

Collusive Practices Inside a Business Network: The Case of Information Exchanges

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Abstract

Business networks are systems of business cooperation integrating several firms that have at the same time cooperation and competition relationships, what makes them a relevant phenomenon for Competition Law. This paper analyses whether some agreements between network members may infringe Art. 101.1 TFEU, taking as an example one of the most important features of business networks – the information exchanges inside them. To this aim, it delimits the different kinds information exchanges taking place in horizontal or vertical networks, identifies the most relevant cases for Competition Law, and proposes an adequate assessment methodology that takes into account the existence and features of the network. The paper therefore concludes that competition law rules cannot be automatically applied when the cooperating companies belong to a business network, and that an accurate competitive analysis in these cases has to consider also the existence, aims, interests, and organizational and functional needs of the network

I. Background

1. *Competition Law and Business Networks*

Business networks can be defined as a group of legally and economically independent firms, which are nevertheless legally and economically linked and have a stable and multiple structure characterised by its interdependence, stability, business autonomy, and the unlimited liability of its members.¹ They are also systems of business cooperation integrating several firms, which have at the same time cooperation and competition relationships between them,² and are therefore a relevant phenomenon for Competition Law. Legal scholarship has frequently pointed

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¹ Juan Ignacio Ruiz Peris, *Un Derecho específico para las redes empresariales* in Juan Ignacio Ruiz Peris (dir.), *Nuevas Perspectivas del Derecho de Redes Empresariales* 73, 86 (Tirant Lo Blanch 2012).

² Fabrizio Cafaggi, *Contractual Networks and the Small Business Act: Towards European Principles?* EUI Working Paper LAW No. 2008/15, 2; Ruiz Peris, *Un Derecho específico*, *op. cit.* at 118.

out that business networks have significant negative externalities,³ and the potential anticompetitive impact of some of these structures is a clear example.

Competition Law issues related with business networks are manifold. They include matters such as the problems posed by networks' relationships in the field of merger control,⁴ the potential abuses of economic dependence inside the network,⁵ or the likelihood that the agreements that constitute the legal link between the members of a contractual network may infringe Art. 101.1 TFEU⁶, with the subsequent possibility to exempt them or not⁷. In turn, this raises the question of whether the exemption conditions set out in Art. 101.3 TFEU or in the block exemption regulations may apply, and if so, to what extent. This second option is especially relevant since the majority of these regulations refer to scenarios of stable cooperation between firms – both at horizontal and vertical level – that can be identified with some types of business networks⁸.

2. *The Relevance of Information Exchanges for Competition Law*

Information exchanges are of strong importance for any business network. Not only because they are an organizational tool inherent to them⁹, but also because they are an essential part of the network relationships since they express the intensification of the duty to act in good faith both at the birth and during the life of the contract¹⁰.

Nevertheless, economist and lawyers have traditionally seen information exchanges with some caution¹¹. This is especially the case in certain areas of legal regulation, such as Competition Law for instance, a legal field in which information exchanges

³ Gunther Teubner, *Netzwerke als Vertragsverbund*, 60–63 (Nomos 2004); Juan Ignacio Ruiz Peris, *Business Networks as a Legal Explanatory Framework*, in *Festschrift für Klaus J Hopt zum 70. Geburtstag am 24. August 2010. Unternehmen, Markt und Verantwortung*, Band. 2, 2913 (De Gruyter 2010).

⁴ Javier Viciano, *La tutela de intereses públicos y las redes contractuales. Especial referencia al control de las concentraciones y las redes empresariales*, in Juan Ignacio Ruiz Peris (dir.), *Hacia un Derecho para las redes empresariales*, 223 (Tirant Lo Blanch 2009).

⁵ Carmen Estevan de Quesada, *Unfair Commercial Practices in Franchise Agreements: The Exploitation of Economic Dependence Situations* 19(4) EBLR 691 (2008); *id.* *El abuso de dependencia económica en las redes de distribución*, in Juan Ignacio Ruiz Peris (dir.), *Hacia un Derecho para las redes empresariales*, 187 (Tirant Lo Blanch 2009).

⁶ Treaty on the Functioning of the European Union (OJ 2010/C83/49).

⁷ On the ancillary restraints doctrine and its application to business networks, see Juan Ignacio Ruiz Peris, *Una nueva orientación del tratamiento antitrust de la coordinación empresarial en las redes de distribución* in *Crisis económica y política de la competencia. III Jornadas nacionales de defensa de la competencia* 93, 98–104 (Tirant Lo Blanch 2009).

⁸ Ruiz Peris, *Una nueva orientación*, 94–95; *id.* *Business Networks*, 2915.

⁹ Teubner, *Netzwerke*, 46–47.

¹⁰ Juan Ignacio Ruiz Peris, *Del contrato bilateral a la relación de red*, in Juan Ignacio Ruiz Peris, (dir.): *Hacia un Derecho para las redes empresariales*, 18 (Tirant Lo Blanch 2009).

¹¹ As Adam Smith pointed out in the 18th century, «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» (Adam Smith, *The Wealth of Nations*, vol. 1, bk. 1, ch. 10 (1776)).

are usually examined in the context of collusion. From the very beginning of the application of the Competition Law rules, the competition authorities and the courts have examined the information exchanges between competitors with suspicion. A good example is the investigation in the United States of the so-called ‘Gary’s dinners’, organised between 1907 and 1911 by Elbert H. Gary, chairman of the board of the United States Steel Corporation, in which the participants exchanged information on prices and production quotas basically, in order to stabilise the steel prices¹². Although Mr. Gary was apparently convinced that these information exchanges were not contrary to the antitrust rules since there was no agreement adopted, the government brought suit and some years later the Supreme Court held that the dinners amounted to price fixing¹³.

In this same vein, legal research has analysed the relevance of information exchanges from the viewpoint of Competition Law¹⁴, and the competition authorities and the courts have also paid attention to this issue¹⁵.

As far as the European Competition Law is concerned, some information exchanges between competitors can be considered as facilitating practices with an anticompetitive impact, a conclusion that has to be based on the analysis of some data related to the characteristics both of the information exchanges and of the relevant market in which the exchange occurs. This is the orientation taken by the Communication from the Commission “Guidelines on the applicability of Art. 101 of the Treaty on the

¹² William H Page, *The Gary Dinners and the Meaning of Concerted Action* 62 S.M.U.L.Rev. 567 (2009).

¹³ *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920), 440–442.

¹⁴ See Kai-Uwe Kühn & Xavier Vives, *Information Exchanges Among Firms and Their Impact on Competition* (Office of the Official Publications of the European Community 1995); Michele Grillo, *Collusion and Facilitating Practices: A New Perspective In Antitrust Analysis* 14 Eur Jnl Law & Econ. 151 (2002); Antonio Capobianco, *Information Exchanges under EC Competition Law* 41 CMLRev. 1247 (2004); Maria Belen González Fernández, *El intercambio de información entre empresas y la libre competencia* in Juan Ignacio Font Galán & Manuel Pino Abad (dir.), *Estudios de Derecho de la competencia*, 363–369 (Marcial Pons 2005); Cani Fernández, *Los intercambios de información* in Santiago Martínez Lage & Amadeo Petitbó Juan (dir.), *Los acuerdos horizontales entre empresas*, 191–212 (Marcial Pons 2009); Julio Costas Comesaña, *El concepto de restricciones de la competencia por objeto y su aplicación a los intercambios de información entre competidores* 30 ADI 167 (2009–2010); Carmen Estevan de Quesada, *Facilitating Practices and Information Exchanges* in Luis Antonio Velasco, Carmen Alonso, Joseba Echebarria, Carmen Herrero & Javier Guriérrez (eds.), *Private Enforcement Of Competition Law*, 819–830 (Lex Nova 2011).

¹⁵ In the European Union, see cases C-7/95P *John Deere Ltd v. Commission of the European Communities* (1998 ECR I-03111), C-8/95 *New Holland Ford Ltd v. Commission of the European Communities* (1998 ECR I-03175), C-49/92P *Commission of the European Communities v Anic Partecipazioni SpA* (1999 ECR I-04125), C-179/99 *Eurofer ASBL v. Commission of the European Communities* (2003 ECR I-10725), C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* (2006 ECR I-11125), C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* (2009 ECR I-04529). Also, for the infringement of Art. 65 del TECA, see Case C-194/99P *Thyssen Stahl AG v. Commission of the European Communities* (2003 ECR I-10821).

Functioning of the European Union to horizontal co-operation agreements”¹⁶, that for the first time includes information exchanges as an autonomous kind of horizontal agreement that can be negatively assessed by the Commission, and that systematises the expertise gathered by the competition authorities and the courts in this field.

It is undeniable that horizontal information exchanges have a more anticompetitive potential than vertical ones, since the former are directly related to the oligopoly problem and the issue of tacit collusion. Yet from the beginning of the 20th century, economists argued that those oligopolists who carefully observe the market in which they operate realise that their behaviours are interdependent and this is an important incentive to coordinate their conducts. This coordination of their competitive behaviours can be achieved even without express agreement among them¹⁷, simply by adapting their conducts to the ones of the rest of competitors rationally. Economists usually employ the term tacit collusion to refer to this phenomenon, while legal scholars use different expressions such as tacit collusion, tacit coordination, oligopolistic interdependence or conscious parallelism¹⁸. In any case, this outcome can only be achieved in oligopolistic markets having certain characteristics, one of the more important ones being market transparency. The successful coordination of competitive conducts, typically of pricing strategies, is only possible if the market is transparent enough so that each firm has information about the conduct of the others, and is able to monitor any deviation from the coordinated course of action. In this context, both economist and legal scholarship have pointed out the importance of market transparency, and thus of information exchanges that enhance it, for the smooth operation of this tacit collusion¹⁹.

¹⁶ OJ C11/01 of 14.01.2011 (hereafter *Horizontal Guidelines*). These Guidelines replaced the previous “Guidelines on the applicability of Art. 81 of the EC Treaty to horizontal cooperation agreements” (OJ C3/02, of 6.1.2001).

¹⁷ See Edward H Chamberlin, *The Theory of Monopolistic Competition: A Reorientation of the Theory of Value* (Harvard University Press 1938), who figured out the famous example of the two gas stations of a small town, situated one in front of the other, that publish their prices in boards which can be modified instantly and costlessly. A good summary of modern oligopoly theory can be seen in Gregory J Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory* 71 *Antitrust L.J.* 719 (2003–2004).

¹⁸ Some legal scholars prefer not to employ the term “tacit collusion”, since collusion has a specific meaning in Competition Law, referred to the prohibited conducts stated in rules such as Art. 101.1 TFEU or section 1 of the Sherman Act: e.g. Richard Whish, *Competition Law*, 547–548 (6th ed., Oxford University Press 2009), who prefers the term “tacit coordination”. But the term “tacit collusion” is also widely employed in the legal literature to describe this kind of coordination without agreement: see, for instance, Antonio Capobianco, *Collusion, Agreements and Concerted Practices: An Economic and Legal Perspective*, in Giuliano Amato and Claus Dieter Ehlermann (eds.), *EC Competition Law: A Critical Assessment*, 45 (Hart Publishing 2007); Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases, and Materials*, 872 (3rd ed., Oxford University Press 2008); Giorgio Monti, *EC Competition Law* 309–311 and 334–344 (Cambridge University Press 2007); Peter Roth and Vivien Rose (eds.), *Bellamy and Child: European Community Law of Competition*, 758–759 (6th ed., Oxford University Press 2008); Herbert J Hovenkamp, *Federal Antitrust Policy*, 179–203 (4th ed., West Publishing Co. 2011); Richard A Posner, *Antitrust Law*, 51–100 (2th ed., The University of Chicago Press 2001).

¹⁹ Market transparency, even being of great importance, is just one of many other characteristics that favour the appearance and maintenance of tacit collusion in a market. Other important market data

On the contrary, vertical information exchanges are usually deemed to be less important from the viewpoint of Competition law since they usually take place in the context of wider vertical agreements that are usually regulated by Competition rules, typically by block exemption regulations²⁰. Something similar happens with the information exchanges taking place inside some technology transfer networks – in cases of licenses of intellectual property rights –, because these agreements are specifically regulated by Competition law²¹. It is nevertheless important to be aware of the fact that in a vertical network the information can also flow horizontally. And this kind of horizontal information exchanges inside a vertical business network can also be relevant for Competition law. This can occur either because the originally vertical information also flows at the horizontal level later, or because the information has a horizontal origin itself and flows at this same level, as it will be discussed subsequently. In all these scenarios of vertical networks, the information exchange can have an important intra-brand anticompetitive effect that merits some attention.

In any of these cases, the fact that the information is exchanged inside a business network is an important point to take into account. Consequently it is advisable to assess the information exchange, not only in the analytical framework outlined in the Horizontal Guidelines, but also in the context of the existence and operability of the network.

In order to better focus the question of the Competition law implications of information exchanges inside a business network, it is useful to start by classifying both the types of business networks and of information exchanges inside them. Given that from the point of view of Competition Law the most relevant distinction is the one between horizontal and vertical networks²², sections II and III focus respectively on the possible information exchanges taking place in each of these two categories of networks. Section IV then identifies the most relevant cases for Competition Law, and proposes an adequate methodology to assess them in the context of Competition law.

are concentration of the market, entry barriers, suppliers homogeneity – in terms of size, costs structure, production capacity, vertical integration, innovation capacity, etc. –, product homogeneity, stability of the market, among many others (for a detailed analysis see Posner, *Antitrust*, 69–79, describing up to seventeen market conditions that favour tacit collusion).

²⁰ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L102/1, of 23.4.2010) and Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L129/52, of 28.5.2010).

²¹ Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Art. 81(3) of the Treaty to categories of technology transfer agreements (OJ L123/11, of 27.4.2004).

²² Business networks can obviously be classified using other criteria: see Teubner, *Netzwerke*, 49–51; Fabrizio Cafaggi, *Introduzione* in Fabrizio Cafaggi (a cura di), *Il contratto di rete*, 15–17 (Il Mulino 2009). A detailed typology of contractual business networks can be seen in Cafaggi, *Contractual Networks*, 11–16 (the two first cases, multilateral contracts and bilateral “linked contracts”, are further analysed in more detail at 16–40).

II. Information Exchanges in Horizontal Business Networks

1. Introduction

Horizontal business networks have deserved a preferential attention from competition authorities as far as information exchanges are concerned. The former block exemption regulations referred to the most important horizontal business networks²³ and the European Commission detailed specific aspects of information exchanges inside this type of network in the old *Guidelines on the applicability of Art. 81 of the EC Treaty to horizontal cooperation agreements*.

By the end of 2010, on the occasion of the draft of the new block exemption regulations²⁴, the Commission took this opportunity to vest all its previous experience from the field of information exchanges in the new Horizontal Guidelines. One of the more important features of the Horizontal Guidelines is the distinction they make between three kinds of information exchanges.

First, there are ‘agreements, decisions by associations of undertakings, or concerted practices under which information is exchanged, where the main economic function lies in the exchange of information itself’²⁵. These will be assessed using the methodology set out in section 2 of the Horizontal Guidelines, entitled ‘General principles on the competitive assessment of information exchange’. Secondly, there are information exchanges that ‘can be part of another type of horizontal co-operation agreement (for example, the parties to a production agreement share certain information on costs)’, and which should be assessed ‘in the context of the assessment of the horizontal co-operation agreement itself’²⁶. And finally, other information exchanges may either ‘constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing, in particular, prices or quantities’ or ‘facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms’. In the first case they will normally be considered and fined as cartels, and in the second one they will be assessed as part of the cartel²⁷.

²³ Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Art. 81(3) of the Treaty to categories of specialisation agreements (OJ L304/3, of 5.12.2000); Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Art. 81(3) of the Treaty to categories of research and development agreements (OJ L304/7, of 5.12.2000).

²⁴ Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development (OJ L335/36, of 18.12.2010); Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (OJ L335/43, of 18.12.2010).

²⁵ Horizontal Guidelines, §56.

²⁶ Horizontal Guidelines, §56.

²⁷ Horizontal Guidelines, §59. The first case is quite clear since it amounts to a typical cartel activity, that of fixing prices or quantities. The second one is that of information exchanges that designed as monitoring devices to check whether the cartel’s participants are following the agreed course of action: in this case the cartel is globally analysed, i.e. all the specific conducts of the participants are

Leaving aside the third category described in the Horizontal Guidelines, since a cartel cannot be considered as a business network, it is necessary to evaluate the relevance of the first two types of information exchanges in connection with business networks.

2. *Information Exchanges Ancillary to Another Horizontal Co-Operation Agreement*

In principle, most of the information exchanges taking place inside a horizontal business network will fall within the second category described in the Horizontal Guidelines. This is so because these information exchanges are performed by definition in the context of a horizontal network that can be considered as a 'horizontal agreement' under Competition Law. They must therefore be assessed in the context of the horizontal agreement itself, as stated by the Horizontal Guidelines. In these cases, there is no need to carry out a specific analysis of the information exchanges that may have been done by the network members, since the competitive assessment will consider all the agreement features globally, i.e. the exchange of information together with any other specific agreements that belong to the wider horizontal agreement.

Competition Law has focused more specifically on certain types of horizontal networks, such as research and development or specialisation ones, which have their own block exemption regulations. But the Horizontal Guidelines also refer to other types of horizontal networks, like production, purchasing, commercialisation or standardisation ones²⁸. In all these cases the competitive assessment will be carried out according to the general methodology stated in section 1.2 of the Horizontal Guidelines, and specifically adapted to each type of agreement in the corresponding section, as well as the general principles on information exchanges stated in section 2²⁹.

Related to this, it is worth considering whether the information exchanges that take place inside other types of horizontal networks that are not analysed in the Horizontal Guidelines, but whose main function is not the exchange of information itself, should be competitively assessed following this same methodology. Given that these types of information exchanges are also undertaken in the context of a wider horizontal agreement, it seems logical to assess them together with the latter. In this case, the competitive assessment cannot be carried out in the context of block exemption regulations, since there is none applicable to them. Therefore the analysis of these information exchanges has to evaluate generally whether the horizontal agreement infringes Art. 101.1 TFEU, taking into account all the network features. If the network violates Art. 101.1 TFEU it will be then necessary to analyse whether it fulfils the exemption conditions stated in Para. 3 of Art. 101 TFEU. On the contrary, if the net-

examined – typically horizontal price fixing, market sharing agreements, etc. (see, for instance, case *Anic Partecipazioni*, *cit.*).

²⁸ Sections 4, 5, 6 and 7 of the Horizontal Guidelines.

²⁹ Horizontal Guidelines, §54.

work does not infringe Art. 101.1 TFEU, but the information exchange has an anti-competitive impact, it may still be necessary to evaluate whether the latter is an ancillary restriction to the former. Legal scholarship has argued that in the context of distribution networks for example, the doctrine on ancillary restraints should be applicable if the restrictions derived from the exercise of the directive power of the network head are aimed to efficiently organise the network and do not have relevant intra-brand exclusionary effects or serious market sharing effects³⁰; and that the same argument could be applied to horizontal networks since the foundations of the theory are general, although admitting that it could be more problematic in these cases³¹.

3. *Purely Informative Exchanges*

As stated in the Horizontal Guidelines, there are occasions where the main economic function of an agreement lies in the exchange of information itself.

This could be the case of informative business networks whose central aim is to enable the members to share certain kind of information, something similar to the systems of information exchange put in place by certain trade associations³². This kind of exchanges can be done directly by network members or can be organised through third parties – such as market research organisations³³ or a firm that operates a register of information on the solvency of customers between financial institutions³⁴. In any of these cases, the agreements should eventually be assessed according to the general principles on the competitive assessment of information exchange established in section 2 of the Horizontal Guidelines.

This issue is especially relevant if one bears in mind the tension between the network members' need to share some information so that the network can properly operate on the one hand, and the potential application of Competition law to this information exchanges on the other. That is why it is advisable to carry out a more detailed analysis of the conditions under which this applicability is possible. These conditions are closely related to the existence of the network and to the specific features of this system of business co-operation³⁵, as discussed in section IV of this paper.

III. Information Exchanges in Vertical Business Networks

1. *Introduction*

There is always a certain vertical flow of information inside a vertical network, which relates exclusively to the relationship between the network head and the

³⁰ Ruiz Peris, *Una nueva orientación*, *op. cit.* at 98–104.

³¹ Ruiz Peris, *Business Networks*, *op. cit.* at 2916.

³² The leading case on information exchanges organised by a trade association is *John Deere*, *cit.*

³³ Horizontal Guidelines, §55.

³⁴ For example, case *Asnef-Equifax*, *cit.*

³⁵ As far as the issue analysed in this paper is concerned, the most important ones are the rights of the network head to co-ordinate, direct and control the activities of the network members.

members with whom it contracts. This type of information flow is the most obvious expression of the value of information as an organizational tool in networks.

But inside a vertical network the information sometimes flows also horizontally, i.e. between members situated at the same level in the network – for instance, between distributors or franchisees. This horizontal information, in turn, can have a vertical or a horizontal origin: a vertical one when the information comes from the network head, and a horizontal one when the information is shared directly by network members without any intervention of the network head.

These three possibilities deserve some more attention and will therefore be analysed separately hereafter, focusing on whether and to what extent these information exchanges are relevant for Competition law and their potential connection with the block exemption regulations.

2. *Purely Vertical Information*

Vertical information is inherent to the network structure, because the network head is always obliged to give some information to the network members, regarding the vertical relationship that links them³⁶. In these cases, similarly to what happens with information exchanges which are part of another type of horizontal co-operation agreement, the information exchange is only one more feature of the vertical agreement, and it should therefore be assessed with the agreement itself, in the context of the corresponding block exemption regulation and Guidelines. If this is accepted in the case of horizontal agreements which are more problematic from the antitrust point of view, as seen before, it seems logical that the rule would also be applied to the vertical information exchanges taking place inside a wider vertical agreement³⁷. This competitive assessment must also logically take into account the data related to the network, since they are needed in order to assess properly the agreement – which is a network.

3. *Horizontal Information Having a Vertical Origin*

In some cases the network head may give some information about the network that

³⁶ This duty has sometimes even a legal character, like for instance in the case of the franchise where the franchisor has a pre-contractual duty to disclose to the franchisee some information related to the network: see Juan Ignacio Ruiz Peris, *Los tratos preliminares en el contrato de franquicia* (Aranzadi 2000); Jaime Martí Miravalls, *Transparencia y redes empresariales*, in Ruiz Peris (dir.), *Hacia un Derecho*, *op. cit.* at 135–163.

³⁷ Always taking into account Art. 6 of Commission Regulations 330/2010 and 461/2010, *cit.*, that enables the Commission “to declare that, where parallel networks of similar vertical restraints cover more than 50 % of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market”. If the information exchanges occur inside a network having those characteristics, they could be out of the scope of the corresponding block exemption regulations. Nevertheless, this does not mean that information exchanges inside this type of networks must be assessed autonomously, but only that they must be assessed outside the block exemption regulations but together with the wider vertical agreement since this is the logical and natural context where the information exchange occurs.

makes it possible for the network members to identify specific data related to other network members, or she may provide direct or indirect information about specific network members. In this case, although the information has a vertical origin – since it comes from the network head and it is provided in the context of the vertical relationship that links her to the network member–, it has a clear horizontal nature because it gives network members data related to their competitors at the same level of the production or distribution chain. It is true that the activity of the network head in this case is apparently similar to the one of a trade association that provides information about the economic sector in which the members operate, the typical case in which the information exchange can be considered a practice that facilitates collusion³⁸. However, in the present case, the fact that the information exchange takes place inside a business network is relevant, and the competitive assessment has to take it into account.

The existence and the features of the network are therefore essential data for a correct assessment in this case. If the information exchange is needed for the correct functioning of the network, or it belongs to the organizational or monitoring powers of the network head, it can be considered as a necessary part of the general vertical agreement. If the wider vertical agreement is covered by a block exemption regulation and the information is an essential factor for the operability of the network, the information exchange should be assessed in the context of the rules applicable to the vertical agreement, i.e. the corresponding block exemption regulation. This could be the case, for instance, of the pre-contractual information about the network that a franchisor has to give to its franchisees, or the serial information that it has to give them during the life of the franchise. On the contrary, if the information exchanged is not necessary for the correct functioning of the network, then it could be deemed not essential under Art. 101.3 TFEU and therefore not admitted.

In fact, these cases are very similar to the purely vertical information seen before. The difference in the present case lies in that the information has not only a vertical meaning – for the organisation of the relationship between the network head and a member of the network–, but it can also have a horizontal impact. This information is nevertheless just one more feature of the vertical agreement, and it should therefore be assessed with it. That is the reason why its competitive assessment must include many additional data besides those related to the information itself and its significance for the functioning of the network.

On the one hand, some questions related to the relevant market have to be carefully considered, such as the potential intra-brand restrictions³⁹, or the appreciable impact on competition produced by the cumulative effects of parallel networks of similar agreements⁴⁰. On the other hand, there are important issues related to the network itself, not only to the organizational or monitoring powers of the network head

³⁸ See case *John Deere*, *cit.*

³⁹ Joseba Echebarría Sanz, *Acuerdos verticales* in Luis Antonio Velasco San Pedro (coord.), *Derecho europeo de la competencia*, 106–122 (Lex Nova 2005).

⁴⁰ Viciano Pastor, *La tutela*, *op. cit.* at 224–231.

mentioned before, but also and especially to the existence of a network interest shared by all its members, one of its legitimate expressions can be the improvement of the network's competitive position in the relevant market⁴¹, always through legal means obviously.

In sum, it does not seem appropriate to assess this kind of information exchange exclusively with the methodology established in section 2 of the Horizontal Guidelines. The existence of the vertical network, with its eventual positive effects for competition, should also be taken into account in this competitive assessment.

4. *Direct Horizontal Information*

Direct information exchanges between network members situated at the same horizontal level are similar to the horizontal agreements on exchange of information that have traditionally worried the competition authorities and the courts. This could be the case, for instance, of distributors belonging to a network in the field of the car industry, which include in a common database the data of the clients who come to ask for information to buy a car, adding also the conditions that they have offered to them.

In this scenario, even if the information exchange takes place in a vertical network, it is obvious that the nature and effects are similar to those of a horizontal exchange of information between competitors. Therefore, it does not seem appropriate to apply automatically the rules on vertical agreements, since these regulate the vertical relationships in the network, not the eventual horizontal relationships that may exist between members situated at the same horizontal level⁴². Nevertheless, the network members situated at the same level in a network do not form either a horizontal network to which to apply the corresponding antitrust rules; in other words, in principle they are not covered by the block exemption regulations on horizontal agreements⁴³.

It appears that the more appropriate assessment methodology for these cases would be that referring to the agreements where the main economic function lies in the exchange of information itself, according to section 2 of the Horizontal Guidelines. But, just as in the cases mentioned in subsection III.3 of this paper, the membership to the network influences the assessment of the information exchanges inside the network, even that of those taking place at horizontal level. It is therefore necessary to qualify this methodology with the special network features, a point that will be discussed in the next section.

⁴¹ Ruiz Peris, *Del contrato bilateral*, *op. cit.* at 16.

⁴² Commission Regulations 330/2010 and 461/2010, *cit.*

⁴³ The relationships in the context of technology transfer networks are a specific case in this context, since the corresponding block exemption regulation examines both the vertical and horizontal agreements in this type of network.

IV. Competitive Assessment of Agreements Whose Main Economic Function Is the Exchange of Information Itself, When They Take Place Inside a Business Network

1. Background

Sections II and III have shown that some information exchanges taking place inside business networks cannot be assessed autonomously, i.e. without considering also the features of the wider agreement – the network – in which they occur. This is the case of both the purely vertical information exchanges and the horizontal information exchanges having a vertical origin, which should be assessed in the context of the vertical agreement and taking into account the network features. The same occurs with information exchanges ancillary to other kinds of horizontal cooperation, which should be evaluated in the context of the horizontal agreement.

Parallel to this, there are other information exchanges that, lacking a more specific framework for their competitive assessment and being considered as agreements whose main economic function lies in the exchange of information itself, should be evaluated according to the methodology established in section 2 of the Horizontal Guidelines. This category includes both information exchanges taking place in horizontal informative business networks, and direct horizontal information exchanges inside a vertical network.

This section argues that in these two cases, in addition to the principles of section 2 of the Guidelines, it is also necessary to take into account the special features of the network in order to make a correct antitrust assessment.

2. Competitive Assessment of Information Exchanges According to the Horizontal Guidelines

In the course of their practice, the competition authorities and the courts have established some criteria to distinguish between legal and illegal information exchanges according to Art. 101 TFEU⁴⁴. These criteria can be divided into two groups: those related to the information and those related to the market in which the exchange occurs⁴⁵.

The Horizontal Guidelines follow this path, but they undertake a much more detailed analysis. They start by determining when an information exchange establishes or is part of an agreement, a concerted practice or a decision by an association

⁴⁴ Although the first reference by the Commission to exchange information systems is to be found in the “Notice Concerning Agreements, Decisions and Concerted Practices in the Field of Cooperation Between Enterprises” (OJ C75/3, of 29.07.1968), the essential criteria for the assessment of these conducts were specified in the Commission’s Seventh Report on Competition Policy: European Commission, *Seventh Report on Competition Policy*, 18–21 (Brussels-Luxembourg 1978). As far as the jurisprudence is concerned, the leading case on the matter is *John Deere, cit.*

⁴⁵ *Asnef-Equifax, cit.*, § 54.

of undertakings, the first condition to be assessed under art. 101 TFEU⁴⁶, and by detailing the main competition concerns pertaining to them – their potential collusive outcome and anti-competitive foreclosure⁴⁷. The Guidelines then distinguish between information exchanges that amount to a restriction of competition by object⁴⁸ and those that have restrictive effects on competition⁴⁹. In the second case, it is necessary to take into account the data related to the characteristics of the market and the information when carrying out the competitive assessment⁵⁰.

The first category includes information exchanges between competitors of individualised data regarding intended future prices or quantities, since they are particularly likely to lead to a collusive outcome⁵¹.

The second one includes exchanges of other kind of information, which have to be analysed on a case-by-case basis as the results of the assessment depend on a combination of various specific factors. According to the Horizontal Guidelines, an information exchange would have restrictive effects and therefore infringe Art. 101.1 TFEU, if it were ‘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’. In order to assess this, the Commission takes into account both the economic conditions on the relevant markets and the characteristics of the information exchanged⁵².

As for the former, the Horizontal Guidelines state that companies are more likely to achieve a collusive outcome in markets that are sufficiently transparent, concentrated, non-complex, stable and symmetric⁵³. As for the latter, if the information exchanged is strategic, updated, not public, refers to individualised data, and the exchange is frequent, it is more likely to have restrictive effects on competition⁵⁴. The Guidelines also include in this second group of criteria the so-called ‘market coverage’, what means that the companies involved in the exchange have to cover a sufficiently large part of the relevant market, so that the information exchange can produce restrictive effects. This data is relevant because without it the competitors

⁴⁶ Horizontal Guidelines, §§ 60–63.

⁴⁷ Horizontal Guidelines, §§ 65–68 and §§ 69–71, respectively.

⁴⁸ Horizontal Guidelines, §§ 72–74. On the possibility that some information exchanges between competitors can be considered as restrictions of competition by object, see Julio Costas Comesaña, *El concepto*, 176–182.

⁴⁹ Horizontal Guidelines, §§ 75–94.

⁵⁰ Horizontal Guidelines, §§ 77–85 and §§ 86–94, respectively.

⁵¹ Horizontal Guidelines, §§ 73–74. The Project of Horizontal Guidelines [SEC(2010)528] included in this group information exchanges of present conducts that could reveal intentions on future conducts, and cases in which future prices or quantities could be deduced from the combination of different data (Project of Horizontal Guidelines, §§ 67–68), but this reference was eliminated from the definitive text of the Horizontal Guidelines.

⁵² Horizontal Guidelines, § 75.

⁵³ Horizontal Guidelines, §§ 77–85.

⁵⁴ Horizontal Guidelines, §§ 86–94.

that are not participating in the information exchange could constrain any anticompetitive behaviour⁵⁵.

Finally, information exchanges have also to be assessed under Art. 101.3 TFEU, checking whether they lead to efficiency gains; they are indispensable – i.e. they do not go beyond what is necessary to achieve the efficiency gains they generate–; the efficiency gains are passed on to consumers to an extent that outweighs the restrictive effects caused; and they do not eliminate competition in respect of a substantial part of the products concerned⁵⁶.

Given that the economic conditions on the relevant markets are data external to the network and therefore may vary depending on the market in which a network operates, they are not suitable as a general conceptual framework for the competitive assessment of information exchanges that take place inside a business network. For this, the central point has to be the characteristics of the information exchanged – since it connects directly to the type of network analysed in each case–, and the market coverage – that combines certain aspects referred to the network and the market. This is what will be considered in the next two subsections, focusing on the two previously selected cases: horizontal informative networks, and direct horizontal information exchanges inside a vertical network.

3. *Horizontal Informative Networks*

This type of network can be created for instance by means of contracts according to which the firms belonging to the network give information about their activity to another firm that creates and manages the information register, and the firms can have access to all registered data in turn. These contracts can be service agreements of a specific nature – e.g. one party provides the information and pays a fee, and the other operates the register and provides the consultation service – that are not included in any of the horizontal block exemption regulations.

In some similar cases, the competition authorities and the courts have considered that these agreements amounted to information exchanges between competitors that have to be assessed according to the methodology established in section 2 of the Horizontal Guidelines. In this line, they have analysed the characteristics of both the information and the relevant market in order to check whether the agreement infringed Art. 101.1 TFEU, and if so, whether it would fulfil the exemption conditions of Art. 101.3 TFEU.

⁵⁵ Horizontal Guidelines, §§ 87–88. The Project of Horizontal Guidelines examined the market coverage as a previous issue, separately from the data related to the market and the information (Project of Horizontal Guidelines, §§ 71–72).

⁵⁶ Horizontal Guidelines, §§ 95–104. The last two requirements – benefit for the consumers and not elimination of competition – are merely outlined. It is true that the four conditions are examined later on in every chapter dealing with specific agreements, but they are also very briefly mentioned in there. In any case, this is something habitual in the Commission analysis (for a critical view on this issue, see Carmen Estevan de Quesada, *Protección de consumidores y Derecho antitrust: la participación de las asociaciones de consumidores en el control de las prácticas colusorias*, 28 ADI 169 (2007–2008).

As far as this paper is concerned, the main issue to be examined is whether the existence of the network provides any data that may suggest a different kind of competitive assessment for this type of information exchange systems. As noted previously, when it comes to assess an information exchange that takes place inside a business network it seems advisable to take into account some specific data like the network interest or the organizational or monitoring powers of the network head. While in other kinds of networks – like franchising, for example – the network interest and the referred powers of the network head are essential elements that can justify the need for some information exchanges, this is more dubious in the horizontal informative networks, especially due to the content and nature of the network interest.

In general terms, the aim of a purely informative network is to provide its members with a wider and more detailed information than the one they could gather themselves alone. If the network members are competitors, the information provided by the network and related to the market in which they operate can enhance market transparency artificially and this could in turn permit or facilitate the coordination of their competitive behaviours under certain circumstances. The European Court of Justice has ruled that these types of informative networks are not restrictions of competition by object⁵⁷, and it has analysed the restrictive effects using the standard criteria related to the information and the market in order to check whether they infringed Art. 101 TFEU and if so, whether they fulfilled the requirements of Art. 101.3 TFEU. Nevertheless, it is worth pointing out that the first assessment – the one related to the object of the agreement – indicates the necessity to take into account the existence and features of the network.

Indeed, the issue of whether this type of informative networks is a restriction of competition by object is closely related to the aims and interest of the network. Before further analysing the possible restrictive effects of the information exchange – i.e. by examining the characteristics of the information and the market – the European Court of Justice has examined in these cases “the essential object of (credit) information exchange systems”, focusing on the purpose of the information exchange⁵⁸. It is worth noting that this purpose determines the network interest, being therefore an essential point in this first step of the competitive assessment of the information exchange. In fact, this amounts to the competitive assessment of the network interest itself. In other words, the first thing to examine is whether the aim and purpose that brought the firms to build the networks was anticompetitive itself. This clearly indicates that the data related to the network must be taken into account right from the start of the competitive assessment.

The possible restrictive effects of the agreement will be analysed only if the network interest passes the “competitive test”, so to say. In this second phase, the competition authorities use the analytical framework described in section 2 of the Horizontal Guidelines, according to which the more relevant data are not the network interest nor the powers of the network head, but instead the characteristics of the

⁵⁷ See *Asnef-Equifax*, *cit.*, §§ 47–49.

⁵⁸ See *Asnef-Equifax*, *cit.*, §§ 46–48.

information and the relevant market. But even in this context the existence of the network is an essential datum for the assessment, since the Horizontal Guidelines state that the market coverage of the firms involved in the agreement has to be examined and this means checking the market coverage of the network. In sum, the competitive assessment in this second phase must also take into account at least one datum related to the network, its market coverage.

4. Direct Horizontal Information Exchanges Inside a Vertical Network

Members of a vertical business network who are situated at the same level in the network can exchange some information directly, without any participation of the network head. In these cases, the assessment methodology is in principle the one described in section 2 of the Horizontal Guidelines, given that these information exchanges take place between competitors and that they are not covered by any block exemption regulation.

However, the existence of the vertical network has also an impact on the competitive assessment of this type of information exchanges. As seen before, the characteristics of the information are one of the main issues that have to be examined, and in order to assess them properly it will be essential to connect them with the network's aims and operational needs. The decisive point here is whether the information exchanged – even if strategic, updated, not public, individualised, and frequent⁵⁹ –, is needed for the correct functioning of the network. In principle the information related to the internal functioning systems of the network could be justified as necessary for the correct functioning of the network. On the contrary, the information related to prices or other commercial conditions set by each member of the network – such as the mentioned before in the example of the car distributors – could be more difficult to justify in terms of their necessity for the network interest and functioning. This shows again that the network interest is one of the essential parameters to use for a correct competitive assessment of the potential anticompetitive conducts inside a network.

Another significant fact in these cases can be the market coverage, which is also connected to the network. This kind of information exchanges will be normally considered as intra-brand agreements and it will be therefore essential to analyse whether they have a significant impact on competition – in terms of market shares and cumulative effect of parallel networks –, something tightly related to the network design and its position in the market. If the network has not market coverage, the information exchange inside it will not have an anticompetitive impact in principle.

⁵⁹ Horizontal Guidelines, §§ 86, 89, 90, 92 and 93, respectively. The characteristics of the exchange itself (its frequency and the fact that it is public, §§ 91 and 94) and the market coverage (§§ 87–88) are also analysed in this group.

V. Conclusions

This paper has shown that the competitive assessment of the information exchanges taking place inside a business network always has to take into account the existence and features of the network, even though in a different manner depending on the type of network.

Most of the information exchanges inside horizontal networks will probably be considered as ancillary to wider cooperation agreements and will therefore have to be assessed in the context of this wider agreement. Even in the case of horizontal informative networks – which have to be analysed according to the methodology of section 2 of the Guidelines – some data related to the network will be essential for the assessment, basically the network interest, when analysing whether the agreement is a restriction by object; and the market coverage, when analysing if it has restrictive effects.

In vertical networks, when there are vertical information exchanges or horizontal exchanges having a vertical origin, it will be essential to take into account the network interest and the organizational and monitoring powers of the network head. And in the cases of direct horizontal information exchanges inside a vertical network, which have to be assessed following the methodology of section 2 of the Guidelines, the important data will be whether the information is necessary for the network interest and correct functioning.

From this first conclusion we can extract a second one of a more general nature for Competition Law. The ascertainment of the importance of the data related to the network for a correct competitive assessment of potential collusive conducts inside it – such as the example analysed in this paper, that of information exchanges – shows that some Competition Law rules, designed to solve some general problems posed by cooperation between competitors, cannot be automatically applied when the cooperating companies belong to a business network. If business networks have legitimate aims and positive effects for the market and the economy that deserve protection – something generally admitted since business networks are considered to promote economic growth –, then it is necessary to take into account their existence, aims, interests, and organizational and functional needs, when analysing some of their conducts.

The correct understanding of the business network phenomenon by Competition Law means not only to recognise the existence and positive effects of networks – something already done to some extent since the block exemption regulations refer to some types of business networks – but also to understand and assess the meaning of their essential features adequately when analysing some of their conducts that can in principle raise some antitrust concerns. In the same way that the correct interpretation of a network contract has to take into account these data, the adequate competitive assessment of the conduct of the network members demands that they are also included in the analysis.

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