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Information and Antitrust: Reflections on the Gypsum and Engineers Decisions

Richard A. Posner*

A persistent and troublesome question of antitrust policy concerns the proper treatment of practices and behavior related to the provision of information to buyers and sellers. The dissemination of pricing information may be evidence of fixing, or it may simply be an efficient market-equilibrating mechanism. In this article, Professor Posner discusses two recent Supreme Court decisions that have addressed this problem and then engages in a general analysis of the problem of information and antitrust. Professor Posner concludes that an exchange of information should be considered lawful without regard to market structure or other factors. When appropriate, however, the trier of fact should be permitted to treat exchanges of information as circumstantial evidence of price fixing.

In its 1977 Term, the Supreme Court handed down two antitrust decisions of general importance: United States v. United States Gypsum Co.1 and National Society of Professional Engineers v. United States.2 Both decisions address a persistent and troublesome question of antitrust policy: the proper treatment under the antitrust laws of practices related to the provision of information to buyers and sellers. This issue was also at the heart of Continental T.V., Inc. v. GTE Sylvania Inc.,3 the major antitrust decision of the previous Term, and was central to notable recent actions in lower tribunals, including the United States v. General Electric Co.4 decree, more commonly referred to as the “Westinghouse” decree, and the FTC’s ReaLemon decision.5 A general analysis of the question of information and antitrust therefore seems timely and is the subject of Part II of this article. Part I prefaces the general discussion with a detailed analysis of the Gypsum and Engineers cases.

I. THE GYPSUM AND ENGINEERS DECISIONS

A. GYPSUM

In Gypsum, several major manufacturers of gypsum board were indicted for alleged violations of section 1 of the Sherman Act.6 Among the practices

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3. 433 U.S. 36 (1977) (vertical restrictions not illegal per se and should be judged under Rule of Reason).
claimed to constitute price fixing, and ultimately the focus of the Government's case, was the practice of "interseller price verification" by which competing manufacturers exchanged information concerning the current prices they were charging to specific customers. This was done, defendants alleged, to prevent customer fraud and to ensure that any price cut offered was necessary to meet a competitive price and was therefore sheltered from attack under section 2(a) of the Robinson-Patman Price Discrimination Act by section 2(b) of that Act. Section 2(b) provides a defense to charges of price discrimination if the discrimination is made in good faith to meet competition.

The principal issues before the Supreme Court in Gypsum were (1) whether proof of intent is required in a criminal antitrust case and (2) whether section 2(b) of the Robinson-Patman Act insulates interseller price verification from attack under the Sherman Act. On the first issue the Court held that intent was a necessary element and that the jury may not be instructed to find intent merely because the agreement to exchange price information affected the level of prices. The jury, however, may infer criminal intent if the agreement did result in a change in the price level. If the agreement is not to exchange information but to fix prices, the inference of criminal intent is automatic from proof that the price level was affected. But in Gypsum itself, because the ostensible agreement was simply to exchange price information in order to avoid violating the Robinson-Patman Act, the possibility that the price level had been altered did not in itself establish the requisite criminal intent, although an actual change in price level could have been used as a basis for inferring that intent.

Although the Court's analysis may sound reasonable enough, I believe that it rests on a confusion in the Justices' minds between the level and the dispersion of prices in a market in which competitors are exchanging price information. The purpose of a legitimate exchange of price information is to narrow the dispersion of prices—that is, to eliminate as far as possible those prices in the tails of the price distribution that reflect the ignorance of buyers or sellers concerning the conditions of supply and demand. There is no reason to expect the price level—the average price in the market—to change. If it does change, that is evidence that the purpose of the exchange of information was not to narrow the dispersion of prices—a legitimate objective—but rather to raise prices above the competitive level.

To be sure, the level and dispersion of prices are not entirely independent. A reduction in dispersion, and hence in uncertainty, may result in an increase
in the price level by facilitating collusion to raise prices. If there is no tacit or express collusion, however, exchanges of price information designed to reduce price dispersion should not result in a change in the price level.

Because the Gypsum Court failed to distinguish between the level and the dispersion of prices, it is not altogether clear that it thought that even a completely innocent price information exchange might affect the level and not just the dispersion of prices. But that seems to be what it thought. The price effect discussed by the Court was “raising, fixing, maintaining, or stabilizing the price of gypsum board.” These terms appear to refer to an impact on the average price of gypsum and not just to a reduction in the dispersion of prices, which would leave the average price unchanged. Perhaps the Court was concerned that an “anticompetitive effect,” or, in my terminology, an impact on the price level, could be the inadvertent byproduct of an innocently motivated exchange of price information. This, however, is unlikely; if the exchange affected the whole price level, and not merely the distribution of prices, the inference would be strong that the real purpose of the exchange was to rig prices. Perhaps the Court was worried that in the trial of an information exchange case the Government might pick a few prices, an unrepresentative sample that happened to rise, and argue that the rise proved that the exchange of price information had affected the price level. In such a case, however, the average price would presumably remain unchanged. If the average price does rise and the rise can be traced to the defendants’ activities, the inference of intent to fix prices is again strong.

The Court’s apparent confusion between level and distribution of prices leaves one puzzled about what the Court meant when it indicated that the criterion for liability in a civil case continues to be proof of either intent to affect, or effect on, the price level. Does this mean that the Government or a private plaintiff can prevail in a civil case on a showing that a few prices went up as a result of a challenged exchange of information, as of course a few would if the exchange had any effect at all? If so, information exchanges are illegal per se. But the Court cannot have meant this, for it also stated that exchanges of price information are not always anticompetitive and are not to be treated as illegal per se for civil or criminal purposes. This statement suggests that the Court must have intended “anticompetitive effect” to refer to an effect on the price level and not to an effect on the dispersion of prices or on a few unrepresentative prices.

This interpretation leads back to the previous problem: If the effect of an information exchange is to raise the entire price level above the competitive level—a clearly anticompetitive effect—why are the defendants not presumed to have intended such an effect under the maxim that a person is presumed to intend the natural consequence of his acts? Perhaps the answer is that the

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18. The term “stabilizing” is the most ambiguous in this string of possible effects. It could be a synonym for “maintaining”—that is, for preventing price from falling to the competitive level. Or it could refer to reducing fluctuations in price over time. Either of these effects differs, however, from reducing the dispersion of prices at any given time.
20. Id.
21. See note 16 supra and accompanying text.
23. See id. at 445.
consequences stemming from an exchange of price information are just too uncertain to invoke the maxim in the context of a felony criminal prosecution. If this is the answer, however, the same treatment should be accorded in a civil case in which the defendant’s liability could amount to be hundreds of millions of dollars.

With regard to the second issue in the case—the defendants’ attempted use of section 2(b) of the Robinson-Patman Act as a defense to a section 1 Sherman Act charge—the Court held that compliance with section 2(b) does not require actual verification of a competitor’s price, and so rejected “interseller price verification” as a Sherman Act defense.24 This result has more significance for actions under the Robinson-Patman Act than under the Sherman Act. Success for the Robinson-Patman plaintiff is very difficult to achieve if the meeting-competition defense is liberally construed, because the usual Robinson-Patman defendant sells at, not below, his competitors’ prices. The Court in Gypsum went out of its way to indicate that the defense is to be liberally construed, notably by its approving quotation of the FTC’s Continental Baking opinion, the high-water mark of FTC liberality in construing section 2(b).25

Gypsum’s emphasis on the role of interseller price verification in Robinson-Patman cases obscures other and more clearly legitimate functions that such verification might serve. Buyer fraud is one situation in which verification may be proper. Apparently it remains a good ground for exchanging price information.26 Another and more subtle situation involves control of sales personnel. A salesperson paid commissions based on sales volume rather than on profit has an incentive to make a sale at any price rather than to drive the hardest possible bargain: he receives only a small increase in his commission if he sells at a higher price, but loses his entire commission if he fails to make the sale. He may thus misrepresent to his firm a competitor’s sales offer in order to justify the low price at which he asks his firm to approve a sale.27 In this

24. Id. at 453.
25. Id. at 454 (quoting In re Continental Baking Co., 63 F.T.C. 2071, 2163 (1963)). Commissioner Elman, whose opinion in Continental Baking was quoted by the Gypsum Court, could afford to be liberal because he was of the view that the proper way for the FTC to attack Robinson-Patman problems was to use the FTC’s broad rulemaking powers to deal with the entire market at once, rather than to construe section 2(b) grudgingly, which would only encourage the sort of questionable competitive exchanges at issue in Gypsum itself. See In re Callaway Mills Co., 64 F.T.C. 732, 748, 756-59 (Elman, Comm’r, dissenting), vacated sub nom. Callaway Mills Co. v. F.T.C., 362 F.2d 435 (5th Cir. 1966). Rulemaking is not an option for the private plaintiff in Robinson-Patman cases, and, given the FTC’s diminished enforcement activity in the Robinson-Patman area, it is increasingly the private plaintiff who is bearing the burden of enforcing the Act. Gypsum makes the private plaintiff’s lot a more difficult one—although from the standpoint of the procompetitive policy of the Sherman Act that is hardly a cause for regret.

For the latest expression of the Supreme Court’s liberality toward the meeting-competition defense, see Great Atlantic & Pacific Tea Co. v. F.T.C., 99 S. Ct. 925, 935 (1979) (reduced bid of seller justified by meeting-competition defense; in light of established business relationship, seller permitted to rely on buyer’s statement that first bid was “not even in the ball park.”).
27. The firm could solve this problem by paying its sales representatives on the basis of profits rather than on the basis of sales generated. Sales personnel, however, may resist this method of compensation because it is difficult for them to monitor the firm’s determination of the profit generated by a particular sale.
circumstance, interseller price verification might have a useful and legitimate function, though perhaps offset by its anticompetitive potential. In any event, the Robinson-Patman Act provides too limited a framework within which to evaluate the economic merits of exchanging price information. Part II of this article proposes a broader framework.

B. ENGINEERS

*Engineers* was a civil action brought by the United States under section 1 of the Sherman Act to eliminate a canon of ethics of the engineers' professional association forbidding its members to engage in competitive bidding. The Supreme Court's result was, as we shall see, unexceptionable, even granting—as I would do—that the prevention of fraud is a proper concern of a trade or professional association. The aspect of *Engineers* that has aroused the most interest is whether the opinion's long discussion of the Rule of Reason fills the gap that several commentators had noted in the *Sylvania* opinion: the absence of any guidelines for the trial of a Rule of Reason case.

*Engineers* does not fill the gap. The Court does state emphatically that the only considerations relevant to application of the Rule of Reason are competitive considerations, but *Sylvania* had already made that clear. The difficult question left open by *Sylvania* and not addressed by *Engineers* was how the competitive considerations are to be ordered, weighed, and woven into a usable test. How important are market shares? Is there a threshold market share below which a Rule of Reason charge must fail, as several circuits have suggested? Alternatively, does the complaint fail if a substantial procompetitive reason for the challenged restriction can be shown? Or is a court really supposed to balance the gains to competition in one market against the losses in another—for example, interbrand against intrabrand competition? Do the courts have the tools to perform such a balancing act?

Only one question relevant to the implementation of a Rule of Reason approach was conceivably resolved in *Engineers*, and the manner in which the

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29. Id. at 681, 682-63.
30. Id. at 692-93.
31. Id. at 693-94. The Court rejected the Society's affirmative defense that competitive bidding would lead to deceptively low bids and inferior work, thereby endangering public safety and health.
33. See Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1 (1977). The "Rule of Reason" is that challenged conduct must be shown to be an unreasonable restriction of competition in order to be held to violate the Sherman Act. The rule has been throughout most of its history more a euphemism for nonliability than an administrable test of legality. *Id.* at 14.
36. See Northwest Power Prods., Inc. v. Omark Indus., Inc., 576 F.2d 83, 90-91 (5th Cir. 1978) (successful defendant had 25% share of power-actuated tool market but still lacked power to unreasonably restrain trade, given particular industry structure); Oreck Corp. v. Whirlpool Corp., 563 F.2d 54, 56 (2d Cir. 1977) (unsuccessful plaintiff alleging that cancellation of its exclusive distributorship was part of conspiracy to restrain unreasonably the sale of vacuum cleaners in U.S. had only 1% market share); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 562 (1st Cir. 1974) (successful defendant's share of public swimming pool construction market would increase from 2.7% to 3% if plaintiff was eliminated).
Court handled it leads one to doubt whether the question has really been laid to rest. The Court noted that a defendant may not justify a restriction challenged under the Rule of Reason by reference to a gain in efficiency that does not increase competition. But when a seller imposes a restriction that enables it to overcome some obstacle to effective sale or promotion, such as the free-rider problem involved in Sylvania, the removal of the obstacle will lead to an increase in competition, for by lowering the seller's costs vis-a-vis those of other firms, it will induce the seller to expand its output. Therefore, because the usual Rule of Reason case involves a market with competitors, an emphasis on competitive factors will usually allow consideration of any efficiency arguments that a defendant might offer on behalf of the challenged practice.

Occasionally, however, a firm or a group of firms may have no competitors and yet still adopt some restrictive practice that might so reduce costs as to be, on balance, reasonable under a sensibly interpreted Rule of Reason. For example, suppose that there are only two firms in a market, that they do not compete vigorously, and that as a result their market price is well above their costs. They merge and obtain such great cost savings that the profit-maximizing monopoly price, which they now charge, is lower than the price that prevailed before the merger. Even here, there is a subtle procompetitive effect because the lower price will attract business from sellers of substitute products, increasing the competition that those sellers face. But I shall ignore this possibility, as did the Court, which suggested that there can be no defense based on superior efficiency because the Rule of Reason allows only competitive benefits and detriments to be weighed; it does not allow pure efficiency considerations as defense or extenuation.

This view ignores, however, a long line of cases, including United States v. Aluminum Co. of America (Alcoa), perhaps the apex of judicial hostility to monopoly, which have made clear that if a market is a natural monopoly, in the sense that the conditions of demand and supply are such that one firm can supply the entire demand at a lower cost than two or more firms could do, a consolidation of all of the firms in the market would not violate the Sherman Act. Because one cannot believe that the Court intended to overrule these decisions in a case not remotely relevant to the status of natural monopoly under the Sherman Act, the status of a pure efficiency defense in Rule of Reason cases is best regarded as unresolved by Engineers.

The difficulty the courts are finding in giving content to the Rule of Reason, a difficulty illustrated by the confused discussion in Engineers, leads one to wonder whether the Rule of Reason can answer the question of how antitrust policy is to respond to buyer and seller information needs. I shall return to this question. Before I do, however, I want to address more directly the question of the proper treatment under the antitrust laws of efforts to provide more, or more truthful, information in markets.

40. 148 F.2d 416 (2d Cir. 1945).
41. See id. at 429-30 (citing cases).
II. THE TREATMENT OF INFORMATION UNDER THE ANTITRUST LAWS

A. THE COMPETITIVE PROVISION OF INFORMATION

For at least a century, economists have been concerned that a purely competitive market would not produce enough information. The underlying problem of information production is the difficulty of appropriating as private profits any of the social benefits that the disseminator of information creates. Unlike most goods, information is not consumed by use. If I, a farmer, sell you an apple, and you eat it, no one else can eat it; thus anyone who wants my apples will have to do business with me and will have to compensate me for my costs in growing them. But if I sell you an idea, and you use it to produce something that reveals the idea, anyone else can use the idea without dealing with me. Of course the law may seek to prevent such appropriation. The point, however, is that some legal intervention or other "artificial" restriction is necessary to make an idea a saleable commodity.

The patent laws impose the necessary restriction, but only in respect to a very limited range of ideas. If by advertising Brand X motorcycles a seller provides general information about motorcycles that competitors can exploit to sell their own brand, nothing in the patent or any other laws will prevent these competitors and their customers from using the information without compensation.

The inapplicability of the patent laws to the uncompensated use of a vast range of types of information has given rise to a demand for private restrictions on information. These restrictions, however, conflict with antitrust principles that have been generally insensitive to the problem of information. Even today, some readers of this article will have difficulty recognizing in the above discussion the issue at the heart of the Schwinn and Sylvania cases. If one dealer invests heavily in advertising, promotion, display, inventory, and other presale services all directed toward providing the consumer with information relevant to his choice among brands, other dealers in the same brand will have an incentive to "free ride" on the investment of the first. They will encourage their customers to get the information from the first dealer and then come back to them to make their purchase at a lower price—which they can afford to charge because they bear none of the expenses of producing the information. It is the same free-riding problem as in the case of (1) the motorcycle producers who ride the coattails of the producer who is increasing the demand for motorcycles in general, and (2) the producer who copies the innovation of a competitor. But Sylvania leaves unanswered the question whether the recognition of the information

44. The purist would note that legal intervention—in the form of laws preventing trespass to or conversion of personal property—is also necessary in the apple case to enable the market to operate.
45. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (bicycle manufacturer imposed vertical restrictions on territories and ultimate sale of its product; if products were sold outright to distributor, manufacturer enjoined from imposing any limitations on resale; if manufacturer retained title to product under consignment plan, Rule of Reason applied to determine legality of restrictions).
free-riding problem in the particular factual setting of that case will carry over to quite different settings that raise the same fundamental problem of information externalities.

The collection and dissemination of market price information, the activity involved in the Gypsum case, is one of those other settings. The information in question is not advertising, but should not be accorded less consideration on that account—some might want to accord it more. It is important for a producer to know the prices at which transactions occur in his market. In principle, to be sure, he could operate in a complete information vacuum with regard to pricing. He could pick a price at random and then observe the market response to his offer. If he found that he was piling up a large inventory of unsold goods, he would infer that he was pricing above the market level and would reduce his price; if he found that he could not produce fast enough to keep up with demand, he would conclude that he was pricing below the market and would increase his price. This process of trial and error would lead him gradually to the profit-maximizing price and output, which in a competitive market would also be the socially optimal price and output. Of course, this level would be temporary, because as soon as demand or supply conditions changed he would find his price either too high or too low and the process of trial and error would begin anew. This blind groping for an ever-changing equilibrium may not be the most efficient way to set price and output levels in a market. With all producers operating in the dark there could be a wide dispersion of prices, with pockets of glut and shortage existing side-by-side.

To be sure, if the costs of consumer search are low, the dispersion of prices resulting from producer ignorance may be dissipated rapidly. Producers may help to keep those costs low through advertising. Most economic analyses of competition under uncertainty have, in fact, focused on consumer search as the equilibrating mechanism. Producer exchange of information has been neglected. Yet even a casual examination of markets in the real world reveals a variety of mechanisms, involving the direct or indirect exchange of information among producers, by which price dispersion may be reduced. These include: (1) organized markets, such as stock and commodity exchanges, which seek to eliminate price dispersions by pooling all buy and sell offers outstanding at the same time; (2) statistical reporting services in many of the industries that do not trade through organized markets—and in many that do, because sales may occur off the exchange; (3) trade association collection and dissemination of market statistics, and (4) direct exchange of price information—sometimes without sinister intent—by competing firms. What lawyer has not asked a fellow lawyer, within or without his own firm, what fee he charges for a particular type of service?

In short, the producer's need to have information about his competitors—including the prices they charge, their output, the quality and reliability of their service, their investment plans, their costs—is not always or obviously less important from the standpoint of efficiency than the consumer's interest in knowing what the market has to offer. In fact, the two interests are closely

49. For a recent example of this literature, see J. Pratt, D. Wise, and R. Zeckhauser, Price Differences in Almost Competitive Markets (Nov., 1978) (unpublished manuscript at Harvard University) (copy on file at Georgetown Law Journal).
related because the consumer's search costs will be higher, other things being equal, in a market in which prices are highly dispersed than in a market in which prices are not so dispersed. If, as Sylvania seems to teach, the consumer's information needs are sufficiently important to warrant restrictive arrangements designed to promote fulfillment of those needs, even at some cost in reduced price competition among dealers, why could not the producer's information needs also justify some activities that have restrictive effects as an unavoidable byproduct? Suppose, for example, in the setting of an organized market like a stock exchange, that some traders decide to take a free ride by trading off the market on the basis of price information generated by that market. If the exchange sought to prevent such activity by adopting a bylaw forbidding its members to trade off the market—one interpretation of the facts in Chicago Board of Trade v. United States— that should not be deemed a per se unlawful restriction, especially in light of Sylvania, which permits a manufacturer to restrict competition among his dealers in order to prevent free riding on the information-generating efforts of some of them.

The Hardwood case provides another illustration of the free-riding problem in producer information. That case involved the collection and dissemination of price information in the hardwood lumber market, which consisted of more than a thousand widely scattered mills, many quite small. Their product was not traded in an organized market that would have brought buyers and sellers together. Given the geographical dispersion and large number of buyers and sellers, the probability of a wide dispersion in prices must have been great. Yet no single firm would have had an incentive to gather and disseminate price statistics because the benefits of its efforts would have accrued mainly to the other firms in the industry. The formation of a trade association was a partial answer to the free-rider problem—partial because firms still had an incentive to free ride on the association's activities, which they could do by not joining the association yet using the information gathered by it. In fact, only a fraction of the hardwood mills in the country belonged to the trade association.

That the Manager of Statistics of the association tried to curry favor with his employers by urging the members of the industry to keep their prices up and by bragging that his exhortations had been effective should not have sufficed to condemn the association's socially-useful activity of collecting and

50. 246 U.S. 231 (1918) (Board of Trade “call rule” requiring uniform price for purchases of to-be-delivered grain occurring between close of exchange and opening on following day held not to violate Sherman Act).
52. American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (“Open Competition Plan” of hardwood producers, in which disclosure of pertinent aspects of business made to clearinghouse that supplied analysis of overall market and suggestions for future production and pricing, held to be an unlawful restraint of trade).
53. The association might have an incentive to disseminate the information even to nonmembers, because the more sellers the information reached the more likely it would be that the price dispersion of the market would be decreased. But even if the association were able to withhold the information from the free riders, they would still be taking a free ride on the improved market conditions generated by the association's efforts, to the extent that those efforts were effective.
54. Participants in the “Plan” operated 5% of the mills engaged in hardwood manufacture in the United States. 257 U.S. at 391. The Court discounted this statistic by noting that the Plan participants produced one-third of the total hardwood output in the United States. Id.
55. Id. at 403-07.
disseminating detailed price information. This information gave the members of the association a much clearer idea of the competitive conditions facing them. The very large number of sellers\(^5\) precluded an inference that the real purpose or probable effect of the exchange was to raise the average price in the market above the competitive price.\(^5\)

Justice Holmes, in a dissenting opinion, clearly grasped the essential distinction between activities designed to reduce the dispersion of prices and activities designed to raise the average price, a distinction that, as I noted earlier, continues to elude the Court. Holmes stated:

> When there are competing sellers of a class of goods, knowledge of the total stock on hand, of the probable total demand, and of the prices paid, of course will tend to equalize the prices asked. But I should have supposed that the Sherman Act did not set itself against knowledge—did not aim at a transitory cheapness unprofitable to the community as a whole because not corresponding to the actual conditions of the country. I should have thought that the ideal of commerce was an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future on both sides. A combination to get and distribute such knowledge, notwithstanding its tendency to equalize, not necessarily to raise, prices, is very far from a combination in unreasonable restraint of trade.\(^5\)

Although the Court enjoined the exchange of information in the *Hardwood* case, its decision did not settle the issue of the legality of exchanging price information, whether through a trade association or any other means. In the *Hardwood* case it was clear that the statistician of the association was trying, however factitiously or ineffectually, to do more than facilitate an exchange of information, and his intent was enough to make the case one of attempted and therefore unlawful price fixing. Until the *Container* decision,\(^5\) subsequent cases cast little light on the permissibility of exchanging price information. The Court in *Container* thought the structure of the market decisive to the legality of an agreement by a group of competitors to exchange price information, and strongly implied that such exchanges were illegal per se in "oligopolistic" markets, but not in nonoligopolistic markets.\(^6\) The continued vitality of this aspect of *Container* has been placed in doubt by the Supreme Court's decision in *United States v. Citizens & Southern National Bank*.\(^6\) The Court stated that "the dissemination of price information is not itself a

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\(^{5}\) There were 365 participants in the Plan. *Id.* at 391.

\(^{57}\) See R. Posner, supra note 47, at 52-54.

\(^{58}\) American Column & Lumber Co. v. United States, 257 U.S. 377, 412 (1921) (Holmes, J., dissenting) (emphasis added).

\(^{59}\) United States v. Container Corp. of America, 393 U.S. 333 (1969) (manufacturers of corrugated containers, who supplied 90% of relevant market, disclosed to each other upon request most recent price charged or quoted to specific customer; information exchange held to "stabilize" a downward price trend, making practice unlawful under § 1 of Sherman Act).

\(^{60}\) *Id.* at 337.

\(^{61}\) 422 U.S. 86 (1975) (to circumvent stringent restrictions on establishment of suburban branches by city banks, defendant bank formed holding company that established de facto branches; bank's practice of founding such branches held not to infringe § 1 of Sherman Act).
per se violation of the Sherman Act.” The Court cited for this proposition Justice Fortas’ concurring opinion in Container, which consists of an emphatic repudiation of any suggestion that exchanges of price information might be illegal per se. Indeed, it seems possible to read Justice Fortas’ opinion—consistently with the position that I am urging here—as suggesting that the exchange in Container was unlawful because there was evidence that it actually affected the level of prices. I said earlier that a proper information exchange would affect the distribution, but not level, of price.

Gypsum is in the spirit of Citizens & Southern in suggesting that the legality of an information exchange is to be appraised on the facts of each case, without necessarily attaching controlling weight to the presence or absence of oligopolistic elements. Yet the Gypsum Court cited Container with apparent approval. And the Court’s inability in Gypsum to distinguish between the effect of information on the dispersion of prices in a market and its effect on the average price in the market suggests that the Court lacks a sure grasp of the fundamental economics of the issue. The current legal status of competitive exchanges of price information is uncertain.

B. A SUGGESTED APPROACH

I want to suggest an approach that would dispel this uncertainty in a manner consistent with the fundamental spirit, if not the specific results and narrow holdings, of the series of price exchange cases from Hardwood to Gypsum. The heart of my proposal is that an agreement simply to exchange price information should not be regarded as a violation of the antitrust laws. Such an agreement should only be admissible as evidence of an agreement to fix prices, which would be, in my view, unlawful whether express or tacit. If the trier of fact is satisfied that a group of firms has agreed to exchange price information but has not directly or indirectly, tacitly or explicitly, formally or informally, agreed to fix prices, there should be no finding of a Sherman Act violation. The likely effect of an agreement just to exchange price information will be to narrow the dispersion of prices, which is a good thing, rather than to raise the average price above the competitive level, which would be a bad thing. If the only thing that a group of competitors does is exchange price information—no matter how detailed the information is, how frequently it is exchanged, or whether it pertains to past or current prices—the price level will be unaffected. Some firms will discover that their prices are too high, others that their prices are too low, but the average price should be unchanged.

Narrowing the dispersion of prices will have none of the bad effects associated with monopoly or price fixing; on the contrary, it will bring the pricing in the market more closely in line with the conditions that would prevail under perfect competition.

It is of course arguable that an agreement to exchange price information will also eliminate the uncertainty and mistrust that prevent “conscious

62. Id. at 113.
65. The discussion that follows modifies my earlier expressed views on this subject. See R. Posner, supra note 47, at 135-47.
66. If average price rose, it would imply that before the exchange of information the industry had a rate of return below the competitive level, which is unlikely, certainly over a prolonged period of time.
parallelism” or other versions of tacit collusion that are too subtle to be identified by the methods of litigation from being effective substitutes for outright collusion. To this it may be replied that whatever mistrust bedevils the underlying tacit agreement not to compete will equally bedevil the agreement to exchange price information: a firm that wants to undersell its competitors secretly will simply submit false price information. 67 This point assumes that the agreement to exchange price information is not legally enforceable. If it is enforceable, the parties will have legal remedies for breach of the agreement and the threat of suit will greatly reduce the problem of cheating. One possibility, then, would be to allow firms to agree to exchange price information but to refuse to allow them to invoke the aid of the courts, directly or indirectly, in the enforcement of such an agreement. The agreement would be unenforceable as against public policy, but not illegal. There would be, then, a threefold division among agreements to exchange price information: (1) perfectly lawful agreements, (2) gray-area agreements, which the courts would not enforce but which the antitrust laws would not forbid; and (3) agreements unlawful under the antitrust laws because they amount to price fixing.

An alternative approach that I have advocated elsewhere and favor here is to deem tacit collusion itself a form of actionable price fixing. 68 An agreement to exchange information ancillary to tacit collusion would be unlawful without more. This approach allows preservation of a clear distinction between the agreement to exchange price information, which, standing alone, should always be lawful, and the agreement that is a mask for, or incident to, actionable price fixing and is therefore unlawful. Alternatives to this approach would be (1) to ban information exchanges in highly concentrated markets, a potentially unsatisfactory approach both because of uncertainty about what threshold of concentration to use and because of considerations that we shall encounter in discussing the Westinghouse decree; 69 or (2) to decide information exchange cases under a broad Rule of Reason approach, an unattractive alternative given the vagueness of the Rule of Reason, which Engineers did not dispel.

Still another possible approach would be to focus on the form of the information exchange. Professor Baxter has suggested that telephonic or face-to-face exchanges of price information be forbidden because of the difficulty of policing the conversation to make sure that the communicating sellers do not go beyond a simple exchange of price information, and actually fix prices. 70 The logic of that proposal, however, suggests outlawing trade association meetings because competitors attending them could use the occasion to fix prices. To be sure, counsel may be present in the formal meetings of the association to prevent just such conduct, but the participants can discuss prices in the hotel corridors just as easily as they can during a telephone conversation. One might as well forbid competitors to belong to the same country clubs.

The result in Hardwood is consistent with my proposal that a pure agreement to exchange price information, unrelated to any underlying

67. I am indebted to George Stigler for this point.
68. See R. Posner, supra note 47, ch. 4.
69. See notes 72-78 infra and accompanying text.
actionable price-fixing conspiracy, should not be deemed unlawful. *Hardwood*
turned on evidence of intent to fix prices on the part of the association's
Manager of Statistics. *Container* is inconsistent with my approach in result; it
found an agreement to exchange prices illegal without suggesting that it was
ancillary to some further agreement to fix prices. My approach, however, is
consistent with the basic premise of the *Container* Court's analysis—that
"interference with the setting of price by free-market forces is unlawful per
se." A pure agreement to exchange price information improves the opera-
tion of the free market by narrowing the dispersion of prices and thereby
bringing the market closer to the model of a perfectly competitive market.

In short, I do not believe that an agreement to exchange price information
is some sort of halfway house between competition and price fixing, the
legality of which should be decided sometimes one way, sometimes the other,
depending on the structure of the market. A pure agreement to exchange
price information should always be considered lawful. Market structure
becomes relevant only when the Government or a private plaintiff argues, as
it is always free to do, that the existence of the agreement to exchange
information provides circumstantial evidence of an underlying agreement to
fix prices. Suppose, for example, that there were only two firms in a market,
selling a completely homogeneous product to knowledgeable buyers, and that
the two firms agreed on a very detailed exchange of current and future prices.
The probability that, in the absence of an exchange of information, prices
would be widely dispersed—to the prejudice of buyers, who would buy at
widely varying prices and sometimes encounter shortages or queues—would
be very small. There would thus be a strong basis for an inference that the
agreement was a mask for something more sinister. Similarly, if the effect of
the information exchange were to raise the level and not merely reduce the
dispersion of prices, one could infer that the motive was price fixing. I do not
want to speculate on how much circumstantial evidence should be deemed
sufficient to convict a firm of price fixing. My point is only that it makes more
sense to treat an agreement to exchange price information as possible
circumstantial evidence of price fixing than as an independent antitrust
violation.

*Gypsum* says too little about the standards for judging such agreements to
allow a confident prediction that the Court will soon adopt any such
approach as I have just proposed. The Court's confusion of the level and
dispersion of prices in a market bodes ill for the chances that it will embrace
an approach that attaches decisive significance to that distinction. But there is
a judicial vacuum here that must be filled. In *Container* the Court came close
to declaring a per se rule against exchanges of price information in any market
that is slightly removed from the model of perfect competition—which means
most markets—but it has since veered away from that position, and now the
bar does not know the status of such agreements.

C. THE WESTINGHOUSE DECREE

It may assist understanding of my position to depart momentarily from the
Supreme Court's decisions and glance at the recent and already celebrated

Westinghouse decree. The decree, entered into in 1977 with the consent of the parties—United States, plaintiff, and General Electric (GE) and Westinghouse, defendants—modified the judgment entered against the defendants in 1962 enjoining their participation in the electrical price-fixing conspiracy. The new order enjoins the defendants from engaging in certain practices that the Department of Justice contends have prevented competitive pricing in the electrical turbine generator industry, in which GE and Westinghouse are currently the only competitors. These practices relate mainly to the dissemination of price information. The defendants are enjoined from disseminating information about prices or price changes—other than to customers, of course—or circulating "price books" or other formulas from which a competitor might readily compute the price the seller was planning to bid. Some of the enjoined practices do not seem on their face informational in nature but are objected to because they make it more costly for the defendants to engage in price competition. Notably, the decree enjoins the practice of promising a customer that if a generator is later sold at a lower price to another customer the price paid by the first customer will be reduced to the level of the second price.

This "price protection" clause, by making it more costly for a competing firm to lower its price, could be ancillary to a tacit agreement to fix prices. Therefore, if one thought such an agreement likely, one might want to enjoin the clause as a prophylactic measure. The fact that GE and Westinghouse used to fix prices expressly may suggest that such a tacit agreement was likely. But there is another side to the price protection clause. Its existence may attest to underlying uncertainty about the conditions of demand and supply, and hence about price, notwithstanding the fewness of sellers. The existence of the clause implies that there is frequently a dispersion of prices for the same generator within the interval of time to which the clause applies. The clause eliminates this dispersion. That is not an obviously bad thing to do. Price protection might be sought by customers in order to eliminate the competitive disparities that would be created by the near-simultaneous sale of the same product at different prices, or in order to reduce search costs—the customers would invest less effort in determining the best time to buy. A question of risk allocation is also involved.

A facile resolution of the price protection question is that the uncertainty giving rise to price dispersion is an artifact of tacit collusion combined with occasional secret discounting, and is to be encouraged because it will eventually result in a collapse of the collusive scheme. This is not an absurd argument. The Justice Department's own memorandum supporting the modification of the decree, however, provides an alternative explanation for the price dispersion and hence for the price protection clause. It notes that

76. Id. at 72,718.
77. To be sure, the customers are electrical utilities, which ordinarily do not compete with one another but serve exclusive territories. There is, however, some competition even in the electrical utility business, and, in any event, public utility commissions will sometimes look to costs of other utilities in deciding whether a particular utility's costs were prudently incurred. See 2 A. KAHN, THE ECONOMICS OF REGULATION 95-112(1971).
very few generators are sold each year. A few unexpected new orders or unexpected cancellations can result in dramatic swings in sales. This situation creates a potential for price dispersion. GE might find itself with a cancellation after it had already sunk substantial costs into the production of the generator; seeking to cut its losses it might offer a lower price than it had offered just a few weeks earlier. This would be reasonable competitive conduct—but it would also be reasonable for the previous customers to have requested, and have compensated GE for providing, assurance that they would get the benefit of any subsequent price cut. For, apart from other reasons noted earlier, these circumstances create uncertainty on the part of buyers about what price they will have to pay for an electrical generator. There is the risk of making a very poor, or a very good, buy. Price protection shifts the risk of a price change from customer to seller within the interval covered by the clause; depending on the parties’ attitudes toward risk and on other factors, this shift may yield a gain in welfare.

The small number of annual sales also suggests the appropriateness of a more tolerant attitude toward the dissemination of price books and other price information than might otherwise be warranted. The consequences of not knowing at what price your competitor is going to sell his product are serious in a market in which each sale is a large fraction of one’s annual business. It might seem, however, that the costs of discovering the rival’s prices, given the infrequency of sales and the scarcity of rivals, would be low even if exchanges of price information were forbidden. The very paucity of transactions, however, may result in price uncertainty, as where the market value of a particular house cannot be estimated accurately because there have been few recent house sales in the neighborhood.

Were it not for the infrequency of sales, the small number of firms in the market (two) would suggest, as I pointed out earlier, that the exchange of price information was masking an agreement to fix prices. But given the infrequency of sales a deeper investigation of the competitive performance of the market than that reflected in the Justice Department’s memorandum would be necessary to support the Department’s belief that the information exchange was indeed just a mask for a continuation of the price-fixing agreement enjoined by the original decree.

My analysis of the Westinghouse decree suggests that a rule that would ban all exchanges of price information in concentrated industries would be too sweeping. Other factors may outweigh the significance of seller concentration in particular cases. There is also the difficulty of agreeing on the concentration threshold beyond which exchanges of price information would be illegal. I prefer to cast the inquiry in terms of whether the exchange of price information is ancillary to express or tacit price fixing; only then should it be forbidden. In the absence of direct evidence of intent, the inquiry would focus on whether the exchange of information had affected the level, or merely the distribution, of prices. If the former, it would be strong evidence that the exchange was ancillary to price fixing and hence unlawful. Many will doubt that it is within the capacity of the courts to assimilate the sorts of economic

data and analyses necessary to distinguish these effects. My response is that the courts will be able to solve the hard problems concerning collusion, including the threat of price fixing presented by the exchange of information among competitors, only when they learn to use economic data, as well as economic reasoning, in the enforcement of the Sherman Act.

D. FRAUD

Let me turn very briefly to the substantive issue in the Engineers case, which is again one of information and competition. The defendant professional association had adopted a rule forbidding members to seek engineering contracts through competitive bidding or even to quote a price in advance of being selected by the client. Once an engineer was selected the client could attempt to negotiate a satisfactory fee, and if the negotiations broke down the client could approach another engineer. At no time, however, would the client be able to solicit simultaneous competing bids. The rationale for this rule, which the Supreme Court struck down as a violation of section 1 of the Sherman Act, was that competitive bidding would encourage fraud. The association had argued that an engineer might submit a proposal that was inadequate from an engineering standpoint in order to underbid his competitors, and the quality of engineering work would thereby be driven below acceptable levels. The problem with this argument is that the purchasers of engineering services can decide for themselves whether the gains from lower prices outweigh the possible quality losses from encouraging price competition. If the association's argument is correct, it will presumably persuade the vast majority of the purchasers of engineering services; there is no basis, however, for withdrawing the decision to accept or reject the argument from the customers. There is no free-rider problem of the sort that might justify a restrictive agreement among competing sellers.

A true fraud issue was raised in Borden's successful resistance to the proposed divestiture of its ReaLemon trademark. The FTC found that Borden had unlawfully monopolized the market for reconstituted lemon juice. The administrative law judge thought the most effective way of dissipating the monopoly was to force Borden to divest itself of its ReaLemon trademark. Had his divestiture decree been upheld, it would have been an example of the use of the antitrust laws to increase the costs of information. If other manufacturers had been free to use the name "ReaLemon" for their concentrated lemon juice, the consumer who happened to prefer to buy from

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80. Id. at 682-83 & n.3.
81. Id. at 684 n.6.
82. Id. at 692.
83. Id. at 684-85 & n.7.
84. Id.
86. Id. at E-9.
87. Id. at E-1.
88. The Commission avoided deciding whether it had the power to order compulsory licensing of a trademark, id. at E-1, concluding that an order prohibiting ReaLemon from pricing to exclude or minimize new entry into the market would be sufficient to dissipate ReaLemon's unlawfully maintained monopoly position. Id. at E-10. The order is printed at E-18.
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Borden would have found it more costly to exercise his preference. Indeed, consumers who did prefer Borden and did not know about the divestiture decree would probably have been deceived into thinking that they were continuing to purchase Borden's brand when they were not. Because there was some evidence in the case that Borden's leading competitor had adulterated its reconstituted lemon juice, a consumer preference for Borden could hardly be viewed as irrational.

CONCLUSION

The cases of the 1977 Term, together with the Sylvania case of the Term before, highlight the problems of formulating sound antitrust policy once the importance of information in the competitive process is recognized. The direct or indirect exchange of price information by competitors can serve procompetitive, pro-efficiency purposes even in markets with only a few sellers. I no longer believe that there is any satisfactory rule of thumb or shortcut for determining when such exchanges should be suppressed. A better approach is the following: Consider the exchange of information to be a lawful practice under section 1 of the Sherman Act regardless of the level of concentration or other factors; but, when appropriate, allow the trier of fact to consider exchanges of information, other communications among the parties to an alleged conspiracy, and such other relevant circumstances as the effect on the price level as distinct from the change in the dispersion of prices, as circumstantial evidence of alleged price fixing.

89. Id. at E-8.
90. See note 65 supra.