

# *Dimitrov, Petrov & Co.*

BULGARIAN LAW FIRM

## **Partners:**

George Dimitrov  
Bogdan Petrov  
Alexander Todorov  
Metodi Baykushev  
Zoya Todorova  
Hristo Nihrizov  
Plamena Georgieva  
Boyana Milcheva

## **Associates:**

Desislava Krusteva  
Dimitar Karabelov  
Sylvina Beleva  
Encho Simeonov  
Donka Stoyanova  
Emil Tumbev  
Boyan Ivanov  
Nikoleta Stoyanova  
Pavlina Ivanova  
Bilyana Stefanova  
Tsvetelina  
Georgieva  
Albena Angelova  
Gergana Georgieva  
Pencho Stanchev

## **Information exchange between competitors in the light of Bulgarian competition law practice. By object and by effect restrictions following *Dole***

Under the present-day economic conditions the information exchange between market participants is a prerequisite for more efficient market operation of each of them. The access to up-to-date market information provides the companies with an opportunity for effective performance of their activity and for adequate investment planning. On the other hand, the exchange of information is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question and the behaviour of the other participants. In such cases, the information exchange constitutes prohibited behaviour within the meaning of Art. 15, Para. 1 of the Protection of Competition Act (*PCA*) or Art. 101, Para. 1 of the Treaty on the Functioning of the European Union (*TFEU*). The present article discusses the possible and prohibited types of information exchange, as well as the potential sanctions of such market behaviour.

In this respect it shall be noted that with its decision No. 1778 of 20.12.2011 the Commission for Protection of Competition (*CPC, the Commission*) adopted Guidelines on the exchange of information between competitors (*the Guidelines*) aiming at providing clarifications to the market participants on the essence, forms and effect of the information exchange in terms of the regulations of competition law. A list (the so-called 'black list') is enclosed to the guidelines with specific examples of prohibited types of information exchange which are considered to constitute a violation of the regulations of competition law.

### **What does information exchange between competitors mean?**

Information exchange between competitors is a form of horizontal co-operation (agreement) which allows competing business entities to provide data regarding the essential economic parameters of their business activities (price and non-price). Horizontal are those agreements that are reached between two or more undertakings operating on the same level of production or distribution of certain products. Horizontal agreements are agreements for co-operation between undertakings that are real or potential competitors on the respective market.

In the Guidelines on the applicability of Art. 101 of the TFEU to horizontal co-operation agreements (*the Guidelines of the European Commission*) the European Commission specifies that horizontal co-operation agreements may

Sofia 1303, Bulgaria  
28 Todor Alexandrov Blvd,  
fl. 7  
tel.: +359 2 421 42 01  
fax: +359 2 421 42 02  
e-mail: [mail@dpc.bg](mailto:mail@dpc.bg)

Varna 9000, Bulgaria  
7 Krastyu Mirski Str,  
fl. 3,

office 9  
tel.: +359 52 912 986  
fax: +359 52 912 987  
e-mail: [varna@dpc.bg](mailto:varna@dpc.bg)

website: <http://www.dpc.bg>

also be reached between parties that are non-competitors, e.g., between two companies active in the same product markets but in different geographic markets which cannot be regarded as potential competitors<sup>1</sup>.

Therefore, the information exchange between competitors, especially in its form of violation of competition law, has a complex nature, and includes a variety of cases, as well as a vast number of choices of market behaviour.

### **Information exchange characteristics**

Of significant importance for the assessment of the anti-competitive effect of the information exchange are some of its characteristics such as market coverage, frequency, publicity, indirectness, diversity.

In respect of the **market coverage**, the information exchange is more likely to have restrictive effect on competition, if the undertakings participating in the exchange hold more shares in the respective market<sup>2</sup>. Regarding **the frequency** of exchange the Commission points out that the frequent exchanges of information between competitors create more favourable conditions for coordinated and concerted market reactions of the undertakings.<sup>3</sup>

If the competitors exchange information without disclosing this information to all undertakings in the respective market, it is considered that a **confidential** exchange has occurred. This type of exchange leads to severe restriction of competition. Cartels – one of the most serious and heavily sanctioned forms of violations of competition, are usually carried out via confidential exchange of information between competitors.

Most frequently undertakings exchange information between them **directly**. An **indirect** exchange, however, is also possible – when the exchange is carried out through an association<sup>4</sup> of the undertakings, through a third party – analyst, agent, auditor, accountant, etc.

In most cases the exchange of information is **bilateral or multilateral** – i.e. the exchange takes place between two or more participants in the market. There are, however, hypotheses of **unilateral** exchange as well. The fact that the exchange is not mutual and the information flow is in one direction only – from one participant to the rest, does not in itself exclude the anti-competitive effect.

---

<sup>1</sup> § 212 of the Guidelines of the European Commission

<sup>2</sup> § 46 and § 47 of the Guidelines of CPC

<sup>3</sup> § 48 and § 49 of the Guidelines of CPC

<sup>4</sup> Decision No.496 of 04.05.2010 of CPC

## Forms of prohibited information exchange

According to the Guidelines the prohibited information exchange could take the following three forms of prohibited agreement:

- **Agreement between undertakings** – the reaching of an agreement, a common understanding<sup>5</sup> of conducting certain behaviour in the market, aiming at prevention, distortion or restriction of the competition between the respective undertakings. The highlight in this case is the form of the agreement – it may be written, oral, signed or unsigned, in the form of a ‘gentlemen's agreement’, etc. The form of the agreement itself does not determine<sup>6</sup> the defining of the concert as a type of violation of Art. 15 of the PCA. The declaration of intention for adopting certain market behaviour<sup>7</sup> by the respective undertakings in even one clause is sufficient enough to be considered a violation.
- **Concerted practice** – factual and intentional concerting of the behaviour between the participants in the market. In its decisions the Court of EU defines concerted practice as a type of behaviour co-ordination between the undertakings, which without reaching an agreement knowingly substitute the risks of competition with practical cooperation between them<sup>8</sup>. Therefore, in this case there is no reached agreement between the undertakings, however, through their actual behaviour they eliminate the economic risk which is typical for the competing market. That is why the CPC adopts that concerted practice may be found when its existence is the only possible explanation for the simultaneous market reactions of the undertakings<sup>9</sup>.

Concerted practice may as well be present in cases when one undertaking unilaterally informs its competitors about its planned market behaviour (including through public announcement<sup>10</sup>). The reason for this is that disclosing a future commercial policy before the competitors even by only one market participant leads to decrease of the strategic insecurity with regard to the future functioning of the market for all participants. Therefore, when a given undertaking receives by any means strategic data for the business activities of their competitor, it is presumed that this undertaking has

---

<sup>5</sup> Case T-9/99, *HFB and Others v Commission* [2002] ECR II-1487, paragraph 199; Case T-61/99 *Adriatica di Navigazione v Commission* [2003] ECR II-5349, paragraph 88; and Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others v Commission* [2005] ECR II-3033, paragraph 118

<sup>6</sup> Decision No.220 of 01.03.2012 of CPC; Decision No.5837 of 29.04.2014 of SAC; Decision No.15333 of 04.12.2012 of SAC; Case C-74/04 P *Commission v Volkswagen* [2006] ECR I-6585, paragraph 37

<sup>7</sup> Case T-56/02, *Bayerische Hypo- und Vereinsbank v Commission* [2004] ECR II-3495, paragraph 60; Case T-53/03, *BPB v Commission* [2007], paragraph 79

<sup>8</sup> Case 172/80, *Gerhard Züchner v Bayerische Vereinsbank AG* [1981] ECR 2021

<sup>9</sup> Decision No.220 of 01.03.2012 of CPC

<sup>10</sup> § 30 of the Guidelines of CPC

received the information and has adapted its market behaviour in the respective manner<sup>11</sup>.

- **Decision by association of undertakings** – in this case the exchange of information is carried out via an alliance or association of undertakings, functioning in the form of a branch organization with the aim to protect the interests of the undertakings by imposing a certain market behaviour on them.

In these cases the particular form of the decision is not of importance either<sup>12</sup>. It may be presented in the form of letters, orders, instructions, protocols, forecasts, recommendations, etc. The only criteria defining the decision as violation are the object and the effect of the decision – the possibility to influence or coordinate the behaviour of the association's members.

On the other hand, in order for a “decision by association of undertakings” to be qualified as a form of an information exchange, it is not necessary that all undertakings which are members of the association have to have provided the data, collected by the association, nor does the information exchange have to be carried out in the form of performance of an assigned legal obligation of the members of the association<sup>13</sup>.

It shall be noted that **information exchange is not always examined as a separate violation. In practice, information exchange is frequently an element of a more large-scale violation of competition, including its most severe form – the cartel.**

### **What type of information shall not be exchanged?**

The exchange of information between competitors is often admissible. **The prohibition of exchange covers the cases in which the latter has as its object or result the restriction or distortion of competition within the respective market, irrespective of its specific results<sup>14</sup>.** Pursuant to §32 of the Guidelines ‘*this is information regarding the economic behaviour of the undertakings that is usually considered their trade secret...*’. Such information is defined as **sensitive or strategic**.

Strategic information the exchange of which may lead to restriction of competition **is most often related to prices** (actual prices, discounts, increase or reduction of prices, formulas and methods of price formation), **clients and**

---

<sup>11</sup> Case C-199/92 P, *Hüls*, [1999] ECR I-4287, paragraph 162; Case C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, paragraph 121

<sup>12</sup> § 24 of the Guidelines of CPC

<sup>13</sup> Case T-14/93, *UIC v Commission*, 1995, ECR II-1503

<sup>14</sup> § 31 of the Guidelines of CPC; Decision No. 496 of 04.05.2010 of CPC; Decision No. 5837 of 29.04.2014 of SAC; Case T-53/03, *BPB v Commission* [2007], paragraph 90

**consumers, production costs, capacity, production quantities, turnover, sale revenue, production quality, marketing plans, risk undertaken, investments, technologies, innovations, etc<sup>15</sup>.** The list is not exhaustive and may include other types of information, which according to the specifics of the market may lead to decreasing or eliminating the strategic insecurity regarding the behaviour of the competitors<sup>16</sup>.

**The exchange of statistic information, however, shall be considered allowed.** The sharing of such information is possible not only between undertakings, but also within their associations, provided however that such information does not allow identification of the data regarding the separate undertakings, the information records of which are used for the compilation of statistics<sup>17</sup>.

### **Characteristics of the sensitive information**

Based on the different classification criteria the following groups of sensitive information may be outlined:

- **Individualized and aggregated information.** The individualized information refers to a definite or definable undertaking. The exchange of aggregated data between undertakings, where the option for recognition of individualized information regarding specific undertakings does not exist, is less likely to lead to restrictive effects on competition than the exchange of individualized data regarding separate undertakings.
- **Current and historic information.** Historic information is the information which refers to a period of more than one year before the exchange occurred; the information referring to a period of less than a year is considered current or updated information. By rule, the exchange of historic information that is presented in statistical (summarized) form is consistent with the rules of competition<sup>18</sup>. Which information is considered updated, however, depends on the peculiarities of the market itself. It should be noted that in more dynamic markets information quickly loses its actuality.
- **Public and confidential information.** Information which by virtue of law or which is commonly published by all undertakings in the respective market (public information) by rule cannot be defined as sensitive

---

<sup>15</sup> § 33 of the Guidelines of EC

<sup>16</sup> Case T-53/03, *BPB v Commission* [2007], paragraph 106; Case C-238/05, *ASNEF-EQUIFAX v Administración del Estado*, Recueil, paragraph 51

<sup>17</sup> Decision No. 793 of 08.07.2010 of CPC

<sup>18</sup> § 37-40 of the Guidelines of CPC

information. Not every type of information which is published, however, may be defined as public. It is possible that all undertakings publish sensitive information aiming at achieving coordination between them which is a violation of the rules of competition. In this case the criterion whether the published information leads to a decrease of the strategic insecurity with regard to the behaviour of the competitors shall be applied.

- **Absolute data.** The presenting of information in the form of statistical indices which reflect the numeric ratio between the activity parameters of different undertakings is less likely to be considered violation of the competition rules than the information presented as absolute data, under the condition that these indices do not allow individualization of the respective undertakings to an extent which would give an opportunity to the other market participants to directly or indirectly define the market strategies of their competitors.

### **When is exchange admissible?**

Certain types of exchange may be released from the prohibition if they have pro-competitive effects<sup>19</sup>. For the purpose thereof, the exchange shall meet the provided for in Art. 17 of PCA, respectively in Art. 101, para. 3 of TFEU, conditions. Pursuant to the Guidelines of CPC there might be individual as well as block exemption from the prohibition.

With regard to **individual exemption** the exchange shall meet the following conditions which are applicable to all forms of prohibited agreements<sup>20</sup> (agreements, concerted practices, decisions by association of undertakings):

- the exchange contributes to the improving the production or distribution of goods or provision of services or contributes to promoting the technical and/ or economic progress – in this case the economic benefits from the information exchange may compensate the anti-competitive effect on the respective market;
- provides the consumers with a fair share of the resulting benefits;
- does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the respective economic benefits;
- does not lead to eliminating of competition in respect of a substantial part of the respective market.

---

<sup>19</sup> Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios*

<sup>20</sup> § 69 of the Guidelines of CPC

In its Guidelines the CPC has set out that certain categories of agreements for horizontal cooperation between competitors meet the requirements for exemption from the prohibition and that is why they are considered as subject to **group exemption**. These are agreements such as specialization agreements, research and development agreements, technology transfer agreements, agreements in the insurance sector.

In its Decision No. 55 of 20.01.2011, the CPC specifies the conditions which the agreements shall meet in order to be deemed released from the prohibition by virtue of law, as every separate case shall be individually evaluated. In case that the specific information exchange, however, cannot be deemed released from the prohibition, the latter shall be qualified as violation under Art. 101 of the TFEU and/or Art. 15 of the PCA. In these hypotheses the undertakings and associations participating in the information exchange are to be held responsible. The CPC is authorized to impose individual fines on the respective undertakings, which are defined under the terms of the PCA, to the amount of 10% from their total turnover for the preceding financial year<sup>21</sup>.

### **The *Dole banana* judgment**

We have to note that in its ruling of 19 March 2015 (Case C-286/13P) relating to the banana cartel, the Court of Justice of the EU (CJEU) has confirmed the EU Commission's approach to information exchange between competitors, and namely that the bilateral exchange between banana importers of pre-pricing information relating to the weekly quotation prices for bananas did amount to a concerted practice with the object of restricting competition in breach of Art. 101 of the TFEU.

The ECJ recalled that the exchange of information between competitors is to be understood in the light of the notion according to which each economic operator must determine independently the policy which he intends to adopt on the common market. *While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question.*

---

<sup>21</sup> See Art.100, para.1, item 1 of the PCA

The *Dole* judgement is important in so far as it provides a summary of EU law and practice in this area. Referring to information exchange between competitors, it is once again confirmed that whenever it is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market, it must be regarded as pursuing an anticompetitive object.

Moreover, it is stated that a concerted practice may have an anticompetitive object even though there is no direct connection between that practice and consumer prices. So even communications on factors relevant to pricing, but that remain some distance removed from market prices or consumer prices, might be considered as having an adverse effect on the market and are therefore "OBJECT" restrictions.

As a conclusion it shall be noted that information exchange between competitors is admissible within the limits provided by law and business practice. Information exchange provides the undertakings with the opportunity to collect market data aiming at higher efficiency and better services for their clients and consumers. The exchange of sensitive information, however, shall be carried out with increased attention in order to avoid creating circumstances restricting the competition within the market. Any sort of communication with competitors in relation to prices or factors relating even indirectly to prices should in any case be avoided.

## **Contacts**

### **Zoya Todorova**

Dimitrov. Petrov & Co. Law Firm  
28 Todor Alexandrov Blvd., fl.7  
1303 Sofia, Bulgaria  
Tel.: +359 2 421 42 01  
Fax: +359 2 421 42 02  
Email: [zoya.todorova@dpc.bg](mailto:zoya.todorova@dpc.bg)  
Website: <http://www.dpc.bg>



### **Radina Tomanova**

Dimitrov. Petrov & Co. Law Firm  
28 Todor Alexandrov Blvd., fl.7  
1303 Sofia, Bulgaria  
Tel.: +359 2 421 42 01  
Fax: +359 2 421 42 02  
Email: [radina.tomanova@dpc.bg](mailto:radina.tomanova@dpc.bg)  
Website: <http://www.dpc.bg>

