

THE EX-ANTE REGULATION OF INFORMATION EXCHANGE: A NEW LOOK AT THE PROPHYLACTIC RULE

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Chairperson: Professor Tan Cheng Han, Chairman, EW Barker Centre for Law & Business

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NUS Law (Bukit Timah Campus), Eu Tong Sen Building, Lee Sheridan Conference Room

ABSTRACT

It is trite law that the exchange of information between horizontal competitors may amount to anti-competitive infringements under Art 101 TFEU. The conceptual basis for this rule, however, is far less obvious. In this article, we attempt to elucidate the fundamental nature of the rule. If the rule is to be consistent with the welfare-maximising objective of competition law, it must be grounded on the conception of prophylaxis – a form of ex-ante regulation. However, given the prophylactic nature of this rule, we argue that enforcement of it through the statutory medium of Art 101 TFEU is problematic. We provide three reasons for why this is so. First, we argue that the classical dichotomy between “object-type” infringements and “effect-type” infringements in Art 101 TFEU aims to address both presumed and actual anti-competitive harm. Regulating the risk of future anti-competitive harm from information exchange, however, requires further inferential leaps that may not be justified. Second, drawing on the literature in industrial economics, we assert that any clear dichotomy separating information exchange practices into distinct categories of “object-type” infringements and “effect-type” infringements is likely to be arbitrary. Third, we contend that in contrast to the ambit of Art 101 TFEU, the rule prohibiting information exchange has a far more limited scope – that of preventing the facilitation of collusion. In light of the aforementioned reasons, we suggest potential avenues for reform. In particular, we submit that liability for information exchange between competitors should only be imposed when firms breach clear and bright-line standards specifying the exact practices that are prohibited ex-ante.

SPEAKERS



Kenneth is a Sheridan Fellow at the NUS Faculty of Law. Kenneth graduated from NUS in 2014 with a Bachelor of Laws (First Class Honours) and a Bachelor of Social Sciences (Economics) (First Class Honours). He also received the Ministry of Trade and Industry (Economist Service) Prize for Best Thesis in Economics. Kenneth has research and teaching interests in the hybrid areas where Law and Economics intersect, such as Law and Economics, Empirical (Quantitative) Legal Studies, as well as in Competition Law/Antitrust. Kenneth is currently pursuing graduate study in Economics at the London School of Economics.



Jerrold is a Final Year Student at NUS reading a Double Degree in Law and Economics. He was placed on the Faculty of Law Dean's list in 2014 and the Faculty of Arts and Social Sciences Dean's Scholars' List in 2016. His research interests are in Corporate and Company law, Empirical (Quantitative) Legal Studies, and the use of Computational Techniques to solve Legal Problems.

REGISTRATION

There is no registration fee for this seminar but seats are limited.

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For enquiries, please contact Ms Atikah at ewbclb@nus.edu.sg

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