



## SHOULD PURE INFORMATION EXCHANGES BE TREATED AS CARTELS?\*

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### ABSTRACT

*The present essay analyses, information exchanges between competitors (under the European Union (EU) Competition Law as a stand-alone practice, and whether or not such practice should be prosecuted as a cartel offense or not.*

**Key words:** *information exchanges; cartels; competition law; restriction of competition by object or effect.*

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\* The views and opinions expressed in this article are of the author alone and do not reflect the opinion, position of the author's employer.

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## ***¿DEBERÍA EL INTERCAMBIO DE INFORMACIÓN TRATARSE COMO UN CARTEL?***

### RESUMEN

En el presente trabajo se analiza sí bajo el Derecho de Competencia de la Unión Europea los intercambios de información puros entre competidores (i.e. no hay más interacción entre los actores) deben ser juzgados como carteles o no.

**Palabras clave:** intercambio de información; carteles; derecho de la competencia; restricción de la competencia por objeto o efecto.

### I. INTRODUCTION

As mentioned the present essay analyses, information exchanges<sup>1</sup> (IE) between competitors<sup>2</sup> (horizontal agreements) under the European Union (EU) Competition Law as a stand-alone practice<sup>3</sup>. In this situation, the information exchange is the only contact between the competitors, as opposed when the information exchange is part of another anti-competitive conduct<sup>4</sup> like occurs in most cartel cases.

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1 In this paper, it is used interchangeably information exchanges (IE) or exchanges of information.

2 The term competitors in this context should be understood as undertakings operating in the same level or the same market, been part of a horizontal agreements.

3 They are two additional scenarios where the IE can take place: “(i) as a part of a wider price fixing or market sharing agreement whereby the exchange of information functions as a facilitating factor; (ii) in the context of broader efficiency enhancing cooperation agreements such as joint venture, standardization or R&D agreements”. OECD. INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMPETITION LAW DAF/COMP(2010)37.p.9.

4 According to Angela Ortega the difference between cartels and IE is that “in cartels undertakings frequently negotiate the terms of their market behaviour with the purpose of reaching a collusive consensus and maintaining their coordinated

Since the dawn of times, authorities have taken an unfavorable view of agreements between competitors “especially when they come in the form of price fixing, market sharing, or bid rigging”<sup>5</sup> substituting the rivalry between them. The reason for this is straightforward those agreements restrict output and raise prices to their consumers or customers, in a similar way that a monopolist would do, and we end up with an agreement that “distribute welfare from consumers to producers and reduces allocative, productive and dynamic efficiency”<sup>6</sup>. Accordingly, cartels have been considered the ‘supreme evil of antitrust’<sup>7</sup> or competition law and the companies involved in them have received the harshest of sanctions including fines, and in some countries like the UK<sup>8</sup> the individuals involved can face criminal prosecution.

Unsurprisingly the Organization for Economic Co-Operation and Development (OECD)<sup>9</sup> has labeled them as “the most egregious violations of competition law,” and it treats them as a “hardcore restriction” that always or almost always produce negative effects on the market<sup>10</sup>. Thus, whenever we have an “anticompetitive agreement, anti-competitive concerted practice, or

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conduct. In contrast, simple exchanges of information do not necessarily amount to explicit discussions intended to reach an agreement, but they can obviously be conducted with the same (collusive) purpose” Ortega, A. Object analysis in information exchange among competitors.(2012) ECP 311.p.43.

5 Niels G, Jenkins H and Kavanagh JF, Economics for competition lawyers (Oxford University Press 2016).p.234.

6 Ibid.p.234.

7 US Supreme Court. Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP 540 US 398, 408 (2004).

8 United Kingdom.

9 All the documents of the OECD can be found at [www.oecd.org](http://www.oecd.org).

10 EU Commission. Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice.p.4. [http://ec.europa.eu/competition/antitrust/legislation/de\\_minimis\\_notice\\_annex.pdf](http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf);

anti-competitive arrangement by competitors to fix prices, (...) establish output restrictions or quotas or share or divide markets by allocating customers”<sup>11</sup> we speak of a “hard core cartel”<sup>12</sup> or just cartel.

Competition Authorities<sup>13</sup> are a concern with pure IE between competitors because they can facilitate coordination and reduce competition between them “allowing coordinated outcomes to emerge.” The IE might allow undertakings or companies to “establish coordination, monitor adherence to coordinated behavior and effectively punish any deviations<sup>14</sup>”. According to the Competition Authorities (CA) of the OECD members, the potential anticompetitive behavior of IE depends on several factors like the type of the information and the structure of the market<sup>15</sup>. Thus, in the present paper, it is said that pure or stand-alone IE should not be treated as a cartel offense.

## II. ARTICLE 101 (1) TFEU

Under the European Competition law, article 101 (1)<sup>16</sup> of the Treaty of the Function of the European Union (TFEU) is used to analyze IE between competitors, so in this section, I will review

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11 OECD (n 4).p.3.

12 In the present paper, the term cartel and hard core cartel mean the same and should be understood as just defined.

13 The term competition authority is used to encompass National Competition Authorities or supranational Competition Authorities such as the European Commission.

14 OECD (n 4).p.11.

15 Ibid.p.11.

16 Ex Article 81(1) TEC. When the Case law or references is made to article 81 it is the same as article 101.

the main concepts that underpin such article. Article 101(1)<sup>17</sup> prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.” The case law of the European Courts and the Commission have given a broad interpretation to all the terms of article 101 of the TFEU to secure that potential anticompetitive behavior of undertakings<sup>18</sup> does not escape Competition Rules<sup>19</sup>.

#### *a. Undertakings*

The term undertaking has been defined in the case law by the European Courts<sup>20</sup> as any entity “engaged in an economic activity, irrespective of its legal status and the way in which it is financed”, and economic activity has been interpreted as “any activity consisting in offering goods and services in a given market”<sup>21</sup>.

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17 Article 101 deals or covers all the interactions or dealing between undertakings in contrast with article 102 that covers unilateral action of undertakings. Article 101 have “traditionally [been] divided into two categories: horizontal (between undertakings active on the same product markets, in particular actual or potential competitors (...), and vertical (between undertakings operating at different economic levels)” Faull J, Nikpay A and Taylor D, *The EU law of competition* (Oxford University Press 2014), p.189. Here I will only focus on the horizontal level.

18 In the present paper the term undertaking is used in a similar way that the term firm, company, competitors and it is used to examine horizontal agreements.

19 Jones, A. *Postgraduate Diploma / Masters in EU Competition Law 2013 / 2014. Module 2- Unit 8. Cartels and Oligopoly*. King’s College London. P.21.

20 This includes the Court of First Instance (CFI) and the European Court of justice (ECJ).

21 Cases C-180–184/98 *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I- 6451, para.75.

### *b. Agreement*

The second element agreement, according to the ECJ is “a concurrence of wills between economic operators on the implementation of policy, the pursuit of an objective, or the adoption of a given line of conduct on the market.” Thus, it must be at least between two parties<sup>22</sup>, the form of the agreement is irrelevant<sup>23</sup> it does not matter the if it is written or oral, if it is a formal agreement, or if it is legally binding under the traditional definition of agreements, if there is a “concurrence of wills” between undertakings<sup>24</sup> where they have “expressed their joint intention to behave in a certain way”<sup>25</sup> it will be caught.

### *c. Concerted practice*

The third concept we must examine is concerted practice. The constant case law of the EU Courts defines a concerted practice as “a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.” Due to the focus of this paper, the concept of concerted practice is crucial, since most if not all the cases of IE as stand-alone conduct are going to be treated as a concerted practice. Here the relevant factor is going to be if the IE is capable of *knowingly substituting the risk of competition*. Therefore, the degree of coordination needed is one that prevents an undertaking from setting their conduct in

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22 Faull and Nikpay (n 18) .p.206.

23 Ibid.p.206.

24 It does not matter that one of the undertakings does not operate in the market where the infringement happened. Case T-99/04, AC-Treuhand AG v Commission [2008] ECR II-1501.

25 Cases T-305/94 etc, PVC II [1999] ECR II-931, para 715

the market independently by removing the uncertainty of what that conduct is going to be or reducing strategic uncertainty<sup>26</sup>.

*d. Object or effect is to prevent, restrict or distort competition*

Deciding when an undertakings practice restricts/distorts<sup>27</sup> competition either by object and effect as Ibáñez Colomo and, Lamadrid argue has been at the center of the debate for decades and to this day remains controversial<sup>28</sup>. Despite the discussions, we know that the object or effect restriction applies equally to both agreements and concerted practices. It is “also clear from the relevant Article 101(1) TFEU case law that establishing the object of an agreement is an exercise that differs from the evaluation of its impact on competition. The nature and purpose of practice are not determined in light of its effects. The Court has consistently held that, once it is shown that an agreement has a restrictive object, it is not necessary to demonstrate that it has an adverse impact on competition”<sup>29</sup>.

According to Ibáñez Colomo and Lamadrid de Pablo, a restriction on competition is likely to be a violation by object if: “(i) is not a plausible means to achieve a pro-competitive objective

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26 C-8/08 - T-Mobile Netherlands and Others [2009] ECR I-04529.para 32 (T-Mobile); and Case C-238/05 Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc) [2006] ECR I-11125, para 51. (Asnef)

27 In the present paper, the use of restricts should be understood to encompass “the prevention, restriction or distortion of competition” as stated in Article 101 (1) TFEU.

28 Ibáñez Colomo, Pablo and Lamadrid, Alfonso, On the Notion of Restriction of Competition: What We Know and What We Don’t Know We Know (October 8, 2016). Forthcoming in Damien Gerard, Massimo Merola and Bernd Meyring (eds), *The Notion of Restriction of Competition*.p.2-3. For another detail analysis of this see Faull and Nikpay (n 18).

29 *Ibid*.p.16.

and (ii) can plausibly harm firms' ability and incentive to compete. (...) The plausibility of the pro- and anticompetitive effects of an alleged infringement cannot be evaluated in the abstract. The analysis (...) needs to consider the economic and legal context of which the practice is part, as well as the lessons of experience and economic analysis. (...) A practice can only be presumed to have a net negative impact on competition where it is capable of restricting competition that would have existed in its absence. If the practice is objectively necessary to achieve the aims sought by the parties, or if competition is precluded by the underlying regulatory framework, it falls outside the scope of EU competition law provisions"<sup>30</sup>.

In contrast “‘by effect’ practices are a plausible source of pro- and anticompetitive effects. They are capable, (...) of having both a positive and a negative impact on competition. This (...) makes it necessary to establish whether a pro- or an anticompetitive effect is more likely than not in the economic and legal context of which the practice is a part. The analysis of the restrictive impact of a practice comprises three additional steps, (...). First, the definition of a benchmark against which the counterfactual – and thus the likely effects of the practice – can be assessed. Secondly, the assessment of whether firms' ability and incentive to compete on the relevant market has decreased or is likely to decrease. Finally, it is necessary to show that the observed or alleged reduction in competitive pressure is attributable to the practice (that is, that there is a causal link between the two)”<sup>31</sup>.

Due to the nature of this paper that examines if IE should be treated as cartels, and as cartels are infringements by objects, it would not be reviewed in detail the assessment of IE as a competition restriction by effects. Suffices to say that all IE not assessed

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30 Ibid.p.44.

31 Ibid p.45.



as a restriction by object would require the much more detail assess that the restriction by effect requires.

### III. ASSESSMENT OF IE UNDER ARTICLE 101(1) TFEU

In this section, it will be seen how article 101 (1) applies to IE. As previously mentioned, for pure IE the key concept is concerted practice<sup>32</sup>. By saying that we have an IE cartel using the notion of concerted practices, makes it more likely that such conducts would be sanctioned that in other jurisdictions; since other jurisdictions require proving the existence of a broader agreement, before imposing sanctions<sup>33</sup>. In any case, it “should not be treated in the same manner as hard-core price fixing or market-sharing cartels when it comes to fining.”

The main difficulty when assessing IE as a (CA) or as counsel for undertakings is that there is not a specific method to separate between pro-competitive or anti-competitive IE<sup>34</sup>. The lack of such a line or proper standard compels to support a case-by-case and applying an effects analysis<sup>35</sup> before condemning the practice or undertakings involved<sup>36</sup>.

As the ECJ stressed on the *Asnef Case*<sup>37</sup> the “compatibility of an information exchange system, (...) with the (...) competition rules cannot be assessed in the abstract. It depends on the

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32 Faull J and Nikpay A have a similar view when they say that “the issue of whether an arrangement amounts to a cartel or stand-alone information exchange (...), it is more prevalent in the context of concerted practices”. Faull J and Nikpay A (n 15) p.991.

33 OECD (n4) .p.12.

34 Ortega, A. (n 4). p.2.

35 Effects analysis in this context means an assessment to see if the IE is likely to restrict within the meaning of Article 101 (1) either by object or effect.

36 Ortega, A. (n 4).p.3.

37 *Asnef*

economic conditions in the relevant markets and on the specific characteristics of the system concerned, such as, in particular, its purpose and the conditions of access to it and participation in it, as well as the type of information exchanged – be that, for example, public or confidential, aggregated or detailed, historical or current – the periodicity of such information and its importance for the fixing of prices, volumes or conditions of service”<sup>38</sup>. This is without prejudice of assessing under the Object or by effect categories of Article 101 (1) TFEU, since in all case one still needs to look at “the economic and legal context of which the practice is part, as well as the lessons of experience and economic analysis”<sup>39</sup> the difference would be how depth analysis is needed before establishing if the practice restriction competition or not.

*a. The case law analyzing ie as an infringement by object (Bananas case<sup>40</sup> and T-Mobile case)*

Arguably, the most important cases to date are the Bananas Case and T-Mobile (preliminary judgment), in this section both cases will be analyzed together as most of the reasoning of T-Mobile was incorporated in the decision of the Bananas case. One important difference is that in T-Mobile there was not a condemnation to the parties as it was a preliminary judgment referred by Dutch Courts, but in the Bananas Case the Commission considered the IE as an infringement by the object, because of this it considered it and sanctioned it as a cartel having the object of fixing prices<sup>41</sup>. The European Courts later confirmed the decision.

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38 Ibid.para.54.

39 Ibáñez Colomo, Pablo and Lamadrid, Alfonso ( n 34).p.44.

40 Case C-286/13 P Dole Food Company, Inc. and Dole Fresh Fruit Europe v Commission, EU:C:2015:184 (“Bananas” or “Bananas Case”).

41 Horizontal Guidelines.para.74.

From both cases, we know that:

- “each economic operator must determine independently”<sup>42</sup> how are they going to act in the market, as such any IE that removes the degree of uncertainty in the market place about their conduct<sup>43</sup> is a restriction by object<sup>44</sup>, without been “part of broader cartel arrangements”<sup>45</sup>.
- Any discussion about future pricing intentions (i.e. “[B]ilateral pre-pricing communications”<sup>46</sup> or a possible reduction of a commission) will be seen as having an anti-competitive object even if there is no connection or impact on consumer prices<sup>47</sup>.
- “the number and regularity of the contacts between competitors [does not matter]. (...)a single meeting between competitors may [be] (...) sufficient”<sup>48</sup>, and not publicly distancing from the IE creates the presumption that the IE was used even in the absence of anticompetitive effects on the market<sup>49</sup>.
- IE “may constitute a breach of competition rules even where the relevant market is not a highly concentrated oligopolistic market”<sup>50</sup>.

The academic commentaries of T-Mobile Case point out that what we had there was a price fixing cartel where “competitors discuss, on the basis of their market knowledge (...) how their

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42 Bananas Case. ECJ. para.119.

43 Ibid.para.121.

44 Bananas Case. CFI.para.59.

45 Ibid.para.59.

46 Ibid. Para.63.

47 Ibid. para.123.

48 Ibid.para.368.

49 Ibid. para.127.

50 Ibid. para.341.

competing products should best be priced<sup>51</sup>, (...) [therefore]we would hardly speak of<sup>52</sup> an IE. “[So it is] obvious to treat such a discussion as a violation by object.” In my opinion, this is a plausible interpretation that best reconciles these cases with the others that endorsed the idea IE should be examined using a “checklist approach to analyze the effects of an information exchange between competitors”<sup>53</sup> as such the T-Mobile and Bananas make clear that an IE “ancillary to a cartel must be treated together with the cartel and as a per se violation”<sup>54</sup>.

Robertson supports that interpretation when she says that part of the problem lies in the fact that the case law of the European Courts contains an “ambiguous distinction between pure and merely ancillary information exchanges, and the special market characteristics present in many of the leading cases.” For example in the Bananas Case, Roberts points out that the IE involved “was below the threshold of a proper cartel”<sup>55</sup> and by treating the IE as a cartel it further blurred “the distinction between a pure information exchange and an information exchange that is ancillary to a proper cartel agreement”<sup>56</sup>.

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51 Meyring B, “T-Mobile: Further confusion on information exchanges between competitors: Case C-8/08 T-Mobile Netherlands and others [2009] ECR 0000” (2009) 1 Journal of European Competition Law & Practice 30.p.31.

52 See in similar terms see Robertson when she says that “the conduct at issue in T-Mobile Netherlands could very well be classified as a cartel to which the information exchanged was ancillary” Robertson, V. H. (2013). A Counterfactual on Information Sharing: The Commission’s Horizontal Guidelines 2011 Applied to the Leading Cases. World Competition Law and Economics Review, (4), p.478.

53 Ibid.p.32.

54 Ibid.p.32.

55 Ibid.p.484.

56 Ibid.p.484.

*b. IE As object restriction*

We know from the Case law of the European Courts and from the Commission Horizontal Guidelines<sup>57</sup> that particular types of IE would be violations by the object<sup>58</sup>, and sanctioned as a cartel. The Horizontal Guidelines expressly recognized that IE of “individualized intentions concerning future conduct regarding prices or quantities should (...) be considered a restriction by (...) object.”

The reason why IE about future prices or quantities are seen as a restriction by object is that it is far more probable that IE is used to collude than to benefit consumers. “also, pro-competitive effects claimed under 101(3) TFEU<sup>59</sup> can only prevent an agreement from being prohibited, if all (four) conditions enumerated in this section are satisfied”<sup>60</sup>. Therefore, the argument goes that it is permissible to automatically classify those IE as object restrictions<sup>61</sup> because “[is] the most effective mechanism to achieve a collusive outcome”<sup>62</sup>.

The approach of the Commission and the European Courts of treating certain IE as an infringement by object, sanctioned as a cartel, it is arguably too severe and not entirely appropriate

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57 Communication from the EU Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1 (Cooperation Guidelines) (Horizontal Guidelines).

58 Ortega, A. (n 4). p.3.

59 Article 101(3) makes the prohibition of 101 (1) inapplicable if the agreement or concerted practice “contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question”.

60 Ortega, A. (n 4).p.35.

61 Ibid. p.35.

62 Ibid.p.34.

for pure IE. For example, Carlton, Gertner, and Rosenfeld affirm that “in the absence of direct evidence to form a naked cartel to restrict output or to raise the price, the appropriate standard to judge the flow of information among competitors is the rule of reason<sup>63</sup>”<sup>64</sup>.

In a similar vein, other academics considered this treatment overly broad because the effects of the IE can vary “depending on the economic context and the characteristics of the market, this practice should not be approached under the ‘object’ analysis.” Prof. Jones argues that the “object classification is inappropriate for some more unusual horizontal cases involving arrangements which are not “naked” but which are ancillary to some form of efficiency-enhancing integration between the parties”<sup>65</sup>.

Niels, Jenkins, and Kavanagh have also expressed their reservation to treating IE as object violations when they say that such treatment should be reserved to hardcore cartels only and that the line between hardcore cartels and other horizontal practices should be drawn carefully<sup>66</sup>.

Prof. Posner goes even further when he says that “[t]he purpose of a legitimate exchange of price information is too narrow

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63 The Rule of Reason is the standard applicable in US Antitrust Law to analyze if a practice is anticompetitive or not, that it is more like the effects analysis of Article 101(1) TFEU, but also it incorporates certain elements of the analysis of 101(3) TFEU because it balances the procompetitive justifications typical of 101(3) analysis. This in oppose to the per se approach that immediately declare illegal certain type of behaviours, due to the harshness of this approach the US Courts have been gradually moved away from that approach reserving it for very serious infringements. Despite not been exactly identical there is a tendency to assimilate the rule of reason analysis with the effects analysis and the per se with the object analysis.

64 Carlton, D, Gertner, R and Rosenfeld, A. ‘Communication among competitors: Game theory and antitrust’ (1997) 5 *George Mason Law Review* 423, 424.

65 Jones, A. (n21).p23.

66 Niels G, Jenkins H and Kavanagh JF (n 5).p.245.

the dispersion of prices—that is, to eliminate as far as possible those prices in the tails of the price distribution that reflect the ignorance of buyers or sellers concerning the conditions of supply and demand”<sup>67</sup>. If one recognizes that “then the only basis for imposing liability (...) would be if the evidence were to show that the exchange, in fact, raised the entire price level above the competitive level”<sup>68</sup>. Furthermore, he considers that “[a] pure agreement to exchange price information should *always* be considered lawful. The level of concentration or other aspects of market structure would not change this conclusion”<sup>69</sup>.

In a similar way to Posner’s Padilla says that the illegality of IE should be reserved for “exchanges that are part of a cartel. For two reasons. *First*, (...) the economics literature on information sharing (...) suggests that there is no other category of exchanges that by their very nature are highly likely to have an anti-competitive effect and highly unlikely to have a pro-competitive motivation. *Second* (...) there is no way to rebut a presumption of illegality in practice<sup>70,71</sup>.”

Another reason why IE should not be automatically treated as a cartel is that IE “may have little value in facilitating coordination unless the information is verifiable. Information which

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67 Richard A. Posner, Information and Antitrust: Reflections on the Gypsum and Engineers Decisions, 67 GEO. L.J. 1187, 1188 (1979). Appears on Rosch, Thomas. Antitrust Issues Related to Benchmarking and Other Information Exchanges. ABA Section of Antitrust Law and ABA Center for Continuing Legal Education’s Teleseminar on Benchmarking and Other Information Exchanges Among Competitors. May 3, 2011.p.5. )

68 Ibid.p.5.

69 Ibid.p.6.

70 This is all the truer in the case of the EU where meeting the threshold of 101(3) TFEU in practice is very hard.

71 OECD (n 4) .p.444.

is not verifiable can be dismissed as “cheap talk”<sup>72</sup> and therefore disregarded”<sup>73</sup>. Nevertheless, “cheap talk” should not be rejected if it is part of a long term commercial relationships<sup>74</sup> since it might “be enough to create credibility”<sup>75</sup>.

In my opinion treating pure IE as a cartel offense based solely on the type of information shared, could be problematic, in particular for the implications it creates for the parties involved in the exchange. A preferable approach is to assess the effects of pure IE focusing on “whether or not the element of uncertainty and secrecy between competitors has been eliminated”<sup>76</sup>. Such an approach requires analyzing the “nature and type of the information exchanged, as well on the structure of the relevant market”<sup>77</sup> as was done in the Wood Pulp case<sup>78</sup>.

In the Wood Pulp Case, the Commission had fined the Pulp Producers for a concerted practice that fixed prices, here the parties had exchanged individualized price data<sup>79</sup>. They IE concerned

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72 “such as announcing a future price increase but leaving open the option to rescind or revise it before it took effect.” OECD (n 4) .p.34

73 Ibid.p.34.

74 OECD (n 4) .p.34. See also Bennett M and Collins P, “The Law and Economics of Information Sharing: The Good, the Bad and the Ugly” (2010) 6 European Competition Journal 311 . p.324. who sustain that “communications between firms may have little value in facilitating coordination unless the information is verifiable. However, there is also evidence that personal friendship and trust play important roles in sustaining collusion (...)thus overcoming the problems of trust. For this reason, even “cheap talk” may pose a danger to reaching and sustaining coordination.”

75 OECD (n 4) .p.34.

76 Jephcott M, Horizontal agreements and EU competition law: EU competition law library (Oxford University Press 2005).p.60.

77 Ibid. 2005.p.60.

78 Joined Cases C-89, 104, 114, 116-117, 125-129/85, Re Woodpulp Cartel: A Åhlström Osakeyhtiö and others Commission [1993] ECR I-307

79 Motta M, Competition policy: Theory and practice (Cambridge University Press 2004).p.213.



“individual prices and capacities, agreed on a selling price, and committed to justify divergences between the commonly agreed prices and the prices they effectively charged.” The ECJ reversed the Commission decision after examining that the “nature of the products, the size and the number of undertakings and the volume of the market in question”<sup>80</sup> provide an explanation why the parties acted the way they have done so. Moreover, in the Woodpulp we see that the fact that parties are involved in IE might not be enough to “furnish proof of explicit collusion (...) if the behavior can be explained by the conditions of competition on the market.” The relevant part of the case is not the outcome; is how the ECJ arrived at its conclusion. It did a comprehensive analysis of the market, the type or characteristics of the market, the competitors, the customers, among other elements, before concluding that a concerted practice was not the only explanation for the parties’ behavior.

The Dyestuffs case<sup>81</sup> is another example where the ECJ did not treat IE between the parties as it did in the T-Mobile and Bananas cases, despite condemning the parties for a similar practice to the one in the Bananas case. In Dyestuffs the parties met up and exchanged information on what their prices would be in advanced (i.e., analogous to the pre-pricing communications in the Bananas Case), and afterward, they set up their prices accordingly by IE. Thus, the ECJ concluded that collusion through the exchanges was the only plausible explanation for parallelism in their prices<sup>82</sup>. However, the important factor here as in the other case is not the result, but the analysis that was done, that seems more appropriate for standalone IE.

Arguably, the major difficulty with the current approach as illustrated by the Bananas Case are the consequences of labeling

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80 Jones, A. (n21) p.64.

81 Case 48/69 ICI v Commission [1972] ECR 619.

82 Motta (n 81).p.188.; and Jones (n22). p.62.

IE as an object restriction, because it considered and fined as a price fixing cartel. Lamadrid argues persuasively that “even if the object categorization were correct, this should only entail a procedural consequence: that the Commission would be dispensed of the burden of proving effects”<sup>83</sup> because the IE of future pricing intentions does not seem to pursued any “legitimate objective.” However, to go from there to “the automatic identification of “object restriction” with “very serious infringement” and even with a “cartel””<sup>84</sup>. “A cartel is something else and is subject to a whole different level of reproach (even criminal in some jurisdictions); (...) a cartel does have effects”<sup>85</sup>. So, even if the IE “may be a restriction by object, (..)t it certainly is not a cartel deserving a quasi-criminal fine. It is a venial sin, not a mortal one. Holding the contrary is not only at odds with traditional (pre-T Mobile) case law, it also is at odds with economic reality and with the principles underlying any sanctioning regime”<sup>86</sup>.

Nevertheless, based on the current case law, the economic theory it seems safe to say that (i)the infringement by object should be reserved only for private IE about future prices and perhaps quantities. I do not think that we should go from that to sanctioning and fining the IE as a cartel or hard core cartel unless there is something else present. (ii) The rest of IE (not future prices or quantities) should not be treated as an infringement by object and need an effect revision or a much more in depth object analysis as was mentioned before.

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83 Lamadrid.A Bananas – Case C-286/13 P, Dole v Commission. Chilling Competition. Available at: <https://chillingcompetition.com/2015/04/28/bananas-case-c-28613-p-dole-v-commission/>. Last accessed December 30, 2106.

84 Ibid.

85 Ibid.

86 Ibid.

*c. Distinction private and public exchanges*

CA tend to view with better eyes public IE because they “lead to market transparency for the benefit of all market players, including consumers (...) that (...) intensifies competition<sup>87</sup>, while private transparency is likely to restrict it<sup>88</sup>. However, the Commission in its Horizontal Guidelines does not distinguish between the private announcement of future prices or quantities and public announcements of future prices or quantities<sup>89</sup> saying only that they are a restriction by object.

The Guidelines should be clarified on this point, because as Massimo Motta mentions IE on future prices and quantities cannot always be the same “One should distinguish (...) whether the announcements are (1) “*private*” announcements directed only to competitors (...) or (2) “*public*” announcements with commitment value to consumers”<sup>90</sup>.

Private announcements intended only for the competitors are hard to imagine any efficiency (...) behind such announcements. Most likely, they just help rivals to coordinate on a (...) collusive price, (...) avoiding costly periods of price wars and price instability. *Advance notice* of intended price changes, as long as it does not fully commit the firm to the price announced, might also be a tool to avoid costly experimentation with the market”. As such it is crucial that the public IE be done in such a way that does not allow competitors to wait and see. As it happened in the Airline

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87 Empirical evidences show that positive effects for “consumers of public announcements outweigh the possible collusive effects from the transparency they generate” OECD (n 4) .p.34.

88 Ibid.p.33.

89 “Information exchanges between competitors of individualized data regarding intended future prices or quantities should therefore be considered a restriction of competition by object”. Horizontal Guidelines. Para.74.

90 Motta (n 81).p.153.

Tariff Publishers (ATP) case where the DOJ<sup>91</sup> reach an agreement with the major airlines where they discontinue the use of a system that allowed Airlines to post an intended price for a route in a way that allows all other Airlines to see, and other Airline matched the price, the price became final, if they did not they would continue to adjust the price again and again until they both agree on the price<sup>92</sup>, “but without consumers ever having the possibility to buy tickets at the announced future fares”<sup>93</sup>. This case illustrates perfectly that the problem is not IE about future price intention, the problem is that the disclosure is made only in private, not in public, allowing the parties involved to coordinate the price.

The exact opposite happens when the future price is publicly announced and is known by the other companies and consumers. It has “commitment value for the undertaking making the announcement; the prices are “transparent” for both consumers and firms, this should not be considered as an anti-competitive practice.” Nonetheless, there could be “instances where the prices are made public mainly to increase transparency among rival firms, rather than to the benefit of customers.” An example of this is where the IE is an advance price notice well in advance of what it is technically needed or the industry does not need such information because it is not how it operates.

Summing up private IE of future prices could be forbidden since they are unlikely to be procompetitive, but public announcements warrant an effect analysis due to their potential procompetitive effect<sup>94</sup>. Unfortunately, the Horizontal Guidelines do not make this distinction treating all IE of future pricing as a res-

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91 The US Department of Justice.

92 Motta (n 81).p.154.

93 Ibid.p.154. For a similar analysis see Bennett M and Collins P, (n 85). p.333-334..

94 Ibid.p.155.

triction by object<sup>95</sup>. Bennett and Collins argue that the lack of distinction risks eliminating public announcements a widespread practice that can, in fact, be beneficial<sup>96</sup> to customers<sup>97</sup>.

Therefore, Bennett and Collins suggest “to delineate infringements by object and effect on the basis of whether the information is provided in private or in public—that is, freely available to everyone at no cost(...) [If IE of] future intentions, is made in private it should be considered as an object infringement. When [the IE of] (...) future intentions, is made in public, it should be considered an effect infringement. (...) [P]roviding a clear bright line between object and effect infringements that may reduce legal uncertainty”<sup>98</sup>.

#### IV. CONCLUSIONS

It seems clear from the Case Law of European Courts and the Commission practice that private IE about future prices would be a concerted practice that restricts competition by object, and what it is perhaps more troublesome is that they are going to be sanctioned as a price fixing cartel. As has been argued throughout this paper treating IE as a cartel is not the best way to assess IE as a stand-alone practice (even if they are future prices are exchanged in private), an approach like the one adopted by the ECJ in the Wood Pulp case seems to be preferable.

Nonetheless, that does not seem realistic considering that European Courts “have (...)a marked preference for the stability of

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95 Reference to the public or private nature of the IE is only made on para.76 of the Guidelines that deals with the analysis of IE under the effects label.

96 Possible benefits of public announcements of future prices can be that it allows “customers (...) to stockpile quantities or defer purchases before changes in prices”. Bennett M and Collins P, (n85). p.334.

97 Ibid. p.334.

98 Ibid. p.334.

the law. (...) they have an inclination to follow precedents, in this and other areas of EU law. (...) Because of their preference for caution, the EU courts are only willing to openly depart from a precedent when the reasons to do so are truly compelling. (...) The EU courts may review their approach long after a consensus has developed around a particular question, and building on the existing case law, instead of departing radically from it”<sup>99</sup>.

Thus, it seems more practical to reconcile and harmonize the current approach by proposing that:

- 1) The object label and consequently cartel label should be reserved only for IE between competitors where they discussed future prices in private which are not made available to their customers, which arguably are not going to be pro-competitive in most cases. Such an approach would reconcile the T-Mobile and Bananas decision with the approach followed in the Wood Pulp Case, the Commission guidelines on Horizontal Agreements of the Commission.
- 2) Alternatively, or Complementary the object label needs to consider the economic and legal context of which the IE takes place, to see if the IE has a legitimate objective,<sup>100</sup> as it would be the IE of future prices done in public. Most importantly the consequence of finding a restriction by object should only be procedural; the Commission does not need to prove the effects of the practice, without equating the IE automatically with a cartel, unless other elements are presents. As arguably was the case in the Bananas and T-Mobile decision previously mentioned.
- 3) Other IE needs to be asses under the effects umbrella to see if it restricts competition or not.

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99 Ibáñez Colomo, Pablo and Lamadrid, Alfonso ( n 34).p.19.

100 Ibid.p.44.

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