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EXPOSÉ ZUR DISSERTATION

vorläufiger Titel der Dissertation

Information Exchange between Competitors and the Application of Article 101 TFEU

verfasst von

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1. The description of the thesis

The thesis discusses the application of Art 101 TFEU to information exchanges between competitors. The area of information exchanges has been perceived as one of the most complex areas of Art 101 TFEU.¹ This thesis tries to clarify many of the perceived issues and provide a robust analytical framework for assessing information exchanges.

The first chapter of the thesis lays down the *conceptual* framework of information exchanges. It explores the different ways in how to classify the different types of information exchanges. There are essentially four ways: based on the ancillarity of the information exchange (ancillary vs pure), the stage of the concertation, the anti-competitive subject matter of the information and the primary flow of information (horizontal vs vertical). The thesis focuses mainly on pure horizontal information exchanges. Another aspect of the conceptual framework are the various characteristics of information exchange. These characteristics can be categorised into those belonging either to the ‘inner layer’ (public availability, commercial sensibility, level of detail and age of the exchanged information) or to the ‘outer layer’ (frequency, public availability and market coverage of the exchange itself).

The second chapter discusses the *economic* literature on information exchanges. The thesis discusses the ways in which information exchanges can entail benefits for suppliers (horizontal market transparency) and customers (vertical market transparency). It emphasises the importance of the vertical transparency and highlights some of the drawbacks of the static models used to demonstrate some of the horizontal efficiencies. It then argues that the foreclosure theory of harm is not convincing, and that the only robust theory of harm of information exchange is collusion. Although the economic literature on collusion is generally rich, it also covers a series of issues that are closely related to information exchanges. This includes the issue of tacit collusion and the structural analysis of factors that make collusion more likely. The thesis also discusses the idea of information exchange as a facilitative practice. It also distinguishes between the economic literature that mainly discusses the issue of ‘market

¹ See e.g. Camesasca P, Schmidt A and Clancy M (2010), "The EC Commission's Draft Horizontal Guidelines: Presumed Guilty when Having a Chat", *European Competition Law & Practice* Vol 1(5), pp 405-417, at p 417; Seitz C (2011), "One Step in the Right Direction – The New Horizontal Guidelines and the Restated Block Exemption Regulations", *Journal of European Competition Law & Practice* Vol 2(5), pp 452-462, at p 455.

transparency’ and the literature that mainly discusses the issue of ‘communication’ as this becomes an important demarcation for the object/effect classification in Art 101 TFEU.

The third chapter discusses the *legal* framework necessary for assessing information exchanges. It focuses on only two conditions of Art 101 TFEU: the concept of a ‘concerted practice’ and the classification as either a ‘restriction by object’ or a ‘restriction by effect’. The analysis of the former concept is important for understanding the importance of information exchanges as the most potent manifestation of collusion theory in Art 101 TFEU (see fourth chapter). The analysis of the latter concept is necessary for coherently assessing pure information exchanges (see fifth chapter).

The fourth chapter, as mentioned, explains the *importance* of information exchanges for collusion theory in Art 101 TFEU. The economic literature on collusion theory emerged initially to tackle the ‘oligopoly problem’.² However, the EU Courts were not convinced that concertation can be proven by mere parallel conduct on the market. This strict case law on mere parallel conduct relates to an evidentiary issue. While parallel conduct constitutes merely circumstantial evidence, information exchanges produces documentary evidence of some form of contact between competitors. Another aspect of the discussion in this chapter is the weight of information exchanges in the various Commission’s Guidelines (Horizontal Cooperation Guidelines, Vertical Guidelines, Technology Transfer Guidelines) as the theory of harm for the theories of harm on the risk of collusive outcomes.

The fifth chapter discusses *pure* information exchanges. The thesis first explores the Commission’s perspective on this type of information exchange. It then thoroughly analyses the case law that has classified certain types of information exchange as either restrictions by effect or restrictions by object. The identifies common themes such as the issue of aggregation (prescriptive perspective) and discusses whether the current state of law is desirable (normative perspective). It then develops a relatively straight forward two-step approach for classifying pure information exchanges as either a restriction by object or effect.

² The oligopoly problem is the problem that in certain situations undertakings act in parallel because they have the increased ability to correctly anticipate the actions of their competitors, mainly due to the simplification of the economics calculations caused by a low number of market players (see Ray Pfeiffer M (1974), "Uniform Pricing in Concentrated Markets: Is Conscious Parallelism Prohibited by Article 85(1) of the Treaty of Rome", *Cornell International Law Journal* Vol 7(2), pp 113-130, at p 114).

2. The current state of research

The economic literature on the various strands of collusion theories is rich. It initially emerged under heading of ‘tacit collusion’, mainly to tackle the so-called ‘oligopoly problem’.³ However, the problem was the legal implementation of those collusion theories under Art 101 TFEU. The EU Courts were not convinced that mere parallel conduct can be considered as sufficient proof of a concertation.⁴ The long-lasting struggle to condemn mere parallel conduct under Art 101 TFEU explains the current practical weight of information exchange. Information exchange produces documentary evidence and is therefore the most potent implementation for collusion theories in Art 101 TFEU. The literature fails to develop such holistic evidentiary picture.

The literature also struggles to provide a clear demarcation between those information exchanges that were considered as restrictions by object and those that were considered as restrictions by effect. The confusion is further deepened because economic literature tries to risk-classify the different types of information exchange and derive from such risk-classification the normative demarcation line.⁵ However, a thorough analysis of the case law reveals a relatively clear demarcation line between by object and by effect restrictive pure information exchanges.

The current state of literature discusses extensively the various abstract formulas provided by the EU Courts over time to identify by object restrictions. However, a narrow focus on an abstract formula might oversee common themes in the case law that are only observable once ones goes beyond such abstract formula. The discussion narrowly focuses on the object/effect

³ See e.g. Ivaldi M et al (2003), "The Economics of Tacit Collusion", Final Report for DG Competition, European Commission, March 2003, available at http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf (accessed on 25 June 2019); Petit N (2013), "The 'oligopoly problem' in EU competition law", last revised 18 February 2013, available at <http://ssrn.com/abstract=1999829> (accessed on 25 June 2019).

⁴ See e.g. Stroux S (2004), "US and EC Oligopoly Control", The Hague: Kluwer Law International, pp 84-85; Joshua J and Jordan S (2004), "Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law", *Northwestern Journal of International Law & Business* Vol 24(3), pp 647-682.

⁵ See e.g. Kühn K-U and Vives X (1995), "Information exchanges among firms and their impact on competition", Luxembourg: Office for Official Publications for the European Community, June 1994, revised February 1995.

distinction without taking into consideration the specific context of the case. Some recent articles aim to overcome these limitations.⁶ This thesis tries to build on those theoretical contributions and develop a robust theoretical framework for the classification of certain types of pure information exchanges as restrictions by object.

More recent literature also discusses the issue of signalling via advance public announcements.⁷ Although there is little case law, the literature still tries to identify the problematic features of anti-competitive public announcements. However, it fails to provide a holistic picture with the existing case law on pure information exchanges. This thesis tries to link both discussions and argue that it does matter little for the by object classification whether the exchange takes place in public or private.

Furthermore, the current literature also lacks a more developed conceptual framework for the different types of information exchange. While some types are more mainstream⁸ than others⁹, the overall categorisation is underdeveloped in the literature. Thus, this thesis also offers a more in-depth discussion about the different ways of categorising different types of information exchange.

⁶ Fai Kwok K H (2018), "Re-conceptualizing 'object' analysis under Article 101 TFEU: theoretical and comparative perspectives", *Journal of Competition Law & Economics* Vol 14(3), pp 467-492; Ibáñez Colomo P and Lamadrid de Pablo A (2016), "On the notion of restriction of competition: what we know and what we don't know we know", 18 October 2016, available via SSRN at <https://ssrn.com/abstract=2849831> (accessed on 25 June 2019).

⁷ See e.g. OECD (2012), "Unilateral Disclosure of Information with Anticompetitive Effects (e.g. through Press Announcements)", DAF/COMP/WP3(2012)1, 31 August 2012; Rabinovici I (2017), "Public Exchange of Information After Container Shipping", *Journal of European Competition Law & Practice* Vol 8(3), pp 149-156.

⁸ For instance the different types based on the ancillarity to other conduct (pure vs ancillary information exchange): see e.g. OECD (2011), "Information Exchange between Competitors under Competition Law", DAF/COMPLACF(2011)6, 18 July 2011, p 4; Bennet M and Collins P (2010), "The Law and Economics of Information Sharing: The Good, the Bad and the Ugly", *European Competition Journal* Vol 6(2), pp 311-337, at p 328.

⁹ For instance the different types based on the stage of the concertation (see Baño Fos J (2015), "The Dogmatic of Article 101 and Information Exchanges", Doctoral Thesis at the Universidad Autónoma de Madrid) or the anti-competitive subject matter of the exchanged information (see Peeperkorn L (1996), "Competition Policy Implications from Game Theory: an Evaluation of the Commission's Policy on Information Exchange", CEPR/European University Institute Workshop on Recent Developments in the Design and Implementation of Competition Policy, 29 November 1996, available at http://ec.europa.eu/competition/speeches/text/sp1996_057b_en.pdf (accessed on 25 June 2019)).

3. Relevant literature

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4. The provisional structure of the thesis

- I. Conceptual framework
 - a. Types of information exchange
 - b. Characteristics of information exchange
- II. Economic framework
 - a. Efficiencies (for suppliers and customers)
 - b. Theories of harm (foreclosure and collusion)
- III. Legal framework
 - a. Legal structure of Art 101 TFEU
 - b. Concept of a ‘concerted practice’
 - c. Distinction between a ‘restriction by object’ and a ‘restriction by effect’
- IV. Importance of information exchange for collusion theories in Art 101 TFEU
 - a. Case law on parallel conduct cases and conclusions for information exchange
 - b. Commission’s Guidelines and conclusions for information exchange
- V. Pure information exchange
 - a. Commission’s view (e.g. Horizontal Cooperation Guidelines)
 - b. Case law on restriction by effect and relates issues (e.g. safe zones)
 - c. Case law on restriction by object and relates issues (e.g. scope of object box)
 - d. Case law on advance public announcements (issue of signalling)
 - e. Conceptual reflections (e.g. blurred line issue)