BUSINESSatOECD | Business and Industry Advisory Committee to the OECD

Comments by the *Business at OECD* (BIAC) Competition Committee to the OECD Competition Committee

Information Sharing in Competition Policy

24 June 2026

I. Introduction

1. Information exchanges are a common and often necessary feature of commercial activity. Somewhat uniquely, they sit along the full spectrum of antitrust analysis, from necessary and procompetitive activity,[1] to illicit behaviour raising competition law concerns, depending on what is shared, with whom, through which channels and for what purpose.

2. From a business perspective, information sharing is often procompetitive, serving clear and important legitimate functions. Firms rely on market intelligence, benchmarking and data-driven insights to inform commercial strategy, improve efficiency, and deliver more competitive offerings to consumers, as well as supporting innovation and investment decisions. In this sense, information constitutes both a strategic asset and a key input into competitive decision-making. Properly structured, information exchanges can enhance competition on both the supply and demand sides and may even be a pre-requisite for competition in circumstances where access to data is a key input to developing a product/service, such as in the context of artificial intelligence models. Data sharing about fraud, credit risk, and insurance claims/loss are also all examples of information sharing driven by legitimate objectives that can enhance competition if properly structured. These efforts can reduce inefficiencies and support the reduction of systemic risks to enable better outcomes for customers.

3. At the same time, information exchanges between competitors can increase market transparency and may, in certain circumstances, reduce strategic uncertainty in ways that soften competitive rivalry. As a result, they occupy an intermediate space in competition law, situated between hard-core cartel conduct, which is universally prohibited, and lawful strategic behaviour arising from oligopolistic interdependence, with many instances in between. Increased transparency may either promote allocative and productive efficiencies or facilitate collusive outcomes, or both, depending on the context. These nuances and ambiguities require a similarly flexible framework for the consideration of antitrust implications of information exchanges.

4. The OECD has developed a substantial body of work on information exchanges through a series of roundtables,[2] which provide an important analytical foundation for

[1] For example, to facilitate M&A deals or other legitimate collaborations.

[2] The OECD has examined information exchanges across a series of roundtables that form the analytical foundation for current enforcement approaches. In 2007, it addressed trade and business associations, recognising both their legitimate functions and their role in facilitating competitor information flows. OECD, Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations, DAF/COMP(2007)45 (Nov. 4, 2008), https://www.oecd.org/content/dam/oecd/en/publications/reports/2008/11/trade-associations_1edd433e/22c015e8-

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understanding these dynamics. Building on this work, the present paper sets out the business community's perspective, as reflected through *Business at OECD* (BIAC), on how existing frameworks should be applied and refined considering evolving market realities. In particular, it focuses on the ever-evolving antitrust enforcement landscape as it applies to information exchanges as well as the implications of digital technologies, algorithmic tools, and new organizational channels.

5. Competition authorities are also attentive to structural links that can create implicit information flows. Mechanisms such as interlocking directorates, cross shareholdings or shared membership in digital platforms, and ecosystems may facilitate the transmission of commercially sensitive insights, even in the absence of direct exchanges. Such structural conduits can implicitly align monitoring and strategic expectations among firms, making it easier for informal coordination to emerge. As enforcement practice evolves, these forms of implicit information flow are receiving closer scrutiny as potential facilitators of anticompetitive conduct, reinforcing the need for competition analysis that accounts for the realities of modern, interconnected markets.

6. The rapid development of digital tools and innovative business forms have significantly increased the speed, scale, and granularity of potential information flows. These developments have also expanded the range of mechanisms through which such exchanges occur. Trade associations, when operating under appropriate governance frameworks, continue to play a central role as structured fora for lawful information exchange, standard-setting and regulatory engagement. However, increasingly, "technology-mediated" exchanges – facilitated by digital platforms, algorithms and data intermediaries operate alongside, and often independently from, traditional association structures. These developments create new opportunities, but also present compliance challenges that existing analytical frameworks were not originally designed to address.

7. In parallel, enforcement practice and scrutiny have also evolved significantly: competition authorities increasingly pursue more information exchange cases and view certain forms of information exchange as standalone infringements.[3] At the policy level,

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en.pdf. In 2010, it developed a core analytical framework for assessing exchanges between competitors, emphasising that competitive risk depends on factors such as market structure, the nature of the information (including its subject matter, age, and level of aggregation), and the modalities of exchange. OECD, Information Exchanges between Competitors under Competition Law, DAF/COMP(2010)37 (July 11, 2011), https://www.oecd.org/content/dam/oecd/en/publications/reports/2011/07/information-exchanges-between-competitors-under-competition-law_bd644d8b/327f7dd3-en.pdf. A 2012 roundtable further examined unilateral disclosures, highlighting the distinction between private communications directed at competitors, which typically lack efficiency justifications, and public announcements, which may benefit consumers but can still raise concerns where they amount to signalling. OECD, Unilateral Disclosure of Information with Anticompetitive Effects, DAF/COMP(2012)17 (Oct. 11, 2012), https://www.oecd.org/content/dam/oecd/en/publications/reports/2012/10/unilateral-disclosure-of-information-with-anticompetitive-effects_9fa5c133/10a2ad51-en.pdf. The OECD has also considered the implications of digitalisation, notably in its 2017 report *Algorithms and Collusion*, and in subsequent work, including contributions to G7 discussions, which explore how algorithms and data-driven tools may facilitate coordination in new ways. OECD, Algorithms and Collusion: Competition Policy in the Digital Age (2017), https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/05/algorithms-and-collusion-competition-policy-in-the-digital-age_02371a73/258dcb14-en.pdf. and OECD, Algorithmic Pricing and Competition in G7 Jurisdictions (2025), https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/10/algorithmic-pricing-and-competition-in-g7-jurisdictions_f936689b/f36dacf8-en.pdf.

[3] While historically information exchanges were often treated primarily as supporting evidence of broader cartel conduct, competition authorities now increasingly pursue certain exchanges as infringements in their own right, where the exchange itself is capable of reducing strategic uncertainty between competitors. This shift is reflected in both case law and enforcement actions. In the EU, the Court of Justice confirmed in *T-Mobile Netherlands* that even a single meeting involving the exchange of information on future conduct may constitute an infringement, without the need to

recent developments reflect greater scrutiny of information exchange. In the United States, the Department of Justice Antitrust Division (DOJ) withdrew longstanding "safe harbor" guidance on information sharing and benchmarking that had previously protected certain exchanges from enforcement. This change significantly and intentionally reduced certainty for businesses, signalling a shift toward case-by-case evaluation of competitor collaborations without clear guidance.[4] In the European Union, the revised 2023 Horizontal Guidelines expand guidance on indirect exchanges, unilateral disclosures and algorithmic coordination.[5] However, the Guidelines stop short of offering businesses a safe harbour, and the guidance provided is heavily dependent on context and individual facts that leave companies with little practical certainty about where the boundaries lie. As a result, businesses are increasingly required to make important, complex compliance assessments without a clear framework. A more balanced approach – one that gives due weight to the legitimate, efficiency-enhancing role of information exchange – would provide greater confidence for procompetitive cooperation.

8. This paper is structured as follows. Section II explores the business rationale for information exchanges, including their efficiency-enhancing effects and the ways in which they support market functioning. Sections III and IV examine the dual challenges faced by business, covering structural and dynamic market changes, as well as the evolving enforcement landscape, which combined paint a particularly complex compliance picture for businesses. Section V delves into a number of instances that merit further analysis and attention, where exchanges may straddle the line between legitimate collaboration and anticompetitive coordination, illustrated through practical scenarios and recent enforcement examples. Section VI sets out suggestions for designing "safe" information exchanges, including guidance on governance, algorithmic tools, trade associations, and compliance frameworks, aimed at ensuring clarity, consistency, and predictability. The

demonstrate actual market effects. Case C-8/08, T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, ECLI:EU:C:2009:343, ¶¶26, 59 (June 4, 2009). More recently, in *Banco BPN and Others*, the Court clarified that a standalone exchange of commercially sensitive information may amount to a restriction of competition "by object" where it reveals a sufficient degree of harm in its legal and economic context. Case C-298/22, Banco BPN/BIC Português SA v. Autoridade da Concorrência, ECLI:EU:C:2024:638, ¶¶ 52–62 (July 29, 2024). At the enforcement level, authorities have also brought cases focusing directly on information-sharing mechanisms, including through intermediaries, such as the U.S.DOJ's 2023 action (currently proposed for settlement) against Agri Stats, which challenged benchmarking-based exchanges as anticompetitive in their own right. Complaint, *United States v. Agri Stats, Inc.*, No. 0:23-cv-03009 (D. Minn. Sept. 28, 2023), Dkt. No. 1. Proposed Final Judgment, *United States v. Agri Stats, Inc.*, No. 0:23-cv-03009 (D. Minn. May 7, 2026), Dkt No. 742-2. Similarly, several European cases, particularly in financial services and benchmarking contexts, have treated the exchange itself as the core theory of harm, rather than merely evidence of a wider cartel. *See* Press Release, Eur. Comm'n, Antitrust: Commission amends and re-adopts decisions in the Euro Interest Rate Derivatives cartel (June 27, 2021), https://ec.europa.eu/commission/presscorner/detail/en/mex_21_3283; and Press Release, Eur. Comm'n, Antitrust: Commission fines UBS, Barclays, RBS, HSBC and Credit Suisse € 344 million for participating in a Foreign Exchange spot trading cartel (Dec. 1, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6548.

4 Press Release, U.S. Dep't of Justice, Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements. There is also a push in the United States to move away from full rule-of-reason analysis toward a presumption of illegality for naked exchanges. Carstensen & Marschall argue that agreements to exchange competitively sensitive information among rivals are usually naked restraints and should be treated as presumptively per se illegal – operationalized via a rebuttable presumption ("quick look") focused on function rather than market effects. Peter C. Carstensen & Annkathrin Marschall, *Pooling and Exchanging Competitively Sensitive Information Among Rivals: Absolutely Illegal Not Just Unreasonable*, 92 U. CIN. L. REV. 335 (2023). Importantly, U.S. agencies are currently inviting public comment on aspects of their enforcement approach in this area, and new guidance appears to be in preparation – a development that the business community is monitoring closely and which may, in due course, provide greater clarity on information exchanges. Press Release, U.S. Dep't of Justice & Fed. Trade Comm'n, Justice Department and Federal Trade Commission Seek Public Comment for Guidance on Business Collaborations (Feb. 23, 2026), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-public-comment-guidance-business.

5 *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, 2023 O.J. (C 259) 1, §§ 6.2.4.1 and 6.2.4.2.

paper concludes in Section VII by emphasising the need for a context-sensitive, effects-based approach supported by workable safe harbours, to safeguard procompetitive information sharing while targeting genuinely harmful conduct, and by drawing on the practical scenarios examined in Section IV to reinforce the case for clear and proportionate regulatory guidance and effects/rule of reason analysis.

9. BIAC notes that ensuring compliance is becoming increasingly complex and while businesses recognise the need for comprehensive ecosystem-wide risk management of information flows and digital interactions, clear and practical guidance from regulators is crucial to ensuring both good outcomes and business confidence.

II. Information Exchanges as a Business Tool

10. Information exchanges are a vital part of legitimate business activity. Firms rely on timely and accurate information to compete effectively, improve forecasting, benchmark performance, and enhance efficiency, as well as underpinning investment decisions and fostering innovation. Such exchanges can support better independent decision-making, lower search costs, reduce inefficient allocation of resources and very often strengthen competition. In many sectors, including credit, insurance, and complex supply chains, information sharing enables more effective risk assessment, entry, and operational planning, generating benefits for both businesses and consumers.

11. Information sharing is embedded in ordinary corporate governance and routine operations. Companies exchange information through trade associations, joint ventures, industry initiatives, and bilateral business arrangements, often in structured and well-governed environments. Participation in these mechanisms usually reflects legitimate business practice and should not be conflated with unlawful coordination.[6] Legal assessment typically distinguishes between exchanges that facilitate a broader anticompetitive arrangement, those that support legitimate cooperation, and stand-alone exchanges where the information itself is the focus.[7]

12. Trade associations play an important role in facilitating legitimate and value-creating cooperation among firms. They often serve as forums for standard-setting, the development and dissemination of best practices, and the establishment of benchmarking frameworks that help members understand industry performance and identify efficiency opportunities. Associations can also support self-regulatory initiatives and provide an organised channel

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6 *See* Bernardo Sarmento & Jorge Padilla, *Another Look at the Competitive Assessment of Information Exchanges Amongst Competitors in EU Competition Law*, 35 REVISTA DE CONCORRÊNCIA E REGULAÇÃO 19, 21 (2018) ("not all information exchanges are born equal. Not all information exchanges are anticompetitive and not all potentially anticompetitive information exchanges materially reduce consumer welfare").

7 Notable examples of enforcement treating information exchanges as standalone infringements include *Banco BPN and Others*, where the CJEU held that a standalone exchange of commercially sensitive information between credit institutions can constitute a restriction of competition by object under Article 101 TFEU without requiring proof of actual or potential effects (Case C-298/22, Banco BPN/BIC Português SA v. Autoridade da Concorrência, ECLI:EU:C:2024:638, ¶¶ 52–62 (July 29, 2024)); the U.S.DOJ's action against *Agri Stats*, alleged that "hub-and-spoke" benchmarking reports to poultry and meat processors were unlawful in their own right and the proposed settlement order would require changes to Agri Stats' practices to address these concerns (Complaint, *United States v. Agri Stats, Inc.*, No. 0:23-cv-03009 (D. Minn. Sept. 28, 2023), Dkt. No. 1.; Proposed Final Judgment, *United States v. Agri Stats, Inc*., No. 0:23-cv-03009 (D. Minn. May 7, 2026), Dkt. No. 742-2); and *T-Mobile Netherlands*, where the CJEU confirmed that even a single meeting capable of removing uncertainty about competitors' future conduct can infringe competition rules (Case C-8/08, T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, ECLI:EU:C:2009:343, ¶¶26, 59 (June 4, 2009)). Stand-alone exchanges can present compliance questions, but these must be weighed against the significant efficiency and benefits they provide.

for industry representation before regulators and legislators. For example, in the *Insurance Ireland* matter, the European Commission reviewed how an association-administered claims data system was accessed to ensure competitive conditions, ultimately accepting commitments to make access transparent and non-discriminatory, while recognising the potential pro-competitive benefits of data pooling when appropriately governed.[8]

13. At the same time, trade associations can create risk from a competition law perspective because they bring competitors together repeatedly and at scale. Recurring meetings and open dialogue can provide an opportunity for discussions that, without safeguards, may stray into competitively sensitive areas, such as pricing intentions, capacity plans, or future strategy. Competition authorities have scrutinised these dynamics closely. In the detergents case, industry interactions in the context of a legitimate sustainability initiative provided an environment where anticompetitive coordination emerged.[9] And in the well-known lysine and citric acid cartel cases, executives used legitimate association meetings as cover for informal side discussions in which illegal pricing arrangements were struck.[10] These examples illustrate how legitimate forums can inadvertently facilitate coordination when governance controls are lacking.

14. Companies and associations generally seek to adopt robust guardrails to manage these risks. Effective safeguards include clear governance and competition compliance policies, consultation or presence of legal counsel with regard to any potentially sensitive agendas or information sharing proposals, and well-documented agendas and minutes for all meetings. Participation should be voluntary and open, with mechanisms to broaden access to aggregated data, such as making it available to non-members or publishing it more widely, to reduce the risk of closed-door exchanges among competitors. Where possible, trade associations should also ensure independent management of meetings due to the important role played by the chairperson in ensuring compliance with guardrails. When such protections are in place, trade associations can continue to deliver significant value while addressing competition law concerns.

15. In today's commercial environment, information flows simultaneously through multiple channels, including trade associations, third-party platforms, algorithmic tools, and structural links such as shared digital ecosystems or common service providers, making competition assessment harder to manage. The proliferation of digital pricing tools, data aggregation services and algorithmic decision-making creates a landscape in which commercially sensitive information can be exchanged or inferred through indirect and automated means, not just through traditional meetings or bilateral contacts. This requires a greater degree of attention to ensure legal and regulatory compliance. These mechanisms may also create new avenues for coordinated outcomes that are harder to detect and analyse using traditional doctrinal frameworks and detection tools.

16. The need to develop clarity and legal certainty on the application of competition law to the use of algorithms and technologies such as artificial intelligence is a prominent

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8 Press Release, Eur. Comm'n, Antitrust: Commission accepts commitments by Insurance Ireland to ensure access to its data sharing platform (June 29, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4242.

9 Press Release, Eur. Comm'n, Antitrust: Commission fines producers of washing powder € 315.2 million in cartel settlement case (Apr. 13, 2011), https://ec.europa.eu/commission/presscorner/detail/en/ip_11_473.

10 Press Release, U.S. Dep't of Justice, Archer Daniels Midland Co. Agrees to Plead Guilty and Pay $100 Million for Role in Two International Price-Fixing Conspiracies (Oct. 14, 1996), https://www.justice.gov/archive/opa/pr/1996/Oct96/508at.htm; and Case COMP/E-1/36 604 – Citric Acid, Comm'n Decision, 2002 O.J. (L 239) 18.

example where businesses would welcome practical guidance. Algorithms for instance give rise to several distinct scenarios that competition law is still working through. One such example is where an algorithm is used to implement or monitor a prior agreement or information exchange between competitors. Here, the underlying human coordination is the core problem, and the algorithm is simply the mechanism. Another example involves competitors independently using the same third-party pricing information tool. To the extent that potential concerns may arise regarding indirect information exchange (similar to a hub-and-spoke situation) – i.e., whether competitively sensitive inputs may be pooled or inferred and thereby create outputs that reduce strategic uncertainty – the relevant question is not whether the tool is shared, but whether appropriate safeguards are in place to ensure that its use does not, in practice, channel competitively sensitive information between rivals. A third scenario involves autonomous algorithms that interact with one another and align market conduct without any human agreement or instruction — the so-called "digital eye" problem — which challenges the traditional notion of "agreement" under competition law altogether.

III. The Evolving Enforcement Landscape Compounds Uncertainty for Business

17. The scope of what is considered competitively sensitive information has evolved over time. While pricing, output, and future commercial strategy are traditionally considered sensitive, some cases, such as the *EU car emissions case* (AT.40178) and labour market enforcement initiatives, show that technical or HR-related information may also fall under scrutiny.[11] The expanding boundaries of competitively sensitive information creates unhelpful uncertainty for businesses when ensuring compliance with information exchange rules. Digitalisation adds a further layer, with algorithms, digital tools and data environments increasing the accessibility of information and allowing for near real-time monitoring of market dynamics. While these tools can enhance efficiency and responsiveness, they also require businesses to be mindful of how exchanges are structured and monitored. "Changes in general transparency will also have implications for how more conventional information exchange mechanisms (from private telephone calls to public announcements) should be considered."[12]

18. The European Commission's revised Horizontal Guidelines now explicitly recognise that information exchange can occur through indirect facilitation, including digital platforms and shared optimisation algorithms, and confirm that even unilateral or passive disclosure of commercially sensitive information can infringe competition law where it influences a competitor's strategy.[13]

19. The extensive use of "by object" or per se approaches to information exchange scenarios can easily thwart pro-competitive information exchanges, particularly where they incorporate multiple presumptions (e.g., single, one-way disclosures; relative to any component of price) that are often impossible to rebut even where justified. A mechanistic application of such presumptions in settings where they were not first developed, e.g.,

[11] Case AT.40178 – Car Emissions, Comm'n Decision (July 8, 2021), https://ec.europa.eu/competition/antitrust/cases1/202330/AT_40178_8022289_3048_7.pdf.

[12] Joseph Bell & James May, *Sharing Too Much? Information Exchange in Digital Economy*, OXERA (July 2018), https://www.oxera.com/wp-content/uploads/2018/07/Sharing-too-much-1.pdf.

[13] *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, 2023 O.J. (C 259) 1, §§ 6.2.4.1 and 6.2.4.2.

presumptions on the sharing of sale prices potentially applied to sharing of employee emoluments, can only exacerbate the uncertainty for businesses wishing to comply.

20. The inherent tension between the commercial necessity of information sharing and the risk of antitrust exposure calls for a flexible, context-specific assessment. In short, an application of rule of reason or "by effect" tests should apply except in cases involving clear-cut horizontal coordination with no plausible pro-competitive justification.[14] Information exchanges should not be categorised as infringements "by object" without careful analysis of their actual or likely effects. Such conduct is generally better assessed under an effects-based, rule-of-reason approach.

21. An effects-based approach to assessment, however, does not obviate the need for and benefits of safe harbours for business. In 2023, the DOJ and Federal Trade Commission (FTC) withdrew longstanding healthcare policy statements on information sharing, explicitly stating that they were "overly permissive" but without disclosing how.[15] They then withdrew the 2000 Competitor Collaboration Guidelines in December 2024, on the basis that those guidelines no longer reflected current enforcement priorities.[16] Together, these withdrawals create turmoil in corporate compliance by signalling that traditional safe harbours are gone but without replacing them with any useful guidance. More recently, in early 2026, the U.S. agencies launched a public consultation process,[17] acknowledging the need for updated guidance – a clear signal that the current administration recognises the need for renewed clarity. The business community is monitoring this process closely, as it may in due course provide greater certainty for companies seeking to ensure compliant conduct.

22. Such erosions of safe harbour guidance further compound the challenges faced by businesses. Previously, they could rely on relatively clear frameworks, particularly for benchmarking and data sharing. Today, the analysis has become fully contextual, focusing on whether the data is forward-looking, whether it is granular and firm-specific, whether it reduces strategic uncertainty, and whether intermediaries or algorithms effectively centralise decision-making across competitors. Compliance has accordingly shifted to case-specific risk assessments, a demanding standard that places a significant burden on businesses operating in data-intensive markets, without any semblance of rule-based comfort zones. In practice, this may necessitate the adoption of an overly-conservative approach to compliance, potentially chilling the scope for otherwise pro-competitive information exchange.

23. Generally speaking, these developments underscore a fundamental structural shift in how information flows are governed and assessed. The core debate has evolved into a more structural and doctrinal question: when does an information exchange constitute a standalone violation of competition law; when can it be characterised as per se or "by

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[14] *See also* Peter C. Carstensen & Annkathrin Marschall, *Pooling and Exchanging Competitively Sensitive Information Among Rivals: Absolutely Illegal Not Just Unreasonable*, 92 U. CIN. L. REV. 335 (2023).

[15] Press Release, U.S. Dep't of Justice, Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

[16] Press Release, Fed. Trade Comm'n, FTC and DOJ Withdraw Guidelines for Collaboration Among Competitors (Dec. 11, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-doj-withdraw-guidelines-collaboration-among-competitors.

[17] Press Release, U.S. Dep't of Justice & Fed. Trade Comm'n, Justice Department and Federal Trade Commission Seek Public Comment for Guidance on Business Collaborations (Feb. 23, 2026), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-public-comment-guidance-business.

object" unlawful; and when should it be assessed under the rule of reason or even a more fundamental inquiry into whether there is an "agreement" or "restraint" at all?

24. In parallel, there is uncertainty as to whether the nature of information that is considered competitively sensitive will itself also continue to broaden – not only due to the application of competition law principles to areas such as labour markets but also as digital tools increasingly create opportunities for information such as technical, aggregated or public data to be analysed at scale and used to make deductions about competitive strategy or reverse-engineer the sources of anonymised inputs.

25. BIAC notes that firms cannot treat compliance as a matter of checking a narrow set of conduct; instead, they must adopt ecosystem-wide risk management that accounts for the full range of channels through which information may travel. Proactive governance, including integrated compliance frameworks, monitoring of digital and platform interactions, and contextual analysis of how data use and sharing affect competitive incentives, has become a structural necessity in the absence of clear safe harbours and amid rapidly evolving technology-mediated markets. However, it is not reasonable to expect business to achieve these outcomes without adequate guidance from agencies. The lack of sufficient guidance will lead to a combination of inefficient market outcomes and unnecessary violations even by well-meaning corporate actors.

IV. Uncertainty in Practice: Multiple Areas in Need of Clarity and Consistency

26. The compliance challenges for business are not merely hypothetical; they are very real and span across multiple scenarios. The following scenarios illustrate where the line between legitimate exchange and competition risk is most difficult to draw in practice and where some semblance of a thoughtful and globally consistent approach would be most welcome for business.

- ***"Gossip" About Future Prices or Commercial Intentions:*** Informal discussions about likely price movements, output plans, or other strategic intentions, even when seemingly casual or one-off, can reduce uncertainty about competitors' future conduct and may be treated as restrictions of competition "by object" irrespective of whether they occur during formal meetings or in informal settings. For instance, during side conversations at industry events, trade fairs, conferences, or even during informal CEO-to-CEO calls framed as routine catchups.[18] Cases such as *T-Mobile Netherlands*[19] and *Bananas (Fresh Del Monte / Dole)*[20] illustrate that even seemingly trivial communications can trigger liability.[21] However, an isolated or incidental

[18] *See, e.g.,* Off. of Fair Trading, Case CE/8950/08, Royal Bank of Scotland Grp. plc & Barclays Bank plc, Decision No. CA98/01/2011 (Jan. 20, 2011), https://assets.publishing.service.gov.uk/media/555de2a0e5274a74ca000023/CE8950_08_dec.pdf (Barclays sought immunity and RBS ended up with a £28.59m penalty for informal information disclosures of a fairly short duration (Oct 2007-early 2008).

[19] Case C-8/08, T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, ECLI:EU:C:2009:343, ¶¶26, 59 (June 4, 2009).

[20] Case C-286/13 P, Dole Food Co. v. Comm'n, ECLI:EU:C:2015:184 (Mar. 19, 2015).

[21] EU enforcement practice, including ongoing Commission investigations into suspected price coordination in sectors such as tire replacement, expressly highlights the Commission's current focus on information exchanges through public communications and indirect channels as a core priority area. *See* Charles Whiddington & Martina Scassini, *When Does Information Exchange Cross the Line into Anti-Competitive Conduct?*, STEPTOE (Feb. 26, 2025), https://www.steptoe.com/en/news-publications/stepahead-antitrust-and-competition-insights/when-does-information-exchange-cross-the-line-into-anti-competitive-conduct.html.

exchange would not necessarily produce anticompetitive effects if assessed in context.

- ***Public Signaling Through Investor Communications and Earnings Calls:*** Public corporate disclosures, including earnings calls, investor presentations, analyst briefings, and other market-facing communications, increasingly raise competition law questions where they contain forward-looking statements capable of reducing strategic uncertainty among competitors.
- Such communications often serve legitimate purposes and may be legally required: listed companies are subject to transparency obligations, investor expectations, and disclosure requirements. Earnings calls are therefore not inherently problematic and, in many jurisdictions, are an integral component of market transparency and corporate governance.
- However, recent enforcement developments[22] suggest that competition authorities may scrutinise whether public statements go beyond legitimate disclosure and instead communicate future commercial intentions capable of influencing competitors' behaviour.

- ***Information Exchange in the Context of Minority Shareholdings:*** Exchanges with minority shareholders often arise naturally in corporate governance and investment contexts. Minority investors frequently seek insight into the financial performance, strategic plans, or operational developments of the companies in which they hold stakes. Companies, in turn, may provide such information to ensure transparency, build investor confidence, and comply with disclosure obligations. In many cases, these exchanges are commercially justified and fully legitimate.
- However, such exchanges can cross the line if competitively sensitive information is shared and could influence the strategic behaviour of rival firms, as highlighted in the *Glovo/Delivery Hero*[23] decision. This risk is particularly pronounced when the minority shareholder also holds stakes in competitors, creating a potential channel for indirect coordination. Regulators have suggested that even routine reporting or governance updates can facilitate alignment between competitors if not carefully structured, documented, and restricted.

- ***Dual Distribution Scenarios:*** Information exchange between a supplier and its distributors is a normal and necessary feature of any vertical relationship.[24] Where

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22 *See AT.40863 –Replacement Tires*, EUR. COMM'N, https://competition-cases.ec.europa.eu/cases/AT.40863. The European Commission initiated inspections in the tyre sector following analysis of public earnings calls, suspecting that manufacturers may have used investor communications to signal future pricing strategies. The case highlights the growing role of public disclosures as a potential information-sharing channel and raises important questions regarding the interaction between securities disclosure obligations and competition law compliance. *See also* Case T-188/24, Compagnie Générale des Établissements Michelin v. Eur. Comm'n, ECLI:EU:T:2025:686 (July 9, 2025) (partially annulling inspection decision and confirming that earnings call statements may constitute sufficiently serious indicia of price signalling to justify inspection).

23 The *Glovo/Delivery Hero* decision provides a recent illustration. In that case, exchanges of commercially sensitive operational and strategic information with minority shareholders who had interests in competing platforms led to cartel activity. While the decision did not prohibit legitimate governance communications, it illustrates the need for clear safeguards to prevent sensitive business data from serving as a conduit for anti-competitive coordination. Press Release, Eur. Comm'n, Commission fines Delivery Hero and Glovo €329 million for participation in online food delivery cartel (June 1, 2025), https://ec.europa.eu/commission/presscorner/detail/hr/ip_25_1356.

24 *Guidelines on Vertical Restraints*, 2022 O.J. (C 248) 1, ¶¶ 96–99. Suppliers and their distribution partners routinely share commercially sensitive information — including in some cases in relation to identified end users — for entirely legitimate reasons: coordinating promotions, managing inventory, aligning brand strategy, or ensuring consistent customer service. This kind of sharing is not merely acceptable; it is often indispensable to making the vertical relationship work effectively, and it would be disproportionate to treat it with suspicion simply because the supplier also sells directly in the same market.

dual distribution does introduce a degree of additional complexity is in situations where the supplier's direct sales activities overlap significantly with those of its distributors, creating a context in which the same information that serves a legitimate vertical purpose could, if not carefully managed, also reduce competitive independence at the horizontal level. In those specific circumstances, some targeted safeguards, such as limiting the granularity of shared data, ring-fencing competitively sensitive information within defined teams, or implementing clear protocols around how shared information may be used, can help preserve the benefits of the vertical relationship while managing the residual horizontal risk. The EC's updated Vertical Guidelines acknowledge this dynamic,[25] but BIAC considers that the guidance would benefit from a clearer articulation of the principle that information exchange in dual distribution is the norm, not the exception, with proportionate safeguards required only where genuine horizontal overlap creates a specific and identifiable risk.

- ***Forward-Looking Exchanges in Market Analysis Contexts:*** Discussions on demand forecasts, capacity constraints, or cost pressures may signal competitor behaviour even without explicit pricing. Typical settings include trade association working groups, industry outlook reports, and sustainability or supply-chain task forces. While framed as cooperative or informational activities, these interactions can facilitate coordination or align market conduct without an overt agreement. It can constitute a concerted practice if it materially influences competitors' decisions, underscoring the fine line between legitimate market research and competition risk.[26] The key issue is therefore not that such interactions are inherently problematic, but whether the nature, level of detail, frequency, and market context could influence competitors' independent decision-making. This highlights the need for careful assessment of where legitimate market analysis ends and competition risk may begin.

- ***Firm-Specific or Recently Historical Data in Concentrated Markets:*** The exchange of "historical" data is generally not problematic and may support legitimate benchmarking, market analysis, or operational planning. Nonetheless, recent enforcement actions in the EU and US reinforce that questions may arise in the context of third party or trade association data portals, member surveys, or benchmarking exercises regarding whether the structure and timing of the information exchange could reduce competitive uncertainty or facilitate market coordination. In this context, further clarity and certainty of guidance on questions such as at what point is data sufficiently historic when considering the recency and frequency of data gathering, requirements for effective aggregation or anonymisation of information, and when concerns may arise regarding limits on the accessibility of outputs to market participants would enable businesses to pursue legitimate activities with confidence.[27]

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25 *Id*. ¶¶ 97-100.

26 *See* Karel Bourgeois, Karl Stas & Benjamin Geisel, *When Talking Things Through is the Problem Not the Solution: The European Commission's Updated Guidance on Information Exchange*, Crowell (Feb. 26, 2024), https://www.crowell.com/en/insights/client-alerts/when-talking-things-through-is-the-problem-not-the-solution-the-european-commissions-updated-guidance-on-information-exchange.

27 In 2022, the DOJ sued Cargill alleging a more than twenty-year conspiracy to share confidential wage and benefits data. Complaint, *United States v. Cargill Meat Solutions Corp.*, No. 1:22-cv-01821 (D. Md. July 25, 2022), Dkt. No. 1. The DOJ and six attorneys general recently proposed a settlement to resolve litigation against Agri Stats in which the DOJ and States challenged among other things the use of "give to get" policy for access to information and the distribution granular weekly pricing reports with nominally reversible anonymity. Complaint, *United States v. Agri Stats, Inc.*, No. 0:23-cv-03009 (D. Minn. Sept. 28, 2023), Dkt. No. 1. Proposed Final Judgment, *United States v. Agri Stats, Inc*., No. 0:23-cv-

- ***Trade Association Meetings:*** While generally pro-competitive, industry fora such as trade associations, trade shows, and collective lobbying events also carry a degree of competition law risk as they can in theory facilitate communication among rivals. Businesses and associations invest significant time and effort into building effective policies and training but ensuring that legitimate discussions do not inadvertently cross the line into inappropriate information exchange requires ongoing vigilance.

- ***Digital or Algorithmic Information Sharing:*** Digital and algorithmic information sharing has introduced new complexities for competition law. Algorithms can implement prior agreements, embedding collusive assumptions in code and thereby stabilising coordinated outcomes without further human intervention.[28] Hub-and-spoke schemes arise when multiple competitors use the same pricing tool that incorporates commercially sensitive data from rivals, creating an unlawful exchange even in the absence of direct contact.[29] The DOJ's enforcement action against RealPage, which resulted in a proposed consent decree prohibiting the use of competitors' data in pricing models and imposing court-appointed monitoring, represents the most significant algorithmic pricing action to date.[30]

27. Beyond these scenarios, autonomous learning algorithms may tacitly align pricing strategies without any explicit human agreement. Recognising these risks, legislative responses have begun to emerge, such as California's AB 325 (2025),[31] which prohibits the use or distribution of "common pricing algorithms" that employ competitor data as part of

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03009 (D. Minn. May 7, 2026), Dkt. No. 742-2. *See also* Press Release, Eur. Comm'n, Antitrust: Commission accepts commitments by Insurance Ireland to ensure access to its data sharing platform (June 29, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4242.

28 AUTORITÉ DE LA CONCURRENCE & BUNDESKARTELLAMT, ALGORITHMS AND COMPETITION 17–20 (Nov. 2019), https://www.autoritedelaconcurrence.fr/sites/default/files/algorithms-and-competition.pdf.

29 The Agri Stats, Inc. case reflects the DOJ's recent interest in information exchange, particularly where a third-party intermediary distributes granular, non-public, and company-specific commercial data among competitors. The allegations brought by the DOJ and six state attorneys general suggested that exchanges involving detailed pricing, production, cost, or labour information may raise antitrust concerns where they reduce strategic uncertainty and enable competitors to monitor and align market behaviour, even without direct contact or explicit coordination. Complaint, *United States v. Agri Stats, Inc.*, No. 0:23-cv-03009 (D. Minn. Sept. 28, 2023), Dkt. No. 1. In May 2024, a motion to dismiss in Agri Stats was denied, confirming that the theory – that a third-party intermediary can function as an anticompetitive hub equivalent to direct competitor-to-competitor exchange – is sufficiently plausible to proceed to full litigation. Memorandum Opinion & Order Denying Defendant's Motion to Transfer and Motion to Dismiss, *United States v. Agri Stats, Inc.*, No. 0:23-cv-03009-JRT-JFD, (D. Minn. May 28, 2024), Dkt. No. 118. The settlement proposed filed on May 7, 2026, would enable Agri Stats to continue to share certain data within limits, indicating that the level of detail, timeliness, and accessibility of shared data remain central to the competitive assessment. Proposed Final Judgment, *United States v. Agri Stats, Inc.*, No. 0:23-cv-03009 (D. Minn. May 7, 2026), Dkt. No. 742-2.

The DOJ reinforced this position in its Statement of Interest in *In re Pork* (2024), explicitly arguing that information exchange itself may constitute concerted action under Section 1 of the Sherman Act; that it need not be merely supporting evidence of a broader cartel; and that even infrequent or irregular exchanges may be problematic. Statement of Interest of the United States, *In re Pork Antitrust Litig.*, No. 0:18-cv-01776-JRT-JFD (D. Minn. Oct. 1, 2024), Dkt. No. 2616. This marks a clear departure from the traditional approach, under which information exchange was treated primarily as a "plus factor" supporting an inference of cartel conduct rather than as an independent basis for liability.

30 Complaint, *United States and Plaintiff States v. RealPage, Inc., et al.*, No. 1:24-cv-00710 (M.D.N.C. Aug. 23, 2024), Dkt. No. 1; Proposed Final Judgment, *United States and Plaintiff States v. RealPage, Inc., et al.*, No. 1:24-cv-00710 (M.D.N.C. Nov. 24, 2025), Dkt. No. 159-1.

The DOJ and FTC have advanced similar theories in other algorithmic pricing cases, including *MultiPlan* and *Yardi*, arguing that sharing competitively sensitive data with a common pricing algorithm is equivalent to direct information exchange, and that the fact that outputs are framed as "recommendations" does not eliminate antitrust concerns. *See* Statement of Interest of the United States, *In re MultiPlan Health Ins. Provider Litig.*, No. 1:24-cv-06795, MDL No. 3121 (N.D. Ill. Mar. 27, 2025), Dkt. No. 382; Statement of Interest of the United States of America, *McKenna Duffy v. Yardi Sys., Inc.*, No. 2:23-cv-01391-RSL (W.D. Wash. Mar. 1, 2024), Dkt. No. 149.

31 Act of Oct. 6, 2025, ch. 338, 2025 Cal. Stat. (AB 325) (codified at Cal. Bus. & Prof. Code §§ 16729, 16756.1), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202520260AB325.

a conspiracy to restrain trade or where a party coerces adoption of the algorithm's recommended prices – and does so without requiring proof of actual competitive harm.[32]

- ***Labour Markets:*** Exchanges regarding wages, benefits, and employment conditions are under increased scrutiny. A prominent example is the 2022 DOJ case against *Cargill*, which alleges a more than twenty-year conspiracy among poultry processors to share confidential wage and benefits information, suppressing worker compensation.[33] This area of enforcement now encompasses compensation and HR data, no-poach commitments, and wage-benchmarking tools, and it has become a significant focus of current OECD policy discussions.

- ***Acqui-Hiring as an Information Channel:*** Hiring a competitor's key team can transfer commercially sensitive knowledge regarding strategy, costs, and pipelines. While normal recruitment is lawful, it can operate as a mechanism for information exchange that requires careful attention, particularly where digitalisation and data-driven strategies amplify the speed and scope of knowledge transfer.

28. Across all these scenarios, the business community's consistent message to competition authorities is that the existence of risk should not automatically warrant prohibition or a presumption of illegality. The appropriate regulatory response should be clear and predictable guidance that enables businesses to structure compliant information-sharing arrangements, not blanket restrictions that may chill pro-competitive collaboration.[34]

V. Suggestions on Designing "Safe" Information Exchanges with Clarity and Predictability

A. Enforcement Approach with Effects Over Form

29. Information exchanges sit between "naked" cartels and lawful tacit coordination/parallelism, creating both efficiency benefits and competition risks. Enforcement should reflect this nuance, rather than collapsing all exchanges into a presumption of illegality. An effects-based analysis should be the default, recognising that

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[32] However, U.S. courts have not uniformly accepted this expansive enforcement theory. A significant counterpoint is the Ninth Circuit's decision in *Gibson v. Cendyn*, in which plaintiffs alleged that competing hotels had used the same revenue management software to coordinate pricing. Gibson v. Cendyn Grp., LLC, 148 F.4th 1069 (9th Cir. 2025). The court rejected the claim at the pleading stage, emphasising that the use of a common software provider does not automatically imply a horizontal agreement, that parallel conduct alone is insufficient without a plausible allegation of coordination, and that there must be a concrete showing of a restraint affecting competition. The court applied a "hub-and-spoke" analysis but concluded that a "wheel without a rim" – i.e., common use of a tool without evidence of a coordinating link between the competitors – was insufficient to establish an agreement. *Id*. at 1098 n.12. Critically, the court did not even reach the question of per se versus rule-of-reason treatment, stopping at the prior threshold question of whether an agreement existed at all. In the *MultiPlan* case, by contrast, the motion to dismiss was denied in 2025, allowing the claim to proceed. Memorandum Opinion and Order on Motions to Dismiss, *In re MultiPlan Health Ins. Provider Litig.*, No. 1:24-cv-06795 (N.D. Ill. June 3, 2025), Dkt. No. 428. The legal boundaries of algorithmic coordination therefore remain actively contested, with enforcement agencies pushing an expansive theory of liability while courts continue to define its outer limits.

[33] Complaint, *United States v. Cargill Meat Solutions Corp.*, No. 1:22-cv-01821 (D. Md. July 25, 2022), Dkt. No. 1.

[34] This is especially pressing in the United States, where the simultaneous withdrawal of established safe harbours and the absence of a settled judicial framework have left businesses navigating genuinely uncharted territory. The ongoing public consultation process represents an important opportunity to restore workable clarity, and the business community strongly encourages authorities to use it to develop guidance that reflects both enforcement experience and commercial reality. *See* Press Release, U.S. Dep't of Justice & Fed. Trade Comm'n, Justice Department and Federal Trade Commission Seek Public Comment for Guidance on Business Collaborations (Feb. 23, 2026), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-public-comment-guidance-business.

whether potential harms outweigh efficiency gains is highly fact-specific. Uncertainty introduced by the evolving enforcement against information exchange risks chilling legitimate, pro-competitive sharing and may discourage practices that ultimately benefit markets and consumers.

B. Guidance and Safe Harbours

30. An effects-based approach should not obviate the need for guidance and safe harbours. Safe harbours should be structured around the type of information exchanged, particularly aggregated, historical, or benchmarking-type data, and the purpose for which the information is shared. Information falling outside a safe harbour should not automatically be treated as anticompetitive; safe harbours are intended to provide certainty without creating a blanket presumption of illegality. Practical guidance should cover the full panoply of real-life scenarios faced by businesses (see Section V above), including public disclosures, recognising that firms often have legitimate or mandated reporting obligations, and that per se prohibitions are generally inappropriate in these contexts.

C. Thoughtful and Judicious Application of Presumptions

31. Given the wide-ranging scenarios in which information exchanges may occur in practice, regulators should exercise caution and restraint in applying presumptions developed in certain settings too mechanistically into new settings without careful thought.

D. AI and Algorithmic Tools

32. Greater clarity is needed on when shared or third-party algorithmic pricing tools constitute information exchanges for competition law purposes. Liability should depend on the nature and use of the data involved, not the technology itself. The mere use of a common pricing algorithm should not be treated as per se unlawful absent evidence of specific intent to cause actual competitive harm. This distinction is critical as digital tools increasingly mediate competitive interactions. The divergence between agency enforcement theories and judicial outcomes — illustrated by the contrast between cases such as *MultiPlan*[35] and *Gibson v. Cendyn*[36] — underscores the urgent need for authoritative guidance that clarifies both the doctrinal basis for liability and the conditions under which use of shared algorithmic tools crosses the line.

E. Trade Associations

33. Trade associations perform valuable efficiency-enhancing functions, including standard-setting, best practices, codes of ethics, and representation before regulators and legislators. These roles should be recognised and supported. Clear governance safeguards, such as counsel oversight, transparent agendas, and proper documentation, can further reduce risk while preserving legitimate collaboration.

F. Compliance Recognition

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[35] Memorandum Opinion and Order on Motions to Dismiss, *In re MultiPlan Health Ins. Provider Litig.*, No. 1:24-cv-06795 (N.D. Ill. June 3, 2025), Dkt. No. 428.

[36] Gibson v. Cendyn Grp., LLC, 148 F.4th 1069, 1098 n.12 (9th Cir. 2025).

34. Investments in compliance infrastructure, including training, monitoring, and AI governance, should carry meaningful weight in enforcement outcomes. The emergence of parallel ex ante digital regulation adds complexity: EU measures such as the DMA limit gatekeepers' use of business users' non-public data, the AI Act restricts certain uses of AI in commercial targeting, etc. Businesses must now navigate not only the ex-post competition law framework but also sectoral digital regulations. Effective risk management therefore requires an integrated approach that considers both compliance obligations and competitive legality across the full business ecosystem.

G. Public Communications Safe Harbour

35. Businesses would benefit from practical guidance regarding public disclosures, earnings calls, analyst presentations, and investor communications. Competition authorities should clarify that public disclosure obligations do not automatically imply antitrust risk and provide practical guidance distinguishing legitimate investor communications from problematic signalling. Clear guidance would reduce uncertainty while preserving transparency obligations and investor confidence.

VI. Conclusion

36. Information exchanges are a structural feature of modern markets. Businesses rely on them to support informed decision-making, improve efficiency and competitive offerings, enhance forecasting, manage supply chains, respond to regulatory and sustainability pressures, and develop innovative solutions, as well as underpin investment decisions. As digitalisation accelerates the speed and scope of data flows, information has become a central competitive asset and a core component of strategic decision-making.

37. At the same time, enforcement trends show that competition authorities increasingly view information exchanges not merely as evidence of collusion but as potential stand-alone infringements, particularly where exchanges reduce strategic uncertainty about future conduct. This shift is occurring in parallel with the emergence of new channels of information sharing – including algorithmic tools, digital platforms, benchmarking intermediaries, and structural links between firms – that complicate the traditional analytical framework developed around trade associations and direct communications.

38. The practical scenarios examined in Section V vividly illustrate the breadth and complexity of the challenge. From informal discussions about future pricing intentions, to minority shareholding disclosures, to algorithmic hub-and-spoke arrangements and labour market benchmarking, the range of conduct that may attract scrutiny is wide, and the consequences may be significant. In many of these situations, the critical question is whether that exchange should be assessed as a restriction by object or under a full rule-of-reason analysis. BIAC strongly advocates for a disciplined application of the object category, confined to those exchanges whose harmful nature is manifest without further inquiry, and for a genuine effects-based assessment in all other cases. This distinction is not merely technical. It is fundamental to preserving space for the many information-sharing practices that are economically beneficial and commercially necessary.

39. These developments reinforce the need for context-sensitive and effects-based assessment, without sacrificing practical guidance and safe harbours, to avoid discouraging pro-competitive exchanges. Many exchanges generate significant pro-competitive

efficiencies, while only a subset create meaningful coordination risks. Overly formalistic or per se approaches risk constraining legitimate business practices, particularly in sectors where information flows are integral to market functioning.

40. For these reasons, BIAC maintains that, outside clear cartel conduct, information exchanges should generally be assessed under a rule-of-reason and effects-based framework, supported by clearer guidance and workable safe harbours. Legal certainty is particularly important as companies navigate a rapidly evolving landscape shaped not only by competition law enforcement but also by new digital regulatory regimes governing the use of data and algorithms. In this context, the business community welcomes ongoing regulatory dialogue, including the current U.S. agency process of seeking comments and the prospect of new guidance, as an opportunity to develop clearer and more proportionate standards that serve both enforcement integrity and commercial certainty.

41. Ultimately, the challenge for competition policy is not to eliminate information exchanges but to govern them in a balanced and proportionate manner. Effective policy should recognise their legitimate economic role, provide predictable safeguards for businesses, and focus enforcement on those exchanges that genuinely undermine competitive independence. In an economy where information flows through complex digital and organisational ecosystems, clarity, proportionality, consistency, and nuanced analysis are the essential tools for maintaining both competitive markets and efficient business cooperation, while preserving the conditions for innovation and investment.