HELLENIC COMPETITION COMMISSION

Guidelines

on the implementation of Article 1A L. 3959/2011

Guidelines on the implementation of Article 1A L. N.3959/2011

Article 1A: Invitation to collude and disclosure of future pricing intentions for products and services between competitors

1. It is prohibited for an undertaking to propose, coerce, motivate or in any way invite another undertaking to participate in an agreement between undertakings or decisions of associations of undertakings or concerted practices aimed at preventing, restricting or distorting competition in the Greek Territory and which consist in:

a) directly or indirectly fixing purchase or selling prices on a market, or

b) limiting or controlling production, supply, technological development, or investments, or

c) sharing markets or sources of supply.

2. It is prohibited for an undertaking to disclose information on price, discount, supply or credit information about products or services [an undertaking] supplies or is supplied, where:

a) the disclosure restricts effective competition in the Greek Territory, and

b) does not constitute a normal business practice.

In order to assess whether a disclosure restricts effective competition, the following shall be taken into account:

a) the degree of specification and the individual nature of the information;

b) whether the information relates to future activities;

c) the extent to which the information is readily accessible to the public;

d) whether the disclosure is part of a pattern of similar disclosures by the undertaking;

e) whether there is a history of past collusion in the specific market or industry between the same undertakings, and

f) whether the market to which the disclosure relates is concentrated and oligopolistic in nature.

Disclosure of information is not considered to restrict effective competition if it is addressed solely to the end users of the product or service.

3. Practices that fall under par. 1 and 2 are not prohibited, as long as they meet by analogy the conditions of par. 3 of article 1.

4. Undertakings with a total turnover of less than fifty million (50,000,000) euros and with fewer than two hundred and fifty (250) employees are excluded from the application of the prohibitions of par. 1 and 2 of Article 1A.

5. This Article is without prejudice to Articles 1 and 2 hereof or Articles 101 and 102 of the Treaty on the Functioning of the European Union. Where the conditions set out herein and in Articles 1 and 2 and Articles 101 and 102 TFEU are met, including, inter alia, the exchange of commercially sensitive information, the latter articles shall apply to the exclusion of Article 1A.

Definitions

Undertaking: The concept of undertaking is the same as the one in the implementation of Articles 1 and 2 of Law 3959/2011 and 101 and 102 TFEU.

Greek Territory: It means the whole or part of the Greek territory.

Tacit Collusion: Horizontal cooperation between undertakings in the absence of an explicit agreement or direct contacts between undertakings in the market.

Collusion: Agreement between undertakings or decision of an association of undertakings or concerted practice. These concepts are the same as those in the implementation of Article 1 of L. 3959/2011 and 101 TFEU.

Price Leadership: A market where a leading firm is able to exert enough influence in the sector that it can effectively determine the price of goods or services and other small firms act as price-takers.

Non-cooperative equilibrium: Market equilibrium where each firm independently chooses the optimal strategy that maximizes its benefits (or its profits or efficiency) by anticipating the equilibrium strategy that its competitors will choose.

End user: Natural or legal persons using (consuming) the product or products for which information on price, discount, supply or credit information is disclosed for reasons unrelated to their commercial or professional activity.

General Framework

1. Article 1A aims to tackle unilateral behaviour consisting of (a) invitation(s) to collude with the object of preventing, restricting or distorting competition in the Greek territory, or (b) announcement(s) relating to communicating mainly future pricing intentions for products or services between undertakings that are competitors *("price signaling"*) if the disclosure restricts competition in the Greek territory and is not an ordinary business practice. It does not therefore apply to invitations or disclosures that occur in the context of a vertical relationship or in the context of a relationship between an undertaking and a final consumer, when this does not have a horizontal object or effect, that is, the invitation or the disclosure do not have as a real target an undertaking that is an actual or potential competitor.
2. In case of an infringement of Article 1A, par. 1 and/or Art 1A, par. 2, the HCC may, inter alia, impose the fines provided for in paragraph 1 of article 25B to the undertakings or associations of undertakings that, intentionally or negligently, committed the infringement.

Purpose of the provision

3. The new article 1A was introduced in Law 3959/2011 by Law 4886/2022[1]. This article aims at the optimal implementation of articles 1 and 2 of the law, regarding two different forms of unilateral practices with significant negative effects on competition. In particular, the provision focuses on practices of an undertaking aiming at:

(a) inviting, coercing, motivating in any way another undertaking to participate in or contribute a collusion between competitors with the object of preventing, restricting or distorting competition, and

[2] Gov. Gazzette Issue A' 12/24.1.2022

(b) communicating (possibly by means of a public announcement) future pricing intentions (price signaling) for its products if it restricts effective competition in the Greek territory, is not an ordinary business practice and serves no other legitimate purpose.

4. Price signaling occurs when firms inform their competitors that they intend to raise prices, causing in turn further price increases throughout the industry. Price signaling can take place publicly, through announcements or comments about prices, or privately through direct contacts between competing firms. Under certain circumstances, such behaviour may fall under the scope of EU and national competition law.

5. In a competitive market, every economic operator must determine autonomously the policy which it intends to pursue in the market. It is also recognized that this requirement of independence does not however deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors[2]. It follows that there should be uncertainty as to the conduct of each undertaking on the market and that undertakings are expected to maximize their profits based on the available information observed on the market and their – independently shaped - expectations of future developments.

There is, however, a wide range of oligopoly markets in which market transparency is insufficiently high to collude tacitly in the absence of any further contacts between the oligopolists, but which are still sufficiently transparent to achieve joint profit maximisation where some additional information is communicated[3]. The existence of contacts between undertakings may amount to an agreement or a concerted practice, in which case Art. 101 TFEU and the national provisions regarding collusive activity apply (in the following: "explicit collusion")[4]. However, there are cases in which Art. 101 TFEU and the equivalent national provisions of competition law do not apply for lack of an agreement or a concerted practice.

6. Even where the provisions regarding collusion in Article 101 TFEU and/or Article 1 Law 3959/2011 do not apply, the unilateral communication may be anti-competitive because it discloses the solicitor's intentions or preferences. In this context, under certain market circumstances, price signaling/disclosure through a purely *unilateral* disclosure of information on future pricing to competitors may lead to higher prices for consumers. In addition, it is sometimes impossible to determine whether a particular solicitation for forming a collusive scheme has or has not been accepted. Also, even a purely uniletaral solicitation may reduce competition by disclosing the solicitor's intentions or preferences[5]; Similarly, there may not be sufficient structural links or connecting factors between the undertakings in the relevant market for the finding of collective dominance[6], or it may not be possible to prove an abuse for this to fall under the scope of Article 102 TFEU and/or Article 2 Law 3959/2011. Finally, a rule against unilateral disclosures and solicitation would serve as a useful deterrent against conduct that is potentially harmful and that serves no legitimate business purpose.

Private and public announcements/disclosures

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[2] Court of Justice judgment of 28 May 1998, Case C-7/95 P *John Deere* v *Commission* ECLI:EU:C:1998:256, paragraph 87; Court of Justice judgment of 8 July 1999, Case C-49/92 P *Commission* v *Anic Partecipazioni* ECLI:EU:C:1999:356, paragraph 117; and Court of Justice judgment of 2 October 2003, Case C-194/99 P *Thyssen Stahl* v *Commission* ECLI:EU:C:2003:527, paragraph 83.

[3] *Cf.* the price-preannouncements in Court of Justice judgment of 31 March 1993, 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* ECLI:EU:C:1993:120 ('Wood Pulp II'); Commission Decision of 7 July 2016, Case AT.39850 — *Container Shipping* (summary: [2016] OJ C 327/4).

[4] Case T- 82/ 08, *Guardian Industries and Guardian Europe v Commission*, ECLI:EU:T:2012:494 (partly set aside by the CJEU in Case C- 580/ 12 P, *Guardian Industries Corp and Guardian Europe Sàrl v European Commission*, ECLI:EU:C:2014:2363, but only with regard to the fine); Joined Cases T- 25– 6, 30– 2, 34– 9, 42– 6, 48, 50– 65, 68– 71, 87– 8 & 103– 4/ 95, *Cimenteries CBR and Others v Commission* [2000] ECR II– 491, para 1852; Case T- 53/ 03, *BPB v Commission* [2008] ECR II– 1333, para 182.

[5] OECD Roundtable in 2012 on Unilateral Disclosure of Information with Anticompetitive Effects, https://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf .

[6] Note however that the General Court in Judgment of 25 March 1999, Case T-102/96 *Gencor Ltd v Commission* ECLI:EU:T:1999:65 para. 273-275 held that the finding of structural links is not indispensable for the establishment of collective dominance

7. Although direct communication is the most effective means for obtaining the requisite mutual understanding, it exposes the firms to competition law liability should evidence of such communications be discovered. Undertakings can also communicate through public announcements/disclosures. It is also possible that public announcements (*e.g.*, announcement of future prices) have the effect of facilitating tacit collusion of undertakings or other situations that may restrict effective competition.

8. Private unilateral disclosures to a competitor over commercially sensitive information[7], if this information is disclosed in the context of a meeting[8], or if users of an online booking platform take knowledge of a pricing rule that is distributed through an instant messaging system[9], is considered to show that if these undertakings coordinated their conduct and may fall under the scope of the prohibitions of Article 1 Law 3959/2011 and/or Article 101 TFEU[10].

9. For a unilateral public disclosure to restrict competition, it could be sufficient for it to convey the supra-competitive outcome, in a direct or indirect way, with it being implicit that the punishment, if the competitors will not comply, is a return to competition. The focus should be on the efficacy of public disclosure for achieving the required mutual understanding for tacit collusion or the non-cooperative equilibrium to become self-enforcing. Because of the high risk of prosecution in the presence of cartel activity, undertakings may easily substitute unilateral public disclosures for private communications to coordinate with competitors or may achieve a non-cooperative equilibrium that reduces consumer welfare through some form of price signaling.

10. Such communications may emanate from an undertaking's management, employees or controlling shareholders, as well as any other person of the sphere of influence of the undertaking/agent or representative (e.g., counsel, advisors etc.).

Scope of Article 1A in relation to Articles 1 and 2 Law 3959/2011 and Articles 101 and 102 TFEU

11. The enforcement of Article 1A par. 1 and/or par. 2 is without prejudice to Articles 1 and 2 of L. 3959/2011 (and/or Articles 101 and 102 TFEU), as it aims at unilateral invitations to collude which have as their object or effect the prevention, restriction or distortion of competition and unilateral information disclosures. Where the conditions set out in Article 1A and in Articles 1 and 2 of L. 3959/2011 (and Articles 101 and 102 TFEU) are met, including, inter alia, the exchange of commercially sensitive information, the latter articles shall apply to the exclusion of Article 1A (see par. 5 of Article 1A). The provision will therefore not apply where an agreement between undertakings or a concerted practice or a decision by an association of undertakings is found, or where the unilateral conduct consists of an abuse of a dominant position.

12. In particular, the provision of par. 1 of Article 1A is **applicable** where (1) the invitation to collude was unsuccessful because it was rejected by the recipient in a way that prevents the application of Article 101 TFEU and Article 1 Law 3959/2011; or (2) the invitation to collude was accepted but it is not possible to prove to the requisite standard of proof that it was accepted. Conversely, par. 1 of Article 1A is

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[7] See General Court judgment of 15 March 2000, Case T-25/95 *Cimenteries CBR and others v Commission*, [2000] ECR II-00491, ECLI:EU:T:2000:77, para. 1849.
[8] See Court of Justice judgment of 4 June 2009, Case C-8/08 *T-Mobile Netherlands and Others* ECLI:EU:C:2009:343, para. 59.
[9] Court of Justice judgment of 21 January 2016, Case C-74/14 *"Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba* ECLI:EU:C:2016:42.
[10] For guidance see European Commission, Draft Guidelines on horizontal cooperation of 1 March 2022, paras 432-434.

inapplicable where an agreement between undertakings, a decision by an association of undertakings, or a concerted practice can be established to the requisite standard of proof (par. 5 of Article 1A). It is therefore not possible that one and the same conduct by the inviting undertaking infringes both par. 1 of Article 1A and Article 101 TFEU/Article 1 Law 3959/2011 concurrently, because Article 1A paragraph 5 requires the absence of an agreement between undertakings, a decision by an association of undertakings, and a concerted practice for par. 1 of Article 1A to apply.

13. The conduct of an investigation under Article 1A and Article 1 of Law 3959/2011 and/or Article 101 TFEU is possible for the same facts. However, it is not possible to establish an infringement based on Article 1A and Article 1 of Law 3959/2011 or Article 101 TFEU cumulatively or subsidiarily.

Invitations to collude

Purpose and scope of par. 1 of Article 1A

14. The purpose of par. 1 of Article 1A is to make illegal the *attempt* at establishing certain enumerated forms of horizontal restrictions of competition by object through unilaterally inviting another undertaking to participate in a cartel aiming at restricting competition. In case of a purely unilateral communication, the *recipient* of the invitation has generally not infringed competition law[11]. The Greek legislature has recognized, in enacting par. 1 of Article 1A, that the undertaking that has invited the recipient (the issuer of the invitation or "the inviting undertaking") may fall within the scope of par. 1 of Article 1A. The recipient's subsequent rejection of an invitation to collude does not alter the fact that the inviting undertaking initiated the process that may result in a cartel agreement or a concerted practice. The inviting undertaking intends to engage in a cartel, and has not merely initiated actions in that direction, but has already taken actions to complete the infringement.

15. A good test for establishing whether par. 1 of Article 1A has been infringed is to ask whether a cartel in the meaning of Article 101(1)(a)-(c) TFEU/ Article 1 of Law 3959/2011 would have been formed if the recipient had accepted the invitation.

The elements of par. 1 of Article 1A

The prohibited action: To propose, coerce, motivate or in any way invite

16. Par. 1 of Article 1A makes it illegal to **propose, coerce, motivate or in any way invite** another undertaking to participate in any of the anti-competitive activities enumerated in paragraph 1. The wording of paragraph 1 makes it clear that the operative action is "to invite" such participation, while proposing, coercing or motivating are merely non-exhaustive examples of such an invitation. "To invite" participation means a communication suggesting to another undertaking or undertakings that participation in an anti-competitive scheme is an available option. "Motivating" with different forms of communication or conduct another undertaking to participate means making such participation appear advantageous by presenting the participation in an anti-competitive scheme as entailing benefits ("carrots"). Alternatively, an invitation can present non-participation as entailing disadvantages

[11] "Generally" because there may be narrow exceptions, for example, where a recipient verbally rejects the offer to collude but nevertheless acts in accordance with the suggested cartel conduct ("protestatio facto contraria non valet" – a protestation that is contrary to the facts is irrelevant), in which case Article 101 TFEU/ Article 1 Law 3959/2011 may apply despite the verbal rejection. Also, there is the possibility that the recipient did, in fact, accept the invitation, but that this acceptance cannot be established to the requisite standard of proof.

("sticks"). The participation is "coerced" where the inviting undertaking *threatens* to impose disadvantages if the recipient rejects the invitation. However, even where the inviting undertaking neither has nor claims to have the power over the occurrence of the disadvantages resulting from non-participation, but merely *warns* the other undertaking that non-participation in the anti-competitive scheme will result in these disadvantages, this amounts to an unnamed alternative of an invitation.

17. In any event, the precise nature of the "invitation" of another undertaking to collude is assessed on a case-by-case basis, taking into account the facts presented before the HCC.

18. Merely communicating one's own actions or plans without more would not generally be considered to be an invitation to collude under par. 1 of Article 1A, unless the communication, explicitly or implicitly, suggests that the recipient may participate in an anti-competitive agreement. However, such communication of one's own actions or plans may nevertheless be unlawful under other provisions of par. 2 of Article 1A where future pricing intentions are communicated.

Private or public communication of the invitation

19. The invitation as a communicative act must be addressed to another undertaking by private or by public communication.

20. This means that **purely internal discussions** within one and the same undertaking are not, as such, caught by par. 1 of Article 1A, even if the content of these discussions reveals that there is an intention to collude with a competitor. However, while these internal discussions are not caught, as such, by par. 1 of Article 1A, they may nevertheless constitute indirect circumstantial evidence which, in combination with other evidence, may establish that an invitation in the meaning of par. 1 of Article 1A has been communicated to another undertaking, even where there is no direct evidence of the external communication.

21. Where the invitation is issued in a **private communication** to a competitor, reducing uncertainty as to the conduct of an undertaking on the market, and the competitor does not take active steps to reject the invitation or to publicly distance itself from the invitation, but instead continues to be active on the market, this will usually be sufficient for the finding of an agreement or a concerted practice and will therefore fall under Article 101 TFEU/Article 1 Law 3959/2011[12]. Where, however, the recipient rejects the privately communicated invitation to collude in a way that prevents the finding of an infringement of Article 101 TFEU/Article 1 Law 3959/2011, par. 1 of Article 1A, which primarily concerns private communications to a competitor or competitors, is applicable.

Examples

1. *Rejected invitation by private communication in a telephone call:* Inviting undertaking A communicates to its competitor B in a telephone conversation: "Raise your fares 20 per cent, and I will raise mine the next morning! You'll make more money, and I will, too." – Recipient B: "We can't talk about pricing!" Recipient B informs the competition authority or publicly distances itself from this invitation.

2. *Rejected invitation by private face-to-face communication:* Inviting undertaking A communicates to its competitor B while visiting B's premises: "Your price is too low. There is plenty of room for both of us in the market. I will not price below [X]." Recipient B informs the competition authority or publicly distances itself from this invitation.

3. *Rejected invitation by private communication by e-mail:* Inviting undertaking A communicates to its competitor B via e-mail: "As you may be aware, we are one of your

[14] Case C- 49/ 92 P, Commission v Anic Partecipazioni [1999] ECR I– 4125, para 121.

competitors. I'm your friend, not your enemy. All three of us – we, you and company C – need to match the price that company D has. I'd say that 48 hours would be an acceptable amount of time." Recipient B informs the competition authority or publicly distances itself from this invitation.

In the three examples above, Article 101 TFEU/Article 1 Law 3959/2011 does not apply because the recipient has informed the competition authority or publicly distanced itself from the invitation. However, if none of the above occurred, this would have constituted a restriction by object in the form of fixing prices. The inviting undertaking A has therefore infringed par. 1 of Article 1A.

Counterexample: *Article 1A inapplicable where the invitation is accepted*

4. *Accepted invitation:* In a conversation between the general manager of A and the managing director of its competitor B, the general manager of A informs the managing director of B that the prices at which B offers its products are lower than those of A, and "as a result, they are ruining the marketplace." When the managing director of B replies that it was not B's intention to undercut A's prices, the general manager of the A sends comparative price lists to B.

In this counterexample, the communications between A and B arguably constitute an agreement between undertakings to exchange competitively sensitive information and to fix prices. Therefore, Article 101 TFEU and/or Article 1 Law 3959/2011 apply to both the inviting undertaking A and the recipient B. Accordingly, par. 1 of Article 1A does not apply (par. 5 of Article 1A). Only if B's acceptance (or conduct deemed an acceptance) could not be established to the required standard of proof could par. 1 of Article 1A be applied vis-à-vis A.

5. *Horizontal and Vertical Agreement Scenario*

Suppliers A and B are the main competitors, in terms of market shares, in a closed oligopoly market for the production of a particular product. Supplier A sends, by e-mail, to its major retailers information about a price change, including the exact rate of the upcoming price increase, as well as the information that this change is to be implemented in three months. By passing this information on to his retailer L, supplier A knows that retailer L also distributes the products of its competitor, supplier B, and that it is very likely that this information will be further passed on to supplier B by retailer L in view of ongoing discussions among them to develop the distribution strategy in various local markets.

In this scenario, Article 1A does not apply, as information about future pricing intentions is exchanged between supplier A and retailer L (which do not compete with each other) and also because this is part of a normal business practice between suppliers and retailers. The disclosure of information by retailer L to supplier B regarding supplier A's intended future price increase does not fall within the scope of Article 1A, also because of the vertical relationship between the two undertakings. However, this mechanism may, under certain conditions, fall within the scope of Article 1 (and/or Article 101 TFEU) if supplier A, when transmitting this information about future price increases to retailer L, *knew* that retailer L would pass this information on to the latter's Competitor, i.e. supplier B. To the extent that this information was passed on to supplier B and the latter remained in the market, without informing the competition authority or publicly distancing itself from the invitation in question, the specific mechanism may fall within the scope of Article 1 of Law 3959/2011. If retailer L contributed to this mechanism by passing on this information to supplier B, it may be found to have infringed Article 1 as a cartel facilitator or in the context of the broader "hub and spoke" arrangement.

22. Where the invitation is issued in **public communication**, such as an investor earnings call, a press release, a public speech, or a media interview, it is typically more difficult to prove that any subsequent actions of competitors are more than mere intelligent adaptations to the observed or expected behaviour of the inviting undertaking. In these cases, although a finding of Article 101 TFEU/Article 1 Law 3959/2011 infringement cannot be entirely excluded depending on the fact of the case, it is possible that the inviting undertaking infringes par. 1 of Article 1A if the public invitation is addressed to a competitor or competitors.

Example

5. In the context of an interview with financial journalists, and in response to a question about the market situation, the CEO of company A stated the following:

"The situation on the market is not good. If there is no immediate response to our efforts to limit excess production and thereby increase our profitability, we will be forced to cut jobs. We invite our competitors B and C to also do what is necessary." Following this interview, competitors B and C publicly distanced themselves from this invitation.

23. The invitation, when contained in a public communication, can be targeted at individual competitors, to a subset of all competitors, or to all competitors. To the extent that the conditions for the application of this provision relate to the communication of very specific types of information (such as information on purchase or selling prices in a particular market), and contains a reference to specific competitors, the provision does not impact in a disproportionate manner on the freedom of expression of the undertakings and/or of every other person.

The subject matter of the invitation: participation in an agreement with the object of preventing, restricting or distorting competition in the Greek Territory

24. Par. 1 of Article 1A is meant to catch attempts to enter into agreements that have the object of restricting competition, where, in other words, the conduct is by its very nature injurious to competition, that is, attempts that lack an independent legitimate business reason. Invitations that are by their very nature injurious to competition will typically be attempts at price fixing, limiting or controlling production, supply, technological development or investments, or allocating markets or supply, that is, attempts that lack an independent legitimate business reason.

25. It is a necessary condition for applying par. 1 of Article 1A that the invitation aims at entering into an agreement with the object of restricting competition, and that the restriction pertains to one of the exhaustively enumerated competitive parameters: a) purchase or selling prices on a market, or b) production, supply, technological development, or investments, or c) the allocation of markets or sources of supply. The wording defining the restrictions caught by par. 1 of Article 1A is, for the most part, identical to that of Article 101(1) (a)-(c) TFEU and to that extent, it is, to be interpreted in the same way as in that provision, so that the relevant case law and guidance on Article 101(1) TFEU can be applied by analogy. The exception is that par. 1 of Article 1A refers (in lit. a) to the direct or indirect fixing of selling or purchasing *prices* only, and not also to "any other trading conditions". It is important to note, however, that an agreement to fix other trading conditions may in certain circumstances amount to an indirect fixing of a selling or purchasing price and would as such be caught under par. 1 of Article 1A.

Examples

6. *Invitations aimed at price fixing:* The examples above all refer to invitations to collude where the agreement would consist of direct price fixing. Where the inviting undertaking suggests, for example, a cap on, or an interval for, the amount of rebates to be granted, this would be a form of indirect price fixing.

7. *Invitation aimed at allocating markets:* Newspaper A is predominantly active in the northern part of a region, and newspaper B is predominantly active in the southern part of the same region. A informs B that it has rejected printing an advertisement of an advertiser located in the southern part of the region and directed the advertiser to B "but that it would probably be asking too much if others did the same." — The invitation to collude aims at entering into an agreement consisting in the allocation of markets and infringes par. 1 of Article 1A.

26. Even where an invitation does not explicitly invite participation in an agreement with the object of restricting competition, it is possible for an invitation to be caught under par. 1 of Article 1A if it invites participation in such an agreement implicitly.

Example

8. Inviting undertaking A makes a public price pre-announcement. When none of its competitors follow suit, A withdraws the price pre-announcement. After exploring its competitors' prices and output, A announces a drastic downtime of its production, through which it reduces its production by some 200,000 tons, as well as the purchase of 100,000 tons from its competitors (in order to deplete industry inventories). In private conversations and public announcements, A's executives communicate A's belief that these actions would support an industry-wide price increase.

The initial price pre-announcement combined with the subsequent announcement of the decision to take a downtime and instead purchase from competitors constitutes, in these circumstances, an *invitation to the competitors to reduce output and raise prices* and infringes par. 1 of Article 1A. The assessment would be different if, contrary to the facts stated in the example, taking the downtime and purchasing from competitors were an efficient business decision and fulfilled the requirements of the Specialisation Block Exemption Regulation or Article 101(3) TFEU. Also, if it was a mere public pricing announcement (without the subsequent production announcements it would be analyzed under par. 2 of Article 1A).

27. For the analysis of the restriction of competition by object, the principles reflected in the national and EU case law and in the currently applicable EU Guidelines on the applicability of Article 101(1) TFEU apply by analogy.

Disclosures relating to future pricing intentions[13]

Purpose and scope of par. 2 of Article 1A

28. Article 1A, par. 2 may alco catch unilateral conduct that does not constitute an invitation to collude but leads to price signaling through the direct or indirect communication of future pricing intentions of an undertaking to its competitors, which does not constitute an invitation to a collusion between competitors the object

[13] Some of the developments in this Section of the Guidelines draw on work by Professor Joseph Harrington, "Collusion in Plain Sight: Firms' Use of Public Announcements to Restrain Competition", Antitrust Law Journal, 84 (2022), 521-563.

of which is to prevent, restrict or distort competition. The potential concern with unilateral announcements in the form of forecasts is that they may facilitate a mutual understanding to compete less aggressively, beyond that which already results from the more concentrated market structure.

The elements of par. 2 of Article 1A

Different forms of unilateral public disclosure

29. Unilateral public disclosure of future intentions (e.g., public announcements concerning future pricing intentions) may take different forms. Public disclosure refers to the conveyance of information by an undertaking or one of its employees using any medium (e.g., speeches, panel discussions, public or semi-public meetings with the presence of competitors, analysts or journalists, interviews published in journals) that is widely accessible to individuals outside the undertaking.

30. The following three categories of announcements may, under certain circumstances, restrict effective competition, because they may facilitate tacit collusion between undertakings or lead to a market situation that may harm consumers.

31. First, an undertaking provides a forecast of its future conduct and the industry's future performance. This forecast could lead other undertakings to act consistently with that forecast. Second, an undertaking prescribes how a rival or the industry at large should behave in the future. This category includes commending or criticizing rivals or the industry for past conduct, as that could be an implicit recommendation that future conduct should be consistent with that which was commended or contrary to that which was criticized. Third, an undertaking describes how its future conduct is contingent on a rival's conduct.

- *The disclosure (public announcement) may refer to a firm's own conduct*

32. An undertaking announcing a forecast of its future own conduct and industry performance would seem innocent enough. It is exactly the type of information that is of interest to the capital market because it helps them to predict firms' future profit streams. Input suppliers value demand forecasts as they aid them in making appropriate production decisions. Consumers want to know whether prices are expected to rise or fall and, therefore, whether they should buy now or postpone purchases. Thus, industry forecasts are useful to many parties in their decision making which means these forecasts enhance efficiency. These forecasts have been communicated in earnings calls, speeches and panels at industry meetings, press releases, interviews, and other media.

33. However, despite the many legitimate bases for a firm publicly forecasting its own and industry future conduct and performance, such statements could be made with anticompetitive intent. That the announcements may be intended for or of value to other market participants (such as investors, consumers or market analysts) is not determinative of their legality. In particular, the forecast may prove self-fulfilling if it facilitates tacit collusion and the reaching of a non-cooperative equilibrium that may be harmful to consumers.

34. Hence, for this class of public announcements, further analysis should be made with regard to the language/wording and in the light of the facts and legal and economic framework in order to establish if (i) the announcement constitutes in reality one of the previous classes of announcements [the disclosure (public announcement) may

describe how a company's future conduct is contingent on a competitor's conduct, or the disclosure (public announcement) may consist of a recommendation about how competing companies or the industry in general should behave in the future] and/or (ii) it considerably increases transparency in a tight oligopoly market, where there is little product differentiation, with very detailed information on the undertaking's future conduct, without the breadth of that announcement being justified by the purpose to inform investors, consumers and the public at large about the firm's conduct and performance and (iii) depending on the time of the assessment, what is the conduct following the announcement or public announcements of competitors. The HCC will also take account of the position of the undertaking in the industry and its ability to influence rivals' conduct, the circumstances under which the statement was made, the level of specificity of the information provided, etc.

35. For instance, if in a specific market undertakings are in the midst of a price war and an undertaking active in the market announces a forecast that it is expected to increase its prices in the near future, and this announcement precedes the price increase, without this announcement being justified by an increase in costs, a rise in demand, a capacity to be taken offline for maintenance, and many other exogenous factors which could be the basis for a firm forecasting higher prices, then the initial public announcement may be interpreted as problematic from the perspective of Art. 1A, par. 2.

36. The challenge is distinguishing a legitimate forecast about future conduct and performance from a forecast intended to coordinate competitors' conduct to restrain competition or to lead to a non-cooperative equilibrium that may be harmful to consumers. In this context, a unilateral forecast about an undertaking's future behaviour may fall under the scope of par. 2 of Article 1A if (i) it does not credibly attribute this conduct to some exogenous factor (such as a change in cost or demand); (ii) the predicted conduct would cause consumer harm, assessed under par. 2 of Article 1A; and (iii) it would not be in the self-interest of a firm to act according to the forecast unless other undertakings did so, too. Where the coordinating effect is found to be intended, it is unlikely that there is any competitive justification for the disclosure, and accordingly, the public announcement may presumably fall under the scope of par. 2 of Article 1A; in these circumstances, it is even possible that par. 1 of Article 1A applies.

Examples

9. Some types of public announcement may be accepted (if these report true facts/conditions of the industry in question)

(a) "In light of growing demand and a shortage of excess capacity, the prices charged are expected to rise."

(b) "A shortage of essential inputs will cause firms to reduce production which can be expected to drive up prices."

(c) "Due to the recent increases in raw material costs, we expect prices to increase by 10-15% in the future"

(d) An analyst asks the CEO of A if he thinks it is likely that supply chain issues will persist in the industry's supply chain. The CEO answers the question sincerely and without going beyond the answer to the specific question.

10. Others may be less acceptable, and a more detailed assessment is needed

(a) "Undertakings in the industry will soon raise their prices as they come to realize that long-term industry profitability is not sustainable with prices at these historically low levels. We will sure do this"

(b) "In view of the recent rises in production costs, we announce that we will increase prices by 12% in precisely two months from now and by 20% by the end of the year"

(The difference with the previous example (c) is that in this particular case the firm announces a specific rate of price increases as well as the time/period during which such increases will take place. In these cases, the HCC will examine whether the announcement is justified by the need to inform customers, for instance because this is a product that cannot be stocked for a long period and has to be consumed immediately. Where the announcement primarily benefits customers (or non-competitors) it will not be considered further).

(c) An analyst asks firm's A CEO:

(i) whether he considers that a significant increase in A's profits in the next quarter is likely to occur;

(ii) whether firm A will adjust prices in line with the rate of inflation or input costs;

(iii) whether firm A will adjust prices in line with the rate of inflation before a specific date;

(iv) whether firm A intends to take action to end the price war that is affecting profitability in the industry;

(v) whether firm A would align its prices with those of firm B if B ceased aggressive competition.

The CEO answers the question sincerely.

Inquiries from analysts or investors may be a first indication of the usefulness of the information for investors and capital markets (e.g. for the valuation of stocks, bonds or derivatives). In many cases, disclosure of information that is useful to investors is desirable under securities legislation and is a normal business practice. To the extent that this happens, the prohibition of art. 1A par. 2 does not apply: see art. 1A(2) (a) (ii).

However, answering to an analyst's questions is not a safe harbor per se. Where the level of details on prices, discounts, supply or credit information and/or determining the timing of changes in the use of this parameter goes beyond what is necessary to meet the legitimate interests of investors and capital markets and, therefore, goes beyond normal business practice, paragraph 2 of article 1A may apply. While overall profitability (and the profitability determining parameters) are obviously of interest to analysts, investors and capital markets, the level of detail required to assess overall profitability is typically lower than that required for collusive objectives and does not include, e.g., a specific time or quantification of a price change or a planned reaction to a competitor's move. The disclosure of information which goes beyond the level of detail encountered in a normal business practice and has a restrictive the effect on competition may therefore fall under the prohibition of paragraph 2 of article 1A. When the information disclosed to the analyst constitute an explicit or tacit invitation for another undertaking to engage in a restrictive agreement, decision or concerted practice, it may even fall under the prohibition of paragraph 1 of Article 1A. (see Example 8 in point 29 above). In a similar case, and when the invitation is expressly or implicitly accepted, alternative application of Article 101 of the TFEU and/or Article 1 of Law 3959/2011 is possible. The risk of par. 2 of article 1A, par. 1 of article 1A, article 1 of Law 3959/2011 and/or article 101 of the TFEU being applied to disclosures of information to analysts is particularly high when the information disclosed concerns competitors' conduct (see par. 40 et seq. and (c)(iv) and (c)(v) below). However, these provisions are applicable where the level of detail of the disclosed information is not limited to what is necessary to serve the legitimate interest of investors and the capital markets, and where the (not strictly necessary) disclosed detail has an appreciable restrictive effect on competition.

A possible answer to question (c)(i), which would be limited to (sincerely) pointing out that the forthcoming cost reductions would likely lead to an increase in profitability in the following quarter, would be relatively unproblematic. Although this response suggests that prices will not fall on the basis of specific cost reductions and may therefore have the potential to create restrictive effects, the response is primarily aimed at allowing a general estimate of profitability, is of value to investors and would be only

part of a normal business conduct. However, the estimate would be different if the CEO's answer to this question explained that next quarter's profitability would possibly increase "because prices will increase by 10%, starting from the first day of next month", and if the answer further added that "profitability is likely to rise as we expect our competitors to respond to this increase in the short term", Article 1A(1) would apply (and, where a concerted practice can be established, for example due to similar disclosures by competitors, it is possible to apply Article 101 of the TFEU and/or Article 1 of Law 3959/2011 instead of Article 1A of Law 3959/2011).

Similarly, in question (c)(ii), the mere (and sincere) disclosure that prices will increase in line with inflation or input costs would generally be in line with normal business practice and, therefore, not falling under the prohibition of par. 2 of Article 1A (see Example 9 above). However, the evaluation may differ if the disclosure also included a reference to the exact date (or a fairly specified and limited range of dates) of the forthcoming price increase, provided that there is sufficient general, or sectoral, understanding as to the rate of the input costs increase or the rate of inflation, respectively. An example of a prohibited level of detail might be the answer to question (c)(iii), depending on how far in the future the "specified date" is placed and on whether the exact rate of inflation that is expected to trigger an increase in price is sufficiently clear.

A meaningful answer to questions (c)(iv) and (c)(v) would not only outline the future conduct of firm A itself, but would identify it in relation to the conduct of A's competitors. As explained in paragraphs 40 et seq. of the guidelines, this is inherently problematic. Any analyst question seeking such an answer should be rejected as inappropriate.

- *The disclosure (public announcement) could be a recommendation as to how competing firms or the industry overall should behave in the future*

37. When a firm’s public announcement communicates to competitors how they should behave, the risk of coordinated conduct and anticompetitive harm is high because of this unilateral disclosure. There are two classes of such announcements.

38. The first class encompasses announcements that expressly recommend how competitors or the industry at large should behave.

Examples

11. “The industry runs the risk of too much supply chasing too little demand. We should all limit how much capacity we are operating”

12. “We should stop this price war and return to pricing at rational levels”

39. Announcements in the second class involve commenting on past conduct by competitors or the industry at large. An undertaking may commend competitors or the industry at large for certain past conduct and thereby implicitly recommend continuation of that conduct, or it may criticize past conduct and thereby implicitly recommend discontinuation of that conduct. Though these are not as explicit an invitation as the first class, the message is no less clear in conveying either a continuation of constrained competition or discontinuation of aggressive competition.

Examples

13. “Prices have been rising in recent quarters and I am grateful that my rivals have focused on margins, not volume.”

14. “My competitors have priced at insanely low levels which is a path to destroying profitability.”

15. “As soon as demand returned to reasonable levels, all the industry could think about was expanding capacity and supply. As a result, prices did not rise and we squandered an opportunity for higher profits.”

40. Consider a firm publicly announcing how rival firms or the industry at large should price or produce which, if that recommendation were to be adopted by the industry, would restrict competition. The only possible avenue for finding such a public announcement not to have anticompetitive intent is that it is expressed for the benefit of parties other than competitors, such as customers or suppliers. If those announcements were informative without affecting conduct, then that would be an alternative justification for them. These announcements are informative only if they are not capable of affecting firms’ conduct. For instance, if it can be established that some of the competitors of the disclosing undertaking changed their conduct, it can be concluded that the public announcement contributed to the restrictive effect on competition, and if a restrictive effect on competition is found to exist, the disclosure may fall under the scope of par. 2 of Article 1A.

- *The disclosure (public announcement) could describe how an undertaking’s future conduct is contingent on a competing undertaking’s conduct*

Examples

16. The announcement could describe the “reward” for pursuing tacit collusion

An undertaking announces: “As a small player in the market, it is not for us to get us out of this price war. However, if another firm raises price, we will be a good citizen and act likewise.”

“Firms need to restrict supply if price is to rise. If other firms limit their production, we will not try to gain market share and will pull back our supply, too.”

17. A public announcement could convey the “punishment” dimension of a reward-punishment scheme

“With the projected weakening of demand, our firm will take some capacity offline and restrict supply in order to maintain price at its current level. But success in stabilizing price will only work if others are similarly restrained in their output.”

Alternatively, a firm could announce it is willing to be a follower. This it could do by announcing how it would respond to a rival’s conduct—such as following another firm’s price increase and being content to maintain, rather than add, market share.

41. When a unilateral disclosure (public announcement) directly or indirectly refers to the conduct of competitors, there is inherently a risk that it could facilitate coordinated, rather than independent, conduct.

Conditions set out in par. 2 of Article 1A

To be prohibited by Art. 1A par. 2, a disclosure of information must fulfill three conditions:

- it must have specific content
- it must restrict effective competition in the Greek territory, and
- it is not an ordinary business practice.

Content of the disclosure

42. The information that is captured by the prohibition of Art. 1A par. 2 must concern "price, discount, supply or credit information about products or services an undertaking supplies or is supplied." This includes announcements pertaining to a firm's price and output, but also announcements pertaining to the customers or markets that a firm serves.

Restriction of effective competition

43. The HCC will take into account various factors in order to assess whether a disclosure restricts effective competition.

44. For the analysis of the restriction of effective competition in the context of art. 1A par. 2 the principles reflected in the national and EU case law and the applicable EU Guidelines regarding the application of Article 101(1) TFEU to the restrictions of competition by effect shall apply mutatis mutandis.

The information disclosed is specific and individualized

45. Unilateral disclosures of information on undertaking's individualized intentions concerning future conduct regarding prices or quantities is particularly likely to lead to consumer harm, as this may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices. Moreover, it is less likely that information disclosure concerning future pricing intentions are made for pro-competitive reasons than exchanges of contemporary data. The disclosure of genuinely aggregated information where the recognition of individualized company level information is sufficiently difficult or uncertain, is much less likely to lead to a restriction of competition than a disclosure of company level information[14]. Collection and publication of aggregated market information (such as sales data, data on capacities, on costs of inputs and components) by a trade association or market intelligence firm may benefit competitors and customers alike by allowing them to get a clearer overall picture of the economic situation of a sector. Such information collection and publication may allow individual competitors to make better-informed choices in order to adapt efficiently their individual competitive strategy to the market conditions.

The information relates to future activities

46. For Article 1A par. 2 to apply, price, discount, supply or credit information relating to products or services the undertaking supplies or is supplied that is disclosed should generally be about future pricing or generally market activity. However, one cannot exclude the possibility that disclosure of present data can constitute a monitoring mechanism for

[14] The possibility that even unilateral disclosure of aggregated information and data may facilitate a collusive effect in markets with specific characteristics, such as an oligopoly with high market concentration in a market with increased transparency cannot be ruled out.

tacit collusion if such disclosure serves to artificially increase the transparency between the undertakings rather than towards the consumers. The threshold when data becomes historic also depends on the data's nature, aggregation, frequency of the exchange, and the characteristics of the relevant market (for example, its stability and transparency). The older the information, the less useful it tends to be for competitors. In any case, it is important to take into account the overall context of information disclosure.

The information is not readily available to the public

47. *Genuinely public information* is information that is generally equally accessible (in terms of costs of access) to all competitors and customers. For information to be genuinely public, obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information. However, even if the information disclosed is considered to be *'in the public domain'*, it is not genuinely public if the costs involved in collecting the information deter other undertakings and customers from doing so. For instance, a possibility to gather the information in the market, e.g. from customers, does not necessarily mean that such information constitutes market data readily accessible to competitors. The disclosure of genuinely public information does not fall under the scope of par. 2 of Article 1A.

The disclosure is part of a pattern of similar disclosures

48. In case there is a pattern of similar information disclosures by the undertaking in question or by the undertaking in question and rivals in the specific relevant market, the information disclosure (public announcement) may raise more concerns from the perspective of Article 1A, as it reduces the uncertainty that exists concerning the conduct of the specific undertaking, in particular for its rivals, and, depending on the market characteristics enables the development of predictions as to its future conduct, thus increasing the transparency of the specific relevant market.

History of past collusion

49. A unilateral disclosure of information may raise more concerns if it takes place in a market with a history of past collusion or there exist contacts between the same competitors in other markets, as in this case it may serve as a support for the continuation of a collusive scheme.

The market to which the disclosure relates is concentrated and oligopolistic in nature

50. If a market is highly concentrated, the disclosure of certain information may, according in particular to the type of information disclosed, be liable to enable undertakings to be aware of the market position and commercial strategy of their competitors, thus facilitating tacit collusion or the development of a non-cooperative equilibrium that may be harmful to consumers. On the other hand, if a market is fragmented, the dissemination and disclosure of information may be neutral, or even positive, for the competitive nature of the market as it may facilitate consumer switching from a product or service to another.

51. In general, the HCC considers that markets with an HHI concentration index (Herfindahl-Hirschman Index) equal to or larger than 2000, deserve more scrutiny, always depending on the characteristics of the market. Similarly, the HCC considers that a market with an HHI concentration index equal to or lower than 1000 presents no risk of

concentration or oligopoly, unless in exceptional circumstances, thus constituting a safe harbour.

52. For an information disclosure to be likely to have restrictive effects on competition, the announcing undertaking (on its own) should have a noticeable market share, at least 10% of the relevant market.

53. A restriction of competition is also more likely where the demand and supply conditions on the market are relatively stable but less likely if there is substantial internal growth by some undertakings in the market, or frequent entry by new undertakings.

Information solely addressed to end users

54. Information solely addressed to end users of the product or service is not considered to restrict effective competition. Information addressed solely to end users enables them to react in time to price changes. For example, if the future pricing announcement concerns a product that can be stored for a long time and is not consumed immediately, this announcement primarily benefits customers (or non-competitors).

55. However, if rivals can immediately take into account this information and adapt their strategy, this may create a higher risk of tacit collusion or the formation of a non-cooperative equilibrium that may reduce consumer welfare. The specific conditions of market demand should therefore be examined.

Example
18. Information only intended for end users
When a firm informs its customers (end-users) announcing that "we will apply a 10% price increase to all orders received after the end of the current quarter", this information usually falls within the exception for disclosures exclusively intended for end users, provided that the information is targeted as far as possible to end users, because the pro-competitive effect (allowing customers to stock products at the current lower price) outweighs the effect of a possible collusion that may occur when information reaches competitors indirectly. When, on the other hand, the information is disclosed through a means of communication (e.g., a public announcement) informing both competitors and end-users, despite the possibility of providing more targeted information, and that information is far from useful to consumers, because it concerns products that cannot be stocked for a long period, but its possibly explained as an attempt to pass the information on to competitors, the exception does not apply. In cases where prior information is a normal business practice (for example, promotional advertising by a supermarket chain about "next week's special offers"), para. 2 of Art. 1A does not apply by virtue of par. 2, first paragraph, subparagraph b.

The disclosure does not constitute a normal business practice

56. Par. 2 of Article 1A provides for an exception to the prohibition principle when the disclosure does constitute a normal business practice. Disclosure of information about price, discounts, etc. constitutes a normal business practice when it is adopted for legitimate business reasons, the main one being consumer demand. Announcements are deemed not to constitute a normal business practice, if they are not imposed by regulation, are not prevalent in other comparable markets unless they constitute an industry practice reducing social welfare. It is on the announcing undertaking to rebut this presumption with evidence on the “normality” of such practices, in view of consumer demand or their positive impact on social welfare.

Relations between paras 1 and 2 of Article 1^{A}

57. Invitations to enter into a price cartel within the meaning of par. 1 of Article 1A involves a unilateral disclosure regarding the purpose of future pricing within the meaning of paragraph 2 of Article 1A. Paragraph 1 of Article 1A primarily concerns private communications between competitors (which do not fall within the scope of art. 1 N 3959/2011 and/or 101 TFEU), however, in some cases, it can also concern public invitations to collude (which do not fall within the scope of art. 1 Law 3959/2011 and/or 101 TFEU) that are addressed directly to competitors, since the circle of those to which the public invitation is addressed can be determined by the specific invitation, without further research of the relevant market.

58. Public disclosures of price, discount, supply or credit information about products or services that are not directly addressed to competitors and are formulated in such a way that they cannot establish the existence of an invitation to collude, but may induce competitors, by effect, into tacit collusion or situations that restrict competition fall within the scope of Article 1A par. 2.

59. Where an invitation to collude through the announcement of future pricing is based on an independent legitimate business reason, it shall not fall within the scope of par. 1 of Article 1A. However, it may be examined to identify any restrictive effects in accordance with par. 2 of Article 1A. Therefore, where the existence of an independent legitimate business reason is not substantiated, the HCC may proceed either (1) with the application of par. 1 of Article 1A, if it considers that the alleged legitimate business reason is pretextual (e.g. the behavior has not sufficient relevance to that legitimate business reason) or (2) otherwise, with the examination of the case for possible restrictive effects in accordance with par. 2 of Article 1A, where the independent legitimate business reasons may be taken into account in the context of assessing the anti-competitive effect.

Geographic scope

60. Invitations to collude fall under the scope of par. 1 of Article 1A, if they are aimed at preventing, restricting or distorting competition in the Greek Territory (or a part thereof). An invitation to collude that restricts competition on a broader territory that includes the Greek territory is assumed to also fulfil the conditions for the application of Article 1A; in this case, the HCC will coordinate its investigations in line with the applicable rules on Cooperation within the Network of Competition Authorities[15]. To that end, whether the HCC is well placed to deal with the case, for example whether the invitation to collude has substantial direct foreseeable effects on competition within the Greek territory, depends on the content and the legal and economic context of the invitation or disclosure, and all facts of the case.

61. For the implementation of par. 1 of Article 1A, the restriction of effective competition should concern higher prices, less variety, lower quality, lower levels of innovation and/or a reduction of potential competition *within* the Greek Territory.

62. Similarly, for conduct to fall under par. 2 of Article 1A, it is necessary that the disclosure restricts effective competition in the Greek territory (par. 2, lit. a of the first subparagraph). The guidance in paras 47 and 48 applies *mutatis mutandis*.

Justification

63. Par. 3 of Article 1A provides that practices that fall under par. 1 and 2 are not prohibited, as long as they meet by analogy the conditions of par. 3 of article 1 Law 3959/2011 and/or Article 101(3) TFEU. The same principles as those reflected in the national and

[15] Commission Notice on cooperation within the Network of Competition Authorities, [2004] Official Journal No. C 101/43.

Union case-law as well as in the applicable EU Guidelines on the application of Article 101(3) TFEU (in particular, the Section on Horizontal Cooperation Agreements referring to information exchange) apply by analogy in the consideration of the possible justifications under par. 3 of Article 1A. The undertakings that have been found to infringe par. 1 or par. 2 of Article 1A bear the legal and evidential burden of proof for the application of the conditions of par. 3 of Article 1A.

Efficiency gains

64. It is recognized that information disclosure may lead to *efficiency gains*, depending on the market characteristics. Indicatively, undertakings can benchmark their performance against the best practices in the industry, may be more able to respond to changes in demand and supply quicker and to mitigate internal and external risks of supply chain disruptions or vulnerabilities. It may benefit consumers and undertakings alike by giving insights into the relative qualities of products, for instance through the publication of best-selling lists or price comparison data. Information disclosure that is genuinely public can thus benefit consumers by helping them to make a more informed choice (and reducing their search costs). Similarly, public information disclosure about current input prices can lower search costs for undertakings, which would normally benefit consumers through lower final prices. Disclosure of consumer data in markets with asymmetric information about consumers can also give rise to efficiencies, e.g., keeping track of the past behaviour of customers in terms of accidents or credit default provides an incentive for consumers to limit their risk exposure; informing consumers reduces consumer lock-in as it helps them to compare future prices and choose a different product, thereby inducing stronger competition.

Indispensability

65. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by the information disclosure do not fulfil the conditions of par. 3 of Article 1A. To fulfil the condition of indispensability, the announcing undertaking will need to prove that the nature of the information and the context in which the disclosure takes place does not involve any risks to unfettered competition that are not strictly necessary for creating the claimed efficiency gains. Moreover, the disclosure should not involve information beyond the variables that are relevant for the attainment of the efficiency gains.

66. For example, for the purpose of benchmarking, the disclosure of individualized data would generally not be indispensable because aggregated information (for example, via some form of industry ranking) could also generate the claimed efficiency gains while carrying a lower risk of leading to tacit collusion and consumer harm.

Pass on to consumers

67. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the information disclosure.

No elimination of competition

68. The criteria of par. 3 of Article 1A cannot be met if the undertakings involved in the information exchange are afforded the possibility of eliminating competition in respect of a substantial part of the products concerned.

Exclusions from the scope of par. 1 and 2

69. Under par. 4 of Article 1A, undertakings with a total turnover of less than fifty million (50,000,000) euros and with fewer than two hundred and fifty (250) employees are excluded from the application of the prohibitions of par. 1 and 2 of Article 1A.