

THE ASSESSMENT OF INFORMATION EXCHANGE AGREEMENTS BETWEEN COMPETITORS FROM THE PERSPECTIVE OF COMPETITION LAW OF THE EU AND OF THE REPUBLIC OF LITHUANIA

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“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices” (A.Smith, 1776).

Abstract. *The article analyses information exchange agreements between competitors. The article aims to reveal the cases where the exchange of information between competitors might be considered as a prohibited agreement, violating Article 101 of the Treaty on the Functioning of the European Union or Article 5 of the Law of the Republic of Lithuania on Competition. The article analyses the legal nature of the information exchange agreements between competitors, with utmost regard to the criteria, according to which an agreement on the exchange of information could be acknowledged as prohibited or violating the rules of competition law. In the article it is presumed that information exchange agreements do not aim at restricting competition, however in certain cases they might have the effect of restriction of competition.*

Keywords: *information exchange, tacit collusion, competition restriction by object, anticompetitive effect.*

Introduction

Exchange of information concerning the market where undertakings are operating is considered as normal commercial practice. Without such information, undertakings would be “blind” in the market, would not have the necessary understanding as regards the laws and conditions of the market operation and would not be able to properly react to the changes of its conditions. Hence, the possession of information concerning the market and its shares could assure undertakings’ successful operation in the market and encourage their inter-competition. However, in certain cases exchange of information might be used as an anticompetitive means, for making a cartel agreement, monitoring it and sanctioning the undertakings that deviate from the conditions of the cartel. It is obvious that in such cases exchange of information could have a negative effect on competition and should be prohibited. In this article, the author concentrates on the dissociation of permissible and prohibited exchange of information between competitors.

The topicality of the theme chosen by the author is conditioned by several factors. First of all, the benefit of the information exchange is increasingly acknowledged and the undertakings are exchanging different information more often, as a result of that, the number of cases, where it has to be assessed whether such exchange is in accordance with the laws of competition, is increasing. Also the Competition Council of the Republic of Lithuania (hereinafter – the Competition Council) is examining such agreements increasingly. Second, in the beginning of 2011 the European Union (EU) Commission (hereinafter – the Commission) adopted the guidelines on horizontal cooperation agreements, quite a considerable part of which is dedicated to information exchange agreements and which introduce a reasoned position on the legal nature of such agreements, generalised by the legal practice of the EU courts and of the Commission. Third, the legal practice of the EU courts and the Commission on the assessment of information exchange agreements is not consecutive and clear enough to make certain conclusions as regards the assessment of agreements of this kind. For all the reasons introduced above the author showed interest in the theme of this article and, having in mind its topicality, chose it as the subject-matter of his research.

It has to be noted that several EU scholars have dedicated their works to the legal analysis of the information exchange agreements – A. Capobianco¹, F. Wagner-von Papp², H.-J. Niemeyer³, E. F. Bissocoli⁴, C. Osti,⁵ and others. However, none of the above authors provided a thorough analysis of information exchange and in none of the works the new guidelines of the Commission on the legal analysis of the information exchange agreements were sifted. There is no thorough research on the assessment

1 Capobianco, A. Information Exchange under EC Competition Law. *C.M.L.R.* 2004, 41: 1247–1276.

2 Wagner-von Papp, F. “Who is that can inform me?” – the exchange of identifying and non-identifying information. *E.C.L.R.* 2007, 28(4): 264–270.

3 Niemeyer, H.-J. Market information systems. *E.C.L.R.* 1993, 14(4): 151–156.

4 Bissocoli, E. Trade Associations and Information Exchange under US and EC Competition Law. *World Competition.* 2000, 23(1): 79–106.

5 Osti, C. Information exchanges in the obscure light of Woodpulp. *E.C.L.R.* 1994, 15(3): 176–182.

of information exchange in Lithuanian legal doctrine as well. Thus, in author's view this work might be notably valuable not only for the Lithuanian but also for the EU competition law studies and beneficial for lawyers-practitioners, as well as competition enforcement authorities in the assessment of information exchange in practice.

The aim of this article is to research how the agreements on information exchange are and should be qualified in the EU and Lithuanian competition law, to establish the criteria (factors) important for the legal assessment of such agreements, whether any information exchange agreements exist, which by their object restrict competition and the effect of which need not be proved, etc. Thus, the subject matter of the research of this article is the assessment of information exchange agreements between competitors in the EU and Lithuanian competition law and its practical application. In order to reach the goal of this article, the legal practice of the EU courts and the Commission was analysed, also the actual legal practice of the Competition Council and Lithuanian courts was critically assessed; the Commission's explanatory documents regulating the information exchange agreements and laying down the guidelines for their legal assessment were analysed. The subject-matter of the research of this article was analysed using different scientific methods, e.g. systemic analytical, historic, linguistic and comparative methods.

1. The Legal Nature of the Information Exchange Agreements Between Competitors

For quite a while, regulation of information exchange agreements between competitors was not clearly defined in the EU competition law. In Article 101(1) of the Treaty on the Functioning of the European Union⁶ (hereinafter – the Treaty), which prohibits 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 there is no prohibition *expressis verbis* to enter into information exchange agreements. No such agreements are also mentioned in the indicative list of prohibited (incompatible with the internal market) agreements. Hence, the current regulation of information exchange agreements is developed in the legal practice of the Commission and the European courts concerning the application and interpretation of Article 101 of the Treaty.

Article 5 of the Law of the Republic of Lithuania on Competition⁷ (hereinafter – the Law on Competition) is virtually identical to Article 101 of the Treaty, therefore while analysing the information exchange agreements not affecting trade between Member States and applying Article 5 of the Law on Competition to such agreements, the relevant legal practice of the Commission and the EU courts, developed with regard

6 Treaty on the Functioning of the European Union. Consolidated version [2010] OJ C 83/47.

7 Law of the Republic of Lithuania on Competition. *Official Gazette*. 1999, No. 30-856.

to the legal assessment of such agreements, and the explanatory documents adopted by the Commission could be followed.

In its several documents the Commission sought to introduce guidelines as regards the legal assessment of such agreements. The first document of this kind was Commission's notice on cooperation agreements of 1968⁸. In that notice, the Commission explained that exchange of information between competitors could in certain cases violate Article 101 of the Treaty, however in each case it was necessary to assess the structure and other qualities of the market, to analyse other important factors of the case under consideration. For instance, if after its exchange the information is used with the purpose to restrict the possibility of undertakings operating in the market to freely operate in the market and the information is exchanged in order to coordinate the actions of undertakings, then it is likely that such exchange will be considered as restricting competition.

In Commission's VII Report on competition policy of 1977⁹ the Commission dedicated a separate part to the information exchange agreements. The report states that exchange of information is not a restriction of competition *per se*, therefore it is necessary to assess the effect of such agreement on competition in a relevant market. While assessing such effect it is necessary to consider, first of all, the market structure (the transparency of the market, which is increased by the exchange of information, usually decreases the market participants' incentives to compete, if such exchange is taking place in oligopoly, concentrated markets), second, the nature and the scope of exchanged information (the more detailed, individualised information is, the more it is normally hidden from the competitors, the more it is likely that the exchange of such information will have a negative effect on the competition), third, other conditions of information exchange (e.g. the publicity or confidentiality of the exchange, etc.).

Commission's guidelines on the applicability of Article 81 of the EC treaty to horizontal co-operation agreements of 2001¹⁰ replaced the Commission's notice on cooperation agreements of 1968. No separate part of the guidelines is dedicated to the information exchange agreements. In paragraph 10 of the guidelines, the Commission clearly states that the guidelines do not regulate the above agreements and that certain types of horizontal agreements between the competitors, e.g. concerning the exchange of information, are analysed separately. However, while analysing separate horizontal cooperation agreements, the Commission nonetheless mentioned the information exchange agreements in the guidelines. For instance, it noted that commercialisation arrangements that fall short of joint selling raise two major concerns, one of which is "a clear opportunity for exchanges of sensitive commercial information particularly on marketing strategy and pricing" (paragraph 146). Paragraph 150 of the guidelines states that the more concentrated the market the more useful information about prices or

8 Notice on Cooperation Agreements [1968] OJ C 75/3.

9 VIIth Report on competition policy [interactive]. [accessed 26-08-2011]. <http://ec.europa.eu/competition/publications/annual_report/ar_1977_en.pdf>.

10 Commission's Guidelines on the applicability of Article 81 to horizontal cooperation agreements [2001] OJ C3/2.

marketing strategy to reduce uncertainty and the greater the incentive for the parties to exchange such information.

Finally, having reviewed its 2001 guidelines after 10 years, the Commission kept its promise and discussed separately and quite thoroughly the information exchange agreements in its Communication¹¹ (hereinafter – the Communication), by dedicating paragraphs 55-110 of the Communication to such agreements. It could be summed up that the rules of this Communication, dedicated to the information exchange agreements, are the most thorough study of the Commission of all times, which not only generalises the legal practice of the Commission and the EU courts, but also provides critical view of the Commission and examples of analysis of separate cases. The relevant rules of the Communication will be analysed below in more detail, when considering the specific aspects of information exchange agreements.

Having analysed the topical legal practice and documents adopted by the Commission, it could be stressed that usually the information exchange agreements between competitors were considered by the Commission as falling within the scope of Article 101 of the Treaty and as often as not were estimated to be prohibited. Nonetheless, it has to be noted that information exchange agreements could be considered as an individual violation of competition law rules as well as a part of other violation – the respective agreement (e.g. cartel) between competitors. In cases where exchange of information is a part of another agreement between the competitors, it has to be evaluated together with the respective agreement between the competitors¹². This article concentrates on the analysis of exchange of information between competitors that could be qualified as an individual violation of competition law.

2. The Assessment of Information Exchange Agreements Between Competitors in Competition Law of the EU and of the Republic of Lithuania

2.1. Assessment in Accordance with Article 101(1) of the Treaty and Article 5 of the Law on Competition

As mentioned above, in the notice of 1968 the Commission stated that information exchange agreements could fall within the scope of Article 101 of the Treaty. In Article 101(1) of the Treaty it is declared that 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 are prohibited as

11 Communication from the 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 C 11/01.

12 Case T-1/89 *Rhone-Poulenc* [1991] ECR II-867.

incompatible with the internal market. Article 101 of the Treaty may be applied to agreements, including information exchange agreements, which satisfy four conditions: the condition of “agreement” between undertakings, the condition of competition restriction, the condition of significant influence on competition (and trade) and the condition of influence on trade. In order to apply Article 5 of the Law on Competition, the agreement has to satisfy the analogous conditions except for the latter – the influence on trade. Further, the introduced conditions shall be analysed, with the exception of the condition of influence on trade, which is of jurisdictional nature and which demarcates the application of the EU and national law.

It has to be noted that Article 5 of the Law on Competition sets analogous regulation on prohibited agreements as Article 101 of the Treaty and the aim of the Law on Competition is to harmonise the national law of Lithuania with the EU law. In addition, it has to be stressed that in cases concerning information exchange the Competition Council and the Lithuanian courts widely refer to the practice of the Commission, the General Court and the Court of Justice of the European Union (hereinafter – the CJEU). For the reasons stated above, the article analyses the practice of the Commission and the EU courts in greater detail, however the practice of the Competition Council and the Lithuanian administrative courts is also critically assessed.

2.1.1. Condition: Agreement Between Undertakings

This condition is necessary in order to identify violation of Article 101 of the Treaty or Article 5 of the Law on Competition. If competitors are exchanging information without entering into an agreement within the meaning of Article 101 of the Treaty/ Article 5 of the Law on Competition (i.e. in the form of an agreement, a concerted practice¹³ or a decision by an association of undertakings), then the respective article cannot be applied. This is also confirmed in the Communication from the Commission: “Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings” (Paragraph 60).

For example, if confidential information of competitors becomes available to undertakings not directly from them, but e.g. from the media, other third parties, then it should not be considered an agreement. Or e.g. if a third party (market research agency) individually gathers, systemises and provides information to its clients, even if such information is obtained from competing undertakings, then such receipt of information should not be considered as an agreement concerning the exchange of information, despite the fact that competitors receive information about each other¹⁴. It is thought that in order for such unilateral receipt of information from third parties could not be

13 A concerted practice is a form of cooperation between undertakings when undertakings have not entered into a direct agreement, however they harmonise their actions in the market, providing the possibility to each other to be aware of the future plans or position concerning a specific issue of another undertaking, consequently eliminating the uncertainty one towards the other in the market.

14 Whish, R. *Competition law*. Sixth Edition. London: LexisNexis, 2009, p. 530.

considered an agreement it has to take place without the knowledge of the competitor, because, e.g. if a third party notifies the competitor of the fact that the data provided by him would be communicated to another competitor and the former does not object to that, it is considered that in such case the reason for stating that an agreement was made emerges. Moreover, the undertaking that received information from a third party should be aware of the fact that this information has been obtained from a competitor, i.e. both competitors have to comprehend that they are exchanging information via the mediator – a third party, otherwise the main feature of the agreement – concurrence of wills – would not exist. It has to be admitted that actually the dissociation of unilateral actions and agreements is very complicated in this case. The explanations of the Commission in the Communication do not bring more clarity either. For instance, in the Communication the Commission states that a form of a concerted practice by agreement could be constituted by such situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it (paragraph 62). Such disclosure could occur, e.g. via mail, e-mails, phone calls, meetings, etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour. The Commission even states fearlessly that a mere attendance at a meeting where a company discloses its pricing plans to its competitors is likely to be considered as an agreement concerning exchange of information, even in the absence of an explicit agreement to raise prices. When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly, unless it responds with a clear statement that it does not wish to receive such data. Consequently, if one competitor publicly declares certain information, which cannot be exchanged and which will reach the other competitor, the fact of the agreement could be stated unless the competitor that received the information clearly expresses his wish not to receive such information. For example, if an employee of one company sends an e-mail with the sales volumes of the company and an employee of another company receiving this e-mail does not react to it in any way (e.g. because he thinks that this information is not important) and does not reply that he is not wishing to receive such information, then, following the logic of the Commission, it could be stated that an information exchange agreement was concluded. Such conclusion would be quite ludicrous, since, in our opinion, in this situation the act on the concurrence of wills is clearly missing.

One of the rare occasions when information was declared publicly and the fact of the agreement was not stated was analysed in the *Wool Pulp* case¹⁵ (hereinafter –

15 Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 *Ahlström Osakeyhtiö and Others v. Commission* [1993] ECR I-1307.

the Wood Pulp case). Undertakings publicly declared the raise of prices, information spread very quickly among the traders and buyers through the local media and there was no agreement between the competitors declared. Actually in its reasoning given in the Communication the Commission states that the possibility of finding a concerted practice cannot be excluded, for example in a situation where a unilateral and public announcement of a company (which is also in, e.g. a newspaper) was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements could prove to be a strategy for reaching a common understanding about the terms of coordination.

It is not clear how the Commission assessed the situation when one company announced information on its website concerning, e.g. the prices of its services that would become effective in one month, while after viewing this notice the competitor would announce, e.g. a fall in prices for a certain period. Is there really an agreement between competitors concerning the exchange of information in such case? Isn't it a mere example of parallel behaviour? Is the concurrence of wills only derived from the fact that while announcing its prices, the first subject has to realise that his competitors will most likely notice the information announced by him and will react accordingly? Is the fact that a subject that announced the information is making checks on the analogous information announced on the websites of his competitors important for the assessment? From the explanations of the Communication from the Commission one thing is obvious – the Commission will need quite a bit in order to suspect agreements concerning information exchange in cases where the information of one competitor reaches another competitor and the latter does not declare that he did not wish to receive the information and will not wish to receive it in the future.

It is thought that the agreement could only be identified in cases where an association, while intermediating for its members, gathers confidential information from them and enables the members' access to it or itself distributes the data for the members of the association. Hence, if that third party, through which the information is exchanged, is an association of undertakings then the agreement would most probably evidence in a form of decision by an association of undertakings, however it could also be declared as a contract. Obviously, the form of an agreement – concerted practice, contract or decision of an association would not have decisive significance in this case. According to the Commission, a situation when a trade association of coach companies X disseminates individualised information on intended future prices only to the member coach companies will be considered as information exchange, which restricts competition by its object and the Commission does not even identify if this is an agreement or a decision by the association (paragraph 105 of the Communication).

2.1.2. Condition: Restriction of Competition and Its Application Criteria

In accordance with Article 101 of the Treaty and Article 5 of the Law on Competition, all agreements which prevent, restrict or distort competition, and which have as their *object or effect* on competition thereof are declared as being prohibited.

This requirement is alternative: if the object of agreement is proven, there is no need to analyse the economic context of the agreement and establish its negative effect on competition¹⁶.

Restriction of competition by object and by effect. Agreements having object of restriction of competition are agreements the harmful effect on competition of which is obvious and has been repeatedly confirmed in practice, therefore they are prohibited *per se* without requiring to prove their anticompetitive effect on competition. While deciding whether the agreement has the object of restriction of competition, “the agreement as drafted, regard being had to its terms, to the legal and economic context in which it was concluded and to the conduct of the parties”¹⁷, shall be taken into account. The object of restriction of competition means that the parties cannot argue the fact that such an agreement restricts competition - such effect to competition has already been legally proven in practice and restricts competition by its own nature, however the parties may prove that the agreement satisfies the conditions of Article 101(3)¹⁸.

While establishing the effect of the agreement on competition, it is necessary to take into consideration the following factors: real conditions of conclusion and implementation of the agreement, especially economic context of the behaviour of the parties to the agreement, the nature of the goods or services concerned and actual structure of the market concerned¹⁹.

The negative effect on competition by information exchange between competitors may take various forms: exchange of information may reduce strategic uncertainty on the market, better conditions for collusion may be created, data exchange may also reduce independency of competitors’ behaviour, their incentives to compete, etc. The Commission identifies the following competition concerns that may be raised by competitors’ information exchange:

By information exchange, undertakings may create better conditions for tacit collusion on the market (e.g. on raising prices) and its monitoring. Information exchange allows undertakings reducing their uncertainty regarding the behaviour of their competitors and helps concerting this behaviour. Information exchange also allows monitoring the performance of tacit collusion already concluded, i.e. to control if the undertakings adhere to it and observe its conditions. If exchange of information is used as a means of monitoring behaviour of the parties to the tacit collusion, the Commission calls it “increasing the internal stability of a collusive outcome on the market” (Paragraph 67 of the Communication). The Commission also notes that information exchange may help increasing the external stability of a collusive outcome on the market, i.e. allows colluding companies to monitor where and when other companies are attempting to enter the market and react into such an attempt of the new entrant (paragraph 68 of the

16 Case 56/65 *Societe La Technique Miniere v. Maschinenbau Ulm* [1966] ECR 235.

17 Joined cases 96-102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and others v. Commission* [1983] ECR 03369.

18 Whish, R., *supra* note 14, p. 117.

19 Case T-374/94 *European Night Services v. Commission* [1998] ECR II-3141.

Communication). Therefore, information exchange may be a certain barrier of entry into the market, determining the foreclosure of the market for new entrants.

Exchange of confidential information may place unaffiliated competitors at a significant competitive disadvantage as compared to the companies affiliated within the exchange system. Unaffiliated undertakings, not possessing important strategic information about the market, may face difficulties while orienting in the market and reacting to its changes. This type of foreclosure is only possible if the information concerned is very strategic for competition and covers a significant part of the relevant market (paragraph 70).

Very similar competition concerns were expressed by the Commission and the EU courts in *UK Agricultural Tractor Registration Exchange* case²⁰ (hereinafter – the *Tractor* case).

Almost analogical competition concerns regarding exchange of confidential information were emphasised in the decisions of the Competition Council. For instance, in the “paper case”²¹ (hereinafter – “the paper case”) it noted that exchange of confidential information could have twofold consequences: 1) reduction of incentives to compete and 2) increase in barriers of entry into the markets.

The Commission practice and the EU case-law is not consistent with regard to the assessment of information exchange agreements as having either their object or effect of restriction of competition.

In one of its first information exchange cases – *Fatty Acids* case²² the Commission stated that the agreement had both – an object and effect – of restriction of competition. It is obvious that such assessment did not provide the answer to which kind of agreements information exchange agreements should be attributed. In *Tractor* case, the Commission acknowledged that an information exchange agreement had anticompetitive effect, since it removed uncertainty and short-term competition on the market, and the CJEU²³ confirmed that both the Commission and the General Court²⁴ reasonably assessed the effect and not the object of the information exchange agreement.

In *Plasterboard* case²⁵ the Commission found that the information exchange agreement had the object of restriction of competition: “An information exchange constitutes *per se* an infringement of Article 81(1) of the Treaty if the requirement of independence according to which each trader must determine independently his conduct on the market is undermined as a result.”²⁶ It should be mentioned that in this case the Commission too broadly and wrongly defined the concept of “*per se*” infringement – it

20 *UK Agricultural Tractor Registration Exchange* [1992] OJ L 68/19.

21 Resolution No. 2S-13 of the Competition Council of the Republic of Lithuania of 26 October 2006 “On the conformity of actions of undertakings involved in paper trade with the requirements of Article 5 of the Law of the Republic of Lithuania on Competition and Article 81 of the Treaty establishing the European Community”.

22 *Fatty Acids* [1987] OJ L3/17, para 33.

23 Case C-7/95 P *John Deere Ltd v. Commission of the European Communities* [1998] ECR I-03111.

24 Case T-35/92 *John Deere v. Commission of the European Communities* [1994] ECR II-957.

25 *Plasterboard* [2005] OJ L 166/8, para 449.

26 *Ibid.*, para 449.

considered information exchange agreements as being prohibited *per se*, i.e. infringing all the requirements of Article 101(1), but not restricting competition *per se*. However, it shall be emphasised that a concept of “*per se* infringement of Article 101(1)” does not exist in the EU competition law.

It is worth mentioning that some legal clarity on *per se* issue is provided in the Communication of the Commission, where it clearly admits that information exchange agreements may be of two types – having their object and having their effect of restriction of competition.

The Commission noted that information exchanges between competitors on their individualised intentions regarding future prices or quantities would normally be considered a restriction of competition by object and as cartels because they generally have the object of fixing prices or quantities and because it is likely that informing each other about their intentions may allow competitors arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices. Moreover, they are very unlikely to fulfil the conditions of Article 101(3) (paragraphs 73-74 of the Communication).

Such a categorical approach of the Commission towards certain types of information exchange agreements seems rather negotiable and not well founded. The Commission was criticised for this approach by the commentators of the draft Communication, however it have not refused the idea to identify in the Communication the information exchange agreements as restricting competition by object. In the author’s opinion, it is very unlikely that information exchange agreements can restrict competition by object. First, restriction of competition by object may be established only in cases where their anticompetitive effect was obviously proved by the EU competition authorities in practice. In the author’s view, the current practice of the EU competition authorities does not allow stating that information exchange between competitors on their individualised intentions regarding future prices or sale/production quantities was acknowledged as practice constantly *per se* restricting competition²⁷. For the same reason, and also due to the different effect on competition and consumers, information exchange cannot be compared to fixing prices. Moreover, in case *T-Mobile*²⁸ the CJEU clearly held that restriction by object may only be established if an agreement has “a potential to have a negative impact on competition”. Secondly, as it will be revealed below, there are many criteria determining the unlawfulness of information exchange – structure of the market, characteristics of information and specifics of exchange, etc., therefore it is not correct to refer to the only criterion for presumption of unlawfulness of information exchange. In the author’s view, it follows that the Commission was soundly suggested to “remit” its categorical presumption, e.g. by indicating that exchange of certain information “generally” or “usually” will be considered as having restrictive object²⁹.

27 See, e.g. Van Bael & Bellis commentary regarding draft Communication [interactive]. [accessed 26-08-2011]. <http://ec.europa.eu/competition/consultations/2010_horizontals/vanbaelbellis_en.pdf>, III part.

28 Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, para 31.

29 European Competition Lawyers Forum (ECLF) commentary regarding draft Communication [interactive]. [accessed 26-08-2011]. <http://ec.europa.eu/competition/consultations/2010_horizontals/eclf_en.pdf>.

On the other hand, if certain actions cause competition restriction by object, their effect shall be established always, not usually. For that reason, it is expedient to refuse the idea that certain information exchange agreements restrict competition by object and while assessing their lawfulness only consider the effect on competition.

It shall be mentioned that Article 5(2) of the Law on Competition clearly states that agreements *per se* restricting competition and information exchange agreements are not included in the list, therefore, it may be stated that notwithstanding the Commission's position in the Communication, under national law there should not be any information exchange agreements that could be considered as having an object of restriction of competition.

While assessing the *effect on competition* of information exchange agreements, the potential effect of information exchange and competitive situation, which would be present in the absence of information exchange, shall be compared. Such effect on market may occur variously: as increase in transparency in the market, reduction of market complexity, buffering of instability or compensation for asymmetry, etc. (see paragraph 76 of the Communication and paragraph 2.1.2.1) and thus favourable conditions for cartel agreement (collusive outcome) may be created. In the Communication the Commission states that in order for information exchange to have restrictive effects on competition, it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition, such as price, output, product quality, product variety or innovation (paragraph 75).

The effect of an information exchange agreement shall be established on the basis of several criteria. In *Asnef-Equifax v. Ausbanc*³⁰ the CJEU stated that the compatibility of information exchange system with competition rules cannot be assessed in the abstract – such assessment usually depends on “the economic conditions on 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” (point 54 of the judgment). In its Communication, the Commission referred to analogous criteria for establishment of effect on competition (paragraphs 75-76).

2.1.2.1. Market Structure Criterion

In *Tractor* case the Commission negatively assessed the information exchange agreement, especially by emphasising the specifics of the market structure where exchange took place, i.e. the fact that the agreement was concluded in oligopolistic market in Great Britain: the largest undertakings on the market held about 80 % of the market share, and the market power on certain specific geographical markets was even

I(A), paras 6-7; Linklaters commentary regarding draft Communication [interactive]. [accessed 23-08-2011]. <http://ec.europa.eu/competition/consultations/2010_horizontals/linklaters_en.pdf>, para 4.1.

30 Case C-238/05 *Asnef-Equifax v. Ausbanc* [2006] ECR I-11125.

stronger, barriers for entry were high, the market was static or even declining, the buyers were loyal to well-known brands and the import was not intensive. In the same *Tractor* case, in its judgment (paragraph 51), which was also supported by the CJEU, the General Court stressed the importance of the due assessment of market structure criterion by stating that “[...] on a highly concentrated oligopolistic market such as the market in question and on which competition is as a result already greatly reduced and exchange of information facilitated, likely to impair substantially the competition which exists between traders”.³¹ In its decision in case *Wirtschaftsvereinigung Stahl*³² (hereinafter – *Stahl* case) the Commission in particular emphasised concentration of the market and high barriers of entry. However, in *Eudim* case³³ prohibited agreement between wholesalers of plumbing, heating and sanitary materials had not been established since the relevant market, where undertakings operated, was quite competitive, fragmented, non-oligopolistic, and undertakings concerned held very small market share, therefore the Commission did not see significant danger to competition. Thus, it may be concluded that evaluation of market structure is one of the core criteria allowing the assessment whether information exchange may harm competition on the relevant market.

Hence, if the market is oligopolistic and products are homogeneous, it is very likely that an information exchange agreement can restrict competition and infringe Article 101(1) of the Treaty. The more concentrated the market, the bigger opportunity that competition can be distorted or restricted and on the contrary the more fragmented the market, the more differentiated the products, the more difficult and expensive the coordination of prices and observation of behaviour³⁴.

Therefore, while assessing whether favourable conditions exist on the market for information exchange and if such exchange can have effect on competition, it is important to assess several economic conditions of the relevant market. Referring to the relevant case-law, the Commission reasonably states in the Communication (paragraphs 77-85) that undertakings are more likely to achieve a collusive outcome in markets, which are sufficiently transparent, concentrated, non-complex, stable and symmetric. Markets with such characteristics create conditions for undertakings to make tacit collusions, successfully monitor deviations and punish for them. Under such conditions, the competitive outcome of information exchange depends both on the initial characteristics of the market where exchange takes place and on the possible changes of these characteristics that may appear due to information exchange.

Transparency and concentration of the market. If the market is transparent, favourable conditions for tacit collusion (cartel agreement) and/or monitoring of performance of this agreement and entry into the market are created. The degree of transparency, *inter alia*, depends on the number of market participants and the nature of transactions, which may be public and confidential bilateral (paragraph 78 of the Communication). The lower the number of market participants, the easier the conclusion

31 Case T-35/92 *John Deere v. Commission of the European Communities* [1994] ECR II-957.

32 *Wirtschaftsvereinigung Stahl* [1998] OJ L1/10.

33 *Eudim* [1996] OJ C 111/8.

34 Whish, R., *supra* note 14, p. 527.

of the tacit collusion and observation of deviations is. Information exchange on a very fragmented market is less likely to create negative effect on competition. The legal doctrine differentiates two types of market transparency – public and private. Public market transparency is the “transparency for consumers” and private transparency is transparency for undertakings³⁵. The former type usually induces competition, and the latter facilitates tacit collusions and restrictions of competition.

Information exchange can increase transparency and therefore limit or remove uncertainties about the strategic “variables of competition” (e.g., prices, output, demand, structure, amount of costs, etc.). The lower the pre-existing level of transparency in the market, the more value an information exchange may have in achieving a collusive outcome. Therefore, as the Commission explains in its Communication (paragraph 78), it is the combination of both the pre-existing level of transparency and how the information exchange changes that level that will determine how likely it is that the information exchange will have restrictive effects on competition. When evaluating the change in the level of transparency in the market, the key element is to identify to what extent the available information can be used by companies to determine the actions of their competitors.

The market is concentrated if there are only few participants and high barriers to enter the market. The level of concentration of the market is usually measured by Herfindahl-Hirschman index (HHI)³⁶. It is worth mentioning that both the Competition Council and the courts referred to HHI index in “paper case”, trying to prove that both paper trade markets were concentrated and therefore information exchange had negative impact on competition on these markets³⁷.

Complexity of the market. Complexity of the market may be shown by, e.g. non-homogeneity of the products on the market, their differentiation (paragraph 80 of the Communication). Actually, it is rather difficult to monitor competitors, if there are many products on the market and they are much differentiated, in such a case there is a need to exchange information more intensively and the information must be very detailed.

Stability of the market. Stability of the market may be defined via stability of supply and demand, number of undertakings on the market, their market shares, non-relevancy of innovations, etc. Unstable demand, substantial internal growth by some companies in the market or frequent entry by new companies may indicate that the current situation is not sufficiently stable for coordination of behaviour between market participants to

35 Faull, J.; Nikpay, A. *The EC Law of Competition*. Second Edition. New York and Oxford: Oxford University Press, 2007, p. 731–732.

36 The HHI is calculated by summing the squares of the individual market shares of all firms in the market. If HHI below 1000 concentration on the market is low, if HHI is between 1000 and 2000 concentration is medium, and if HHI is above 2000 – high (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/03, paras 16, 19–20).

37 Judgment of Vilnius county administrative court of 7 June 2007 in administrative case No. I-579-13/07 UAB „Schneidersöhne Baltija“ and UAB „Libra Vitalis“ v. Competition Council of the Republic of Lithuania. The court admitted that parties to the information exchange agreement operated on the oligopolistic market of relatively high concentration.

be likely (paragraph 81 of the Communication). Instability on the market may also be confirmed by existence of countervailing buyer power³⁸ (presence of one or more buyers on the market, having market power and able to dictate their market conditions).

Collusive outcomes are more probable on the markets, which are rather stable, since in an unstable situation it is hard to know whether the sales of an undertaking reduced due to decreased demand or due to the fact that the competitor offered very low prices. Information exchange in certain conditions may be necessary for increasing stability in the market, and the increase of stability may create barriers of entry, therefore a collusive outcome is more feasible and sustainable on the stable market.

Symmetry of the market. When undertakings are homogenous in terms of their costs, demand, market shares, product range, capacities, etc., they are more likely to reach a common understanding on terms of coordination because their incentives are more aligned, therefore a collusive outcome is more likely in symmetric markets (paragraph 82 of the Communication).

It follows that the legality of information exchange highly depends on the economic conditions of the market, which were present before the exchange of information and which appear during or after its implementation.

In the abovementioned “paper case” the dispute arose between participants of information exchange system and the Competition Council on the characteristics of the relevant markets and their impact on assessment of information exchange. The Competition Council defined two separate relevant wholesale markets: chalky paper market and office paper market. Both markets were also defined by the Competition Council during the investigation period (1999-2004) as “oligopolistic markets with relatively high concentration”. During the investigation, the Competition Council obtained evidence from the undertakings that in 2001-2003 average prices of chalky and office papers went down and this was influenced by objective criteria, e.g. paper prices went down also on foreign markets, Asian producers reduced their prices; in both paper markets there were very many other undertakings, all holding about 19% market share; in 2003 the number of paper traders increased from 28 to 40, the market shares of paper traders constantly changed, etc. The Competition Council did not find the fact that entrance into paper trade markets required huge investments or that there were any other barriers of entry. Therefore, it was obvious that the markets were open for entry, unstable, competitive and the definition given by the Competition Council of “oligopolistic markets with relatively high concentration” was absolutely inadequate.

2.1.2.2. Peculiarities of Information Exchange

The peculiarities of information exchange depend on several parameters of information – its content, character, level of particularity, the age of information, the frequency and manner of exchange of information, etc.

The content and character of exchanged information. The exchange of confidential information violates the rule, according to which every businessman should

38 Capobianco, A., *supra* note 1, 41, p. 1268.

independently fix his market strategy.³⁹ Under the conditions of unrestrained competition every undertaking operates in a market without the knowledge of the conditions, which its competitors are applying to their clients, the future strategic plans concerning pricing, marketing and development in the market. Such ignorance of competitor's confidential information stimulates uncertainty about the competitors' behaviour and competition. Accordingly, the exchange of information, which is usually confidential and tightly related with trade, e.g. concerning sales prices, applied discounts, amount (quantities) of sales and production, market shares, commercial strategies, investment projects, etc. shall be assessed very strictly, because it can eliminate the uncertainty of an undertaking as regards the behaviour of its competitor.

The Commission in the *Glass Containers* case⁴⁰ clearly stated that the actions of the producer, whereby he forwards to his competitors information relating to the main elements of his price fixation policy, such as price-lists, discounts and other conditions of trade, tariffs and sales conditions applied to special clients, are apparently violating Article 101 (paragraph 43 of the decision). In its decision *COBELPA/VNP*⁴¹ (hereinafter – *COBELPA*) the Commission once again underlined that exchange of information concerning prices, discounts, changes in prices (reduction, increase), conditions of sales, supply and payment can be understood only as a wish to coordinate trade strategies and to create the conditions of competition, which are not different from the conditions of regular competition by means of exchanging the risk created by competition with practical cooperation (paragraph 29 of the decision).

In the Communication (paragraph 86) the Commission also underlined that exchange between competitors of strategic data, that is to say, data that reduces strategic uncertainty in the market, is more likely to be caught by Article 101, because once the incentives of the parties to compete decrease, their independence in decision-making also decreases. The Commission also provided the explanation which information is considered to be “strategic”: information related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, research and development (R&D) programmes and their results. In Commission's opinion, information relating to prices and quantities is the most strategic, followed by information about costs and demand, however, the importance of the information may depend on the particularity of the sector in which undertakings operate, e.g. if undertakings compete with regard to R&D it is the technology data that may be the most strategic for competition.

If one of the main criteria (risks) in the assessment of information exchange agreements is the elimination of uncertainty concerning the behaviour of the competitor, then while assessing the importance of the content of information in the assessment of the agreement, the main question should be – whether the analysed information allows

39 Case T-141/94 *Thyssen Stahl AG v. Commission* [1999] ECR II-00347.

40 *Glass Containers* [1974] OJ L 160/1.

41 *COBELPA/VNP* [1977] OJ L242/10.

the undertaking foresee the competitor's behaviour in the trade and to readjust to it, consequently restricting the independence of this undertaking in decision-making and restricting competition in the relevant market. Therefore, a question arises: whether exchange of certain data really allows the undertaking foresee the behaviour of a competitor and endangers competition? In its practice the Commission acknowledged such information exchange agreements as prohibited: concerning the delivery of goods⁴², the supply to clients⁴³, market shares⁴⁴, etc. The author deeply doubts if exchange of, e.g. information concerning amounts of sales/production and the market shares really in all cases allows the competitors in a market of any structure foresee the behaviour of each other and in such a way readjust to each other. In the author's opinion, exchange of information of this kind could have negative effect on competition only in exceptional cases. First of all, information relating to amounts of sales and market shares is due to its nature in all events historical or at best topical, it is never related to the future plans of competitors.⁴⁵ The uncertainty as regards the behaviour of competitors is usually eliminated namely by the information about competitor's future plans, therefore it is not clear in which way historical or topical information about the market shares or amounts of sales/production could be beneficial for the same reasons. Second, it is not clear how information as regards, e.g. the fact that competitor X has a market share equal to Y percent allows the undertaking foresee the behaviour of this competitor X and to readjust to it, as well as the way it could reduce the incentives to compete. In what way the information to the effect that, e.g. the market share of a competitor is larger than that of the undertaking and that it is growing increasingly could prevent that undertaking from competition? Moreover, it is very doubtful whether information that the market share of the competitor is decreasing could eliminate incentives of competitors to further compete. The author agrees that in certain cases exchange of information concerning amounts of sales/production and market shares could have an anticompetitive effect; however, these are only exceptional cases, in most cases information concerning competitors' market shares and amounts of sales/production is only encouraging competition in the market. For instance, in the author's view, the information on market shares could be essentially beneficial only together with other information, e.g. relating to prices. Undertakings can exchange information concerning prices, their variations and at the same time exchange information on market shares without entering into a cartel on price fixation. In such a way undertakings may monitor how changes in prices influence changes in market shares, what price, e.g. warrants the increase of a market share, etc. Without additional information on competitors, information relating to market shares only allows answering the question "what market share?" but not "why this market share is as such?". Without information, e.g. what the competitor is doing in order to increase his market share, it is unlikely that information relating to the market share could be beneficial to him. On the other hand, information relating to market shares and amounts of sales could be quite

42 *COBELPA/VNP* [1977] OJ L242/10.

43 *Vegetable Parchment* [1978] OJ L 70/54.

44 *Wirtschaftsvereinigung Stahl* [1998] OJ L1/10.

45 Niemeyer, H.-J., *supra* note 3, p. 155.

beneficial even without additional information in cases when competitors had already entered into a tacit collusion, e.g. concerning division of markets (by fixing sales or production quotas) and exchange information on market shares and amounts of sales in order to be able to determine if cartel participants comply with the agreement, as it happened, e.g. in the *White Lead* case⁴⁶. Accordingly, information exchange agreements relating to amounts of sales/production and market shares should not be considered as prohibited agreements, unless it is proved that they assisted in entering into a tacit collusion and maintaining it.⁴⁷ In addition to that, the riskiness of the above information depends on the nature of the tacit collusion.⁴⁸

For the above-mentioned reasons and because of the unfair assessment of the factual circumstances of the case, in the author's opinion, the decision of the Competition Council in the "paper case" is unsound. In that case, the Competition Council simply stated that quarterly exchange of information relating to amounts of paper sales and market shares decreased the incentives of paper traders to compete and increased the barriers of entry into relevant paper markets. However, the author would like to draw the attention to the fact that the nature and the content of information exchanged between the companies did not and could not allow the competitors clearly foresee each other's behaviours and to influence them accordingly, moreover, to coordinate the actions in the respective markets. The Competition Council also did not determine that the exchange of information between the companies conditioned the coordination of their actions, e.g. by fixing prices or dividing markets, by choosing equivalent market strategies, etc., on the contrary, the facts showed that the prices were not fixed or increased, the market shares of the agreement participants constantly interchanged, they constantly looked for the means to increase the efficiency of their business (e.g. they decreased prices, aimed at increasing amounts of sales, etc.), i.e. effectively competed between each other. It has to be noted that unfortunately the courts supported the false position of the Competition Council. The Supreme Administrative Court of Lithuania (hereinafter – the SACL) underlined that "an artificial increase of transparency of quite concentrated and/or oligopolistic market, which is reached when the competitors exchange information, that is detailed, individualised, topical (not old) and publicly accessible, can significantly decrease the inner competition between the information exchange participants, also restrict outside competition between the participants of the exchanged information and the new participants in the market. The participants of the information exchange system, having thorough and topical information about the other participants in the market, usually lose their intention to actively compete between each other in such a market, as any of their more important actions may be quickly noticed and it could operatively attract reaction in a form of contra decisions (actions). In addition to that, new or other participants of the market, who did not join or were

46 *White Lead* [1979] OJ L 21/16. In this case three sole producers of steel in the EU agreed to divide the markets by fixing delivery quotas. In order to assess if the agreement is followed every month they were exchanging information related to sales, which was detailed by every country separately.

47 Niemeyer, H.-J., *supra* note 3, p. 156.

48 Capobianco, A., *supra* note 1, p. 1264.

not affiliated to the information exchange system due to the will of the participants exchanging the information, would not dispose of information, which is significant and topical, and which is disposed of the participants exchanging information, which would consequently influence their negative competitive position, compared to the participants of information exchange, and would burden the effective competition with them.”⁴⁹ The court also rejected the arguments of one of the companies as regards the fact that during the four years of information exchange the potential effect of restriction of competition should have somehow practically evidenced and, since it did not, objectively it did not exist, and underlined that Article 101 of the Treaty forbid not only real but also potential anticompetitive effect, besides it could not be unambiguously rejected that if there was no information exchange, then the market shares or the prices of the goods of the companies that exchanged information would have been different. The court also stated that it is obvious that it is practically impossible to provide evidence concerning the situation which could have occurred if there was no exchange of information, also what potential anticompetitive effect the respective agreements, concerted practises or decisions of associations could have had and that these types of evidence cannot be required from the Competition Council.⁵⁰ It has to be underlined that such “theoretical”, formal and not sufficiently reasoned position of the Competition Council and the courts⁵¹ was criticised by the SACL in another similar case on information exchange – the “milkmen” case⁵². The SACL, based on the decision of the CJEU in *T-Mobile* and other cases, underlined that the Competition Council can declare a violation of Article 5(1) of the Law on Competition only when it is positive that the information exchange between competitors could have had influence on the existing or potential behaviour of the competitor in the market or in revealing the behaviour, which was decided upon or foreseen to be initiated in this market. This means that in the case under consideration

49 Judgment of the Supreme Administrative Court of Lithuania of 16 October 2009 in administrative case No A502-34/2009 *UAB „Schneidersöhne Baltija“ and UAB „Libra Vitalis“ v. the Competition Council of the Republic of Lithuania*.

50 *Ibid.*

51 Resolution No. 2S-3 of the Competition Council of the Republic of Lithuania of 18 February 2008 “On the conformity of actions of undertaking engaged in milk procurement and processing activities and the associations of these undertakings with the requirements of Article 5 of the Law on Competition”. In the milkmen case, after having evaluated all the information, the Competition Council reached the conclusion that undertakings under investigation were, via an association, exchanging confidential information related to amounts of procured milk of these undertakings, amounts of different kinds of products produced and sold and thus violated the requirements of Article 5(1) of the Law on Competition. In addition to that, it was found that five of the subjects under investigation were harmonising various prices of milk products, consequently they violated the requirements of Article 5(1) of the Law on Competition, which prohibits direct or indirect fixation of purchase or sales prices or any other conditions of trade. As regards the nature of information exchange, the Competition Council stated that the above information, which was constantly received by undertakings exchanging it, enabled the undertakings to easily estimate the market shares of other undertakings, monitor and analyse their changes compared to the exact amounts and their changes, as well as monitor and assess the activity of their competitors and compare it in the capacity of the whole Lithuanian national market.

52 Judgment of the Supreme Administrative Court of Lithuania of 11 June 2009 in administrative case No. A-822-750/2009 *AB „Rokiškio sūris“ and UAB „Marijampolės pieno konservai“ v. the Competition Council of the Republic of Lithuania*.

the Competition Council should have examined if information exchange under the circumstances of the case under consideration could eliminate the uncertainty related to the planned behaviour of interested companies, whereas in this particular case the resolution of the Competition Council contained only a presumption that undertakings lost their independence in their decision-making. What is more, the Competition Council and the court of first instance absolutely ignored the fact that there was no exchange of information about the competitors' behaviour, which was decided upon or foreseen to be initiated in a particular market. The court obliged the Competition Council to perform additional investigation.

It has to be underlined that during the investigation of information systems of "SKS Vaistai" the Competition Council was not that formal, withstanding the fact that in that system the information concerning prices of wholesalers was exchanged⁵³. During the investigation, the Competition Council found that all branches of medicines producers in Lithuania, as well as educational institutions, state institutions, pharmacies and wholesalers of medicines and medical goods are using "SKS Vaistai". "SKS Vaistai" provides annotations of medicines, information about the amendments of legal acts. Wholesalers of medicines and medical goods provide information about their supply – medicines and medical goods stored in the warehouses and their prices. The majority of wholesalers operating in Lithuania (around 30) provide their supply in the system. The system allows the wholesalers providing actual information on supply, therefore the pharmacies that order goods electronically can perform that more easily and quickly than before the creation of the system, when the supply was provided on paper price-lists, which quickly became outdated and useless. The price monitoring performed by the Competition Council showed that usually the wholesale prices provided in the system were very similar and were rarely changed. In reaction to the inquiries of the Competition Council, the wholesale companies explained that the similarities among prices were mostly influenced by the regulated mark-ups and the fact that the wholesale prices provided in the system were not final prices, which were paid for medicines and medical goods by the pharmacies, as according to the agreements between the wholesale companies and the pharmacies the discounts from the turnover were applied. Having considered all the peculiarities of "SKS Vaistai" system operation, also the benefit provided and, seemingly, having considered that the system does not allow the undertakings foresee each other's behaviour (e.g. the system provides only topical and not final prices), the Competition Council admitted that information exchange that took place via the system should not be considered as violation of Article 5 of the Law on Competition.

The assessment of information exchange also depends on the *publicity of information*. It is logical to assume that undertakings have no incentives to exchange "public" information, because why should there be a need to exchange such information

53 Resolution No. 1S-23 of the Competition Council of the Republic of Lithuania of 3 February 2011 "On the termination of investigation related to the conformity of actions of undertakings engaged in the wholesale of medicines, medical goods and medical devices, and administer the information system of pharmacies, with the requirements of Article 5 of the Law on Competition".

when it is accessible to everyone? It seems that the same is admitted by the Commission in the Communication, where it separates “genuinely public information” and information “in the public domain”. *Genuinely public information* is information that is generally equally accessible (in terms of costs of access) to all competitors and customers. For information to be genuinely public, obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information. In contrast, *information “in the public domain”* is the information that is public from the first glance, however actually it is not easily accessible, because the costs involved in collecting the data deter other companies and customers from collecting/receiving it (paragraph 92 of the Communication). It seems that in the Communication the Commission took into consideration the remarks of the commentators⁵⁴ that the fact that different companies can experience different costs while collecting information alone cannot constitute a sufficient ground to regard that information public. It is obvious that in cases when undertakings themselves participate in the system of information exchange and provide their data to the market research company summarising and systemising it, then it is normal if the access to the systemised data for such companies costs less than to the undertaking that does not participate in the system. However, it has to be accepted that if access to information costs so much that undertakings do not wish to purchase it, then it is doubtful if such information could be considered public.

Special attention shall be drawn to Example 5 presented by the Commission in paragraph 109 of the Communication, where the Commission noted that the fact that certain part of information is publicly announced shall not automatically mean that such information is “genuinely public”, if in order for undertakings not participating in the exchange to obtain the same information in a different way it would be necessary to incur substantial time and costs. The Commission presents the example of four companies owning petrol stations - the information is displayed on large display panels at every petrol station, however, one would have to travel frequently large distances to collect the prices displayed on the boards of petrol stations spread all over the country, therefore would suffer additional time and transport costs. Consequently the fact that, e.g. prices of goods are indicated on the shelves of stores shall not mean that exchange of information about “shelf prices” of all the goods in all the stores in Lithuania will be considered as non-prohibited exchange of public information. For instance, if retailers of foodstuff decide to exchange information about shelf prices of milk and bread products on a monthly basis, such an exchange shall not be considered as exchange of public information, since other undertakings will face difficulties in gathering the same information, especially taking into consideration the fact that the products are not homogenous and are highly differentiated.

It should be mentioned that the Competition Council took into consideration the public nature of information exchanged in case of investigation of insurance

54 See, e.g. Linklaters commentary on the draft Communication [interactive]. [accessed 23-08-2011]. <http://ec.europa.eu/competition/consultations/2010_horizontals/linklaters_en.pdf>, para 4.4; European Competition Lawyers Forum (ECLF) commentary on the draft Communication [interactive]. [accessed 23-08-2011]. <http://ec.europa.eu/competition/consultations/2010_horizontals/ecclf_en.pdf>, para. I(D).

companies' actions, and after finding no infringement, terminated the investigation⁵⁵. The undertakings concerned exchanged information about volumes of insurance services provided (signed contributions) in litas and signed contracts by numbers. The Competition Council noted that information exchanged by insurance companies via the bureau, under competition law was usually considered as confidential and giving competitive advantage and therefore was not revealed to competitors or shared with them. However, the Competition Council took into account the fact that the same information, exchanged between the insurance companies via the bureau was also put on the website of the Insurance Supervisory Commission, therefore the Competition Council did not see any infringement in the actions of insurance companies, in particular due to the fact that the data was announced by the Insurance Supervisory Commission which, though being confidential in nature, became public.

Aggregation of information. Exchanges of aggregated, non-individual data that defines common sales data and production volumes in particular economic sector, where recognition of individualised company level information is sufficiently difficult, is permitted, however exchange of information that is usually considered confidential and not freely available, may infringe Article 101(1)⁵⁶. The more detailed information and the more it is related to future (strategic, etc.) plans of undertakings concerned, the more important its protection and non-availability for competitors⁵⁷. The more detailed the information is, the easier the competitors may foresee each other's actions and concert them accordingly⁵⁸.

Collection and publication of aggregated market data (such as sales data, data on capacities or data on costs of inputs and components) by a trade organisation or market research companies may benefit market participants (suppliers and customers) alike by allowing them getting a clearer picture of the economic situation of the sector and make better-informed individual choices in order to adapt their strategy to the market conditions efficiently. The exchange of individualised data facilitates common understanding on the market and punishment strategies by allowing the coordinating companies to single out a "deviator" or a new entrant. However, it seems that the Commission does not intend to create "safe harbour" for all exchanges of aggregated data, since, in accordance with its view, it cannot be excluded that even the exchange of aggregated data may facilitate a collusive outcome in markets with specific characteristics due to peculiarities of that relevant market. For instance, if the market is oligopolistic and stable with only a few participants, then even the exchange of aggregated data, e.g. about price reductions, between participants to the collusive agreements will be sufficient to establish deviations from the agreement and to take relevant reprisals (sanctions). In other words, "in order

55 Resolution No. 2S-33 of the Competition Council of the Republic of Lithuania of 23 December 2010 "On the conformity of actions of undertakings involved in non-life insurance and of their associations with the requirements of Article 5 of the Law of the Republic of Lithuania on Competition and Article 81 of the Treaty establishing the European Community".

56 See *COBELPA case, Italian Cast Glass* [1980] *OJL* 383/19.

57 Whish, R., *supra* note 14, p. 528.

58 Capobianco, A., *supra* note 1, p. 1264.

to keep collusion stable, companies may not always need to know who deviated, it may be enough to learn that someone deviated” (paragraph 89 of the Communication).

Age of data. The Commission notes in the Communication (paragraph 90) that assessment of information exchange depends on the fact whether the exchange is related to future plans of undertakings or to their past behaviour. The doctrine sometimes distinguishes three types of exchanged information in accordance with its age: future information, actual (current) information and historic information⁵⁹. In the Communication, the Commission defines actual and historic information as “historic data” and states that exchange of such information is unlikely to raise danger to competition, however, the assessment also depends on the age of the information exchanged. In *Tractor* and *Stahl* cases the Commission considered the exchange of individualised information that was one year-old (so-called historic data) as not restricting competition. Old, irrelevant information is not helpful for concluding collusive agreement and for monitoring their implementation as well as entries into the market, as out-of-date data does not allow timely reaction to “unacceptable changes” and therefore may be unhelpful for undertakings.

The Commission admits that “there is no predetermined threshold when data becomes historic, that is to say, old enough not to pose risks to competition” (paragraph 90 of the Communication). Therefore, it seems that the Commission refused its earlier position on the limitation of historic data by a period of one year and also refused “safe harbour”, which was created for undertakings in its earlier practice. The Commission allows understanding that criterion of age of information, as any other criteria, shall be applied in accordance with the principle of “case-by-case” assessment. For instance, it explains that data may be considered as genuinely historic if it is several times older than the average length of contracts in the industry. Moreover, the threshold for the data to become historic also depends on its nature, aggregation, frequency of exchange, and the characteristics of the relevant market (for example, its stability and transparency). Of course, if sales conditions on the market change frequently, even half-year information may be considered as irrelevant and out-of-date, and if the market is stable and static, then even information which is a year and a half old may be rather informative and useful. Actually, it is difficult to foresee how market participants shall calculate “average length of contracts in the industry”. It is extremely difficult if there are very many participants on the market and therefore the question arises - maybe it is necessary to exchange information between competitors on validity terms of contracts? Moreover, even if undertakings succeed to calculate the average length of contracts in the industry, it is not clear how many times the information shall be older than this average length⁶⁰. For instance, if on average contracts are concluded on the market for a period of one year, and the data is two-year old, may this data be considered “historic”?

Frequency and means of the information exchange. If information exchange is permanent (periodical, continuous) or very frequent, it allows undertakings foreseeing

59 Faull, J.; Nikpay, A., *supra* note 35, p. 735.

60 Simmons & Simmons commentary regarding draft Communication [interactive]. [accessed 26-08-2011]. <http://ec.europa.eu/competition/consultations/2010_horizontals/simmonssimmons_en.pdf>, para 2.2.

their competitor's behaviour and concert it, also react to deviations from the agreed behaviour and punish for them. The assessment of possible anticompetitive effect of information exchange may depend on the characteristics of the market and on other conditions, e.g. if trade conditions of the market change frequently and are constantly reviewed, adaptation to these conditions and their changes may require frequent exchanges of information, and on the contrary, if the market is quite stable and contracts are long-term, then undertakings are not interested in frequent exchange of information. Frequency of exchange of information also depends on other parameters of information – the nature, age and aggregation of data (paragraph 91 of the Communication). Frequency of information exchange directly relates to the age of information, since the more frequent the exchange of information is, the more relevant and newer the information itself is.

Information exchange can take various forms. For instance, data can be directly shared between competitors, they can also be shared indirectly through a common agency (for example, a trade association) or a third party (such as a market research company) or through the companies' suppliers or retailers (paragraph 55 of the Communication). It shall be noted that the way of exchanging information in no way affects the outcome of the legal or economic assessment of information exchange, however it shall also be noted that information exchange via the internet amounts to information exchange by any other means of communication. Nonetheless, it shall be noted that the area of e-commerce is very sensitive to information exchanges and may lead to high transparency on the e-market⁶¹, therefore it is usually recommended to implement additional means for the protection of information (e.g. by establishing firewalls, access passwords, etc.)⁶². Assessment of information exchange may also depend on publicity of information exchange. Information exchange is genuinely public if it makes the exchanged data equally accessible (in terms of costs of access) to all competitors and customers. In the Commission's opinion, the fact that information is exchanged in public may decrease the likelihood of a collusive outcome on the market, however, it does not exclude the possibility that even genuinely public exchanges of information may facilitate a collusive outcome in the market (paragraph 94 of the Communication), especially if such market is oligopolistic.

2.1.2. Condition of Appreciable Effect on Competition

In order to be caught by Article 101 of the Treaty, any agreement shall both restrict competition and have appreciable effect on it. The Commission rightly notes that for an information exchange to be likely to have restrictive effects on competition, the companies involved in the exchange have to cover a sufficiently large part of the relevant market, otherwise, the competitors that are not participating in the information

61 Whish, R., *supra* note 14, p. 529.

62 Van Bael, I.; Bellis, J. F. *Competition law of the European Community*. Austin (Tex.): Wolters Kluwer Law & Business; Alphen aan den Rijn: Kluwer Law International, 2010, p. 390.

exchange could constrain any anti-competitive behaviour of the companies involved. For example, by pricing below the coordinated price level undertakings unaffiliated within the information exchange system could threaten the external stability of a collusive outcome (paragraph 87 of the Communication).

The Commission is also right by stating that the concept “sufficiently large part of the relevant market” cannot be defined in the abstract and depends on the specific facts of each case and the type of information exchange in question. Where, however, an information exchange takes place in the context of another type of horizontal co-operation agreement (these types are distinguished in the Communication) and does not go beyond what is necessary for its implementation, in the Commission’s opinion, market coverage below the market share thresholds, that ensure “safe harbour” from application of Article 101 for undertakings, and set out, e.g. in the Communication (e.g. for joint purchasing agreements - up to 15 % on purchasing and up to 15 % on sales market(s)), in the relevant block exemption regulation (for instance, for specialization agreements – 20 percent of the relevant market share of the parties⁶³) or in the *De Minimis Notice*⁶⁴ (for horizontal agreements (between competitors) – up to 10 % of common market share) pertaining to the type of agreement in question will usually not be large enough for the information exchange to give rise to restrictive effects on competition (paragraphs 87-88 of the Communication). It shall be noted that Commission’s guidelines on “sufficiently large part of the relevant market” concept give few legal clarity and assistance for establishment of appreciable effect on competition. It is obvious that the agreement on information exchange between competitors that jointly hold market share of 10 or even 20 % shall not be considered as having appreciable effect on competition. It may be stated that the Commission has provided a specific *de minimis* rule, which helps defining information exchange agreements of minor importance and not making appreciable impact on competition, however, Commission’s explanations and references to other legal acts do not explain in which cases appreciable effect on competition may be established. It is worth reminding that if the agreement cannot be considered as *de minimis*, it also cannot be automatically considered as appreciably restricting competition. In author’s opinion, there is always a specific “grey zone” which involves agreements which are not *de minimis* and which also do not have appreciable effect on competition. It is obvious, that if information is exchanged between the parties to specialization agreement jointly holding 25 % of market share (i.e. more than “safe harbour” provided in the block exemption), it shall not automatically mean that such an agreement has appreciable effect on competition, since it is very likely that undertakings

63 Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements [2010] OJ L 335/43, article 2.

64 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C 368/07. “National” *de minimis* rules are also established by Resolution No. 1S-172 of the Competition Council of the Republic of Lithuania of 9 December 2004 amending Resolution No. 1 of the Competition Council of the Republic of Lithuania of 13 January 2000 “On the requirements and conditions for agreements that do not infringe Articles 5(1) and 5(2) of the Law on Competition due to their inappreciable effect on competition”. *Official Gazette*. 2004, No. 181-6732.

having the rest 75 % of the market will successfully manage to restrict anticompetitive behaviour of the participants to information exchange agreement. The author considers that the situation may change, if parties to the agreement hold 40 % of the market. In such a case assessment of the situation will depend on various factors including assessment of “countervailing power” – possibility of competitors and buyers to put obstacles to conclusion or implementation of the agreement.

Classification of information exchange agreements into restricting competition by object and by effect becomes extremely relevant while assessing appreciable effect on competition. Agreements having their object of restriction of competition are not considered as of minor importance even if the market share thresholds are not exceeded. Moreover, Commission’s *De Minimis Notice*⁶⁵ is just a recommendation and does not have legal power for EU courts (see paragraph 4 of the notice) which therefore may consider as *de minimis* the agreements not indicated in the notice, however, in case of the Commission, an infringement of legal certainty rule may be discussed in such a case. For instance, if we consider that the list of agreements between undertakings, which are not considered as *de minimis* and are specified in paragraph 11 of the *De Minimis Notice* (“list of cartel agreements”), is not exhaustive, agreements on exchange of individualised data about competitors’ future prices and quantities will not be considered as *de minimis*, moreover, their effect on competition shall not be proved and appreciable effect on competition will be presumed only due to the nature of the agreement. And on the contrary, if we consider that the list of agreements between undertakings, which are not considered as *de minimis* and are specified in paragraph 11 of the *De Minimis Notice*, is exhaustive, then agreements on exchange of information, although considered by the Commission as capable of restricting competition by object in Communication, but which are not listed in the list of non-*de minimis* agreements in the *De Minimis Notice*, may still be considered as *de minimis*. This uncertainty about the status of information exchange agreements may be removed by supplementing the list of paragraph 11 of the *De minimis Notice*. It is also worth mentioning that the *De minimis* Resolution of the Competition Council may be applied to information exchange agreements, as they are not included in the “list of cartel agreements” (paragraph 7) and this list cannot be interpreted widely, therefore theoretically agreements between competitors on exchange of individual data related to future prices and quantities (if parties to the agreement have no more than 10% of market share) may be considered as having minor importance for competition under national competition rules.

65 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C 368/07. “National” *de minimis* rules are also established by Resolution No. 1S-172 of the Competition Council of the Republic of Lithuania of 9 December 2004 amending Resolution No. 1 of the Competition Council of the Republic of Lithuania of 13 January 2000 “On requirements and conditions for agreements that do not infringe Articles 5(1) and 5(2) of the Law on Competition due to their inappreciable effect on competition”. *Official Gazette*. 2004, No. 181-6732.

2.2. Assessment under Article 101(3) of the Treaty and Article 6 of the Law on Competition

In *COBELPA* case⁶⁶ the Commission stated that information exchange agreements, which fall into the scope of Article 101(1) of the Treaty, can rarely satisfy the conditions of Article 101(3), i.e. those of exemption⁶⁷, unless they produce certain efficiencies. For instance, in *Tractor* case the plea of the parties to apply Article 101(3) was rejected as unfounded. However, in some exceptional cases information exchange agreements may satisfy the conditions of Article 101(3). In *International Energy Agency*⁶⁸ the Commission granted individual exemption to the exchange of information about oil quantities during oil shortage period and admitted that continuous supply of oil has strategic importance and definitely overweighs restrictive effect on competition that appears due to information exchange. In *Asnef-Equifax v. Ausbanc* case⁶⁹ the CJEU acknowledged that the register storing data on solvency of clients created by undertakings – credit institutions – might satisfy the conditions of the exemption.

It shall be mentioned that in accordance with the rules on managing loan risk database, conformed by the Board of the Bank of Lithuania⁷⁰, commercial banks, specialised banks and subsidiaries of foreign banks registered in the Republic of Lithuania shall provide data about the borrowers and granted credits and all this data is stored in the loan risk database. In accordance with section II of the Rules on managing the loan risk database, the data stored in the database may be submitted to all banks via the Bank of Lithuania, e.g., data about the borrower, data related to grant of the loan, the acknowledgement of the borrower as non-performing its credit obligations (for the first and subsequent cases), etc. The aim of the above-mentioned database is to ensure effective functioning of the credit system, create preconditions for banks to evaluate the reliability of the borrowers on the basis of submitted data and to gain access to the data in the database about the borrowers, loans and their pay-ups.

In its Communication (see section 2.3), the Commission analyses cases where information exchange agreements are justifiable and correspond to the conditions of Article 101(3) of the Treaty.

First of all, information exchange agreement shall *lead to efficiency gains*. The Commission states in the Communication that in certain situations information

66 *COBELPA/VNP* [1977] OJ L242/10.

67 Article 101(3) of the Treaty foresees four conditions of the exemption (non-application of Article 101(1)): two positive and two negative. Positive conditions are the following: first, the agreements shall contribute to improving the production or distribution of goods or to promoting technical or economic progress, second, it shall allow consumers gain a fair share of the resulting benefit. The negative conditions are the following: first, the agreement shall not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives (a so-called necessity requirement), and, second, the agreement shall not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

68 *International Energy Agency* [1983] OJ L 376/30.

69 Case C-238/05 *Asnef-Equifax v. Ausbanc* [2006] ECR I-11125.

70 Resolution No. 125 of the Board of the Bank of Lithuania of 21 December 1995 “On the approval of management of the loan risk database”. *Official Gazette*. 1996, No. 2-63.

exchange can help companies allocate production towards high-demand markets (for example, demand information) or low cost companies (for example, cost information), where, e.g. it allows substantial cost savings, reduces unnecessary inventories or enables quicker delivery of perishable products to areas with high demand and their reduction in areas with low demand. The Commission admits that registering information about past behaviour of customers (e.g. about accidents or credit defaults) provides an incentive for consumers to limit their risk exposure, therefore examples of such efficiencies are usually found in the banking and insurance sectors, which are characterised by frequent exchanges of information about consumer defaults and risk characteristics (paragraphs 95-97 of the Communication).

It is interesting to note that the Commission admits that exchanging past and present data related to market shares may in some situations provide benefits to both companies and consumers by allowing companies announce certain quality characteristics of their products to consumers (e.g. in order to choose their next book, consumers use best-selling lists, which actually reveal sales amounts of book distributors, i.e. their market shares). The Commission also notes that genuinely public information exchange can also benefit consumers by helping them reduce their search costs, and finally can reduce final process of the products. For example, very similar service, allowing comparing prices of different sellers, is offered on the Lithuanian internet site www.kainos.lt. However, attention shall be drawn to the fact that consumers benefit from such information exchanges only if, first, the information is public, second, information is recent – about current prices, so that consumers can plan their purchases rather precisely. In other cases consumers' benefit is not so obvious, though also possible (paragraph 99 of the Communication).

Another important requirement that shall be met by the information exchange agreement - the *necessity criterion*: information exchange shall be indispensable for achieving efficiencies. As the Commission explains in the Communication, the parties will need to prove that the subject-matter, aggregation, age, confidentiality and frequency of the data, as well as coverage of the exchange are of the kind that carries the lowest risks and indispensable for creating the claimed efficiency gains. For instance, if efficiencies may be achieved by exchanging aggregated data, then exchange of individualised data would not fulfil the indispensability criterion. Moreover, it seems that the Commission presumes that sharing of individualised data on future intentions is not indispensable, especially if it is related to prices and quantities (paragraph 101 of the Communication).

In order to fulfil the requirements of the exemption, an information exchange agreement shall also satisfy two additional requirements: it shall insure *pass-on of efficiency gains to consumers* and *shall not afford the possibility of eliminating competition in respect of a substantial part of the products concerned* (paragraphs 103-104 of the Communication). "Pass-on to consumers" shall be such as to outweigh the restrictive effects on competition caused by an information exchange, e.g. when market power of participants to information exchange agreements is low, it is more likely that the efficiency gains would be passed on to consumers to an extent that outweighs the

restrictive effects on competition, and on the contrary – the higher the marker power of information exchangers the lower the possibility that efficiencies would be passed on to consumers.

Conclusions

1. Information exchange agreements between competitors may sometimes infringe the provisions of EU and Lithuanian competition law. In some cases, such an agreement may be a part of another prohibited agreement and in other cases it may constitute an independent infringement.

2. Information exchanges between competitors may be prohibited in exceptional cases, where it may be established that competitors concluded such exchange agreement, i.e. expressed their will to exchange information and concerted it accordingly.

3. Analysis of the Commission's practice and the Communication allows stating that the Commission is apt to consider certain information exchange agreements as cartels; however the author doubts that there are information exchange agreements that by their nature and object restrict competition. In the author's view, it is reasonable to refuse an idea that certain information exchange agreements have object of restriction of competition, and to take a view that while assessing the legality of such agreements only their effect on competition shall be taken into account.

4. There are several factors influencing legal assessment of information exchange agreements – economic conditions of the market, where information exchange takes place, characteristics of the exchanged information and peculiarities of the exchange. All these factors are important, thus information exchange agreements shall be assessed taking into account all of the above-mentioned factors, not just referring to one or few of them.

5. Economic conditions of the market that were present before information exchange and that appeared during and/or after its implementation, have a great impact on assessment of information exchange agreements. Negative effect on competition is more likely on the market, which is rather transparent, concentrated, simple, stable and symmetric.

6. Specifics of the assessment of information exchange also depend on several other parameters – content of information, its nature, particularity, age, frequency, type of exchange, etc. It is more likely that negative effect on competition will appear if undertakings exchange information that is strategic, confidential, related to future plans, individualised, rather than detailed and exchanged frequently. Exchange of that kind of information allows undertakings removing uncertainty about competitors' behaviour and concerting it, thus restricting undertaking's independency in taking decisions and restricting competition on the relevant market.

7. With regard to the author's opinion that information exchange agreements may restrict competition only by their effect (not object), appreciable effect on competition

of such agreements shall be proven in each case. Significant effect on competition is likely to appear if undertakings involved in exchanging information hold large market shares.

8. It is likely that agreements on information exchange that infringe Article 101(1) of the Treaty or Article 5 of the Law on Competition, will benefit from the exemption, if they create economic efficiencies, which are passed on to consumers, there are no alternative means to create such efficiencies other than by information exchange, and if participants to the information exchange agreement do not have significant market power.

References

- Bissocoli, E. Trade Associations and Information Exchange under US and EC Competition Law. *World Competition*. 2000, 23(1): 79–106.
- Capobianco, A. Information Exchange under EC Competition Law. *C.M.L.R.* 2004, 41: 1247–1276.
- Case 56/65 *Societe La Technique Miniere v. Maschinenbau Ulm* [1966] ECR 235.
- Case T-1/89 *Rhone-Poulenc* [1991] ECR II-867.
- Case T-35/92 *John Deere v. Commission of the European Communities* [1994] ECR II-957.
- Case T-374/94 *European Night Services v. Commission* [1998] ECR II-3141.
- Case C-7/95 P *John Deere Ltd v. Commission of the European Communities* [1998] ECR I-03111.
- Case T-141/94 *Thyssen Stahl AG v. Commission* [1999] ECR II-00347.
- Case C-238/05 *Asnef-Equifax v. Ausbanc* [2006] ECR I-11125.
- Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529.
- COBELPA/VNP* [1977] OJ L242/10.
- Commission's Guidelines on the applicability of Article 81 to horizontal co-operation agreements [2001] OJ C3/2.
- Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] C 368/07.
- Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements [2010] OJ L 335/43.
- Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance [2011] OJ C 11/01.
- Judgment of Vilnius county administrative court of 7 June 2007 in administrative case No. I-579-13/07 *UAB „Schneidersöhne Baltija“ and UAB „Libra Vitalis“ v. Competition Council of the Republic of Lithuania*.
- Judgment of the Supreme Administrative Court of Lithuania of 11 June 2009 in administrative case No. A822-750/2009 *AB „Rokiškio sūris“ and UAB „Marijampolės pieno konservai“ v. Competition Council of the Republic of Lithuania*.
- Judgment of the Supreme Administrative Court of Lithuania of 16 October 2009 in administrative case No. A-502-34/2009 *UAB „Schneidersöhne Baltija“ and UAB „Libra Vitalis“ v. Competition Council of the Republic of Lithuania*.
- Eudim* [1996] OJ C 111/8.
- European Competition Lawyers Forum (ECLF) commentary regarding draft Communication [interactive]. [accessed 26-08-2011]. <http://ec.europa.eu/competition/consultations/2010_horizontals/ecf_en.pdf>.

- Faull, J.; Nikpay, A. *The EC Law of Competition*. Second Edition. New York and Oxford: Oxford University Press, 2007.
- Glass Containers* [1974] OJ L 160/1.
- Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/03.
- Joined cases 96-102, 104, 105, 108 ir 110/82 *NV IAZ International Belgium and others v. Commission* [1983] ECR 03369.
- Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v. Commission* [1993] ECR I-1307.
- International Energy Agency* [1983] OJ L 376/30.
- Italian Cast Glass* [1980] OJ L 383/19.
- Law of the Republic of Lithuania on Competition. *Official Gazette*. 1999, No. 30-856.
- Linklaters commentary regarding draft Communication [interactive]. [accessed 23-08-2011]. <http://ec.europa.eu/competition/consultations/2010_horizontals/linklaters_en.pdf>.
- Niemeyer, H.-J. Market information systems. *E.C.L.R.* 1993, 14(4): 151–156.
- Notice on Cooperation Agreements [1968] OJ C 75/3.
- Osti, C. Information exchanges in the obscure light of Woodpulp. *E.C.L.R.* 1994, 15(3): 176–182.
- Plasterboard* [2005] OJ L 166/8.
- VII Report on competition policy [interactive]. [accessed 26-08-2011]. <http://ec.europa.eu/competition/publications/annual_report/ar_1977_en.pdf>.
- Resolution No. 125 of the Board of the Bank of Lithuania of 21 December 1995 “On the approval of management of loan risk database”. *Official Gazette*. 1996, No. 2-63.
- Resolution No. 1S-172 of the Competition Council of the Republic of Lithuania of 9 December 2004 amending Resolution No. 1 of the Competition Council of the Republic of Lithuania of 13 January 2003 “On the requirements and conditions for agreements that do not infringe Articles 5(1) and 5(2) of the Law on Competition due to their inappreciable effect on competition”. *Official Gazette*. 2004, No. 181-6732.
- Resolution No. 2S-13 of the Competition Council of the Republic of Lithuania of 26 October 2006 “On the conformity of actions of undertakings involved in paper trade with the requirements of the Article 5 of the Law of the Republic of Lithuania on Competition and Article 81 of the Treaty establishing the European Community”.
- Resolution No. 2S-3 of the Competition Council of the Republic of Lithuania of 18 February 2008 “On the conformity of the actions of undertaking engaged in milk procurement and processing activities and the associations of these undertakings with the requirements of Article 5 of the Law on Competition”.
- Resolution No. 2S-33 of the Competition Council of the Republic of Lithuania of 23 December 2010 “On the conformity of actions of undertakings involved in non-life insurance and the associations of such undertakings with requirements of the Article 5 of the Law of the Republic of Lithuania on Competition and Article 81 of the Treaty establishing the European Community”.
- Resolution No. 1S-23 of the Competition Council of the Republic of Lithuania of 3 February 2011 “On the termination of investigation related to the conformity of actions of undertakings engaged in the wholesale of medicines, medical goods and medical devices, and administer the information system of pharmacies, with the requirements of Article 5 of the Law on Competition”.
- Simmons & Simmons commentary regarding draft Communication [interactive]. [accessed 26-08-2011]. <http://ec.europa.eu/competition/consultations/2010_horizontals/simmonssimmons_en.pdf>.
- Treaty on the Functioning of the European Union. Consolidated version [2010] OJ C 83/47.

- UK Agricultural Tractor Registration Exchange* [1992] OJ L 68/19.
- Van Bael, I.; Bellis, J. F. *Competition law of the European Community*. Austin (Tex.): Wolters Kluwer Law & Business; Alphen aan den Rijn: Kluwer Law International, 2010.
- Van Bael & Bellis commentary regarding draft Communication [interactive]. [accessed 26-08-2011]. <http://ec.europa.eu/competition/consultations/2010_horizontals/vanbaelbellis_en.pdf>.
- VegECRble Parchment* [1978] OJ L 70/54.
- Wagner-von Papp, F. "Who is it that can inform me?" - the exchange of identifying and non-identifying information. *E.C.L.R.* 2007, 28(4): 264–270.
- Whish, R. *Competition law*. Sixth Edition. London: LexisNexis, 2009.
- White Lead* [1979] L 21/16.
- Wirtschaftsvereinigung Stahl* [1998] OJ L1/10.

SUSITARIMŲ DĖL APSIKEITIMO INFORMACIJA TARP KONKURENTŲ VERTINIMAS PAGAL EUROPOS SĄJUNGOS IR LIETUVOS RESPUBLIKOS KONKURENCIJOS TEISĘ

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Santrauka. *Straipsnyje nagrinėjami susitarimai dėl apsikeitimo informacija tarp konkurentų. Pagrindinis straipsnio tikslas – atskleisti susitarimų dėl apsikeitimo informacija vertinimo pagal Europos Sąjungos (toliau – ES) ir Lietuvos Respublikos (toliau – LR) konkurencijos teisę ypatumus ir atriboti tuos atvejus, kai susitarimai dėl apsikeitimo informacija yra laikomi draudžiamais susitarimais ir kai tokie susitarimai nesukelia jokio pavojaus konkurencijai, netgi priešingai – vertinami kaip konkurenciją skatinantys susitarimai. Tačiau pažymėtina, kad atribojimo kriterijų yra gana daug ir sudėtinga juos visus teisingai pritaikyti praktikoje. Minėtų kriterijų teisingo taikymo problematika pasireiškia ir ES Komisijos bei teismų, ir LR Konkurencijos tarybos bei teismų praktikoje. Iki šiol konkurencijos teisėje nėra aiškiai apibrėžta, ar yra tokių susitarimų dėl apsikeitimo informacija, kurie savo tikslu riboja konkurenciją ir kurių poveikis konkurencijai neturėtų būti įrodinėjamas. 2010 m. pabaigoje Komisija išleido Komunikatą dėl horizontalaus bendradarbiavimo susitarimų, kuris turi atskirą ir gana išsamų skyrių, skirtą informacijos mainų susitarimams. Komunikate Komisija daro prielaidą ar netgi prezumpciją, jog apsikeitimai individualaus pobūdžio informacija apie būsimas kainas bei gamybos / pardavimo kiekius laikytini savo tikslu ribojančiais konkurenciją ir prilygsta karteliniams susitarimams, dėl ko bus vertinami atitinkamai. Straipsnio autorius abejoja dėl tokios prezumpcijos tikslingumo bei teisingumo ir daro išvadą, jog susitarimai dėl apsikeitimo informacija gali tik turėti konkurenciją ribojantį poveikį, tačiau tikslo riboti konkurenciją jie neturi.*

Atsakymas į klausimą, ar susitarimas dėl apsikeitimo informacija turi antikonkurencinį poveikį, priklauso nuo daugelio veiksnių, tokių kaip, pavyzdžiui, ekonominės sąlygos rinkoje,

kurioje vyksta informacijos mainai, informacijos, kuria keičiamasi, pobūdis, informacijos apsikeitimo proceso (sistemos) savybės ir t. t. Tikėtina, kad konkurenciją ribojantis poveikis atsiras tuo atveju, kai konkurentai keičiasi informacija, kuri yra strateginio pobūdžio, konfidenciali, susijusi su ūkio subjekto ateities planais, individualizuota, detali ir kuria keičiamasi dažnai. Straipsnio autorius norėtų pažymėti, kad visi susitarimų dėl apsikeitimo informacija vertinimui aktualūs veiksniai turėtų būti vertinami visi kartu ir vieno ar kelių veiksmų taikymas, neatsižvelgiant į kitus veiksnius, neturėtų būti laikomas lemiamu. Susitarimo dėl apsikeitimo informacija šalys visais atvejais turėtų būti laisvos įrodinėti, jog jų sudarytas susitarimas atitinka išimties sąlygas.

Reikšminiai žodžiai: *keitimasis informacija, informacijos mainai, slaptas susitarimas, konkurencijos ribojimas pagal tikslą, konkurenciją ribojantis poveikis.*

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