

## Chapter 11

# A Synoptical Analysis of the Guidelines on the Exchange of Competitively Sensitive Information Between Competitors under the Competition Act 89 of 1998

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### Abstract

The Competition Commission (Commission) has identified a critical need to provide comprehensive guidance to trade associations and various public and private stakeholders on the exchange of information amongst firms. These stakeholders often seek advisory opinions from the Commission regarding the establishment of systems for sharing information. Notably, the scope of permissible and impermissible information exchanges under section 4 of the Competition Act 89 of 1998 remains ambiguous, creating uncertainty in practice. In this context, it is imperative for the Commission to offer clear and authoritative guidance on distinguishing between types of information exchange that may inhibit competition and those that could promote market efficiencies. This chapter critically appraises the recently issued guidelines on the exchange of competitively sensitive information, assessing their alignment with prevailing regional and international practices, particularly those in the United States, selected European Union member states, and the United Kingdom. Through this analysis, the chapter aims to contribute to a deeper understanding of the role and effectiveness of these guidelines in fostering a balanced approach to competition law enforcement.

**Keywords:** small enterprises, sensitive information, competition, exchange systems, equitable opportunity.

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## 11.1 Introductory Remarks

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In conducting business, companies may acquire information that gives them a competitive advantage over other firms. Such information may pertain to certain aspects of business strategies, including but not limited to the reduction of production costs, effective consumer outreach, and the utilisation of cutting-edge technology.<sup>1</sup> This type of information is categorised as competitively sensitive information and is maintained as proprietary knowledge by companies in order to maintain their competitive advantage.<sup>2</sup> Because of its detrimental impact on competition, the Competition Act 89 of 1998 generally prohibits the sharing of competitively sensitive information with other firms.<sup>3</sup>

Information exchanges can yield both beneficial and detrimental impacts on competition. On the positive side, the availability of information enables firms to enhance the efficiency of their distribution networks, strengthen their marketing strategies, and promote innovative investments in infrastructure and research and development.<sup>4</sup> By sharing non-sensitive data, companies can improve operational coordination and reduce market inefficiencies, leading to better consumer outcomes and more robust industry

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<sup>1</sup> The legislature in s 1 of the Competition Act 89 of 1998 defines confidential information as ‘trade, business or industrial information that belongs to a *firm*, has a particular economic value, and is not generally available to or known by others’.

<sup>2</sup> See, Guidelines on the Exchange of Competitively Sensitive Information 2023 para 2.5. ‘Competitively Sensitive Information’ means ‘information that is important to rivalry between competing firms and likely to have an appreciable impact on one or more of the parameters of competition (for example, price output, product quality, product variety or innovation). Competitively sensitive information could include prices, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, research and development programmes and their results’.

<sup>3</sup> The Competition Act s 4. See also, Das Nair, R and Mncube, L ‘The Role of Information Exchange in Facilitating Collusion: Insights from Selected Cases’ in K Moodaliyar and S Roberts (eds) *The Development of Competition Law and Economics in South Africa* (HSRC 2014) 181.

<sup>4</sup> R Nitsche and N von Hinten-Reed *Competitive Impacts of Information Exchange* (Charles River Associates Limited 2004) 10–18.

growth.<sup>5</sup> Furthermore, companies possess the capacity to enhance their levels of productive efficiency through the implementation of benchmarking initiatives, which allow for the comparison and acquisition of best practices from other firms.<sup>6</sup> However, empirical evidence demonstrates that information sharing can pose significant hazards to competitive dynamics.<sup>7</sup> Sharing of information can have a significant impact on the promotion of conspiracy, which can cause substantial damage to both competition and consumers.

The potential challenges faced by enforcement agencies in managing the diverse impacts of information exchange may be mitigated if a mechanism existed to establish a distinct demarcation between its pro-competitive and anti-competitive manifestations. One of the primary challenges is that information exchange can provide either positive or negative outcomes in nearly all scenarios.<sup>8</sup> For example, in the event that companies engage in the sharing of information regarding their pricing activities, such an exchange could potentially result in increased prices within the market, consequently limiting competition. Conversely, it could also lead to heightened price competition amongst competitors in the market, which could prove highly advantageous for consumers. The diverse and perhaps contradictory consequences arising from the exchange of information present a significant obstacle for competition authorities when conducting comprehensive legal evaluations. Within this particular context, the matter of determining the suitable legal criterion for evaluating the exchange of information amongst competitors is important.

Competition laws across various jurisdictions lack explicit measures pertaining to the regulation of information exchange

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<sup>5</sup> Ibid.

<sup>6</sup> M Bennett and P Collins 'The Law and Economics of Information Sharing: The Good, the Bad and the Ugly' (2010) 311 *European Competition Journal* 311 at 318.

<sup>7</sup> See D Genesove and WP Mullin 'Rules, Communication, and Collusion: Narrative Evidence from the Sugar Institute Case' (2001) 91 *American Economic Review* 379 at 388.

<sup>8</sup> K-U Kuhn 'Designing Competition Policy Towards Information Exchanges – Looking Beyond the Possibility Results' in Organisation for Economic Co- operation and Development (OECD) 'Policy Round Tables: Information Exchanges Between Competitors under Competition Law' (2010) 416.

between competing firms.<sup>9</sup> Instead, these issues are addressed within the context of established prohibitions against cartel agreements and/or coordinated practices.<sup>10</sup> Hence, this commentary aims to critically assess the effectiveness of the Guidelines on the Exchange of Competitively Sensitive Information between Competitors under the Competition Act 89 of 1998 (the Guidelines) in addressing potential gaps in the law, providing clarity for businesses and regulators alike. It seeks to determine whether the Guidelines offer sufficient guidance to market participants and the Competition Commission in navigating the complexities of information exchange.

The commentary is structured into five main parts. The first part outlines the potential benefits and legal risks associated with different forms of information exchange between competitors. It explores how certain types of information sharing can foster efficiencies but also pose risks of facilitating collusion or other anti-competitive conduct. The second part delves into the specifics of the Guidelines, analysing their provisions and offering interpretations of key aspects. The third part discusses various methods of information sharing, including direct and indirect exchanges, and their potential implications for market competition. In the fourth part, the commentary reviews relevant case law from South Africa, the United States, and the European Union, focusing on how these jurisdictions have approached issues of information exchange between competitors. The analysis highlights key legal principles that can inform the Competition Commission's enforcement approach in South Africa. The fifth and final part provides a conclusion, summarising the findings and offering

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<sup>9</sup> See, for instance, A Capobianco 'Information Exchange under EC Competition Law' (2004) 41(5) *Common Market Law Review* 1247 examines how information exchange amongst competitors is treated under European Community (EC) competition law. The article discusses the legal and economic implications of information sharing between companies, focusing on how such practices can influence competition within the EU's single market. E Bissocoli 'Trade Associations and Information Exchange under US and EC Competition Law' (2000) 23(1) *World Competition*

79. Bissocoli analyses key cases and regulatory approaches, offering insights into how authorities assess the impact of information exchange on market competition. The study underscores the importance of distinguishing between permissible and impermissible information-sharing activities to maintain fair competition.

<sup>10</sup> Competition Act s 4.

recommendations for refining the Guidelines to better address identified gaps and enhance their practical application in the South African context.

By addressing these aspects, this chapter aims to provide a nuanced understanding of the role of the Guidelines in regulating competitively sensitive information exchanges while also identifying areas where further clarity or legislative amendments may be needed.

## **11.2 Benefits and Potential Legal Issues of Sharing Competitively Sensitive Information**

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Although the Guidelines are not binding on the Commission, Competition Tribunal, or Competition Appeal Court when they exercise their discretion and interpret the Competition Act, they must be taken into account when interpreting and applying the Act.<sup>11</sup> It is crucial to note that the Guidelines issued by the Commission do not outright prohibit the exchange of information. Instead, it is argued that the primary objective of the Guidelines is to achieve a balance between the positive and negative impacts that the sharing of competitively sensitive information may have on market competition. Accordingly, this part presents a detailed examination of the benefits and drawbacks associated with such exchanges.

The sharing of information within the market may result in increased levels of transparency and openness. In return, this can yield benefits for both consumers and companies.<sup>12</sup> This phenomenon can give rise to tangible advantages for consumers and enhance operational effectiveness for businesses, ultimately contributing to the overall enhancement of consumer wellbeing.<sup>13</sup> On that note, economists

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<sup>11</sup> South African Competition Commission ‘Guidelines on the Exchange of Competitively Sensitive Information’ (2023) para 1.1.

<sup>12</sup> C Schultz ‘Transparency on the Consumer Side and Tacit Collusion’ (2005) 49(2) *European Economic Review* 279; H Varian ‘A Model of Sales’ (1980) 70(4) *American Economic Review* 651. S Albæk, P Møllgaard and PB Overgaard ‘Law-Assisted Collusion? The Transparency Principle in the Danish Competition Act (1996) 17 *European Competition Law Review* 339–340.

<sup>13</sup> See Bennett and Collin (note 6 above) 318; R Bloomfield and M O’Hara ‘Market Transparency: Who Wins and Who Loses?’ (1999) 12(1) *The Review of Financial Studies* 5 at 7–9.

are of the view that market transparency is conducive to promoting competition.<sup>14</sup> It serves to eliminate information asymmetries by enabling market participants to make informed choices.<sup>15</sup> In certain cases, market transparency even facilitates the functioning of specific markets, such as health sectors.<sup>16</sup> Suppliers profit from information exchanges whether they share it internally or with the market.<sup>17</sup> The potential benefits encompass a broad spectrum, for instance, enhanced comprehension of the market and demand structure.<sup>18</sup> This helps suppliers to formulate more efficacious marketing strategies and streamline distribution networks.

Enhanced market transparency can potentially enable the entry of new firms into the market by enabling them to assess business prospects within a certain industry effectively.<sup>19</sup> In markets characterised by significant demand variations, wherein suppliers must uphold elevated inventory levels to meet peak demands, the exchange of information may facilitate improved demand forecasting, hence enabling inventory optimisation.<sup>20</sup> The exchange of cost-related information facilitates the ability of organisations to assess their performance relative to their competitors (benchmarking), thereby motivating them to implement efforts aimed at enhancing productive efficiency.<sup>21</sup> Information exchanges may potentially have positive impacts on technology innovation marketplaces characterised by substantial investment

<sup>14</sup> See, A Scalia and V Vacca 'Does Market Transparency Matter? A Case Study' (1998) *BIS Papers* 2 at 113; V Thakoor 'Market Power, Growth, and Inclusion: The South African Experience' (2020) *International Monetary Fund Working Paper* 13.

<sup>15</sup> Bennett and Collin (note 6 above); Bloomfield and M O'Hara (note 13 above) 7–9.

<sup>16</sup> DA Austin and JG Gravelle 'Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Health Sector' (2007) *CRS Report for Congress* CRS 1 at 3. See also, R Jensen 'The Digital Provide: Information (Technology), Market Performance, and Welfare in the South Indian Fisheries Sector' (2007) 122(3) *The Quarterly Journal of Economics* 879.

<sup>17</sup> See OECD (note 8 above).

<sup>18</sup> Ibid.

<sup>19</sup> P Kotnik and M Kovač 'Self-Assessment System: Detrimental Effects Upon Entrepreneurial and Innovative Activity' (2017) 5(1) *Journal of Advanced Research in Law and Economics* 23.

<sup>20</sup> Das Nair and Mncube (note 3 above) 181.

<sup>21</sup> M Motta *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 141.

costs.<sup>22</sup> In such markets, the presence of uncertainty over future demand can hinder investments in new goods.

As stated above, information sharing has both advantages and disadvantages. Sharing information amongst competitors has the potential to significantly undermine competition, primarily due to its capacity to encourage collusion.<sup>23</sup> Nevertheless, assessing the practice becomes notably challenging within the framework of competition regulations due to the diverse range of methods via which information sharing can occur.<sup>24</sup> Furthermore, determining its impact is a complex task, as numerous instances of information sharing may actually promote competition. In addition to the challenge mentioned above, the evidentiary burden for establishing such information exchange as a violation of competition law is arduous. It is thus recommended that competition authorities employ both their advisory and regulatory functions when addressing the sharing of information.<sup>25</sup> The significance of advice is particularly notable within the context of information exchanges due to the complex nature of their evaluation under competition regulations.<sup>26</sup> Basically, the sharing of competitively sensitive information has both the capacity to generate operational efficiencies as well as give rise to anti-competitive consequences.<sup>27</sup> Nonetheless, this prospective ambiguity must not hinder the promotion of efficiency through the exchange of information.<sup>28</sup> Hence, regulatory bodies in many jurisdictions, including South Africa, release guidelines outlining their enforcement strategies in this regard.<sup>29</sup>

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<sup>22</sup> Jensen (note 16 above) 879; See also MC Levenstein and VY Suslow ‘Cartel Bargaining and Monitoring: The Role of Information Sharing’ (2006) in Swedish Competition Authority *The Pros and Cons of Information Sharing* (Konkurrensverket 2006) 36; MP Doyle and CM Snyder ‘Information Sharing and Competition in the Motor Vehicle Industry’ (1999) 107(6) *Journal of Political Economy* 1326.

<sup>23</sup> Nitsche and Von Hinten Reed (note 4 above) 10–18.

<sup>24</sup> OECD (note 8 above) Report 12.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> OECD (note 8 above) Report 12–14.

<sup>28</sup> Ibid.

<sup>29</sup> See, an in-depth analysis of policies from 21 countries compiled by the OECD Competition Committee (2010) – Australia 105; Belgium 113; Canada 119;

### 11.3 Different Forms of Information Sharing in a Market

The current guidelines pertain to the sharing of competitively sensitive information amongst competitors and exclude non-competitively sensitive information.<sup>30</sup> The Guidelines are concerned with the sharing of competitively sensitive information amongst competitors, either through direct communication or by utilising a third-party intermediary, such as a trade association, an accounting firm, or a private entity responsible for collecting, processing, and distributing information amongst firms.<sup>31</sup> This part provides an in-depth explanation of these forms of information sharing and highlights areas that may pose potential challenges to firms.

#### 11.3.1 Direct and vertical exchanges

The most common method of sharing information is direct exchanges between competitors.<sup>32</sup> Direct exchanges occur when companies share sensitive data with each other without intermediaries or public disclosure, often encompassing aspects like pricing strategies, production capacities, future market intentions, or detailed customer information.<sup>33</sup> The economic theory of collusion suggests that such exchanges can reduce uncertainty amongst competitors, making it easier to achieve and sustain collusive outcomes.<sup>34</sup>

The Competition Commission, through its guidelines, aims to clarify the boundaries between information exchanges that are permissible and those that pose a risk of facilitating collusion.

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Chile 131; Czech Republic 137; Denmark 146 Finland 160; France 170; Germany 194; Greece 198; Israel 204; Japan 212; Korea 218; United Kingdom 272, United States 294.

<sup>30</sup> South Africa Competition Commission (note 11 above) para 3.1.

<sup>31</sup> Ibid. See also, C Graham 'Information exchange with competitors' *Cooley* 30 July 2023, available at <https://www.cooley.com/news/insight/2023/2023-07-31-information-exchange-with-competitors>, accessed on 3 July 2023.

South Africa Competition Commission (note 11 above) para 3.1.

<sup>32</sup> V Auricchio 'Contacts Between Competitors: Developments Under Italian Competition Law' (2010) 4 *European Competition Law Review* 167.

<sup>33</sup> GJ Stigler 'A Theory of Oligopoly' (1964) 72(1) *Journal of Political Economy* 44–61.

<sup>34</sup> M Ivaldi, B Jullien, P Rey, P Seabright and J Tirole 'The Economics of Tacit Collusion' *Final Report for DG Competition, European Commission* (March 2003) 4–10.

According to Kühn, the nature of the exchanged information – such as its specificity, currency, and confidentiality – determines whether it enhances transparency or, conversely, enables firms to coordinate behaviour in a way that diminishes competition.<sup>35</sup> The Commission's Guidelines seek to provide a framework for assessing these exchanges, emphasising the need for a case-by-case analysis that considers market context and the strategic intent behind the information sharing.

The risks associated with direct exchanges of information are particularly pronounced when the data is recent, firm-specific, and detailed. For example, sharing future pricing intentions or current sales data can enable firms to align their pricing strategies, reducing the scope for competitive rivalry and effectively operating as a form of tacit collusion.<sup>36</sup> This aligns with empirical studies that have demonstrated how information sharing can stabilise cartels by allowing firms to monitor compliance with collusive agreements, thus reducing the incentive for any one firm to deviate.<sup>37</sup>

However, as pointed out earlier, not all direct exchanges are necessarily anti-competitive. In some contexts, the exchange of information can produce significant efficiency gains, such as reduced transaction costs, better demand forecasting, and more efficient resource allocation. These benefits are particularly relevant in industries with high fixed costs or substantial supply chain integration, where greater transparency can foster better coordination and market outcomes.<sup>38</sup> Scholars such as Motta have argued that under specific conditions,

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<sup>35</sup> UK Kühn 'Fighting Collusion by Regulating Communication Between Firms' (2001) 16(32) *Economic Policy* 167–204. Kühn discusses the role of information exchanges in enabling collusion and suggests regulatory approaches to mitigate this risk.

<sup>36</sup> JE Harrington 'How Do Cartels Operate?' (2006) 2(1) *Foundations and Trends in Microeconomics* 1–105. This work provides an in-depth examination of cartel behaviour, including the role of information sharing in maintaining collusive agreements.

<sup>37</sup> MC Levenstein and VY Suslow 'What Determines Cartel Success?' (2006) 44(1) *Journal of Economic Literature* 43–95.

<sup>38</sup> See MS Gal *Competition Policy for Small Market Economies* (Harvard University Press 2013) 111–153.

information sharing may facilitate pro-competitive effects by reducing market uncertainty, which can enhance innovation and market entry.<sup>39</sup>

The challenge for the Competition Commission lies in striking a balance between preventing covert collusion and allowing information exchanges that can enhance economic efficiency. Hence, the Guidelines serve as a critical tool in clarifying to businesses the types of exchanges that are likely to attract regulatory scrutiny. By delineating the boundaries of acceptable conduct, the Commission aims to promote a competitive environment where information sharing contributes to market efficiency without compromising the core principles of competition law.

Vertical agreements in pricing may incorporate contingency clauses such as price matching clauses or resale price maintenance clauses.<sup>40</sup> These provisions enable the supplier to identify instances where competitors have offered lower prices.<sup>41</sup> Consequently, these clauses serve to enhance the likelihood of identifying variances and enabling competitors to re-strategise their pricing or marketing. The ‘English clause’ raises similar concerns, as it requires customers to reveal the presence of competing offers and provide the dominant firm with information regarding the terms and conditions of these offers.<sup>42</sup> The dominant firm possesses the right to match the rival offer, enabling it to leverage the information obtained from its customer base, which would otherwise be unavailable, to tailor its market strategy. In *Hoffmann-La Roche & Co. AG v Commission of the European Communities*,<sup>43</sup> the court concluded:

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<sup>39</sup> See M Motta *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 144–150.

<sup>40</sup> HP Marve ‘The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom (1994) 63(1) *Antitrust Law Journal* 59.

<sup>41</sup> *Ibid.*

<sup>42</sup> European Commission ‘Eleventh Report on Competition Policy – Published in Conjunction with the Fifteenth General Report on the Activities of the European Communities in 1981’ (1982) *Publications Office of the European Union* 1 at 11–194.

<sup>43</sup> *Hoffmann-La Roche v Commission of the European Communities* Case 85/76 [1979] ECR 461 para 106.

The fact that an undertaking in a dominant position requires its customers or obtains their agreement under contract to notify it of its competitor's offers, whilst the said customers may have an obvious commercial interest in not disclosing them, is of such a kind as to aggravate the exploitation of the dominant position in an abusive way<sup>44</sup>

The main problem with vertical agreements is that they serve to establish an artificial state of market transparency.<sup>45</sup> This, in turn, facilitates the acquisition of valuable information by the dominant firm on the market dynamics and the activities undertaken by its competitors. Such information has significant importance in the implementation of the firm's market strategy.

The vertical sharing of information between manufacturers and retailers is generally deemed acceptable when the information pertains solely to the retail sales of the manufacturer in issue.<sup>46</sup> Vertical exchanges can potentially lead to a violation of competition laws if they enable the disclosure of rivals' sales data and if this information can be used to disrupt the retail operations of dealers or parallel importers.<sup>47</sup> In many instances, the transmission of information follows a vertical direction since it encompasses enterprises operating at distinct stages of the trading process.<sup>48</sup> However, the impact of this communication is horizontal, as it influences the competitive dynamics amongst retailers or suppliers.

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<sup>44</sup> Ibid.

<sup>45</sup> See, T Björkroth 'Exchange of Information and Collusion – Do Consumer Switching Costs Matter?' (2010) 6(1) *European Competition Journal* 311.

<sup>46</sup> They are well known as the 'hub and spoke arrangements'. See, examples from the *United Kingdom Double Glazing OFT* decision of 8 November 2004 (CA 98/08/2004); *Replica Football Ki OFT* decision of 1 August 2003 (CA98/06/2003); *Argos Ltd/ Littlewoods v Office of Fair Trading* [2006] EWCA CIV 1318, Case Nos 2005/1071 and 1074; and *Umbro Holdings Ltd v Office of Fair Trading* ( Judgment on penalty) and *JJB Sports v Office of Fair Trading* [2006] EWCA Civ 1318, Case No 2005/1623.

<sup>47</sup> UK *Agricultural Tractor Exchange decision* (in [1992] OJ L 68/19).

<sup>48</sup> Ibid.

### 1132 Exchanges facilitated by the industry or trade association

Trade and industry groups often provide a favourable environment for enterprises to engage in the sharing of information.<sup>49</sup> Bissocoli stated that historically, those engaged in a shared economic endeavour have always recognised the value of convening in a collective setting to deliberate upon their mutual concerns and enhance their representation through a single entity.<sup>50</sup> The absence of direct interaction amongst rivals, with communication being overseen by a trade association, does not inherently alter the evaluation of the practice within the framework of competition regulations. The primary function of trade associations is to gather and distribute industry-specific information to their members, which is considered a legitimate role as an institution.<sup>51</sup> It is crucial to differentiate instances where the dissemination of information is part of a collusive agreement between members from cases where the trade association's activities enhance market efficiency, benefiting both competitors and consumers.<sup>52</sup>

It is posited that to mitigate potential breaches of competition law effectively, trade associations must implement procedures aimed at proactively averting the occurrence of anti-competitive spillovers that may stem from their institutional responsibilities. To promote transparency and inclusivity, associations should consider making the information gathered available to individuals who are not affiliated with the association. Additionally, it is important to ensure that participation in statistical programmes is voluntary and open to both members and non-members alike.<sup>53</sup> Lastly, it is recommended that the management of the trade association remains independent from its members to uphold impartiality and prevent conflicts of interest.<sup>54</sup>

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<sup>49</sup> Bissocoli (note 9 above) 79–106.

<sup>50</sup> Ibid.

<sup>51</sup> See, example Citrus Growers' Association of South Africa 'Trending prizes: South African oranges sold well, but the price cannot go up' *Fresh Plaza* 22 August 2023, available at <https://www.cga.co.za/Page.aspx?ID=3207>, accessed on 31 August 2023.

<sup>52</sup> Bennett and Collins (note 6 above) 318.

<sup>53</sup> Capobianco (note 9 above) 1261.

<sup>54</sup> R Lake & J Donald 'Anti-competitive information exchange amongst competitors: Final guidelines issued' Norton Rose Fulbright 3 March 2023, available at <https://www.financialinstitutionslegalsnapshot.com/2023/03/anti-competitive->

### 1133 Exchange of competitively sensitive information by independent third parties

Autonomous consultants, such as Nielsen, Jupiter MMXI, Bangkok Poll Center, Norsk, and Gallup, frequently support the coordination of information on the market structure. The primary responsibility of these consultants is to oversee market activities, including the collection, organisation, and dissemination of industry data and market research to relevant stakeholders.<sup>55</sup> Market studies, which are often sponsored by individual firms, largely depend on publicly available information, confidential information obtained from consultant companies, and data gathering conducted at the retail level.<sup>56</sup> Although market studies serve as a mechanism for disseminating potentially sensitive information, competition agencies exhibit a greater degree of hesitancy when it comes to challenging these initiatives.<sup>57</sup>

The reluctance to prosecute is due to a number of reasons. First, in many instances, a genuine exchange of information amongst competitors is absent, as the consulting company acquires information autonomously from the market rather than directly from the suppliers. Therefore, the requirement for the implementation of cartel regulations, specifically the presence of a consensus amongst rivals, is not fulfilled. Since the Guidelines have included information obtained from a third party, it is crucial that when prosecuting a matter, the Commission must demonstrate that the competitors agreed to provide information to a third party as a medium between them, which would be proof of collusion.<sup>58</sup> In *Commission Decision, Wirtschaftsvereinigung Stahl*,<sup>59</sup> the court held:

Specialist organisations carry out studies on the basis of surveys at the point of sale. Secondly, the information is sold by those organisations and not exchanged between competitors. However accurate those surveys are, this is

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information-exchange-amongst-competitors-final-guidelines-issued/, accessed on 20 March 2023.

<sup>55</sup> OECD (note 8 above) Report 33.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> *Commission Decision, Wirtschaftsvereinigung Stahl* [1998] OJ L 1/10.

<sup>59</sup> *Commission Decision* (note 58 above) para 35.

an instance of a provision of services by a third party and not of an agreement capable of being assessed in the light of Article 65 of the ECSC [European Coal and Steel Community] Treaty.<sup>60</sup>

Second, it is worth noting that the data utilised in these market analyses is typically accessible to the public. In cases where the market exhibits transparency, the sharing of information does not introduce any potential for collusion inside the market. Third, the use of specialised consultants for obtaining market intelligence enables cost savings that improve the business's operational effectiveness. In contrast, in the scenario where the rival firms collectively commission the market study, and the firms supply the data to the consultant, the consultant may assume a role akin to that of a trade association, potentially resulting in increased susceptibility to breaching the Competition Act.

#### **11.4 Recent Guidelines on Information Sharing in South Africa**

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The legal framework for assessing the exchange of information between competitors is found in section 4(1) of the Competition Act. The Guidelines acknowledge that section 4(1)(b) establishes a complete prohibition in cases where the exchange of information leads to the specific behaviour outlined in this part, without allowing for the possibility of justifying such claimed anti-competitive behaviour based on efficiency, pro-competitive, or technological benefits.<sup>61</sup> Since the sharing of competitively sensitive information is not precisely provided for in the Competition Act, there have been uncertainties as to what constitutes a permissible exchange of competitively sensitive information. Therefore, the Guidelines provide a comprehensive list of factors that the Commission will consider when analysing the impact of the exchange of competitively sensitive information amongst competitors.

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<sup>60</sup> *Commission Decision* (note 58 above) para 58.

<sup>61</sup> See, D Makhubele 'Fighting Over Breadcrumbs – Cartels and the Competition Act 89 of 1998' (2014) *De rebus* 5389. The article examines the impact of cartels on the market, economic growth, and consumers. The discussion also addresses the legal status of cartels by citing statutory provisions and prevalent judicial precedents on the subject. See also, *Commission v Murray & Roberts Ltd (Competition Tribunal)* (unreported case no 017277) [2013] ZACT 75 (22 July 2013).

## 11.41 Market characteristics

According to the Guidelines, when evaluating information interchange between competitors, it is essential to take into account the specific characteristics of the market in which they operate.<sup>62</sup> The salient characteristics of a market that warrant consideration encompass, but are not confined to, the following aspects: the degree of product homogeneity, the level of market concentration, the transparency of information within the market, the symmetry and stability of market shares amongst competing firms, barriers to entry, and the historical presence of collusion within the market. It is opined that when a market has a higher concentration and a lower degree of product differentiation, there is a greater likelihood that the exchange of competitively sensitive information between competitors will lead to colluding in the market.<sup>63</sup> Consequently, the risk of violating the Competition Act is higher in such circumstances.

Basically, there are two main types of markets, namely a concentrated and a fragmented market.<sup>64</sup> Market concentration refers to the extent to which a small number of firms dominate total sales, production, or capacity in a particular market. It is a key concept in competition economics and anti-trust law, as high levels of concentration can indicate reduced competition, potentially leading to monopolistic or oligopolistic market structures.<sup>65</sup> Market concentration has been a prominent feature observed not only in industries that are dependent on economies of scale but also in consumer products.<sup>66</sup> The presence of substantial market concentration can be attributed to a combination of historical privileges and scale-related factors.<sup>67</sup> In *John Deere Ltd v Commission of the European Communities*,<sup>68</sup> it was held that '[o]n a

<sup>62</sup> South Africa Competition Commission Guidelines (2023) 6.3.1.1.

<sup>63</sup> Ibid.

<sup>64</sup> See, T Buthelezi, T Mtani and L Mncube 'The Extent of Market Concentration in South Africa's Product Markets' (2018) *Working Paper* CC2018/05 1–17.

<sup>65</sup> OC Herfindahl 'Measurement of Concentration of Industries' (1950) 3(3) *The Journal of Industry, Competition and Trade* 157–171; J Tirole *The Theory of Industrial Organization* (MIT Press 1988) 67.

<sup>66</sup> Buthelezi, Mtani and Mncube (note 64 above) 1–17.

<sup>67</sup> Buthelezi, Mtani and Mncube (note 64 above).

<sup>68</sup> *John Deere Ltd v Commission of the European Communities* 28 May 1998, John Deere, C-7/95 P, Rec. p. E-3111. Many European cases allude to the same case law, such

truly competitive market, transparency between traders is in principle likely to lead to the intensification of competition between suppliers,' at least when this transparency benefits consumers. However, it is believed that a market with a high level of concentration is more prone to the occurrence of collusive practices.<sup>69</sup> Hence, it is suggested that when assessing whether or not sharing competitive information should be permitted, the commissioner should be more conservative where the market concentration is high. In this context, a 'conservative interpretation' should be understood as an interpretation of the Guidelines that lean more towards the protection of specific consumer rights rather than attempting to promote the market advantage of rival firms.

A fragmented market, sometimes referred to as a fragmented industry, refers to a customer market where no singular corporation or organisation possesses sufficient influence to effectively steer the sector towards a particular trajectory.<sup>70</sup> Fragmented markets and industries are characterised by the presence of numerous competing enterprises and organisations operating within a given industry.<sup>71</sup> However, none of these smaller or medium-sized entities has a dominant position over the whole market.<sup>72</sup> In contrast to a concentrated market, when a market is highly fragmented, information exchanges between firms are less likely to have collusive effects that would restrict competition.<sup>73</sup> This is mostly due to the presence of several market participants, which can significantly complicate the process

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as the judgment made by the *European Commission on Wirtschaftsvereinigung Stahl*, which provides a detailed account of the process whereby information transfers in a concentrated market serve to perpetuate collusion.

<sup>69</sup> OECD (note 8 above) Report 33.

<sup>70</sup> S Claessen 'Fragmentation in Global Financial Markets: Good or Bad for Financial Stability?' (2019) *BIS Working Papers No 815* 5.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Tirole (note 65 above) 350–360; CA Holt and JS Wilson 'Cartels and Bidding Rings: The Significance of Market Structure' (1988) 31(1) *Journal of Law and Economics* 1–34. B Shepherd *Competitive Strategy and Structural Analysis* (Oxford University Press 2004). Shepherd's work provides an in-depth analysis of how market structure influences competitive strategies. In his discussion on fragmented versus concentrated markets, Shepherd argues that fragmented markets, characterised by many small players, lack the cohesive structure necessary for effective collusion.

of monitoring such exchanges. However, it is crucial to conduct a thorough evaluation of the current or possible impacts of information exchanges on a case-by-case basis.<sup>74</sup> This is because there is a possibility that information exchanges could have anti-competitive consequences, even in fragmented markets.<sup>75</sup> It is posited that while the risks of collusion are more pronounced in concentrated markets, the potential for anti-competitive effects should not be overlooked in fragmented markets. The South African Competition Commission could enhance its framework by issuing sector-specific guidelines that consider the concentration level of the market when evaluating information-sharing practices. This would ensure that regulation is proportionate and tailored to the risks of each market. Furthermore, with the digital transformation of markets, information sharing is becoming easier and more instantaneous, potentially exacerbating risks in concentrated sectors. The Commission needs to update its enforcement strategies to account for how digital platforms and real-time data exchanges could facilitate collusion, even in markets that are not traditionally viewed as concentrated. Enhanced monitoring of digital communication channels between competitors would help close this gap.

#### 11.4.2 Exchanges of historical, current or future conduct

The sharing of strategic data amongst competitors, specifically data that minimises strategic uncertainty in the market, is generally regarded as anti-competitive.<sup>76</sup> For this reason, the Guidelines provide that the sharing of competitively sensitive knowledge pertaining to future actions is deemed to be anti-competitive.<sup>77</sup> Furthermore, the sharing of current or recent information may be deemed as a potential violation of competition law if the exchanged information has the potential to influence the behaviour of market

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<sup>74</sup> South Africa Competition Commission (note 62 above) para 6.3.1.3.

<sup>75</sup> OECD (note 8 above) Report 185.

<sup>76</sup> M Firestone 'A Quick Look at Two Areas of Doctrinal Difference between EU and US Decision Makers' (2011) 20(1) *Tulane Journal of International and Comparative Law* 25.

<sup>77</sup> South Africa Competition Commission (note 62 above) para 6.3.2.1.

participants at the moment of the exchange.<sup>78</sup> Similarly, the sharing of historical information that is sensitive to competition may also be anti-competitive. Still, the degree of aggregation plays a crucial role in determining the extent of this evaluation.<sup>79</sup> The higher the level of disaggregation of competitively sensitive information, the greater the likelihood of it being deemed anti-competitive. The frequency at which exchanges of competitively sensitive information take place will also have an impact on evaluating the problematic nature of such exchanges, with a higher frequency of exchanges being a more significant risk.<sup>80</sup>

When considering future data, it is important to exercise caution, not only in relation to the data pertaining to a firm's intended market strategy but also with regard to its perception of market development. This subjective viewpoint holds significant value as it offers invaluable insights for anticipating future behaviour. These exchanges may be compared to information exchanges regarding future pricing. In broad terms, the evaluation of future data exchanges tends to be more stringent compared to those involving past or current data, particularly in concentrated markets.

In relation to historical data, it is not necessary to restrict the fundamental nature of information sharing pertaining to previous prices, such as price reports (referred to as *mercuriales*), which are statements concerning presently implemented prices.<sup>81</sup> This is permissible as long as such exchanges do not enable businesses to discern specific positions within the market, specifically in terms of commercial conditions employed by a particular enterprise or in relation to a specific customer. Discussions pertaining to expenses may also be deemed appropriate, as long as these expenses do not constitute the majority of the overall cost framework, in order to avoid the possibility of complete disclosure and enable the creation of a cost matrix that would incentivise businesses to conform. In every scenario under consideration, it is crucial to evaluate the potential

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<sup>78</sup> South Africa Competition Commission (note 62 above) para 6.3.2.1.

<sup>79</sup> South Africa Competition Commission (note 62 above) para 6.3.2.2.

<sup>80</sup> South Africa Competition Commission (note 62 above) para 6.3.2.5.

<sup>81</sup> South Africa Competition Commission (note 62 above) paras 6.3.2.1–6.3.2.5.

impact on competition amongst operators, with the aim of effectively aligning with market demands. This evaluation should also take into account the potential risks to competition if the entities receiving the information were to utilise it solely for price setting rather than considering the costs associated with production and distribution.<sup>82</sup>

We are of the view that the argument that aggregated and anonymised data is harmless overlooks the potential for sophisticated data analytics to reverse-engineer insights from large datasets. Even when data is presented in aggregate form, competitors can often infer market positions, pricing strategies, and cost structures, particularly when the number of players in a market is small. This transparency can paradoxically lead to greater predictability, weakening the competitive edge that naturally arises from uncertainty. For example, in sectors like telecommunications or banking, where a few major players dominate, aggregated historical data can enable competitors to align their conduct, reducing the incentive to outdo each other on price, innovation, or service quality.

Given the risks of even seemingly benign historical data sharing, a more stringent approach should be considered. A blanket prohibition on sharing historical conduct data could better preserve the independence of each competitor's strategies, ensuring that firms rely on their own analysis and forecasts instead of drawing on industry-wide data that inadvertently fosters alignment. In this view, data privacy and firm-specific insights are best maintained by restricting access to historical information, thereby protecting the market's competitive integrity and preserving the consumer benefits that come from truly independent business strategies.

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<sup>82</sup> See, Canadian Competitor Collaboration Guidelines (2009), available at <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/competitor-collaboration-guideline>, accessed on 20 October 2023 par 3.7.2: 'However, it should be noted that an agreement to disclose historical information could raise concerns where such information provides a meaningful indication of future intended pricing or other competitively significant factors.'

### 1143 Mechanism for and accessibility of exchanged information

Competitively sensitive information disclosed between competitors to the exclusion of the public may be used to prove a violation of the Competition Act.<sup>83</sup> The Commission observes that aggregated historical data shared amongst industry participants must be simultaneously accessible to all industry participants.<sup>84</sup> The Commission will evaluate the mechanism through which the exchange occurred, that is, directly or indirectly or via third parties. Direct communication is likely to be considered by the Commission as possible evidence of a violation of section 4 of the Competition Act.

This approach raises an important question: Is it possible to establish regulations that protect information exchanges with monitoring capabilities by differentiating between public and private information?

First, the sharing of information between rival firms may be considered inconsequential if that information is readily accessible from external sources. Given that all firms have unrestricted access to the data, what significance does the sharing of information hold? Upon further examination of the underlying collusion theory, it becomes apparent that there are inherent shortcomings associated with this line of reasoning. The importance of monitoring as a necessary condition for maintaining collusion is not solely derived from firms observing the actions of their competitors but also from the firms' recognition that their activities are vulnerable to monitoring. In the absence of a consensus over the specific criteria for evaluating information across all firms, the publicly accessible information would be rendered ineffective in terms of its monitoring impact. This implies that the mere availability of publicly accessible monitoring information does not alleviate the apprehension around the possibility of collusion.<sup>85</sup>

Second, it is generally accepted that the disclosure of information by corporations can effectively mitigate concerns regarding anti-

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<sup>83</sup> South Africa Competition Commission (note 62 above) para 6.3.3.1.

<sup>84</sup> Ibid.

<sup>85</sup> OECD (note 8 above) Report 34.

competitive consequences.<sup>86</sup> This assertion holds validity in the sense that consumers may exhibit a desire to respond to price announcements by altering their selections regarding the timing of their purchases.<sup>87</sup> Financial markets frequently depend on the dissemination of firms' announcements regarding demand and pricing dynamics. This information possesses an inherent value that surpasses the potential benefits of coordinating or monitoring exclusively through private communication.

#### 11.4.4 Indispensability of the information exchanged

The last but not least factor for consideration is the indispensability of the information. According to the Guidelines, in cases where there is a legitimate need to disclose competitively sensitive information to achieve competitive benefits, such information exchange should be deemed essential for the actualisation of these benefits.<sup>88</sup> Furthermore, it should pose the least amount of risks to competition and should be confined solely to the information that is pertinent and essential for achieving the gains mentioned above.<sup>89</sup>

The assessment of whether the exchange of information amongst competitors will lead to anti-competitive outcomes depends on several factors. These factors include the nature of the information being exchanged, how the information is aggregated, the age and level of confidentiality of the information, and the frequency at which the exchanges occur.<sup>90</sup> Le Grange and Smith argued that

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> South African Competition Commission (note 62 above) para 6.3.4.1.

<sup>89</sup> South African Competition Commission (note 62 above) para 6.3.4.2. See also, P Kotnik and M Kovač 'Horizontal Exchange of Information – Institutional Impact on Entrepreneurial Activity' (2012) 12(3) *Perspectives of Innovations Economics and Business* 34.

<sup>90</sup> A le Grange and S Smith 'To share or not to share? A discussion on the Competition Commission's guidelines on the exchange of competitively sensitive information' *Cliffe Dekker Hofmeyr Kenya* 15 March 2023, available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2023/Practice/Competition/competition-law-alert-15-march-2023-to-share-or-not-to-share-a-discussion-on-the-competition-commissions-guidelines-on-the-exchange-of-competitively-sensitive-information.html>, accessed on 28 March 2023.

although the factors are clear, the competition authorities may not necessarily share the parties' perspective that information exchanges are essential.<sup>91</sup> In fact, there have been instances where firms, believing that they were acting in the industry's best interests, engaged in the exchange of competitively sensitive information, only to have the competition authorities perceive these exchanges as collusive.<sup>92</sup> The lysine cartel is one of the most prominent examples of firms exchanging competitively sensitive information to manipulate market conditions.<sup>93</sup> Major global producers of lysine, including Archer Daniels Midland (ADM), Ajinomoto, and Kyowa Hakko, coordinated pricing and production levels from the mid-1990s to the early 2000s. These firms shared sensitive information to stabilise lysine prices and manage supply, effectively reducing competitive pressures and maintaining artificially high prices. Competition authorities in multiple jurisdictions, including the United States Department of Justice (DOJ)<sup>94</sup> and the European Commission, prosecuted the involved companies. ADM, for instance, pleaded guilty and was fined US\$100 million by the DOJ in 1996 for its role in the cartel.<sup>95</sup>

### **11.5 Selected Case Law from Foreign Jurisdictions on Completely Sensitive Information Sharing**

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South Africa has a limited number of legal rulings addressing the exchange of competitively sensitive information under its competition law, with most cases resulting in consent orders. Consequently, foreign case law becomes essential in illustrating how sharing such information amongst competitors can harm competition. This section focuses on examples from two key jurisdictions: the United States and the European Union.

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<sup>91</sup> Le Grange and Smith (note 90 above) 1.

<sup>92</sup> Ibid. See examples, European Commission 'Antitrust: Commission fines truck producers €2.93 billion for participating in a cartel' *European Commission Press Corner* 2016, available at [https://ec.europa.eu/commission/presscorner/detail/el/ip\\_16\\_2582](https://ec.europa.eu/commission/presscorner/detail/el/ip_16_2582) 588, accessed on 2 October 2024. This press release outlines the Commission's findings, and the penalties imposed on the truck companies.

<sup>93</sup> *United States v Archer-Daniels-Midland Co* 812 F. Supp. 714 (N.D. Ill. 1993).

<sup>94</sup> *United States v Archer-Daniels-Midland Co* (1993) 714.

<sup>95</sup> *United States v Archer-Daniels-Midland Co* (1993) para 211–212.

## 11.5.1 United States

In the United States, competition law is regulated in terms of the Sherman Antitrust Act of 1890. The case summaries below only dealt with information shared on public platforms in contravention of section 1 of the Sherman Antitrust Act, which provides that '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce amongst the several States, or with foreign nations, is hereby declared to be illegal'.<sup>96</sup>

In *United States v Container Corp*,<sup>97</sup> the Container Corporation and 17 other companies (defendants) specialising in the manufacture of containers would share pricing information amongst themselves. The defendants did not have a formal agreement in place; rather, it was customary for each competitor to share price information with the expectation that a reciprocal request for information would be made in the future. This practice was not conducted with regularity, as the data was frequently obtained from the defendants' records or directly from their clients. The sharing of pricing information contributed to the stabilisation of prices, albeit at a lower level. Collectively, the defendants controlled 90% of the market share. The United States complained to the container manufacturers, alleging that their practice of sharing prices violated section 1 of the Sherman Act.<sup>98</sup> But the complaint was dismissed by the District Court.

The Supreme Court held that although there was no written agreement when a defendant made a request for price information and subsequently obtained it, they were essentially expressing their agreement to provide similar information in exchange.<sup>99</sup> The court further accepted that there existed a lack of regularity and consistency in the occurrence of price exchanges amongst the defendants.<sup>100</sup> Additionally, the relevant data was frequently obtained either from the defendants' records or directly from the consumers. However,

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<sup>96</sup> Sherman Antitrust Act s 1.

<sup>97</sup> *United States v Container Corp*, 393 U.S. 333 (1969).

<sup>98</sup> In *United States v Socony-Vacuum Oil Co*, 310 U.S. 150, the Court held that all forms of price-fixing are per se violations of the Sherman Act.

<sup>99</sup> *United States v Container Corp* (note 97 above) 335.

<sup>100</sup> *Ibid.*

the fundamental objective of the agreement was to provide price information upon request. The court further held that the primary aim of this reciprocal exchange of prices was to stabilise prices.

Nevertheless, the recognition of a competitor's pricing usually leads to the implementation of price-matching strategies,<sup>101</sup> thereby prohibiting new firms from entering the market. For this reason, the sharing of prices by the defendants was held to be anti-competitive and in violation of section 1 of the Sherman Act.<sup>102</sup> The court cited the *United States v Socony-Vacuum Oil Co*,<sup>103</sup> wherein it was held that 'in terms of market operations, stabilisation is but one form of manipulation'.<sup>104</sup>

Considering that the Fourth Industrial Revolution is introducing the use of artificial intelligence, it is opined that the Commission may gain insight from the findings in the *United States v Airline Tariff Publishing [ATP] Company, Civil Action*.<sup>105</sup> This case centred on the use of a computerised tariff publishing system as a means to facilitate deliberate price sharing amongst airlines.<sup>106</sup> The ATP was accountable for the acquisition and distribution of more than 100,000 fare updates on a daily basis. Its membership encompassed both airlines and computer reservation systems used by travel companies for ticketing.<sup>107</sup> It was alleged that the ATP system facilitated coordination in five ways: rapid monitoring of competitor actions, enforcement of collusion, expression of intent to raise fares without affecting market shares, negotiation regarding potential fares, restrictions, elimination of discounts, and the establishment of fare links across different markets.<sup>108</sup>

The airline industry argued that it used the computerised system to share its prices as a strategic and efficient tool to improve business operations. They further maintained that the usage of the system, along

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<sup>101</sup> *United States v Container Corp* (note 97 above) 336.

<sup>102</sup> *United States v Container Corp* (note 97 above) 337.

<sup>103</sup> *United States v Socony-Vacuum Oil Co* at 310 U.S. 223.

<sup>104</sup> *United States v Container Corp* (note 97 above) 337.

<sup>105</sup> *United States v Airline Tariff Publishing Company, Civil Action* No. 92-2854, filed December 21, (1992).

<sup>106</sup> *United States v Airline Tariff Publishing Company* (note 105 above) 5–9.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

with the practice of preannouncing tariff increases, provided benefits to customers by mitigating the financial strain associated with travel planning. Consumer groups and travel agents expressed opposition to the limitations on the ATP and raised objections regarding the settlements. Before the court, the legal issue was whether the use of the ATP system by the airlines constituted a form of illegal price-fixing under the Sherman Act. Specifically, the DOJ contended that the sharing of intended future prices through the ATP system allowed for tacit collusion, making it possible for airlines to adjust their pricing strategies in a manner that stabilised prices across the market.

The case ultimately led to a consent decree, where the airlines agreed to modify their use of the ATP system and implement restrictions to prevent the future use of fare codes and other mechanisms that could facilitate coordinated pricing. The decree prohibited the use of ‘first-ticket dates’ for announcing future fare changes and restricted how airlines could use ‘last-ticket dates’ to communicate with each other. While the airlines did not admit to wrongdoing, the decree aimed to restore competitive dynamics in the industry by curtailing the methods that allowed airlines to align their fare changes without formal agreements.

The ATP case underscores the potential for digital platforms to be used as tools for facilitating tacit collusion. As South African industries increasingly adopt digital tools and platforms for pricing and data sharing, the Competition Commission should be vigilant about how these systems might be used to enable indirect price coordination amongst competitors. Clear guidelines and regulations could help prevent similar practices in South African markets. Furthermore, the case highlights the risks associated with sharing information about future price changes.

In South Africa, where certain industries such as telecommunications and retail are highly concentrated, regulators should ensure that announcements of future pricing or market strategies do not become a mechanism for signalling and coordinating amongst competitors.<sup>109</sup> This can be achieved through regulations that limit

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<sup>109</sup> See E Sutherland ‘Telecommunications in South Africa: Enforcement of Competition’ *Competition Commission of South Africa* (2021) 1–18. This paper explores

how future price information is shared in concentrated markets. The resolution of the ATP case through a consent decree demonstrates how anti-trust authorities can use such settlements to prevent anti-competitive practices while allowing industries to continue operating with adjusted behaviours. South Africa's Competition Commission could adopt a similar approach, focusing on corrective actions that restore competition without necessarily imposing punitive measures that may disrupt the industry.

Recently, in *United States v Agri Stats Inc*,<sup>110</sup> the DOJ filed an anti-trust lawsuit against Agri Stats, Inc, a data analytics company, in the US District Court in the District of Minnesota. Agri Stats provides detailed reports to subscribers in the meat processing industry, including producers of chicken, pork, and turkey.<sup>111</sup> These reports contain extensive data on costs, production levels, pricing, and profitability. Although the data is purportedly anonymised, the DOJ argues that it is sufficiently detailed for competitors to infer each other's operations.<sup>112</sup> Agri Stats allegedly facilitated the exchange of competitively sensitive information, enabling the industry participants to monitor each other's business strategies and coordinate their behaviour. The central issue is whether Agri Stats' role in facilitating the exchange of detailed market data amongst competitors constitutes a violation of section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade.<sup>113</sup> The DOJ contends that the reports provided by Agri Stats allowed processors to coordinate production levels and pricing, thereby reducing competition, raising prices, and ultimately harming consumers. As of now, the case is in its preliminary stages, with the court denying Agri Stats' motion to dismiss. This decision allows the case to proceed to discovery, where the DOJ will further explore

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the regulatory and competitive landscape within South Africa's telecommunications sector. It examines how the Competition Commission of South Africa, alongside the Independent Communications Authority of South Africa (ICASA), enforces competition laws to address anti-competitive behaviour in this concentrated market.

<sup>110</sup> *United States v Agri Stats, Inc*, No. 0:23-cv-03009 (D. Minn. filed Sept. 28, 2023).

<sup>111</sup> *United States v Agri Stats, Inc* (note 110 above) para 12–21.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

how Agri Stats' reports influenced the competitive dynamics of the meat processing industry. The court has not yet made a final determination on the merits of the DOJ's allegations, but by allowing the case to move forward, it has indicated that the allegations raise serious questions about the potential anti-competitive effects of such information exchanges.

An earlier landmark case, *American Column & Lumber Co v United States*,<sup>114</sup> involved a trade association in the hardwood lumber industry that facilitated the exchange of detailed business information, including pricing and production data, amongst its members. The Supreme Court held that such exchanges violated section 1 of the Sherman Act.<sup>115</sup> Despite the absence of a formal agreement, the Court reasoned that the sharing of detailed pricing data allowed competitors to monitor each other's actions closely, leading to uniform pricing behaviour and reducing competition in the market. The decision underscored that even information sharing through trade associations could be deemed illegal if it results in coordinated market behaviour that suppresses competitive rivalry.

In contrast, the *Maple Flooring Manufacturers Association v United States*<sup>116</sup> case highlighted a more nuanced perspective on information sharing. Here, an association in the wood flooring industry shared historical pricing, production, and shipment data amongst members.<sup>117</sup> The Supreme Court concluded that the exchange of past data did not violate the Sherman Act, emphasising that the information was historical rather than forward-looking.<sup>118</sup> The Court found no evidence that members used the data to align their future pricing decisions, distinguishing it from the more direct price coordination seen in *Container Corp*. This case clarified that not all information sharing is inherently illegal under anti-trust laws, particularly if it does not directly facilitate future price alignment amongst competitors.

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<sup>114</sup> *American Column & Lumber Co v United States*, 257 U.S. 377 (1921).

<sup>115</sup> *American Column & Lumber Co v United States* (note 114 above) 258–260.

<sup>116</sup> *Maple Flooring Manufacturers Association v United States*, 268 U.S. 563 (1925).

<sup>117</sup> *Maple Flooring Manufacturers Association v United States* (note 116 above) 268.

<sup>118</sup> *Ibid*.

Further broadening the scope of anti-trust concerns regarding information exchange, the *FTC v Indiana Federation of Dentists*<sup>119</sup> case dealt with the collective decision of dentists to withhold patient X-rays from insurance companies. The Federal Trade Commission (FTC) argued that this practice restricted competition by preventing insurers from evaluating the necessity of treatments independently.<sup>120</sup> The Supreme Court agreed, holding that the collective decision to restrict access to information constituted an unreasonable restraint of trade under the Sherman Act.<sup>121</sup> This decision extended the principles of anti-trust law to encompass cases where the restriction of information, rather than its exchange, was used to limit market competition.

These cases collectively demonstrate how US courts have navigated the complexities of information exchange under the Sherman Act. The rulings illustrate a careful balance between recognising the potential pro-competitive benefits of sharing certain types of data, such as historical information, and condemning practices that reduce competitive uncertainty and facilitate coordinated behaviour. As markets become increasingly digitised, the lessons from cases like *Container Corp, ATP*, and *American Column* continue to shape the application of anti-trust principles to the modern challenges posed by information sharing and technological coordination amongst competitors.

## 1152 European Union

The guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal agreements (EU guidelines) guide the fundamental principles to be considered when evaluating the exchange of information in relation to Article 101 of the EU Treaty.<sup>122</sup>

<sup>119</sup> *FTC v Indiana Federation of Dentists*, 476 U.S. 447 (1986).

<sup>120</sup> *FTC v Indiana Federation of Dentists* (note 119 above) 455–465.

<sup>121</sup> *FTC v Indiana Federation of Dentists* (note 119 above) 453–464.

<sup>122</sup> Article 101 (ex Article 81) states that ‘The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade

In *P Hüls AG v Commission of the European Communities*,<sup>123</sup> the European Court of Justice (ECJ) was called upon to examine the admissibility of evidence gathered by the European Union Commission (EU Commission) during its investigations into the petrochemical industry in Europe. Based on the information gathered, the EU Commission arrived at the conclusion that from 1977 to 1983, multiple entities engaged in collusion to establish minimum prices, commonly referred to as *target* prices, and implement a framework for regulating yearly volume.<sup>124</sup> Significantly, the EU Commission discovered that the producers engaged in regular communication and meetings to establish their commercial strategies, periodically establish target pricing, and allocated an annual sales target or quota to each manufacturer in order to divide the market.<sup>125</sup>

According to the ECJ, unless proven otherwise by the parties involved, there exists a presumption that the companies participating in the coordinated activity and continuing to operate in the market, consider the information exchanged with their competitors when

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between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: – any agreement or category of agreements between undertakings, – any decision or category of decisions by associations of undertakings, – any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.’ *European Commission v Volkswagen AG and Audi AG* (2021) para 3.

<sup>123</sup> *P Hüls AG v Commission of the European Communities* [1999] ECR I-04287.

<sup>124</sup> *P Hüls AG v Commission of the European Communities* (note 123 above) 3–9.

<sup>125</sup> *P Hüls AG v Commission of the European Communities* (note 123 above) para 160–168.

making decisions regarding their behaviour in that market.<sup>126</sup> This holds particularly true in situations where the exchange of information occurred regularly over an extended duration. The presumption also extends to scenarios where the entity is solely acquiring information. The responsibility, therefore, rests with the parties involved to demonstrate that the sharing of information had no impact whatsoever on their behaviour inside the market.

In *T-Mobile Netherlands v Raad van Bestuur van de Nederlandse*,<sup>127</sup> the case stemmed from a 2001 meeting between Dutch mobile network operators, including T-Mobile Netherlands, KPN Mobile, Orange Nederland, and Vodafone Libertel. During this meeting, the companies discussed reducing standard dealer commissions for post-paid mobile subscriptions.<sup>128</sup> The Dutch competition authority, Raad van Bestuur van de Nederlandse Mededingingsautoriteit, determined that this meeting constituted an anti-competitive practice, even though there was no continuous system of information exchange established afterward.<sup>129</sup>

The central legal issue was whether a single instance of information exchange at a meeting could be classified as an anti-competitive practice under Article 101 of the Treaty on the Functioning of the European Union (TFEU). Specifically, the ECJ was asked to determine if such a meeting could influence market behaviour, even in the absence of a systematic, ongoing exchange of information.<sup>130</sup> The ECJ ruled that even a single exchange of information could be considered anti-competitive if it had the potential to influence the market conduct of the participants.<sup>131</sup> The Court emphasised

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<sup>126</sup> *P Hüls AG v Commission of the European Communities* (note 123 above) para 160.

<sup>127</sup> *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-456.

<sup>128</sup> *T-Mobile Netherlands BV* (note 127 above) para 12.

<sup>129</sup> *Ibid.*

<sup>130</sup> *T-Mobile Netherlands BV* (note 127 above) 17–25.

<sup>131</sup> *T-Mobile Netherlands BV* (note 127 above) paras 23–62. See also, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, para 26, and 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, para 63.

that an exchange of information can amount to a concerted practice if it removes uncertainties between competitors regarding future behaviour.<sup>132</sup> This ruling was significant because it broadened the interpretation of what could constitute a restrictive practice under Article 101 TFEU, indicating that the impact or potential impact on market behaviour is more critical than the frequency of the exchange.

The *T-Mobile* case demonstrates that even a one-time meeting or communication can be deemed anti-competitive if it has the potential to influence market conduct. For South Africa, this underscores the importance of examining not only sustained information exchanges but also isolated interactions amongst competitors that could impact competition. The South African Competition Commission could adopt a similar approach, ensuring that any exchange of sensitive information is analysed for its potential effects on market behaviour, even if it occurs only once.

In *European Commission v Volkswagen AG and Audi AG*,<sup>133</sup> the European Commission investigated an anti-competitive agreement amongst several major car manufacturers, including Volkswagen AG, Audi AG, BMW, and Daimler.<sup>134</sup> The companies were found to have coordinated their actions regarding the development of emission-reducing technologies, specifically in the area of selective catalytic reduction (SCR) systems for diesel engines. Notably, Daimler received full immunity from fines for cooperating with the investigation, providing evidence that helped establish the existence of the cartel.<sup>135</sup> The investigation revealed that between 2009 and 2014, these car manufacturers coordinated their actions concerning the development of SCR systems, which are used to reduce nitrogen oxide (NOx) emissions from diesel engines.<sup>136</sup> The companies shared sensitive information about the size of AdBlue tanks (a solution used in the SCR system) and their refill ranges.<sup>137</sup> They also agreed not to

<sup>132</sup> *T-Mobile Netherlands BV* (note 127 above) para 23–62.

<sup>133</sup> *European Commission v Volkswagen AG and Audi AG*, Case AT.40178 (July 8, 2021).

<sup>134</sup> *European Commission v Volkswagen AG and Audi AG* (note 133 above) para 2.1.

<sup>135</sup> *European Commission v Volkswagen AG and Audi AG* (note 133 above) paras 2.1–2.2.

<sup>136</sup> *European Commission v Volkswagen AG and Audi AG* (note 133 above) para 2.2.

<sup>137</sup> *European Commission v Volkswagen AG and Audi AG* (note 133 above) para 2.

develop these systems beyond what was legally required, even though more advanced technology was available. This limited technological competition and innovation, restricting consumer access to cleaner diesel engines during a period when vehicle emissions were a significant environmental concern.

The primary legal issue was whether this coordination constituted an infringement of Article 101 of the TFEU, which prohibits agreements that restrict competition.<sup>138</sup> The case specifically centred on whether the car manufacturers' coordination in limiting the technical development of emission-control technologies amounted to a cartel, even though they did not coordinate directly on prices or market shares.<sup>139</sup> The European Commission determined that the coordination amongst the car manufacturers did indeed violate Article 101 of the TFEU, as it restricted competition in the development of emissions technologies. The Commission concluded that this agreement limited technological progress, ultimately reducing competition on a product feature that directly impacted consumers.<sup>140</sup> The car manufacturers were fined a total of €875 million (estimated at over R16 billion), with reductions applied for their cooperation and settlements during the investigation.<sup>141</sup> Daimler received full immunity for revealing the existence of the cartel, while Volkswagen and BMW received reductions for their cooperation in the investigation. This case underscores the challenge of distinguishing between beneficial industry cooperation (for example, standard-setting for safety) and agreements that harm competition by limiting progress. For South Africa, which is promoting collaborative initiatives across sectors such as energy transition and digital transformation, regulators need clear guidelines on when cooperation amongst firms crosses into anti-competitive behaviour. This will help maintain a balance that encourages industry advancements without allowing collaboration to stifle competition.

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<sup>138</sup> *European Commission v Volkswagen AG and Audi AG* (note 133 above) para 2.3.

<sup>139</sup> *European Commission v Volkswagen AG and Audi AG* (note 133 above) para 2.1.

<sup>140</sup> *European Commission v Volkswagen AG and Audi AG* (note 133 above) para 3.

<sup>141</sup> *Ibid.*

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## 11.6 Concluding Remarks

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The exchange of competitively sensitive information between firms sits at the intersection of collaboration and competition, a space fraught with both opportunity and risk. As the analysis of legal principles from the United States and European Union demonstrates, such exchanges can foster operational efficiencies, spur innovation, and enhance market transparency. Yet, they can also serve as a breeding ground for tacit collusion, price fixing, and market manipulation. This duality presents a profound challenge for competition authorities, including South Africa's Competition Commission, which must navigate the fine line between promoting pro-competitive collaborations and preventing anti-competitive behaviour. The South African context, characterised by a mix of concentrated and fragmented markets, calls for a tailored approach to regulating information exchanges. While lessons from foreign jurisdictions provide a useful framework, they also highlight the need for South Africa to develop its own jurisprudence, one that reflects the unique economic realities and regulatory challenges of the region. By embracing an adaptive regulatory stance – one that evolves alongside technological advancements and the rise of digital platforms – the Commission has the opportunity to not only safeguard competition but also to influence the strategic direction of emerging markets.

In this dynamic landscape, the question remains: How can South Africa strike a balance that nurtures innovation without compromising competitive integrity? The answer lies in a forward-looking regulatory framework that values transparency, recognises the diversity of market structures, and remains vigilant against the subtleties of modern collusion. This balance is not just about enforcing existing laws but about reimagining competition policy in a way that anticipates future challenges. It is in this challenge that the true test of South Africa's competition law lies – shaping a fair and dynamic marketplace that is resilient in the face of rapid global change.

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