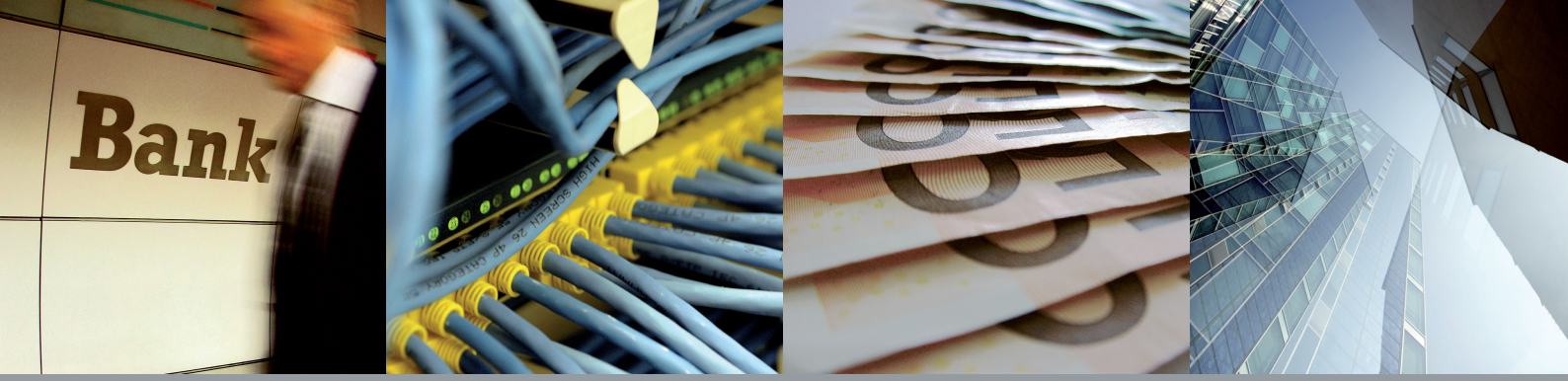


Banking Industry Architecture Network (BIAN)

Antitrust Compliance Guidelines

BIAN

SCHULTERIESENKAMPFF.

Introduction

A market economy requires free and undistorted competition. Antitrust law therefore aims to preserve the freedom of competition. In this context the major jurisdictions in Europe and the US especially provide for:

- **A prohibition of restrictions of competition.**
- **A prohibition of the abuse of a dominant market position.**

With regard to BIAN and its members, the prohibition of restrictions of competition is of major importance.

Each and every violation of antitrust rules can incur high fines and considerable damage claims. Anticompetitive agreements are automatically null and void. Furthermore, some countries, in particular the USA, stipulate criminal prosecution, incurrence of high fines and imprisonment.

The antitrust authorities – the European Commission and the US Department of Justice/Federal Trade Commission, but also the domestic antitrust authorities in the EU Member States – are investigating violations of antitrust law with increasing intensity. For this purpose the authorities have the right to request for information, to conduct dawn raids, to confiscate documents and to conduct sector investigations even without reasonable suspicion. Several companies have been ordered to pay fines amounting in some cases to hundreds of million euros.

Prohibition of restrictions of competition

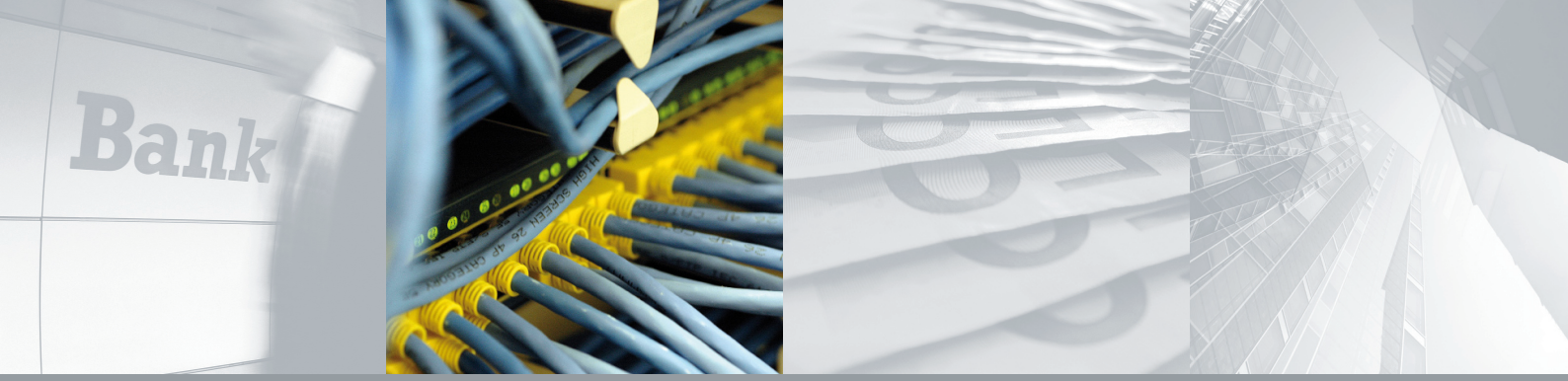
In all major jurisdictions – especially in European law and US law as well as in the domestic laws of the EU member states – **agreements between undertakings, decisions of associations of undertakings** and **concerted practices** which have as their object or effect the restriction of competition, are prohibited.

Even verbally or merely implied agreements which restrict competition, are forbidden.

According to the concept of a concerted practice, it is sufficient that the undertakings concerned have knowingly substituted practical cooperation between them for the risks of competition even without having concluded a proper agreement.

As a consequence

- **BIAN** itself, which qualifies as association of undertakings, has to comply with antitrust law especially while setting standards for the banking industry by way of definition of banking interoperability requirements.
- **BIAN members** have to comply with antitrust law while participating in BIAN meetings or events.



Restriction of competition

A system of undistorted competition requires that every undertaking must determine independently the policy which it intends to adopt on the market and the conditions which it intends to offer to its clients. Thus an agreement or a concerted practice between undertakings or a decision of an association of undertakings is capable of restricting competition if it reduces the strategic uncertainty.

Restrictive effects on competition are likely to occur where it can be expected that, due to the agreement, decision or concerted practice, the undertakings would be able to coordinate their market behaviour by raising prices or reducing output, product quality, product variety or innovation.

The following "hardcore restrictions" are always forbidden between direct competitors, i.e. not only if the pro competitive effects do not outweigh the restrictive effects:

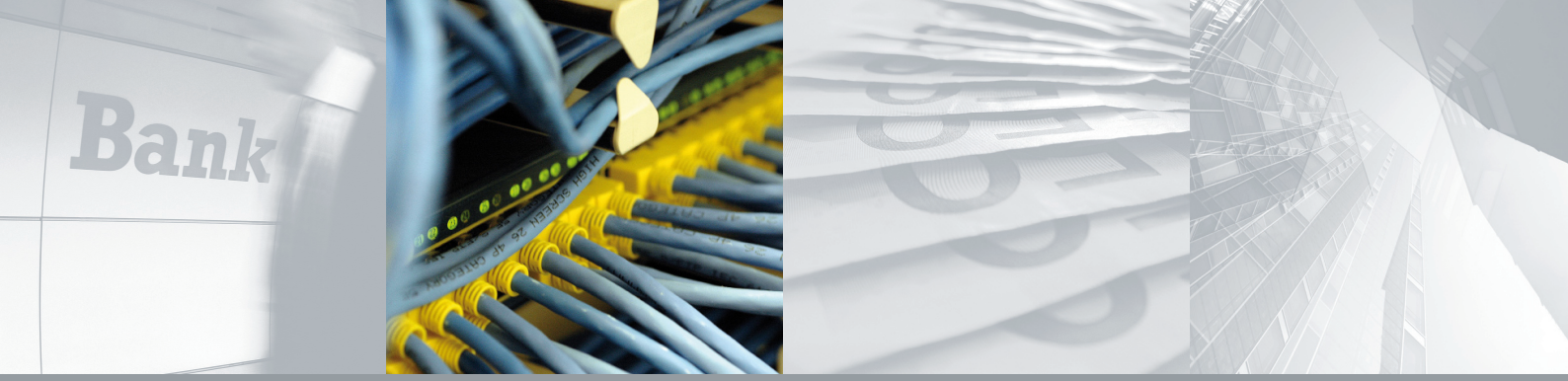
- **Price fixing.**
  Example: Several Banks agree during a BIAN meeting on unified fees for the exchange of currencies.
- **Division or allocation of customers or sources of supply.**
  Example: IT company X and IT company Y agree upon that X shall solely attract big companies (sales > EUR 5 bn.) while Y shall only attract companies with sales less than EUR 5 bn.
- **Division or allocation of territories.**
  Example: Issuers of public investment funds agree to offer their products only within different clearly defined regions. As a result, there is no longer any competition between undertakings.

Antitrust law requirements regarding the exchange of strategic information between BIAN members

With regard to the exchange of market information between BIAN members while participating in the network, antitrust law precludes any exchange of data which are capable of reducing the competitors' strategic uncertainty on the market and thereby diminishing their incentives to compete.

Therefore the following strategic information **must not** be discussed within BIAN:

- **Pricing and pricing policies, terms and conditions of sale.**
- **Credit terms and billing practices.**
- **Suppliers' terms and conditions.**
- **Turnover figures (if not genuinely public)**
- **Profits and profit margins.**
- **Costs and risks.**
- **Distribution plans and practices.**
- **Marketing plans and practices.**
- **Bids, including intent to bid or not to bid for a particular contract or program.**
- **Selection, retention or quality of customers/clients or suppliers.**
- **Investments.**



Antitrust law requirements regarding unilateral disclosure of strategic information by BIAN members

Antitrust law even prevents BIAN members to reveal the above mentioned strategic information concerning their future market behaviour unilaterally in the course of their participation within BIAN. If a BIAN member does reveal such information via mail, e-mail or phone call, the other BIAN members must respond immediately with **a clear and documented statement** that they do not wish to receive such information. Otherwise the competent antitrust authorities might assume to have accepted the information and to have adapted the market conduct accordingly.

If a BIAN member starts to reveal strategic information within a BIAN meeting, the chairman or any other member should ultimately ask to stop such behaviour. Otherwise the other BIAN mem-bers should immediately leave the room and ask for documentation in the minutes. In order to facilitate such documentation, a draft of the minutes should generally be communicated to the participating BIAN members for sign-off.

Consequences of violating antitrust law

Legal consequences of a violation of antitrust law

Possible legal consequences are:

- **The agreement concerned is null and void under civil law.**
- **The antitrust authorities may impose fines on both BIAN and its members.**
- **For example under European or German law fines may amount up to 10% of the undertakings' total turnover.**
- **In some jurisdictions, in particular Germany, the antitrust authorities may also personally fine the employees involved.**
- **Some jurisdictions, in particular the USA, stipulate criminal prosecution, incurrence of high fines and imprisonment.**
- **Damage claims by clients and competitors.**
- **Disciplinary measures vis-à-vis the employees involved.**