

## Energy & Restrictive practices

### Energy and restrictive practices : an overview of EU and national case law

**Anticompetitive practices, Exchange of information, Joint-venture, Vertical restrictions, Remedies (antitrust), Barriers to entry, Foreword, Remedies (mergers), Anticompetitive object/effect, Cartel, Energy**

Note from the Editors : although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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This chapter provides an overview of the practice of the European Commission (“EC”) and the European national competition authorities (“NCAs”) regarding the application of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) and its national equivalents [1] in the energy sector since the adoption of Regulation 1/2003 [2]. After an introductory discussion on Article 101 TFEU enforcement trends we provide short summaries of EU and national cases, the latter grouped by sector, i.e., electricity, gas and fuels.

#### **Enforcement at EU level**

EU antitrust enforcement in the electricity and gas sectors has been highly influenced by the process of market liberalization and integration of national energy markets by successive regulatory packages. Particularly the Third Energy Package adopted in 2009 [3] was flanked by activist antitrust enforcement focusing on vertical integration of network and supply activities and market access. The 2007 EU Sector Inquiry [4] identified a series of market malfunctions that hampered liberalization and market integration. One of the main problems identified was vertical integration of incumbents which in the EC’s view distorted investment incentives and foreclosed markets. Given the nature of the issues that the EC sought to address, it made limited use of Article 101 TFEU. Article 102 TFEU was the main enforcement tool and the EC has often been willing to push the existing limits of the law to address the identified market malfunctioning. Between 2005 and 2014, the EC opened only four investigations under Article 101 TFEU, compared with around 10 cases under Article 102 TFEU. Of these four Article 101 TFEU cases, three date from the last two years and one is still ongoing. This trend suggests that the EC is broadening its enforcement focus to include a variety of practices that restrict competition in energy markets.

The two most recent investigations opened by the EC under Article 101 TFEU target (alleged)

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restrictive conducts in traded energy markets : the power exchanges case and the benchmarking in the oil and biofuels sectors case. The power exchanges case, decided in March 2014, involved a market sharing arrangement between EPEX Spot (“EPEX”) and Nord Pool Spot (“NPS”), each dominant in their respective areas. While it is unsurprising that the EC intervenes against market sharing, the case illustrates the fact that power exchanges are coming of age. They are no longer seen mainly as market facilitators. They are also seen as sources of potential competition concerns.

The investigation into the oil and biofuels sectors was opened in May 2013 and is ongoing. The EC is investigating *inter alia* whether the companies concerned have colluded to manipulate Platts’ published prices for a number of oil and biofuel products and whether they may have prevented others from participating in the price assessment process, with a view to distorting published prices. Unlike most past cases in the energy sector, this investigation does not address obstacles to market integration in their various shapes and forms. It mirrors the collusion cases that we have seen in the financial services sector and in the more integrated national energy markets. Once markets become more integrated and competitive, new issues arise.

This broader focus also mirrors to a significant extent Regulation 1227/2011 on wholesale energy market integrity and transparency (“REMIT”). REMIT prohibits insider trading and market manipulation in wholesale energy markets and is enforced by national regulatory authorities in cooperation with the European agency ACER. The EC itself has no enforcement powers under REMIT. However, since there is significant overlap between practices caught by REMIT and Articles 101 and 102 TFEU, the EC remains an important part of the enforcement landscape.

## **Enforcement at Member State level**

The enforcement focus at Member State level mirrors to a significant extent that of the EC. NCAs have also focused mostly on abuse of dominance enforcement. However, the share of Article 101 TFEU investigations (or the national equivalent) is higher and practice suggests a certain willingness by NCAs to expand the boundaries of EC’s settled decisional practice when applying antitrust principles to bilateral conduct in the energy sector. National energy markets are often more integrated giving rise to concerns about collusive conduct by incumbents aimed at preserving the *status quo* despite liberalization efforts, such as market sharing agreements, customer allocation or bid rigging. In the fuel sector, a number of cases address resale price maintenance in distribution agreements.

Our review of the national cases suggests that at least some NCAs are more willing than the EC to innovate under Article 101 TFEU. Unlike several of the EC’s abuse of dominance cases, its Article 101 cases have been fairly conventional. One of the more innovative cases is the Spanish NCA’s investigation into the main electricity suppliers and the industry association UNESA (decided in 2011). This investigation involved a series of allegedly coordinated practices between the main electricity suppliers and UNESA that were considered part of a strategy aiming at preventing customers from switching suppliers in the context of liberalization of the retail electricity market, thus raising barriers to entry to independent and new suppliers. Among these alleged concerted practices the Spanish NCA pushed for a surprisingly wide interpretation of the very narrowly defined EU “sham litigation” doctrine, targeting UNESA’s decision to lodge an appeal against the Ministerial Order that regulated the conditions for switching supplier following the abolition of regulated tariffs. The Order included the obligation of the main suppliers to make available customer

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information to competitors to facilitate switching. The appeal was based on data protection rules and therefore it could reasonably be considered to be an attempt to assert the rights of the members of UNESA. However, the NCA surprisingly considered that it was not an isolated fact that was justified on its own merits, but a component of an alleged strategy of the members of UNESA to hinder customers from changing suppliers. Another example worth mentioning is the decision of the Greek NCA of 25 November 2005 whereby it fined BP and Shell for concerted practices aimed at the indirect fixing of their final wholesale prices through a common policy of discounts offered to retailers. Despite the lack of documentary evidence, the NCA concluded that, having regard to the circumstances of the market, the only plausible explanation of the alignment of prices was the existence of a concerted practice between the two suppliers. In light of the strict conditions set out in the *Wood Pulp* case law to find a concerted practice based on parallel behavior, this is another interesting example of NCAs willing to push the bar on Article 101 TFEU enforcement [5].

NCAs have been active in applying Article 101 TFEU in the context of temporary business associations or joint ventures set up by energy companies to provide a specific service in different markets or to participate jointly in tenders, and they have not hesitated to sanction such practices when considered restrictive of competition.

NCAs have also dealt with certain types of conduct under Article 101 TFEU that were addressed by the EC under Article 102 TFEU, notably export or resale bans in supply contracts, or long-term supply agreements. For instance, in 2010 the German NCA accepted commitments from major energy suppliers in 17 cases relating to resale bans on take-or-pay volumes in gas and electricity supply contracts with industrial customers. The German NCA considered that the combination of minimum purchase requirements with a resale ban in the contracts investigated was contrary to Article 101 TFEU as this prevented customers from selling the volumes exceeding their own demand, while still requiring them to pay for such volumes. The EC has challenged similar restrictions under Article 102 TFEU because they adversely affected market liquidity and raised barriers to entry [6]. Resale restrictions are generally challenged because they hamper market integration. In the energy sector enforcement is directly linked to the functioning also of individual national markets.

It is also worth mentioning that in the UK the energy regulator (Ofgem) and the financial regulator - the Financial Services Authority - launched an investigation into pricing benchmarks in the wholesale gas sector. While the case was closed in 2013 for lack of evidence it was a forewarning of what is to come. Market manipulation issues in the energy markets will likely become a core enforcement focus either under competition rules or REMIT.

We provide below a brief summary of European and national cases.

## 1. Cases decided by the EC

### a. *Power Exchanges (2014)*

The case concerned a market sharing agreement among two power exchanges, "EPEX", headquartered in Paris, and NPS, headquartered in Oslo. Power exchanges are organised markets for trading electricity. Spot trading means trading in the short run, such as within the same day or for the next day.

The EC found that EPEX and NPS had agreed not to compete with one another for their spot

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electricity trading services in the European Economic Area (EEA) [7]. The infringement took place in the context of discussions on establishing the Internal Energy Market (IEM), a EC initiative aimed at fully integrating national electricity markets. EPEX and NPS created a joint venture, the Sibelius project, to cooperate and discuss technical solutions for cross-border trade. However, the EC found that they had also agreed not to compete with each other and to allocate European territories between them. The EC found that these agreements extended beyond the legitimate purpose of the cooperation creating the IEM, thus breaching Article 101 TFEU and Article 53 of the EEA Agreement.

The infringement lasted for at least seven months in 2011 and 2012 and ended when the EC and the EFTA Surveillance Authority carried out unannounced inspections at the companies' premises. Two years after the unannounced inspections, on 5 March 2014, the EC settled the case with both undertakings and imposed fines totaling € 5.9 million.

#### *b. EU probe in oil and biofuels sectors (2013)*

On 14 May 2013, the EC carried out unannounced inspections of several companies operating in the crude oil, refined oil products and biofuels sectors. The investigation, which is pending, concerns the prices assessed and published by Price Reporting Agencies in the sectors concerned, namely Platts. The EC is investigating the conduct under Articles 101 and 102 TFEU. The EC has concerns that the companies under investigation may have colluded to manipulate Platts' published prices for a number of oil and biofuel products, in particular by reporting distorted figures, and that they may have prevented others from participating in the price assessment process, with a view to distorting published prices. These prices are used as benchmarks for traders in both financial derivative and physical markets for a significant number of commodity products in Europe and worldwide, including natural gas.

#### *c. Siemens/Areva (2012) [8]*

On 18 June 2012, the EC accepted binding commitments offered by Areva SA ('Areva') and Siemens AG ('Siemens') [9]. The EC was concerned that the non-compete obligation and the confidentiality obligation agreed by both companies in the context of a nuclear joint venture were not proportionate in terms of scope and duration.

In 2001, Siemens and Framatome S.A. (Areva's legal predecessor) decided to create a full-function joint venture, Areva NP, to pool their businesses related to nuclear plants. Siemens held the minority shareholding (34%) and Framatome S.A. held the majority shareholding (66%). As part of the Shareholders' Agreement to constitute the joint venture, the companies included a post-joint venture non-compete clause for a period of 8 to 11 years, subsequently reduced to 4 years by an arbitral award, after Siemens' loss of joint control of the joint venture. The confidentiality clause had the same duration as the non-compete obligation. Moreover, the scope of the agreement covered a wide range of products of civil nuclear technology in which the joint venture was not active.

In 2009, Siemens exited the joint venture and Areva acquired sole control. Proceedings were opened in 2010, following two complaints filed by Siemens with the EC (which were later withdrawn). Siemens and Areva offered commitments to the EC to address the competition concerns. The commitments included a reduction of the duration of the non-compete clause and the confidentiality

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clause to three years and a reduction of its scope to the core products/services provided by the joint venture.

*d. E.ON and GDF Suez (2009) [10]*

This case was the first in which the EC imposed fines on companies operating in the energy sector for an infringement of Article 101 TFEU [11]. The origins of the case can be traced back to 1975 when Ruhrgas AG (now E.ON Ruhrgas, part of the E.ON group) and Gaz de France (now part of GDF Suez) decided to build the MEGAL pipeline to transport the Russian gas to France and Germany. At that time, they also agreed through two side letters not to sell that gas in each other's home markets.

The EC considered that this arrangement constituted a market sharing agreement caught by Article 101 TFEU. The infringement lasted from January 1980 until September 2005 in the German market, and from August 2000 to September 2005 in the French market. This difference in duration is mainly due to the fact that GDF had a statutory monopoly on the import of gas into France until the First Gas Directive was due to be transposed in 2000 whereas German law did not provide for such rights. However, accepted market demarcation arrangements meant that competition was effectively excluded in Germany until 1998, which the EC took into account when determining the fines. The EC imposed fines of € 553 million on each of E.ON Ruhrgas (jointly and severally with E.ON) and GDF Suez.

E.ON and GDF Suez sought the annulment of the decision or, alternatively, a reduction of the fine by bringing an action before the General Court. The General Court largely upheld the decision but reduced the duration of the infringement, as it considered that the EC did not have sufficient evidence to prove that the French part of the infringement continued after August 2004, and set the amount of the fine at € 320 million for each company [12].

## **1. Cases decided by NCAs**

### ***a. Gas***

*i. Natural gas distribution (2iGas and Linea Distribuzione) - Italy (2013) [13]*

The Italian NCA fined 2iGas and Linea Distribuzione as well as their controlling companies, E.ON Italia and Linea Group Holding, approximately € 1.3 million for a restrictive agreement in the natural gas distribution market [14]. 2iGas and Linea Distribuzione created a temporary business association with a view to participating jointly in tenders organized by the municipality of Casalmaggiore, despite having the capacity to participate separately. The temporary joint venture (known as "ATI") allegedly aimed at ensuring that both companies would continue to manage the gas distribution service independently, in the exact same municipalities in which each had previously operated. In addition, it allegedly allowed 2iGas and LD to obtain more favourable conditions in the tender.

On appeal, the Italian Regional Administrative Court annulled the decision [15]. The Court took into account the fact that the Italian Code of Public Contracts imposed no limits that would apply to the conclusion of ATI contracts and, in addition, according to case law, ATI contracts could not be considered unlawful *per se*. Indeed, the Court found that the anticompetitive nature of such contracts should be assessed on a case by case basis, supported by specific evidence showing that

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the agreement is able to significantly and uninterruptedly affect the market, something that was not proved in the case at hand.

*ii. LPG cartel – Germany (2013) [16]*

On 16 April 2013, the Higher Regional Court of Düsseldorf increased the total amount of fines that had been imposed by the German NCA in 2007 on the 5 members of a liquefied petroleum gas (“LPG”) cartel, namely Friedrich Scharr KG, Primagas GmbH, KG (now Salzgitter Gas GmbH), Progas GmbH & Co. KG, Sano-Propan GmbH and Tyczka Totalgaz GmbH) from € 180 to € 244 million [17]. The companies involved were German subsidiaries of major oil and gas multinationals, accounting for more than two thirds of the German market. The companies had operated customer protection agreements for sales of LPG for standard tanks of up to 2.9t, used mainly by smaller commercial and household customers. They exchanged information about enquiries from customers and compensation was mutually offered in the event of a change of supplier. This notification system was run by a jointly operated logistics company on which a fine was also imposed.

*iii. Modernisation and maintenance of natural gas plants – Romania (2012)*

Four natural gas companies (SC Condmag, SC Inspec, SC Moldocor and SC TMCUB) were found to have exchanged sensitive information in order to rig two public procurement procedures organized during 2009-2011 by Transgaz, a State-owned network operator. Their goal allegedly was to allocate among them the works for the modernization and maintenance of natural gas plants. SC Condmag and SC Inspec coordinated with respect to a tender in 2009, and SC Moldocor and SC TMCUB with respect to a tender in 2011. The Romanian NCA imposed fines totaling € 5.6 million in a decision issued in November 2012 [18].

*iv. Supply of LPG – Italy (2010) [19]*

The Italian NCA sanctioned the three main Italian suppliers of LPG (ENI, Butangas and Liguigas) for a cartel of more than 10 years aimed at fixing prices for LPG sold in cylinders and small tanks [20]. Evidence of the infringement showed that the companies’ directors regularly held meetings at which they exchanged information and they also coordinated and synchronized their price lists. The investigation was opened following a complaint by the National Prices’ Monitoring Agency (Garante per la Sorveglianza dei Prezzi) and a subsequent leniency application by ENI, which was granted full immunity from fines. It was the first decision of the Italian NCA in a cartel case that was based on a leniency application.

*v. Joint Venture for import and distribution of LPG in Brindisi port – Italy (2009)*

On 20 May 2009, the Italian NCA settled a case in the market for importation and distribution of LPG via the port of Brindisi accepting remedies from the parties and closing the investigation without sanctions [21]. The companies involved were FVH S.p.A., Liguigas S.p.A., Quiris S.a.p.A., Butangas S.p.A. and I.P.E.M. Industria Petroli Meridionale S.p.A. The Italian NCA found that the joint venture created by the five companies could amount to an anticompetitive agreement aiming at (i) limiting access of third parties to the deposit of LPG in Brindisi ; (ii) coordinating the parties’ resale of LPG to third parties and (iii) exchanging information on the quantities of LPG transiting through the port of Brindisi and thus facilitating coordination in the sale of LPG in the downstream market to final consumers.

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vi. *E.ON Ruhrgas – Germany (2009)* [22]

On 10 February 2009, the German Federal Court of Justice confirmed [23] a decision of 13 January 2006 by the German NCA [24] that found long-term gas supply agreements concluded by E.ON Ruhrgas to be contrary to Article 101 TFEU. The German NCA had introduced thresholds for the assessment of long-term take-or-pay agreements under Articles 101 TFEU, as follows. Supply contracts with distributors lead to anti-competitive foreclosure effects and were therefore illegal if they covered a period of more than four years and contained a minimum purchase obligation of 50-80% of the distributor's actual total demand, or if they covered a period of more than two years in case of a minimum purchase requirement of 80% or more. The Federal Court of Justice rejected E.ON Ruhrgas' argument that it could not calculate a distributor's future demand at the time of entering into the long-term contracts.

vii. *Technical gas cartel – Italy (2007)* [25]

On 11 December 2007, the Italian Council of State annulled a decision of the Italian NCA that had found eight undertakings active in the industrial gas sector (Air Liquide, Sapio, Siad, Sol, Rivoira, Linde, Son, Sico) guilty of engaging in a horizontal agreement to partition the market through a system of customer sharing [26]. The Italian Council of State considered that the Italian NCA had failed to prove the existence of the alleged cartel.

viii. *DONG and HNG/MN – Denmark (2005)* [27]

On 21 December 2005, the Danish NCA approved a natural gas supply agreement between natural gas supplier DONG and its distributor HNG/MN under the equivalents of Article 101 and 102 TFEU. The Danish NCA imposed commitments to the parties, requiring an early termination of the exclusive supply clause and prohibition of such clause in future contracts [28].

The natural gas supplier DONG and its customer Hovedstadsregionens Naturgas (HNG) presented to the EC and the Danish NCA a supply agreement in the fall of 2003. The authorities took the view that certain provisions were likely to infringe competition law. First, the parties agreed on an exclusivity period of six years and three months during which HNG could only purchase gas from DONG. The clause was deemed problematic by the authorities on the grounds that it would foreclose the possibility for other suppliers to compete for that customer, thereby infringing article 101 TFEU. Second, the agreement provided different prices paid by HNG depending on whether its customers were metered or non-metered. The Danish NCA took the view that this provision was anti-competitive because it would reduce the incentives of HNG to compete efficiently for both types of customers. In the end, the agreement was cleared with commitments. The parties committed to shorten its duration by two years and, in the event of a renegotiation of the agreement, not to include an exclusivity clause nor a distinction of prices based on the type of customer.

## **b. Electricity**

i. *Agreement to close down coal power plants – The Netherlands (2013)* [29]

In the context of an agreement between organisations representing employers, employees, environmental NGOs, companies and other social actors that aimed to benefit from the transition to a more sustainable energy policy and sustainable economic development in the Netherlands, four

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electricity producers (GDF Suez Netherlands, E.ON, RWE/Essent and EPZ) agreed to close down five older coal fired power plants (all constructed in the 1980s) in a coordinated manner. In a position paper of 26 September 2013, the Dutch NCA declared that the deal over closing down coal power plants could be harmful for consumers. It considered that as the agreement involved around 10% of Netherlands' generation capacity and coal fired generation capacity has one of the lowest marginal costs of unit production, it could lead to a significant upward pressure on prices [30].

*ii. Electricity generation dispatch services - Italy (2012) [31]*

On 30 May 2012, the Italian NCA fined three electricity generators (Repower, EGL and Tirreno Power) € 323 million for a concerted practice aiming at sharing the market for the provision of certain dispatch services during public holidays off peak hours in the area of Naples [32]. The Italian NCA found that the anticompetitive conduct aimed at sharing the 'start-up to baseload demand', a system that ensures that grid voltage is maintained in the area during off-peak hours. The companies allegedly rigged the bids organized by the Italian transmission system operator with the aim of allocating equally the market and increasing prices. The Italian NCA had to infer the anticompetitive conduct from the behavior of the parties, as it did not find direct evidence of the agreement (the investigation was triggered by an anonymous tip from a whistleblower). One of the elements that weighed in the NCA's decision was that from April to August 2010, each player was able to win the auction once in three consecutive holidays.

*iii. Liberalization of the electricity supply market - Spain (2011) [33]*

On 2 November 2009, the Spanish NCA issued a decision analyzing whether the judicial action of the Association of the Electric Industry Companies (UNESA) against a Ministerial Order could amount to a violation of competition rules [34].

UNESA groups the main electricity suppliers in the Spanish market and it had lodged an appeal against a Ministerial Order for the revision of the electricity rates in view of the deregulation of the energy market that was ongoing at that time. As part of the deregulation process, set tariffs were to be abolished and domestic consumers and small and medium enterprises ("SMEs") had to choose a supplier in the liberalized market. Those customers that did not choose a supplier and who had the right to keep a regulated tariff (the "tariff of last resort") would automatically pass to the supplier that was charged with "last resort" customers within the group that had been their supplier until then. To facilitate supplier change, the Order required current suppliers to make available customer information to their competitors. UNESA's appeal claimed these provisions of the Order contravened data protection regulations. The Spanish NCA considered that the action to lodge an appeal through an industry association could amount to a coordinated practice of its members to prevent customers from switching electricity suppliers during the deregulation process. Ultimately the Council of the Spanish NCA decided that UNESA could not be held liable for the alleged infringement. However, the investigation threw light on possible evidence of a series of coordinated practices between the members of UNESA that could form a strategy to foreclose and restrict competition in the electricity market, including the decision to appeal the said Order, and it enabled the NCA's Investigation Division to open a second investigation against UNESA's members and the association itself.

This second case dealt with the collusive conduct of Iberdrola, Endesa, E.ON España, Gas Natural, Hidroeléctrica del Cantábrico and UNESA itself which was allegedly part of a strategy to hinder

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customers from switching suppliers in the context of the deregulation of the retail market. The alleged practices consisted in two sets of agreements : the first comprised various elements, namely the decision to appeal the said Ministerial Order through UNESA, preventing portability of customer information, restricting the scope for changing suppliers during a certain period and refusing to provide information requested by another supplier (Centrica). The second agreement involved fixing of the contractual terms offered to the most important energy consumers. UNESA was accused of facilitating these practices, offering a forum for the competitors to meet, as well as consolidating the agreements through their validation by its governing body. The Spanish NCA delivered the decision on the second investigation on 13 May 2011 finding the suppliers and UNESA guilty of anticompetitive practices contrary to Article 101 TFEU [35]. In particular, the NCA found that the practices investigated were part of a strategy to raise barriers to entry to independent suppliers, which had also resulted in an artificial reduction of competition between the five main suppliers. The NCA imposed fines totaling € 61 million.

*iv. Control and maintenance of thermic plants in Potenza - Italy (2011) [36]*

On 22 September 2011 the Italian NCA fined four associations for fixing the price of the control and maintenance of thermic plants in the City of Potenza [37]. A memorandum of intent signed by four local associations of companies and cooperatives and the local government approved a standard contract for the control and maintenance of thermic plants with power inferior to 35 KW. The parties established a uniform price for the services to be provided. The contract covered both the regular annual maintenance of the plants and the residual ad hoc maintenance. In the course of the proceedings, the associations suspended the application of the memorandum of intent and offered commitments to eliminate the allegedly anticompetitive elements of the agreement. These commitments were rejected by the Italian NCA.

*v. Electricity generation in Sicily - Italy (2010) [38]*

The Italian NCA issued two decisions on 22 December 2010 in relation to the conduct of two major electricity generators in the area of Sicily : Enel and Edipower [39]. Proceedings were opened under both Articles 101 and 102 TFEU. Regarding the Article 101 violation, the Italian NCA alleged that the companies had coordinated their bidding strategies for peak hours. The Italian NCA did not find evidence of collusion but it considered that the anomalous fluctuations of electricity prices recorded in 2008 and 2009 were due to a collusive arrangement among Edipower, owning 19,5% of installed generation capacity in Sicily, and its tollers (A2A trading, Edison trading, Iren mercato and Alpiq energia Italia). The collusion allegedly consisted in withholding pivotal power generating capacity so as to raise zone-based prices. According to the Italian NCA, the plausibility of collusion among the tollers was further enhanced by the important structural links between them. The parties offered commitments, which were eventually accepted by the Italian NCA .

*vi. Resale bans in gas and electricity supply contracts - Germany (2010) [40]*

On 7 July 2010, the German NCA accepted commitments from energy suppliers RWE, EWE, RheinEnergie, Wingas, N-Ergie, Stadtwerke Hannover, Erdgas Muenster, Stadtwerke Leipzig, SWM, Entega, Stadtwerke Kiel, Koethen Energie in 17 cases relating to resale bans on take-or-pay volumes in gas and electricity supply contracts with industrial customers [41]. The German NCA emphasized that it does not see take-or-pay clauses as per se anti-competitive. By contrast, the combination of

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minimum purchase requirements with a resale ban was considered as a breach of Article 101 because it prevented customers from selling the volumes exceeding their own demand (to traders or to the energy exchange), while still requiring them to pay for such volumes. The German NCA found that the resale ban restricted competition on distribution markets and hindered trade with electricity and gas. The suppliers committed to inform customers that the clause prohibiting the resale was removed.

*vii. Lignite export bans - Czech Republic (2010) [42]*

SUPN, one of the three lignite mining companies present in the Czech Republic, was fined by the Czech NCA on 8 January 2010 for infringing Article 101 TFEU by entering into agreements with its distributors not to export lignite from the Czech Republic [43]. The NCA's decision was confirmed by two judgments of the Czech courts.

According to the Czech NCA's findings, arrangements whereby SUPN prohibited distributors from exporting foreign lignite fuels were concluded and implemented between 1997 and 2009. Some of the distributors transposed the restrictive clause to the contractual arrangements between themselves and their own customers. According to the NCA, there was no evidence of any enforcement mechanism in place, nor were there sanctions for non-compliant distributors. On that basis, the NCA concluded that, insofar as the restrictive provisions were not enforced, the investigated conduct did not constitute an abuse of dominant position but it was rather an infringement under Article 101 TFEU. The NCA stated that SUPN's conduct had limited the autonomy of the distributors as to their choice of customers and destination of their supply.

*viii. Renewable Energy - France (2003)*

On 28 November 2003, the French NCA fined three renewable energy companies (Apex BP Solar, Vergnet and Total Energie) for market-sharing and bid-rigging, as well as the renewable energy trade union (Siprofer) for facilitating and enhancing the anticompetitive agreements [44]. The investigation revealed that the three companies held various meetings in order to organize the electrification of isolated sites, under the umbrella of Siprofer. In particular, they allegedly allocated two auctions that were to be organized by the public authorities of the Gard department, one to Apex and the other one to Vergnet. In the same meeting, Apex and Total Energie allegedly came to an understanding on a general split of all their projects. The president of Siprofer required a signed copy of the agreements from each of the undertakings in order to formalize and consolidate them. The authorities ended up organizing one single auction. Apex and Vergnet submitted a common proposal that was eventually successful. The companies subsequently split the projects and working sites according to their previous agreement. The French NCA imposed fines totaling € 68,000 to the three companies and Siprofer for information exchange, market-sharing and bid-rigging.

**c. Oil/Fuel**

*i. Jet fuel supply - France (2013) [45]*

The case concerns an alleged cartel between the four oil companies established in La Reunion Island Airport, namely Chevron-Texaco, Total, Exxon Mobil and Shell, in relation to a tender organized in 2002 by Air France concerning its jet fuel supply for stopovers in La Reunion. On 4 December 2008, the French NCA found that the companies concerned had colluded to bid volumes that reflected

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their historical share of supply and imposed fines totaling € 41.1 million [46]. The NCA's decision was upheld by the Paris Court of Appeal [47]. However, the French Supreme Court (*Cour de cassation*) subsequently quashed the judgment of the Paris Court of Appeal, ruling that an effect on inter-state trade had not been demonstrated [48]. The case was referred back to the Paris Court of Appeal, which upheld again the NCA's decision in its judgment of 28 March 2013 [49]. A new appeal before the French Supreme Court is still pending.

*ii. Agreement to stop supply of a type of car fuel - Romania (2012) [50]*

On 10 January 2012, the Romanian NCA imposed fines totaling € 200 million on six Romanian oil companies for collusive conduct breaching Article 101 TFEU [51]. The companies fined were Petrom, Lukoil, Rompetrol Downstream, Mol Petroleum and ENI. The six companies were found to have exchanged information on their future conduct on the market and agreed on stopping the supply of gasoline by Eco Premium.

*iii. Heavy fuel oil for seagoing vessels - Germany (2011) [52]*

On 8 November 2011, the German NCA imposed fines totaling more than € 11 million on two suppliers of heavy fuel oil for seagoing vessels : BOMINFLOT and BMT. The two companies were found to have allocated amongst themselves equal shares for the delivery of heavy fuel oil in Germany's Weser-Ems region. The two companies were found to have engaged in market allocation, regular price and quota agreements. According to the German NCA, the agreements had been operative from mid- 2005 until early 2007. The fines were reduced after both companies agreed to settle the case [53].

*Agreements between Repsol and resale distributors - Spain (2010) [54] iv.*

On 11 July 2001, the Spanish NCA found that Repsol had violated competition rules by fixing the retail price of fuel to its distributors acting as commissioners or agents [55]. However, it found that no infringement was proven regarding contracts with its resale distributors.

The Association of Petrol Station Owners of Andalusia appealed before the High Court the part of the decision that found that Repsol's agreements with resale distributors did not breach Article 101. It further claimed that Repsol had infringed the EC Regulation 1984/83 on exclusive dealing by extending the exclusivity clauses signed with its distributors beyond 10 years. On 7 December 2007 the High Court dismissed all the claims thus confirming the NCA's findings that no infringement existed with respect to contracts with independent distributors [56].

The Association lodged an appeal before the Supreme Court, which on 10 November 2010 upheld the ruling of the High Court and the decision of the Spanish NCA [57]. The Supreme Court found that a price fixing practice in Repsol's contracts with its resale distributors had not been demonstrated, but only a maximum price recommendation. In this regard, the recommendation of a price between a supplier and its resellers bound by an exclusivity clause does not amount to a violation of the competition rules. The Supreme Court found that two elements supported this findings : the absence of an ex-post control mechanism and the fact that no sanctions were foreseen if the price was not followed. Finally, regarding the duration of the exclusivity clause, the Supreme Court held that because Repsol had made important investments in the petrol stations, the 10-year limitation of Regulation 1984/83 did not apply.

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*v. Agreements between fuel suppliers and their independent distributors – Spain (2009) [58]*

On 30 July 2009, the Spanish NCA imposed fines totaling € 7.9 million on REPSOL, CEPSA and BP for indirectly fixing the retail prices charged by the service stations operated by independent contractors [59]. According to the Spanish NCA, the way in which the fuel companies priced the fuel sold to the independent stations, combined with the methodology followed to establish the commissions received by the latter and other terms of their commercial relationships, eliminated any incentives by the stations to apply discounts and compete on resale price, in such a way that the recommended prices communicated to the stations became in reality fixed prices. The NCA found that with these practices, the fuel companies aimed at restricting price competition between the stations in their respective networks. Further, the Spanish NCA found that the investigated practices also had the effect of restricting competition between service stations from different networks. Since all stations followed the recommended prices given the impossibility in practice to apply discounts and, in turn, the fuel suppliers based their recommended prices on the prices charged by distributors from competing brands in the same geographic area, all prices charged in a same geographic area were in reality aligned.

*vi. Agreements between OK and its distributors for motor vehicle fuels – Denmark (2009) [60]*

On 29 April 2009 the Danish NCA found a Danish fuel supplier, OK a.m.b.a., and its wholly-owned subsidiary DK-Benzin A/S to have infringed Article 101 TFEU by engaging in resale price maintenance [61]. The NCA analyzed the conditions agreed between the supplier and its distributor in order to benefit from a financial system built by the supplier to support the distributor in case of a “price war”. The agreement provided that financial support could be denied if the distributor undercut the competitors’ prices by more than a certain percentage or, in some cases, if it did not respect the prices listed by the supplier. These clauses were found to violate competition rules since they reduced the incentives of the distributors to lower their prices below a certain threshold. Nevertheless, the Danish NCA did not impose any fine on the parties involved but only ordered the termination of the practice.

*vii. Unleaded petrol – Greece (2008)*

On 25 November 2005, the Greek NCA fined BP and Shell almost € 50 million for price fixing in the market for unleaded petrol [62]. The Greek NCA found that both petrol suppliers used their strong brand names to align their wholesale prices.

Since there was no written proof of coordination between the two competitors, the NCA concluded that, having regard to the circumstances of the market, the only plausible explanation of the alignment of prices was the existence of a concerted practice aimed at the indirect fixing of their final wholesale prices through a common discount policy offered to their respective retailers. In particular, the Greek NCA found that both companies applied a common discount policy by dividing the domestic market into regions : in some regions, Shell would offer discounts 50% above BP’s discounts in those same regions, whereas in other regions it was the other way around, with the result that their net wholesale prices were equalized across the market. The NCA found that price alignment could not be justified by market transparency, as discounts offered by wholesalers to retailers were not announced publicly. Further, according to the NCA, the strong brand name of the two players differentiated them from the rest of domestic players, because the only competitive

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threat for each of the two companies was the other. The two companies priced systematically higher than their rivals and their market shares consistently converged between 2000 and 2006. As a result of the investigation, the two companies had to change their discount policy towards retailers by calculating discounts independently.

viii. *Jet fuel supply - Italy (2008)* [63]

On 14 June 2006, the Italian NCA imposed a € 315 million fine on six oil companies (Eni SpA, Exxon Mobil unit Esso, Shell, Kuwait, Libya state-owned Tamoil, and Total) for restrictive practices under Article 101 TFEU on the jet fuel supply market [64]. The Italian NCA found that the oil companies had cooperated to share the market and foreclose new entrants, mainly through the exchange of sensitive information via cooperative joint ventures which held and operated jet fuel supply facilities used for storage and refueling at Italian airports. The information exchanged concerned mostly bids organized by the airlines for the supply of jet fuel. The NCA assumed that the information made available by the members of the joint venture board appointed by a given oil company was known to the oil company in question, since the members represented the interests of the shareholders. Therefore, all the information shared by the members of the board was considered as evidence of the shareholders' intention to exchange sensitive information.

The Italian NCA imposed both behavioral and structural remedies. The behavioral remedies consisted in adopting internal rules to avoid the risk of antitrust infringements, such as setting up Chinese walls between the board and the management activities of the joint venture. The structural remedies consisted in the obligation to eliminate co-participation of more than one oil company in the share capital of each of the joint ventures after two years.

In February 2007, the Lazio Administrative Tribunal upheld the substantive findings of the NCA but considered that it had not proved that the structural remedy imposed was proportionate.

On appeal, the Council of State upheld the NCA's decision on February 2008 but clarified that the NCA was not competent to impose structural remedies under Italian law, only to order the companies to cease the infringing conduct [65].

ix. *Coordinated stop of production and distribution of a type of car fuel - Poland (2007)* [66]

On 31 December 2007 the Polish NCA fined PKN and Grupa Lotos for agreeing to stop the supply and sale of a certain type of petrol (U 95) used in older vehicles and for which demand was steadily declining since the 1990s [67]. The NCA based its decision on a series of emails between the two competitors showing how they agreed on stopping supply and how they communicated it to other competitors and to the customers.

x. *Fuel supply - Italy (2007)* [68]

Following a complaint by FITA, the National Association of Artisans and Small and Medium Shipping Enterprises, the Italian NCA started an investigation into the behaviour of all the nine fuel suppliers : Eni, Esso, Kuwait, Shell, Tamoil, Erg, Api and IP. FITA claimed that the companies had colluded by increasing simultaneously their prices, thus obtaining a perfect price alignment. Although the Italian NCA did not find evidence of collusion between the undertakings, it considered that the parties under investigation engaged in the exchange of information by communicating to the press

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recommended prices on a national basis, before their publication on the website of the Ministry of Economic Development, as well as price components which were not published by that Ministry and were not otherwise available. On 20 December 2007, the Italian NCA issued a decision to accept the commitments offered by the parties, including to stop communicating prices and price components to the specialized press and set prices on a local basis rather than nationally [69].

*xi. Galp contracts with service stations - Spain (2007) [70]*

On 3 September 2007, a Spanish Commercial Court rejected the claim filed by Comillas 2 and Estación sardinero S.L., two service station operators, against their supplier, Galp [71]. The operators complained that their agreements with Galp contained clauses amounting to price fixing and that the exclusivity period of 30 years breached competition rules. The court held that the agreement concerned was *de minimis* on the ground that Galp only had a 3% share in the market for the distribution of fuel through service stations. Both the National High Court [72] and the Supreme Court, upheld the commercial's court ruling [73].

*xii. Agreements between CEPSA and petrol stations - Spain (2007) [74]*

The Spanish Confederation of Service Station Businesses (CEEES) filed a complaint with the Spanish NCA claiming the agreements concluded between CEPSA and a number of petrol stations were not agency contracts, but in reality distribution agreements that had the effect of restricting competition. On the grounds that competition rules were not applicable to agency contracts and that the contracts in question were genuine agency contracts, the NCA concluded that the complaint required no action [75]. The CEEES lodged an appeal against the NCA's decision before the National High Court that was dismissed [76], and finally another appeal was filed before the Supreme Court. The Supreme Court referred a question to the Court of Justice of the EU ("CJEU") [77]. The CJEU established that Article 101 TFEU applied to a agreements such as the ones at issue when the service station operator assumes to a non-negligible extent the financial and commercial risks linked to the sale to third parties. On 4 May 2007, the Supreme Court ruled accordingly and stated that the contracts were in reality resale or distribution agreements such that the obligation imposed on the stations to comply with the final price fixed by CEPSA was anti-competitive [78].

*xiii. Jet aviation fuel supply - Greece (2007) [79]*

On 5 February 2007 the Greek NCA fined € 9 million several refineries for price coordination in the jet aviation fuel sector [80]. The investigation had its origin in the complaint brought by IATA, the International Organization for Jet Aviation services, against EL.PE SA and Motor Oil SA, major oil refineries operating in the Greek market, concerning the uniform application of prices in the sector of jet aviation fuel. The Greek NCA decided that the structure and circumstances of the market as well as the setting of prices in the relevant sector could only be attributed to a concerted practice between the undertakings aimed at fixing and raising prices. The defendants were obliged to move on to "Compulsory Stock Obligation" cost estimations (provided for by national law implementing Directive 98/93) and keep statements of account of the estimated cost. Moreover they had to make these figures known to their contracting parties within 30 days from the day of the decision.

*xiv. Agreement between Repsol and its fuel distributor El Mareny - Spain (2006) [81]*

On 7 March 2006, a Spanish Commercial Court declared null and void an exclusive purchasing

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agreement between Estaser el Mareny and Repsol [82]. Estaser el Mareny sought annulment of the agreement concluded with Repsol for a period of 25 years under which it granted Repsol tenancy rights over a piece of land in exchange of the right to exploit a petrol station in the same place. The agreement included a single-branding clause regarding the distribution of oil products. The retail price of the product was left to Repsol. Estaser el Mareny claimed that it should be considered a reseller and not an agent for the purposes of the application of Article 101 TFEU and that the contract lacked cause, since the price was not determined in it. The Court stated that the reseller was bearing important risks and thus the agreement was not an agency contract but an anti-competitive agreement that restricted competition by allowing Repsol to fix prices and exceeding the five year maximum period laid down for single-branding provisions.

xv. *Texaco gas stations - The Netherlands (2005)* [83]

The Dutch NCA opened an investigation against a fuel supplier - [W] [84] - and three service stations operated by independent contractors with whom [W] had an exclusive supply agreement - [X],[Y], [Z]. The alleged anticompetitive conduct was a concerted practice between [W] and the three independent service stations aimed at hampering the entry of [V] on the market.

[V] announced the opening of a new gas station in Nijmegen offering fuel at lower prices, following which, [W] and its distributors advertised in the local newspaper that they would offer equal discounts for a week. As to the three independent service stations, [W] recommended that they apply the same discounts and offered them to cover the cost difference for a week by selling them the fuel at a lower price.

Subsequently, [V] lodged a complaint with the NCA claiming that the matching discounts and the accompanying advertising were the result of an agreement between [W] and the three independent service stations to prevent its entry on the market. In its decision of 25 June 2002, the NCA found that the offer of parallel discounts by [W]'s distributors and the three independent service stations amounted to a concerted practice contrary to Article 101 TFEU.

[W] and three independent service stations challenged the NCA's decision before the District Court of Rotterdam. On 24 June 2006, the Court set aside the decision of the Dutch NCA for failing to demonstrate that the alleged parallel behaviour of the appellants amounted to horizontal agreements or concerted practices [85]. There was no evidence of an agreement or coordinated practice between the three independent service stations to apply [W]'s discount recommendation, and according to the Court, the fact that [W]'s advice to apply the discount resulted in identical discounts by the three independent operators did not mean that the latter had coordinated their behavior. The parallel pricing behavior could be explained by the vertical relationship between [W] and its independent distributors. Regarding the meaning of 'agreement between undertakings' the Dutch court emphasized the need to show acquiescence of the dealers towards the discount policy of the supplier. Even though the dealers tacitly adhered to the discount, the Dutch NCA had not proven concurrence of will in terms of the anticompetitive objective.

xvi. *Fuel distribution on motorways - France (2003)* [86]

On 31 March 2007, the French NCA sanctioned Total France, Esso, BP France and Pétroles Shell, imposing a fine of € 27 million, for having exchanged over the phone information on the prices

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charged in their service stations on certain motorway sections almost on a daily basis [87].

The French NCA considered that such frequent exchanges of price information substantially reduced the information collection costs in a market which could be characterized as a tight oligopoly. These practices artificially increased price transparency between suppliers. Although in principle service stations could obtain information on the prices charged by others simply by driving by and checking the price, this exercise would be too costly. Anti-competitive outcomes would have been easier to sustain given these frequent exchanges of information, allowing for regular monitoring and immediate retaliation in case of deviation.

The decision by the French NCA was annulled by the Paris Court of Appeal [88]. The degree of price alignment was not sufficient for the Court to consider that it could only be explained by a concerted practice. Moreover, information collection costs would not have been considerably reduced by direct exchanges of price information between competitors to cause an artificial increase of transparency within the market. These practices were therefore not considered as having facilitated reaching a higher price outcome or having reduced price-based competition.

Interestingly, the EC seems to seek to override the judgment of the Paris Court of Appeal in one of the information exchange examples in the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [89].

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[1] Note that references to Article 101 TFEU in the summaries of national cases should be understood as also referring to the national provision equivalent to Article 101 TFEU, as applicable.

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[3] The Third Energy Package includes the following legislation : Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC ; Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC ; Regulation (EC) No 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators ; Regulation (EC) No 714/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 ; Regulation (EC) No 715/2009 of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005.

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[5] 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* [1993] ECR I-1307.

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[76] Spanish National High Court, 22 January 2002, case nº 996/1998, *Confederación Española de Empresarios de Estaciones de Servicio v Administración General del Estado y CEPSA.*

[77] Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio v. CEPSA* [2006] ECR I-11987.

[78] Spanish Supreme Court, Judicial Review Chamber 4 May 2007, Case nº 1890/2002, *Confederación española de empresarios de estaciones de servicio (CEEES) vs. Compañía española de Petróleos, SA (Cepsa)*

[79] [Eleni Rentouka, The Greek Competition Commission fines € 9 M refineries for price coordination in the jet aviation fuel sector \(IATA/ El.PE.-Motor Oil\), 5 February 2007, e-Competitions Bulletin February 2007, Art. N° 13669](#)

[80] Greek NCA, 5 February 2007, Decision 327/V/2007, *IATA/EI.PE.SA. and Motor Oil SA.*

[81] [Pablo Ibáñez Colomo, A Spanish Commercial Court declares null and void an exclusive purchasing agreement on the basis of Art. 81.1 EC \(El Mareny/Repsol\), 7 March 2006, e-Competitions Bulletin March 2006, Art. N° 12440 ; Pablo Ibáñez Colomo, A Spanish Court finds a distribution agreement to be null and void pursuant to Art. 81.2 EC and decides that the claimant is not entitled to recover the sums paid by virtue of the contract \(Aloyas/Repsol\), 15 April 2005, e-Competitions Bulletin April 2005, Art. N° 320](#)

[82] Madrid Commercial Court, 7 March 2006, Case 39/04, *Estaser El Mareny, S.L. v. Repsol Comercial de Productos Petrolíferos, S.A.*

[83] [Marsela Maci, A Dutch Court set aside the decision of the NCA for failing to demonstrate that the alleged parallel behaviour of the appellants in the motor fuel sector amounted to horizontal agreements or concerted practices \('Texaco gas stations'\), 23 June 2005, e-Competitions Bulletin June 2005, Art. N° 15811](#)

[84] The Dutch NCA decision is not available. This summary is based on the judgment of the District Court of Rotterdam of 24 June 2005, which does not disclose the names of the parties.

[85] District Court of Rotterdam, 24 June 2005, *Texaco and Texaco gas stations v. Dutch Competition Authority.*

[86] [French Competition Authority, The French Competition Authority sanctions major oil companies for having entered into agreements on the market of fuel distribution on motorways \(Total Fina Elf France\), 31 March 2003, e-Competitions Bulletin March 2003, Art. N° 61680](#)

[87] French NCA, 31 March 2003, Decision nº 03-D-17, *Total France, Esso, BP France, Pétroles Shell (Practices in the motorway fuel distribution market).*

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[88] Judgement of the Paris Court of Appeal, 9th December 2003, available at <http://www.economie.gouv.fr/files/f...>

[89] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C11, 14.1.2011, p. 1.

*“109. Genuinely public information*

Example 5

**Situation :** The four companies owning all the petrol stations in a large country A exchange current gasoline prices over the telephone. They claim that this information exchange cannot have restrictive effects on competition because the information is public as it is displayed on large display panels at every petrol station.

**Analysis :** The pricing data exchanged over the telephone is not genuinely public, as in order to obtain the same information in a different way it would be necessary to incur substantial time and transport costs. One would have to travel frequently large distances to collect the prices displayed on the boards of petrol stations spread all over the country. The costs for this are potentially high, so that the information could in practice not be obtained but for the information exchange. Moreover, the exchange is systematic and covers the entire relevant market, which is a tight, non-complex, stable oligopoly. Therefore it is likely to create a climate of mutual certainty as to the competitors' pricing policy and thereby it is likely to facilitate a collusive outcome. Consequently, this information exchange is likely to give rise to restrictive effects on competition within the meaning of Article 101(1)", available at : <http://eur-lex.europa.eu/legal-cont...>&from=EN

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