure that the persons can repay the loans it takes. At least one could argue that this are sectors which the Commission is giving examples on when they are describing what an asymmetric market is.\(^\text{190}\)

However, the Commission is clear on one thing, as soon as the undertakings involved might eliminate the competition on a relevant market, the justifications under art 101(3) cannot apply.\(^\text{191}\) This means that if an undertaking is carefully examine on how the information could gain the market in a positive way, such as new innovations, it might be possible to exchange such information without breaching EU competition law. Once again, the argument of why the competitors exchanged the information in the first place has to be answered. So if exchanged information could harm and a elimination of the competition could be possible, the undertakings does not have any possibilities to justify their actions under art 101(3) TFEU and the block exemption regulation.

\(^{190}\) Commission, ‘Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements’, (COM) 2011, C 11/01, para. 90.

7. Conclusion

What is clear after this study is that exchange of information has a strong relationship with art 101(1) TFEU even though the concept is not explicitly mentioned in the article. Exchange of information has instead developed through case law and falls now within the scope of art 101(1) TFEU. However, the study has also established that information that is exchanged is not always infringing EU competition law, it depends on the specific facts of the case. Information that is exchanged can harm competition in two ways. The first one is that the information restricts competition by object. Restriction by object is such a serious breach that it is not possible to justify. Secondly is restriction by effect, which can be hard to exempt from, but still possible since many factors has to be taken into account to determine the effect of the market. Restriction by object and effect can occur in many ways, such as horizontal or vertical agreements, concerted practice our in collusive outcome.

When the information may restrict the competition by effect, one has to examine the market characteristics and the market coverage. Some markets are easier to affect than others. In small markets, the outcome can be more restrictive no matter what type of information that is exchanged. The reason is that such market is more sensitive to act upon others future plans. Undertakings in small markets should act very carefully in all matters, and not exchange any type of sensitive commercial information. Undertakings can only exchange information that is for the improvement of the market, or act upon already established public information. When the market is more open and transparent, it is harder to harm competition law. Therefore, the Commission has established that the undertakings who exchanges the information needs to have a least 10% of market shares if the exchanged information should be able to harm the competition. Otherwise it will not be a sufficient serious harm of the market, and information under this condition is possible to exchange.

The study has shown that exchange of information is one of the normal infringements of EU competition law. In order to fulfil the legal question and the purpose of the study, it is important to know in what situations it is possible to justify the exchanged information. As stated above, it depends on the specific case. The Commission has stated that sensitive commercial information is strictly forbidden to exchange. Undertakings should never
exchange information about customers, prices, quantity and customer lists. Instead they can exchange information about their total turnover because it is already published, if a competitor would like such information. Information that improves the competition in a way of innovation, improves the distribution of goods or promotes technical improvements of the market is also allowed to exchange. Undertakings who exchange information, even if it might be caught under art 101(1) and infringes competition, can justify this under art 101(3) TFEU. Information is legal to exchange if undertakings can demonstrate that the information will improve the competition among the competitors and the market, and if the result benefits the consumers. Undertakings can therefore exchange information that benefits the customers, the market and the competition on the market and if it promotes innovations or technical improvements. However, one should bear in mind that this is hard to justify since the information actually was considered to be a breach according to art 101(1) TFEU from the beginning. Third parties agreement, or research and development agreements is necessary to the extent that it helps to develop the innovation, since research can be very expensive for undertakings. It is also allowed for new undertakings to gain this information since they need to know what type of market they are entering. It is therefore possible to exchange information to third parties as long as the intention of the information is to develop the innovation on a certain market.

The study has established that one of the most crucial aspects when it comes to exchange of information is that the information shall not affect the undertakings independence in its decision making. If affected, it can be considered as a collusive outcome and infringe EU competition law. This is important to have in mind when exchanging information and one can argue that if an undertaking is in discussions of exchanging information to a competitor, this should be taken into consideration, before the exchange takes place. If the undertaking can secure that the information will not affect the independence of a competitors decision making, the information can be exchanged. However, this is not the only aspect the undertaking has to take into consideration. The frequency of the exchanged information is still something that has to be in mind, even if only one meeting with the intention of the exchanged information is to infringe EU competition law. Even though that the frequency matter, it cannot be dismissed that only one meeting can harm the competition if sensitive information is exchanged.
Information that is more than one year old is possible to exchange between competitors without restricting the competition. Such information has been determined to not be useful for affecting the independency of the decision making of undertakings. The information is not allowed to create a collusive outcome. To avoid collusive outcome, it is important to compete hard instead of exchange sensitive commercial information that could be used as strategically useful information.

Public information and price signalling, such as future sales is considered to be legal to exchange as long as both customers and competitors can access the information equally easy. Undertakings can for example announces future sale in newspapers or on TV-commercials as long it is gives the same access to both competitors and consumers. At similar occasions, information that has been public from an undertaking, gives competitors the right to act upon such information. Since it already has been made public and as long it does not contains sensitive commercial information, it will not affect the competition if undertakings act on the public information. As long the competition is equally easy and is accessible to competitors and consumers, undertakings is allowed to exchange such information.

There are also different situations where the exchange of information can take place, which will give answer to the second legal question of this paper. Situations as such does not matter, it is normally about the characteristics of the market and the information in those situations. However, undertakings may think that it is legal to discuss sensitive commercial information in trade association, which is not true. If discussing such information in trade associations, undertakings tend to end up in a cartel. It is legal to discuss terms and condition in a trade association, because it gives an undertaking a better position to negotiate for its products or services, and it gives certainty to customers on the market. However, if an undertaking receives sensitive commercial information, they should make it clear that they are not interested in such information. It does not matter if it was by accident or by purpose, the undertakings have to state in a clear way, that they do not want to receive such information. In Hub and Spoke situations it is important for an undertaking to not be the hub and transfer the information about other customers. The only thing undertaking shall give information about is the own business and make sure their employees compete hard instead of exchange information about others.
An undertaking is allowed to exchange information that is older than one year, information that is not of a commercial sensitive character (unless it is more than one year old), information that does not affect a competitor's independency in its decision making, public information as long it has equal access to everyone and information about their products or services to establish general terms and condition on the relevant market. Information that would improve the quality, innovation is also possible to exchange.
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