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Pooling and Exchanging Competitively Sensitive Information Among Rivals: Absolutely Illegal Not Just Unreasonable

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POOLING AND EXCHANGING COMPETITIVELY SENSITIVE INFORMATION AMONG RIVALS: ABSOLUTELY ILLEGAL NOT JUST UNREASONABLE

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* Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School. Professor Carstensen had the privilege of discussing the analysis of information exchanges in panels at the American Antitrust Institute's *15th Annual Private Antitrust Enforcement Conference* (November 10, 2021) and the DOJ/FTC *Public Workshop on Promoting Competition in Labor Markets* (December 7, 2021). The practical and theoretical insights of his fellow panelists have contributed greatly to the analysis of the issue. In addition, Harry First, Joseph Harrington, Christopher Leslie, Doug Malamed, William Page, and D. Daniel Sokol have commented on earlier drafts. Their comments have also been very helpful. Timothy Spurlin, Wisconsin '24, provided valuable research and editorial assistance.

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INTRODUCTION

In February 2023, Doha Mekki, the Principal Deputy Assistant Attorney General for Antitrust ("AAG"), announced the withdrawal of the long-standing policy statements of the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") on information exchange.[1] Those policy statements had encouraged and shielded anticompetitive information sharing for more than a quarter of a century.[2] Their replacement was long overdue. While acknowledging the harms to competition that such exchanges can create, her speech failed to provide a framework for analysis of such agreements that would replace the ambiguous and misdirected standards currently employed. Those standards are based on a false analogy to the current standards governing ancillary restraints of trade—which are usually lawful unless the parties have substantial market power and the restraint itself is unreasonably restrictive. Historically, restraints based on the exchange of competitively sensitive information were condemned as unlawful once their anticompetitive function was apparent.[3] The current standards as AAG Mekki recognized have led to confusion and significant under enforcement of the rules against such restraints of trade.

An agreement to exchange competitively sensitive information among rivalrous competitors usually results from an intent to inhibit or restrict the discretion of the participating firms to engage in competition. Hence, any such exchange is in itself a naked agreement, restraining trade without legal justification. Therefore, the appropriate doctrinal label would be per se illegal, but the possibility that the exchange might not result in a restraint means that the better doctrinal label would be a rebuttable presumption of illegality, often called a "quick look" review. Whether or not there is restraint is and should be the central focus of analysis for determining the proper outcome.

Because of the lack of clarity in the case law and the general failure to focus on the function of such agreements, courts have imposed irrelevant criteria for the determination of the legality of such information exchanges. These criteria have complicated the analysis and deterred challenges that could have penalized and probably reduced the number of such anticompetitive agreements. This problem is partially explained by

1. Doha Mekki, Principal Deputy Assistant Att'y Gen., Dep't of Just., Remarks as Prepared for Delivery, (Feb. 2, 2023), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0 [hereinafter Mekki Speech]. On July 14, 2023, the FTC followed suit. *See* Press Release, Federal Trade Commission Withdraws Health Care Enforcement Policy Statements (July 14, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/federal-trade-commission-withdraws-health-care-enforcement-policy-statements.

2. *See infra* text at notes 202-11.

3. *See infra* text at notes 86-96.

the fact that most recent litigation has involved private class actions seeking damages that must prove actual harm to support the damage claim. Hence, the harm issue has been conflated with the question of whether the information exchange at issue itself is unlawful.

This Article both explains the nature of the problems with the contemporary legal analysis of agreements to exchange or pool competitively sensitive information, and proposes a better analysis based on core functional principles central to Section 1 jurisprudence. Part I provides descriptions and definitions of key concepts. Part II follows with a functional analysis of communications to establish that in the usual case that communications sharing confidential business information among rivals lack any productive function and serve only to provide information that restricts competitive conduct. Thus, such agreements are naked restraints of trade. Part III describes and evaluates the evolution of legal doctrine governing the exchange of confidential competitive information among rivals. This evaluation links contemporary American doctrinal criteria to the factual and functional issues at stake. It also critiques the efforts of the FTC and DOJ to provide guidance even after the withdrawal of their past guidance. Finally, Part III describes European Union ("EU") competition law and its stricter and more useful approach to this conduct. The implication of this analysis is that the central issue in these cases is the function of the information exchange rather than the exchange's overall "reasonableness." Part IV addresses the link between not unlawful "tacit collusion" and agreements to exchange competitively sensitive information, which do satisfy the requirements of Section 1 for liability. Part V then provides an analytic framework that employs a presumption of illegality as the central tool to focus on the functional character of such agreements. Part V also recognizes that in a limited number of cases the presumption of an illegal restraint on competition would not be appropriate.

I. SOME PRELIMINARY DEFINITIONS AND DESCRIPTIONS

The exchange of competitively sensitive information is problematic only in a context in which firms engage in rivalrous competition as opposed to perfect competition. But not all exchanges of information among rivals involve an understanding to exchange such information. Thus, initially, it is essential for this Article to define both the context and kinds of exchanges which are of concern. Second, the meaning of the term "restraint," while central to Section 1 law, is rarely defined and again creates ambiguity. This topic, therefore, requires brief consideration. Third, private damage cases, which are currently the most likely contexts for litigating the legal merits of such exchanges, have contributed to the

problem of developing a coherent articulation of a standard because such cases require additional and essential elements beyond proof of an unlawful agreement. The role of those other elements needs to be identified. Fourth and finally, a central feature of analysis of restraints of trade is the function of the restraint. The naked-ancillary dichotomy is central to the determination of whether a per se rule or a rule of reason should apply to specific agreements that impose restraints on competition. Each of these four points require elaboration as a predicate to the legal and functional analysis of information exchanges.

A. Distinguishing Between Information Exchanges Among Rivals and Other Communications

1. The Relevance of Rivalry

Better public knowledge of market conditions, including information about supply and projections of demand, is likely to result in greater price stability as both buyers and sellers have similar information. In a "perfectly" competitive market, no one business can affect the quantity or price of the product sufficiently to affect the market. In such a situation, individual enterprises are not rivals, and they can sell all they desire at whatever the prevailing price might be. Buyers and sellers are fully informed about all relevant market circumstances. Because such market participants are not rivals, they have no economic reason to keep any information confidential.[4] Indeed, buyers and sellers are likely to find it helpful in their planning to exchange information, including details of specific plans, to improve their own decision-making. Knowing what the farmer down the road is using or paying for seed or fertilizer, or how many acres she will plant of a certain crop, has no impact on the price of the crop or the sales potential of the farmer up the road who is planting the same crop. Thus, their sharing of information does not give rise to an inference of restraint.[5]

The economic situation is different when market participants are rivals.[6] Rivalrous competition involves situations in which individual businesses compete to make specific sales or compete to hire employees

4. Non-market privacy preferences might still induce reticence about plans.

5. In contrast, if those same farmers start to discuss the wages they pay for help, that may lead to a restraint on wage competition exactly because in this aspect of their business they may well be "rivals" and not perfect competitors.

6. *See generally* JOHN MAURICE CLARK, COMPETITION AS A DYNAMIC PROCESS 13-17 (1961); *see also* F. M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 10 (1971) ("[S]ellers consider themselves conscious rivals . . . [when] each believes his economic fortunes are perceptibly influenced by the market actions of other individual firms . . . .").

or obtain other necessary inputs.[7] The models of monopolistic competition or imperfect competition show that in such instances most rivals have some discretion over prices and output.[8] In this context, knowledge of competitively sensitive information that tells a firm what its rivals are doing or are seeking to do has a different significance. The informed rival can make a more competitively effective response. Armed with this information, a firm could undercut the prices or bid higher on input purchases than its rival.

No rational firm would want to endow its rivals with this kind of information if the rivals desired to use the information to achieve a competitive advantage. Hence, an agreement to exchange such information is usually inconsistent with the rational unilateral interests of rivals. The sharing of such information implies an understanding that it will be used in ways that do not result in vigorous competition. For example, sharing current prices for specific customers would be plausible only if the recipient was not going to undercut those prices as it sought to compete for that business. Or such information might reassure a rival that its competitors are not cutting prices below its list prices. Information about inventory, wages, proposed wages, or other input costs can also provide a basis to reassure rivals that competitive activity is not likely to break out on either the supply or output side of the market.

2. Types of Communication

There are a range of ways in which rival business executives communicate with each other,[9] such as one-on-one conversations that include no specific commitments to continue nor any agreements. Evidence of such discussions may be relevant to show proof of an underlying agreement to fix prices or otherwise coordinate competition.[10] But such discussions in themselves are unlikely to be agreements or understandings of the sort that are relevant to this analysis.

On the other hand, when rival executives agree to exchange otherwise confidential information concerning capacity, sales, expected changes in sales, list prices, or other such data directly or through some third party, an agreement to create and operate an information pool or exchange

7. Rivals compete for specific sales, or input purchases based on prices, quantities, and other factors such as delivery time or related services. With respect to any specific transaction, it is a zero-sum game. One rival will win and the other will lose.

8. *See generally* EDWARD H. CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION (8th ed. 1965); JOAN V. ROBINSON, ECONOMICS OF IMPERFECT COMPETITION (2d ed. 1969).

9. *See* Joseph E, Harrington, *Collusion in Plain Sight: Firms' Use of Public Announcements to Restrain Competition*, 84 ANTITRUST L.J. 521 (2022).

10. *See, e.g.*, *In re* Flat Glass Antitrust Litigation, 385 F.3d 350, 364 (3d Cir. 2004).

exists.[11] This is the type of understanding that raises competitive concerns even if there is no additional explicit agreement concerning a dimension of competition.

The distinction between general communications and an information exchange can be ambiguous in some contexts. A pattern of specific information repeatedly exchanged among rivals provides the best evidence of an information exchange of the sort that can result in a restraint on competition.[12] For example, in one case there was no explicit exchange agreement, but the court found that rival hospitals provided information in various ways about present and future wages for their nurses such that it would be reasonable for a jury to conclude that there was an understanding to share competitively sensitive information.[13] As with other elements of an antitrust case, this is a matter of proof in which the evidence must support the conclusion sought.

3. Competitively Sensitive Information

The kind of information being exchanged is also an important factor and again involves boundary issues. The key concept is that parties are exchanging information of a sort that would ordinarily be confidential in a world of rivalrous firms, and they would not share this information without some understanding about how their rivals would use it.

Restrictions on employees as to what information they can disclose or use when they leave employment provide one basis on which competitive sensitivity can be measured. Another source of such criteria are the rules governing disclosure of information obtained by government agencies from firms during investigations.[14] Firms themselves often assert that a range of data about their internal operations must be treated as confidential or as trade secrets. Such claims in turn are self-definitions of what such firms regard as competitively sensitive.[15] Individual industries are likely to have specific kinds of information that are particularly relevant to competition, whether those are production capacity, inventory,

11. For example, Agri Stats provided such a service for competing poultry, pork, and turkey processors. *See infra* text accompanying notes 161-66 and 181-201.

12. For example, the commitment of box makers to share current prices to specific customers in *United States v. Container Corp*., 393 U.S. 333 (1969) or of dry wall manufacturers to verify the prices offered to specific customers in *United States v. U.S. Gypsum*, 438 U.S. 422 (1978) are examples of focused commitments to exchange specific competitively significant information.

13. *See* Carson-Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603, 624-34 (E.D. Mich. 2012).

14. *See, e.g.*, 16 U.S.C. § 46(f) ("Provided: That the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential . . . .").

15. A potential irony in this is that it often appears that firms over-claim confidentiality but such claims in the context of information pooling would provide a basis for a more inclusive definition of competitively sensitive information.

or other dimensions of the business such as projected list prices.[16] It is, however, likely that in most situations the competitive sensitivity of the information will manifest in the specifics of the industry involved.

B. The Definition of "Restraint" in Antitrust Law

There is relatively little discussion of the meaning of the term "restraint of trade" in either scholarship or caselaw concerning Section 1.[17] Generally, the concept of a restraint is reasonably self-evident. The Cornell Law School Legal Information Institute defines it this way: "A restraint of trade is any activity that tends to limit a party's ability to enter into transactions. The term is most commonly used in the context of government antitrust regulation."[18] In the famous *Chicago Board of Trade* decision, the Court pointed out that contracts by their nature restrain the freedom of action of the parties with respect to the market.[19] Thus, a restraint in this context is a limit imposed on an economic actor with respect to its choices and actions in the market. Self-imposed restraints are ones that the firm can change at will, but a restraint imposed by agreement limits the freedom of action of the actor regardless of its wishes or desires.

Not all information exchange agreements impose restraints. For example, an agreement to share information about "best practices" does not bind the parties to any particular future conduct in the market. The basic test is whether the information being exchanged is consistent with independent action or whether it functions to impose a limitation or restraint on the economic choices and actions of the parties. [20]

Whether a particular understanding involves a restraint on competition is most significant in the context of information exchanges. There are a few plausible reasons for rivalrous firms to exchange otherwise confidential information in circumstances in which it is probable that the exchange would not be and is not intended to restrain the decisions that the participating firms make about their market conduct. This feature of

16. *See, e.g.*, Case T-799/17, Scania v. Comm'n, ECLI:EU:T:2022:48 (Feb. 2, 2022) (upholding the Commission's complaint against truck makers that exchanged confidential information about list prices even though actual sales were made as discounts off of the list price); *see also* Joseph E. Harrington, *The Anticompetitiveness of a Private Information Exchange of Prices*, 85 INT'L J. INDUS. ORG., Dec. 2022.

17. *Cf.*, Buffalo Broad. v. Am. Soc'y. of Composers, Authors, & Publishers, 744 F.2d 917 (2d Cir. 1984) (reversing a finding of an unlawful restraint of competition because the contract terms did not restrain the parties' freedom of action).

18. *Restraint of Trade*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/restraint_of_trade#:~:text=A%20restraint%20of%20trade%20is,For%20example%2C%20federally%2C%2015%20U.S.C.

19. Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918).

20. For example, it is impossible to identify any legitimate business reason for rivals to exchange forthcoming list price changes. *See* Harrington, *supra* note 16.

information exchange is why it would not be correct to condemn every such exchange absolutely. However, the proper focus for determining the legality of such an exchange agreement must be on the function of the exchange rather than extraneous questions about market effects.

C. The Requirement of Effect in Private Damage Cases

Complicating the evolution of the judicial analysis of information pooling is that most of the recent cases have been private damage actions, and usually class actions. In such cases, it is incumbent on the private antitrust plaintiff to establish both that the restraint is unlawful and that it has caused the kind of harm to the plaintiff that antitrust laws seek to remedy.[21] In contrast, the government can prevail without any showing of specific economic loss or economic harm if the agreement is found to be per se illegal.[22]

Thus, the legality of such a restraint and its effect on the market are separate and distinct legal questions. But when they are conflated, it results in a doctrine that unduly narrows the scope of illegality of such restraints. The example of a speeder on the highway illustrates this distinction. Speeding is an offense that results in a ticket and a fine regardless of whether anyone was harmed. If speeding results in injuries, then the victims get damages, but the victim must first prove those damages. The victim likely must also prove that the driver broke a traffic law, but that is distinct from proving that the victim suffered injuries and damages. The distinction in antitrust is similar: public enforcement sanctions the unlawful conduct itself while the private damage claimant must show actual damages as well as a violation of the law.

D. The Functional Distinction Between Naked and Ancillary Agreements in Restraint of Trade

A naked restraint is an agreement among parties only to restrain how they compete with each other or with others. The classic price fixing cartel is an example of this kind of restraint. The only function of such a cartel is to create, allocate, and exploit market power. Such restraints can take many different forms.[23]

The central functional insight is that all naked restraints only regulate market competition. They serve no other function even if there are claims

21. *See* Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

22. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

23. *See generally* Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941 (discussing the different ways that conspirators can restrain competition).

that the results are in some sense positive. By focusing on function and not ultimate consequences, it is possible to eliminate formalistic claims that a particular naked restraint is in some sense novel and so courts need to examine its particular effects in great detail.[24] Indeed, such agreements are void as a matter of contract law exactly because they are naked restraints.[25] There are exceptional cases in which courts have recognized that some public authorization exists for specific cartelistic conduct either explicitly, such as in state actions claims,[26] or implicitly, as in cases involving private standard setting groups.[27] In those cases, the courts have recognized that the conduct is exempt from antitrust oversight, but only when the conduct falls within the scope of and is consistent with the authorization that makes it per se legal.[28]

Ancillary restraints, as opposed to naked restraints, function to facilitate in some way a primary productive transaction or venture involving the parties to the agreement. Thus, participants in a joint venture must agree to set prices, to assign territories, and with whom they will deal. These are not illegal price fixing, territorial allocation, or unlawful group boycotting. They inhere in the joint venture. Restraints, such as restrictions on how former employees can use information learned during their employment, can address a problem of opportunistic risk. Most "vertical" restraints arise from transactions or ventures involving an upstream supplier and downstream customer and so are at least potentially ancillary to the transaction.[29]

In 1898, Judge, and later Chief Justice, Taft wrote the *Addyston Pipe* decision with the concurrence of Justice Harlan and Judge Lurton, who also subsequently served on the Supreme Court.[30] That decision is generally regarded as one of the most important decisions in antitrust law.

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24. *See In re* Processed Egg Prods., 962 F.3d 719, 723 (3d Cir. 2020) (upholding a jury verdict that an agreement to restrain competition as to the size of hen cages was "reasonable" because consumers preferred such eggs); *see generally* Peter C. Carstensen, *The Third Circuit's Scrambling of Precedent in* Processed Eggs, 68 ANTITRUST BULL. 73 (2023).

25. *See* RESTATEMENT (SECOND) OF CONTS. § 187 (AM. L. INST. 1981) ("A promise to refrain from competition that imposes a restraint that is not ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade.").

26. *See, e.g.*, FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).

27. *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988).

28. This analysis is developed in Peter C. Carstensen & Bette Roth, *The Per Se Legality of Some Naked Restraints: A (Re)Conceptualization of the Antitrust Analysis of Cartelistic Organizations*, 55 ANTITRUST BULL. 349 (2000) (in limited circumstances some naked restraints are exempt from antitrust law's per se condemnation). *See also* Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545; Peter C. Carstensen, *The Incoherent Justification for Naked Restraints of Competition: What the Dental Self-Regulation Cases Tell Us About the Cavities in Antitrust Law*, 51 LOY. U. CHI. L. REV. 679 (2020) [hereinafter Carstensen, *Dental Cavities*].

29. *See* Ohio v. Am. Express, 138 S. Ct. 2274, 2284 (2018).

30. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).

It identified the central functional reason for per se condemnation of agreements that involve only naked restraints of trade.

> [W]here the sole object of both parties in making the contract as expressed therein is merely to restrain competition . . . it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.[31]

In contrast, a court can evaluate a restraint that is "ancillary" to a legitimate productive transaction or venture based on whether the restraint reasonably protects the legitimate interests of the parties to the agreement.[32]

The resulting bright line from *Addyston Pipe* was that agreements resulting in naked restraints are absolutely illegal (or exempt if within the scope of some public authorization) while ancillary ones would be subject to further review to determine whether they were reasonable given the circumstances. Such restraints, whether vertical or horizontal, are the ones that *Addyston Pipe* identifies as being subject to some sort of reasonableness test. Subsequent Supreme Court decisions with few exceptions have applied this "rule of reason" only when the parties were in fact involved in some kind of productive transaction or venture.[33]

The 1979 *Broadcast Music (BMI)* decision reaffirmed the centrality of this distinction.[34] The *BMI* opinion rejected the application of a per se illegal label to a joint venture that marketed a music product (a license) that bundled a group of copyrights and set prices—hence a price fixing agreement among competing music producers.[35] The Court observed:

> Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services, they are literally "price-fixing," but they are not *per se* in violation of the Sherman Act. Thus, it is necessary to

31. *Id.* at 282-83.

32. *Id*.

33. *See* Peter C. Carstensen, *Lost in (Doctrinal) Translation: The Misleading Retelling of the Supreme Court's Antitrust Decisions on Restraints of Trade*, 62 SMU L. REV. 525 (2009) [hereinafter Carstensen, *Lost*].

34. Broad. Music, Inc. v. CBS. 441 U.S. 1 (1979).

35. *Id.* at 15.

> characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price-fixing." [36]

Similarly, the *Northwest Wholesale Stationers* decision in 1985 rejected a per se label applied to a collective refusal to deal by a cooperative that supplied its members with a variety of stationary goods.[37]

What greatly confuses the recognition of this functional analysis is the use of the per se label to describe what is really a presumption of illegality in cases in which the parties are in fact engaged in a joint productive venture. The best example is the Supreme Court's decision in *United States v. Topco* involving the allocation of territories among its participants.[38] The Court first condemned this plan as "per se violations."[39] On remand, however, the trial court preserved the restraint in a less restrictive form, and the Supreme Court upheld the decision in a memorandum order without opinion.[40] The older case law on vertical price fixing is another example of presumptive illegality.[41] The prohibition on tying is also labeled a per se rule, but in fact requires proof that there is an unreasonable and adverse effect on competition—the classic components of a rule of reason case.[42]

Contemporary doctrinal language often uses the term "quick look" to describe these kinds of decisions.[43] Regrettably, that same label is also applied to cases involving naked restraints where it takes only a "quick look" to determine that there is no authorization for the conduct.[44] Moreover, although courts may refer to specific restraints as naked or ancillary, the centrality of this functional analysis has not been made pivotal in conventional doctrine. Hence, there is a disconnect between the doctrinal language explaining when the per se rule applies and when the rule of reason applies. As a result, this functional distinction is submerged in a formalistic use of labels.

Further confusing the analysis, as noted earlier, some of the "per se" cases are functionally presumptions of illegality while many rule of reason cases functionally employ a presumption of legality which avoids

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36. *Id.* at 9 (citing United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898)).

37. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985).

38. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

39. *See id.* at 608.

40. *Id.*; United States v. Topco Assocs., Inc., 414 U.S. 801 (1973) (noting that only Justice Douglas favored full briefing).

41. *See* Carstensen, *Lost*, *supra* note 33.

42. Tying involves the conditioning of the purchase of one good or service on the buyer's taking a second good or service. *See, e.g.*, Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984**) (**tying is illegal when the party engaged in tying has market power); *cf.*, N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

43. *See* Polygram Holdings v. FTC, 416 F. 3d 29 (D.C. Cir. 2005).

44. *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).

any detailed analysis of the ancillary nature of the restraint at issue.[45] Conversely, some of the decisions upholding naked restraints based on informal authorization describe the analysis as an application of the rule of reason when in fact the courts have considered whether the naked restraint was authorized and within the scope of that authorization.[46] The descriptive poverty of doctrinal explanations for analyses of restraints of trade is, thus, a major impediment to doctrinal coherence. The goal of this Article is not to reform antitrust doctrinal language but rather to stress the centrality of function to the results of restraint of trade cases.

II. A FUNCTIONAL ANALYSIS OF INFORMATION EXCHANGES AND THE ROLE OF ECONOMICS

Functionally pooling or exchanging competitively sensitive information usually is a naked agreement, i.e., it has no productive role. So, if it functions to restrain the parties' competitive freedom of action, then it should be illegal. Of course, it could be ancillary to a transaction or venture involving two or more rivals. Hence, as in restraint analysis generally, it is important to distinguish the underlying function of the restraint. There is also the possibility that a particular exchange agreement does not create a restraint. Thus, unlike with overtly cartelistic agreements, it is the plaintiff's burden to establish that the specific exchange has the function of restraining competition among the rivals exchanging such information. Indeed, experimental economics provides important insights into how such communications are likely to affect competition. Finally, it is useful to explain why a standard economic analysis of such information exchanges is only marginally relevant to their legal status even if the analysis may well be very significant as to the existence of specific damages.

A. Application of Naked Restraint Analysis to Information Exchanges

When parties to an exchange of competitively sensitive, confidential information are not engaged in a related productive transaction or venture, their exchange is not ancillary. Instead, its only function is to provide the

45. An example is *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) which effectively created a presumption of legality for resale price maintenance because a plaintiff had to prove that there was a market effect before it could even contend that the function of the restraint was naked.

46. *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999); *see generally* Carstensen, *Dental Cavities*, *supra* note 28.

participants with information. Hence, it is a naked agreement which, if it were a contract, would be void and unenforceable.[47]

Under what circumstances would rivals exchange such otherwise confidential information or pool it in ways that provide insights into their competitive capacity and plans? The most likely explanation is that they expect and intend to dampen (i.e., restrain) each other's competition.[48] Knowing that its rivals will know exactly what the firm has in inventory and in production, as well its current prices, costs, etc., will necessarily inhibit its undertaking of any aggressive competitive stance because it will know that its rivals will have knowledge of its actions. Hence, those rivals will be able to respond quickly and effectively to the firm's market choices. Indeed, rivals sharing such information of necessity must have an understanding that they will not compete vigorously.[49]

However, there are a few plausible explanations for why rivals who are not engaged in a related productive transaction or venture may agree to exchange or pool confidential information that would be consistent with there being no restraint on their future decisions. Rivals might only want to have a better idea of how their costs compare to those of others in the same or related industries.[50] To do this they would need to share sensitive information about capacity, input costs, inventory practices, and possibly industry techniques; each based on agreed and consistent criteria used to develop industry averages and comparative benchmarks. Such benchmarking in turn would allow each participant to identify areas in which it might improve as well as the areas in which it already has an advantage. To be useful, this kind of information needs to be developed using standard definitions that permit comparison. In addition, it would seem inconsistent with this explanation for firms to directly share their own information. Instead, it would be more consistent and logical for a third-party consultant to collect and aggregate this data. What the participating rivals need are measures of the mean and median of relevant aspects of their business as well as some understanding of the dispersion

47. *See* RESTATEMENT (SECOND) OF CONTS. § 187 (AM. L. INST. 1981); *see also* Joseph E. Harrington, Jr. & Christopher R. Leslie, *Horizontal Price Exchanges*, 44 CARDOZO L. REV. 2301 (2023).

48. As shown earlier, *see supra* text accompanying notes 4-8, in perfectly competitive markets this inference would not hold because knowledge of the details of another business in the same line would have no effect on the incentives of the business receiving this information.

49. It is well established law that conduct as well as verbal commitment can create an agreement that restrains trade conduct. *See* Interstate Cir., Inc. v. United States, 306 U.S. 208, 307-08 (1939) ("[K]nowing that concerted action was contemplated and invited, the . . . [rivals] gave their adherence to the scheme and participated in it. Each . . . knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which . . . was unreasonable within the meaning of the Sherman Act . . . .").

50. This is more than an exchange of "best practices" because the goal is to allow more specific comparison of various elements of a business based on data from other businesses.

(high value to low value) of those factors.[51] The resulting information should not be company or plant specific, as its only function is to provide a basis for individual firms to benchmark their performance and make unilateral decisions about what to do.

A second potential explanation for the exchange of otherwise confidential data on contemporary sales prices is the need for a better understanding of current prices. For many commodities there are public markets that provide key information about present and future prices. The Chicago Mercantile Exchange is an example of one such public market.[52] But for other commodities that are sold directly to buyers, ascertaining prevailing prices can be a more challenging task. Private services exist to provide that information for many of those commodities.[53] These services obtain information about transactions usually from both buyers and sellers to provide reliable indexes of prices together with, in at least some circumstances, the quantities involved.[54] The United States Department of Agriculture, for example, collects and publishes information on many agricultural products.[55] Other government agencies collect price and output data on other commodities, such as oil.[56] Government indexes, like those of private services, are available to all market participants.[57] Once it has this information, a business can, after considering its costs and capacity, make decisions about the quantity to produce and the prices likely to prevail in the market.

Where production of a commodity takes time and can vary, forward-looking estimates of supplies or prices—the two are highly correlated—are important components of a business's planning, as well as the planning of its customers and suppliers. Hence, in the absence of third-party services, rivals might plausibly want to have some information about current average prices for inputs or outputs to see how the prices they pay or receive compare. If that information is provided in a way that

51. Indeed, since the goal is to inform each firm of its relative capacity, the aggregated data from a sample of firms should usually be sufficient to provide the necessary insight.

52. *See* CME GRP., https://www.cmegroup.com/ (last visited Oct. 6, 2023). The CME provides a forum in which traders can buy and sell both futures and current supplies of various commodities and financial instruments.

53. For example, Urner Barry provides information on prices for a variety of commodities. *See* URNER BARRY, https://www.urnerbarry.com/ (last visited Oct. 6, 2023).

54. *See, e.g.*, *Lumber Prices and Market Summary: Nov 2021 (Video)*, MADISON LUMBER REP., https://madisonsreport.com/lumber-prices/ (last visited Oct. 6, 2021) (reporting lumber prices on a weekly basis).

55. *See USDA Market News*, U.S. DEP'T OF AGRIC., https://www.ams.usda.gov/market-news (last visited Oct. 6, 2021) (listing a variety of price reports on various agricultural commodities).

56. *See, e.g.*, *Monthly Crude Oil and Natural Gas Production*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/petroleum/production/ (reporting monthly production figures for petroleum).

57. Private research services, such as Urner Barry, see *supra* note 53, charge for their information which can result in restricting stakeholders' access.

all stakeholders have equal access to it, then there is a plausible argument that such information pooling could serve a legitimate market facilitating interest. However, when rivals keep such information confidential and limit access, the foregoing inference is no longer plausible. Moreover, when the number of rivals competing in the market declines, the claim that firms need to pool price information becomes increasingly questionable, as markets are likely to involve interdependent buying and selling already. More detailed price information is very likely to only serve the function of deterring price competition.

Regional wage information is another example where public sources may not be sufficient. To hire and retain employees, employers can plausibly argue that they need an understanding of the range of current wages and benefits for comparable kinds of workers. Regional wage surveys by public agencies can often provide this information.[58] Recently, local and state laws have required that employers post pay ranges when advertising job openings; these posted pay ranges also provide sufficient information for competing rivals.[59] But, it is possible that in some regions such information may not be available.[60] Hence, competing employers might pool such information though a third party in an aggregated and fully anonymized form. However, if such information is kept confidential among rival employers, then it only serves the function of discouraging wage competition and increases the informational difference between prospective employees and employers. If wage and benefit information is easily available to all stakeholders, then it is less likely that competition will be restrained. Instead, employees, even if they have limited bargaining power with respect to their own employer, will be able to seek alternative employment.

A further example is the sharing of credit information concerning customers both generally and within specific industries. It is competitively sensitive because it can affect the terms of a transaction, but here third parties share such information to enhance their capacity to make credit decisions. A seller asked to give credit has a manifest interest in knowing the creditworthiness of the buyer. Much of that information is

58. *See, e.g.*, *Overview of BLS Wage Data by Area and Occupation*, available at https://www.bls.gov/bls/blswage.htm.

59. For example, New York City recently imposed this requirement. *See Salary Transparency in Job Advertisements*, N.Y.C., https://www.nyc.gov/site/cchr/media/pay-transparency.page#:~:text=Effective%20November%201%2C%202022%2C%20the,range%20in%20all%20job%20advertisements (last visited Oct. 6, 2023). The motivation appears largely to be based on an interest in limiting wage discrimination based on the gender or race of job seekers. *Id.*

60. Such information sharing is relevant only in situations where there are a substantial number of rivals because as the number of competing employers declines it will be increasingly possible to infer the wage and benefits offered by the competing rival.

now available through credit rating agencies.[61] Still, there may be types of business for which agency information is insufficient to make necessary decisions and a pooling of experiences might be useful. Again, the characterization of the exchange will depend on the use made of the information. If the rivals make it a practice to refuse to deal with any buyer that has a negative credit report, that would suggest that the reports are being used as a collective coercion tool. On the other hand, if rival sellers make sales on multiple terms that simply include, rather than rest on, credit history, then the agreement to exchange information does not operate as a restraint on the seller's decision.

The foregoing examples are probably not the only possible explanations for a naked exchange of competitively sensitive information that is not a restraint. However, the discussion of the merits of exchanging information in the case law is usually abstract and generalized. Those discussions rest on the premise that efficient markets require information. Rarely do the courts examine how specific exchanges of otherwise confidential information would facilitate that efficiency rather than restrain the rivals from competing.

B. Distinguishing Exchanges Ancillary to Transactions or Ventures

An agreement to exchange competitively sensitive information between two rivals might be ancillary to some productive joint venture or transaction between those firms. Such an exchange of information being part of a productive transaction is not a naked restraint. Mergers and acquisitions are examples of this. Indeed, there are some reasonably clear standards governing how information should be exchanged during those types of negotiations because of the obvious risk that if the combination does not occur, the parties may lose their incentive to compete with each other.[62]

If, instead, the parties propose to engage in a joint venture, again they will need to share information about production, distribution, and prices. Transactions and ventures that require ongoing relations between the

61. *See, e.g.*, *List of Consumer Reporting Companies*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/consumer-tools/credit-reports-and-scores/consumer-reporting-companies/companies-list/#:~:text=There%20are%20three%20big%20nationwide,and%20other%20inquiries%20and%20information.

62. *See* Holly Vedova et al., *Avoiding Antitrust Pitfalls During Pre-Merger Negotiations and Due Diligence*, FTC BUREAU OF COMPETITION (Mar. 20, 2018), https://www.ftc.gov/enforcement/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger-negotiations-and-due-diligence.

parties can necessitate sharing of information.[63] The same kind of information exchange is also likely in franchise and vertical distribution contexts. Here, again, detailed information on inventory, sales, etc., can be very important for the upstream and downstream planning of production and pricing.

The central distinguishing characteristic of an ancillary information exchange is that all the parties to that exchange are participants in an identifiable transaction or productive joint venture. It should therefore be relatively easy to distinguish these situations. To be sure, there would remain the question of whether the information exchanged is necessary for the transaction or venture. But because most such exchanges are at least arguably ancillary, a different legal analysis is needed, as will be discussed later.

C. The Problem of Characterization of Some Communications

As discussed earlier, not all communications among rivals fit into the category of information pooling. Indeed, these communications can be ambiguous. The central characteristic of an information exchange or pool is that there is a consistent pattern of providing rivals, directly or through a third party, with confidential, competitively sensitive information. This can, however, be relatively informal, such as the practice of flat glass manufacturers to share proposed changes in their list prices with each other.[64] The evidence showed a pattern of such exchanges, which in turn established that there was an understanding between the manufacturers to exchange the list price information.[65] However, in *In re Flat Glass*, the court only used this exchange of list price information as a basis to infer an underlying agreement to fix prices.[66] In both the *Chocolate* and *Text Messaging* cases, the intermittent exchange of information among lower-level employees—while potentially probative of collusion on some dimension of competition—would not seem to support an inference of an agreement to pool information.[67] In contrast, in both *Container Corp.* and *Gypsum*, there were patterns of exchanging specific confidential

63. *See, e.g.*, United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975).

64. *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 359-60 (3d Cir. 2004).

65. *Id.* at 363-68.

66. *Id.* at 368-89. The court refused to find collusion with respect to auto glass sales, *see id.* at 369-70, despite the fact that all competitors shared otherwise confidential list prices with an entity that then recommended retail prices. This system coordinated competition among the glass manufacturers even if it did not qualify as a "price fix." It provided a means to restrain competition among these rivals in this market.

67. *See In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015); *see also In re* Text Messaging Antitrust Litig., 782 F.3d 867 (7th Cir. 2015).

information by sales personnel.[68] Hence, the agreement to exchange confidential information was a reasonable inference.

D. The Contribution of Experimental Economics

The role of information and communication among rivals is the subject of a number of studies using experimental economics.[69] The contending hypotheses stated that improved information about rivals would increase competitiveness in markets[70] or that it would facilitate collusive conduct.[71] Experiments focused on providing extensive market information without any communication among the decision-makers found that the results included improved competitive performance.[72] In contrast, when rivals could communicate with each other in addition to having information about everyone's past or present conduct, the results included nearly perfect coordination of competition that maximized the shared monopoly profits of the firms.[73] Further, even if the firms only had aggregate market data but could communicate, the results included increased prices and reduced output.[74]

These experiments used groups of individuals who were given data and asked to determine price and output. These experiments separated access to information from communications about that information. When the participants could not communicate with each other, the results approximated that of a perfectly competitive market.[75] This confirms the standard economic model of perfect competition. But when the participants could communicate as well, the same information became

68. *See* United States v. Container Corp. of Am., 393 U.S. 333 (1969); United States v. U.S. Gypsum Co., 438 U.S. 422 (1978).

69. *See generally* Marco Haan et al., *Experimental Results on Collusion*, *in* EXPERIMENTS AND COMPETITION POLICY 9 (Jeroen Hinloopen & Hans-Theo Normann eds., 2009).

70. *See* Fernando Vega-Redondo, *The Evolution of Walrasian Behavior*, 65 ECONOMETRICA 375 (1997).

71. *See* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON., 44, 48-49 (1964) (arguing that firm-specific information facilitated collusion as it revealed secret price cuts).

72. Steffen Huck et al., *Learning in Cournot Oligopoly – An Experiment*, 109 ECON. J. 80, 81 (1999); Steffen Huck et al., *Does Information About Competitors' Actions Decrease or Increase Competition in Experimental Oligopoly Markets?*, 18 INT'L J. INDUS. ORG. 39 (2000); Stephen Rassenti et al., *Adaption and Convergence of Behavior in Repeated Experimental Cournot Games*, 41 J. ECON. BEHAV. & ORG., 117 (2000); Theo Offerman et al., *Imitation and Belief Learning in an Oligopoly Experiment*, 69 REV. ECON. STUD. 973 (2002).

73. Miguel A. Fonseca & Hans-Theo Normann, *Explicit vs. Tacit Collusion – The Impact of Communication in Oligopoly Experiments*, 56 EUR. ECON. REV. 1759 (2012); Miguel A. Fonseca & Hans-Theo Normann, *Endogenous Cartel Formation: Experimental Evidence*, 125 ECONS. LETTERS 223 (2014).

74. Francisco Gomez-Martinez et al., *Firm-Specific Information and Explicit Collusion in Experimental Oligopolies*, 82 EUR. ECON. REV. 132 (2015).

75. *See supra* note 72.

central to coordinating production and prices.[76] The participants became rivals in these experiments and so coordination of production and price was both possible and economically desirable whenever feasible.

This body of work serves to provide strong support for the functional analysis proposed in this Article. When rivals share detailed, competitively sensitive information, they are also communicating directly or indirectly, and the results are very likely to be anticompetitive. While there are contexts in which sharing information can have a legitimate function, the risks even then of anticompetitive effects are significant.[77] Hence, there should be a strong presumption against rivals communicating such information with each other directly or indirectly.[78]

E. The Limited Relevance of an Economic Analysis of Actual Effects

Professor Harrington and two economic consultants disagree about the competitive effects of exchanging list prices where sales are rarely, if ever, made at those prices. This debate illustrates the limited importance of proof of economic effects for a determination of the legality of an agreement to exchange information.[79] Professor Harrington provided a proof based on standard economic assumptions which shows that the secretive exchange of such information could have a significant adverse effect on prices because the parties would have strong incentives to stabilize list prices at higher levels.[80] The consultants' response conceded that such effects were plausible under some circumstances given the assumptions that Professor Harrington had made, but showed that as the number of firms increased, the effect would decrease.[81] The consultants also claimed that under some alternative assumptions, there would be no effect if the parties focused on stabilizing output (as in Cournot competition) rather than prices (as in Bertrand competition).[82] These economic analyses provide useful insights into the market conditions under which one would expect rivals to agree to exchange such

76. *See* Gomez-Martinez et al., *supra* note 74.

77. *See id.* (discussing implications of transparency on financial markets).

78. Haan et al., *supra* note 69, at 28 ("As we noted already in our introduction, direct communication between firms has a strong and positive effect on the ability to collude."). Among other venues for communications are trade associations, trade shows, and collective efforts to lobby at the state and national levels. While all of these opportunities cannot be forbidden, reasonable efforts to police them might limit the resulting communication.

79. *See* Harrington, *supra* note 16; Timo Klein & Betram Neurohr, *Should Private Exchanges of List Price Information Be Presumed to Be Anticompetitive?*, 23 J. INDUS., COMPETITION & TRADE 33 (2023); *see also* Harrington & Leslie, *supra* note 47.

80. Harrington, *supra* note 16.

81. Klein & Neurohr, *supra* note 79, at 39-46.

82. *Id.* at 46-52.

information, though they do not address at all whether there is an agreement to exchange information or whether such an exchange functions to restrain competition. Indeed, Professor Harrington's critics were hard pressed to postulate a procompetitive explanation for such an agreement. Indeed, they acknowledged that their argument goes only to "anticompetitive impact" of such conduct, i.e., its price effect.[83] While asserting that there might be procompetitive reasons for keeping price lists confidential and for only sharing them on a confidential basis, Professor Harrington's critics do not identify any specific reason for the exchange that would be procompetitive.[84]

This example shows that conventional economic analysis focuses on the consequences of information exchange. Such an analysis is essentially indifferent as to the function of the exchange itself, and instead, its concern is with determining the effect on price, output, and other economic variables. This is helpful in contexts such as merger and monopoly analyses. It is also relevant to private damage claims as shown earlier in this Article. But as with other types of naked restraints, such analyses are irrelevant to the initial issue of the legality of the agreement itself.

Competition law, as opposed to such an economic analysis, is concerned with the nature of the market process itself.[85] To effectively police market conduct, private appropriation of the power to determine market results must be rejected. In some circumstances, some restraints might appear desirable, but that should not detract from the fundamental principle of competition law that all naked restraints of competition are inherently unlawful unless authorized. Consequently, there can be tension between the goal of ensuring workably competitive markets and the goal of maximizing consumer welfare.[86] This tension is not well recognized in the discourse on competition law but lies at the center of the ambiguous definitions of the rule of reason that are invoked to justify some naked restraints.[87] The analysis in this Article proceeds on the assumption that the primary goal of competitive law is to preserve, protect, and enhance the competitive process. The assumption that the law's goal is to directly maximize economic welfare regardless of the means would lead to

83. *Id.* at 53.

84. *Id.* at 54 ("If, in addition to keeping list prices private, there are also benefits to exchanging list price information with competitors (e.g., along the lines discussed above), then there would be a procompetitive feature specific to a *private* information exchange: namely that it would allow both the benefits of the information exchange and the benefits of list prices remaining private to materialize.").

85. *See supra* text accompanying notes 23-46.

86. See, e.g., Leon B. Greenfield et al., *Antitrust Populism and the Consumer Welfare Standard: What Are We Actually Debating*, 83 ANTITRUST L. J. 393 (2020).

87. *See* Carstensen, *Dental Cavities*, *supra* note 28.

upholding some cartelistic conduct.[88] But using consumer welfare, however defined, as the primary goal of competition law is unlikely to result in upholding most information exchange. It would, however, provide a stronger basis for the argument that the focus should be on actual effects.

III. THE LEGAL AND FUNCTIONAL ANALYSIS OF INFORMATION EXCHANGES AND COMMUNICATIONS AMONG COMPETITORS

A. The Evolution of American Doctrine

The analysis of the pooling of information among rivals has been the subject of antitrust cases since the early history of antitrust. The first major Supreme Court case, *American Column Co. v. United States*, involved the pooling of detailed information including inventory, sales, current prices, and orders among the major flooring producers.[89] The manager of the trade association consolidated and analyzed the information and then went to meetings of flooring association members to explain the implications of this data in terms of production.[90] There was no express agreement to restrict production.[91] Because the participants operated about 5% of all flooring mills but produced about one-third of the total production in the country, they had a great ability to control output; this data provided the basis on which these producers could affect price by restricting output.[92] The Court majority condemned the arrangement despite the relatively modest market share collectively held by the participants. The evidence also showed that prices had remained high despite a dramatic decline in demand. The decision focused on the function of the agreement:

> It has been repeatedly held by this Court that the purpose of the statute is to maintain free competition in interstate commerce and that any concerted action by any combination of men or corporations to cause, *or* which in

88. There are cases, such as the one involving territorial allocations among firms that searched heirs to estates, in which the claim is plausibly made that the cartel resulted in lower costs which in turn could increase output even at collusively set prices. Despite a lower court's initial willingness to consider that as a consumer welfare defense, the court of appeals rejected that effort and demanded a per se result. *See* United States v. Kemp & Assocs., Inc., 907 F.3d 1264, 1278 (10th Cir. 2018).

89. Am. Column Co. v. United States, 257 U.S. 377 (1921).

90. *Id.* at 392-93.

91. *Id.* at 393.

92. *Id.* at 392. Given the disparity between the number of participants and their volume compared to the rest of the industry, it is a reasonable inference that the remaining firms were small with relatively fixed productive capacity. Brandeis reports that there were more than 9,000 flooring mills in the country at that time. *Id.* at 413.

> fact does cause, direct and undue restraint of competition in such commerce falls within the condemnation of the Act and is unlawful.[93]

Indeed, the only plausible functional explanation for pooling such information was that there was a mutual understanding among the rivals that they would moderate and restrain their competition by limiting production given that they knew exactly what every other major rival was doing. But Justices Brandeis, Holmes, and McKenna dissented, emphasizing that markets need information to be efficient, which apparently included the kind of detailed, confidential information being pooled.[94]

Shortly after that, the Court reviewed an agreement among rival linseed oil manufacturers that pooled price and output data that a third party collected and coordinated.[95] The third-party coordinator provided the participating firms with detailed information about each other's prices and plans.[96] The coordinator monitored claimed discounts from the published price lists of the rivals and imposed penalties for deviations.[97] The underlying agreement, however, provided that the parties were not to use their monthly meetings or their information to fix prices or allocate markets. Nevertheless, the Court reversed the trial court's dismissal of the government's case: "If, looking at the entire contract by which they are bound together, in the light of what has been done under it, the Court can see that its necessary tendency is to suppress competition in trade between the states, the combination must be declared unlawful."[98] Here again the function of the information exchange was to deter the participants from discounting because any such effort would be immediately revealed and sanctioned. Thus, an express price fix was not necessary to ensure a general increase in prices because of the information exchanged.

A few years later, in 1925, the Court rejected a challenge to the Maple Flooring Manufacturers' Association's practice of providing its members information about the average cost of production, freight rates from a location central to the primary area of production, and detailed

93. *Id.* at 400 (emphasis added). The "or" in this statement is significant in terms of a per se understanding of this conduct.

94. *See id.* at 413-19 (Brandeis, J., dissenting); *id.* at 412-13 (Holmes, J. dissenting). For a fuller analysis of Brandeis's position see Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, 15 RSCH. L. & ECONS. 1, 63-65 (1992).

95. United States v. Am. Linseed Oil Co., 262 U.S. 371 (1923). As will later be stressed, this is a per se type of condemnation based on a quick look. at the agreement because it had no other function than the suppression of competition.

96. *Id.* at 379-85.

97. *Id.*

98. *Id.* at 389.

information about inventory and sales.[99] The majority asserted that the record did not show uniformity of prices, and that the information exchanged by these rivals concerned only past transactions.[100] Hence, they rejected the government's challenge to this information exchange: "[T]he sole question presented by this record . . . is whether the combination of the defendants . . . as actually conducted by them, has a *necessary* tendency [function] to cause direct and undue restraint of competition . . . ."[101] However, the opinion also declared that "information, gathered and disseminated . . . may be the basis of agreement . . . to lessen production arbitrarily or raise prices . . . . Such concerted action constitutes a restraint . . . and is illegal . . . ."[102]

This decision defined the agreement among a substantial number of flooring producers to pool information as one that only improved individual market sophistication by providing better information about current market conditions.[103] The lack of evidence of uniformity of prices was important for the majority.[104] But a significant functional fact was that most sales were on a delivered basis (i.e., the sales included rail freight charges) which meant that net prices to sellers in different geographic locations would vary.

Given a dispersed group of producers, often in relatively isolated locations necessary for their productive activities, a system that provided information about market conditions had a plausible justification.[105] The Court's opinion emphasized that the information exchanged about prices and inventory related to past events and not current ones.[106] The exception was a book containing freight rates from Cadillac, Michigan that was used in setting delivery prices.[107] Here, arguably, the need-to-know rates to thousands of locations justified a system from which the producers could make a reasonable allowance for shipping costs in calculating their overall bid.

99. Maple Flooring Mfrs. Ass'n. v. United States, 268 U.S. 563, 586 (1925).

100. *Id.* at 568.

101. *Id.* at 578.

102. *Id.* at 585.

103. There had been both a significant change in the composition of the Court since the *Linseed* decision, and its new members were supportive of the "open competition" movement that emphasized cooperation among competitors to stabilize prices. *See generally* LOUIS GALAMBOS, COMPETITION AND COOPERATION: THE EMERGENCE OF A NATIONAL TRADE ASSOCIATION (1966). Moreover, Justice Stone, the author of this decision and the *Cement* decision was a friend of Herbert Hoover, the Secretary of Commerce, who was a strong proponent of the cooperative endeavors. M. Browning Carrott, *The Supreme Court and American Trade Associations, 1921-1925*, 44 BUS. HIST. REV. 320, 335 (1970).

104. *Maple Flooring Mfrs. Ass'n*, 268 U.S at 567-68.

105. *Id.* at 566.

106. *Id.* at 573.

107. *Id.* at 571-72.

The Court announced a similar result that same day in a case involving the pooling of information by cement manufacturers with respect to job-specific contracts.[108] These contracts committed manufacturers to deliver a set quantity of cement at a stated price for a proposed project so that contractors could make a firm bid.[109] Several cement manufacturers might well make such commitments to one contractor. When the price of cement went up in the period prior to the awarding of the contract, a successful contractor might claim cement from more than one of its potential suppliers. The cement producers, therefore, established a system of reporting that allowed each to determine if any other producer was also delivering cement for the same job.[110] Having that information, one or more producers could refuse to deliver.[111] Thus, the function of this exchange was to facilitate refusals to deal and so avoid creating price competition.[112]

The Court majority took the view that even with the knowledge that a rival was delivering cement for a project, each company made an independent decision about whether it too would deliver cement to that contractor.[113] Hence, the information exchanged among rivals did not, in the Court's view, function to restrain their individual decisions.[114] The Court took the view that a contractor taking from multiple suppliers was engaged in a deception because it represented that the cement being taken was for use on a specific job when in fact it was diverting some of that cement to other jobs.[115] But this would seem to misperceive the function of the exchange, which was to ensure that sellers did not sell at the lower prior price that they had quoted (with the sole exception of one seller selling for a specific job). Because of the sharing of delivery information, no rational seller would adhere to its original prices if it could avoid delivering on the contract. Thus, this exchange of information resulted in a collective buyer boycott.

The opinion also described a system of using common freight rate books and basepoint pricing, which caused prices to buyers to be uniform

108. Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925).

109. *Id.* at 591.

110. *Id.* at 603.

111. *Id.* at 604.

112. This information exchange is different from that involving credit as the sellers had in each instance agreed to make the sale at the price proposed. While the buyer might be acting opportunistically in taking more cement than it needed for a specific job, the identity of the job is not necessarily a central element in the transaction which is primarily an option to buy a set quantity of cement at a set price if the buyer chooses to act on the option.

113. *Cement Mfrs. Protective Ass'n*, 268 U.S. at 605-06.

114. *Id.*

115. *Id.* at 604-05.

at any point in the country.[116] The Court chose to believe that the individual manufacturers remained entirely independent in their pricing decisions and that they did not rely on the detailed information they obtained to restrain these pricing decisions.[117] About two decades later, the Court would find this same pattern of delivered pricing relying on a basepoint system to be unlawful because it believed its only function was to restrain competition.[118] But in 1925, the Court majority was not yet able or willing to appreciate how this information exchange in the context of a highly fungible product would function to restrain an individual firm's pricing decision.

Three justices dissented from *Maple Flooring* and *Cement*. The very short dissent from Justices Taft and Sanford declared that the facts of both *Maple Flooring* and *Cement* fell within the scope of the conduct condemned by *American Column* and *American Linseed*.[119] Justice McReynolds observed that the records "disclose carefully developed plans to cut down normal competition in interstate trade and commerce."[120] Thus, the dissenters saw the function of these information exchanges as restraints on competition.

In 1936, the Court revisited the question of information exchange in the *Sugar Institute* case involving a scheme that included a commitment by rivals to refuse to give discounts off of publicly announced prices; and sharing of confidential, sensitive information that was not made publicly available.[121] The opinion recognized that some sharing of information among rivals, especially if it was publicly disclosed, could improve market processes, but the agreement at issue involved both express commitments as to how the rivals would compete (e.g., agreeing to give up any secret discounts to capture business from rivals), and sharing any information necessary to ensure adherence to this agreement. Seven of the Justices supported this decision, while Justice Stone, the author of the *Maple Flooring* and *Cement* decisions, and Justice Sutherland, who had also been in the majority, did not participate.[122] Because the parties had bundled the information exchange with an explicit restraint on

116. *Id*. at 591-92.

117. *See id.* at 593-602, 603-06.

118. *See* FTC v. Cement Inst., 333 U.S. 683 (1948).

119. Maple Flooring Mfrs. Ass'n. v. United States, 268 U.S. 563, 586 (1925) (Taft, C.J., dissenting).

120. *Id.* at 587 (McReynolds, J., dissenting).

121. Sugar Inst., Inc. v. United States, 297 U.S. 553 (1936). The facts were similar on the discounting issue to those in *United States v. American Linseed Oil Co*., 262 U.S. 371 (1923). *See also* David Genesove & Wallace P. Mullin, *Rules, Communication, and Collusion: Narrative Evidence from the Sugar Institute Case*, 91 AM. ECON. REV. 379 (2001).

122. *Sugar Inst., Inc.*, 297 U.S. at 605. Once again there had been a significant shift in the composition of the Court as well as an emerging concern with the political implications of state-sponsored cartels, as seen in Italy, Germany, and Japan. *See generally* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966).

discounting from list prices, the impact of this decision on the development of standards governing pure information exchange was ambiguous in light of the earlier *Maple Flooring* and *Cement* decisions.

Agreements verifying a rival's price or offered price were the subject of two Supreme Court decisions. In *Continer Corporation*, a civil case decided in 1969, the Court seemed to declare that such verification was inherently unlawful absent a "controlling circumstance."[123] The case involved the sale of boxes and an agreement to provide potential rivals with the prices currently being charged to a specific customer for which the rival proposed to compete. This information meant that the rival could undercut the current supplier's prices, but then the exchange of information would make no business sense. If, instead, the rival used the information to make its bid at the same price as the current supplier, any transfer of business would not result in a price war. Thus, the function of this information exchange was only to restrain the incentive to compete on price.[124] As in prior cases, the criteria used by the Court to determine whether this exchange was illegal were ambiguous. Justice Fortas's frequently cited concurrence rejected a per se label, but focused on a functional analysis of the specific information exchange.[125] While he cast his analysis in terms of evidence of effects, what he pointed to was the fact that after having the exchanged information, the rival quoted the same price to its desired customer.[126] Thus, Justice Fortas's ultimate conclusion was that "[the] defendants' tacit agreement to exchange information about current prices to specific customers did, in fact, substantially limit the amount of price competition in the industry."[127]

The second case, *U.S. Gypsum*, a decade later, involved a criminal prosecution in which a group of rival dry wall manufacturers agreed to verify prices offered to buyers when the buyer claimed another potential seller had offered a price below the dry wall's list price.[128] The Court reversed the criminal convictions in this case based on an error in the instructions related to intent, but it also addressed several other issues raised in the case including the defense offered for the exchange of information. Here, the defendants claimed that the Robinson-Patman

123. United States v. Container Corp., 393 U.S. 333, 335 (1969) (referencing the *Cement* decision).

124. *Id.* at 336-37 ("The result of this reciprocal exchange of prices was to stabilize prices. Knowledge of a competitor's price usually meant matching that price.").

125. *Id.* at 339 (Fortas, J., concurring) ("There is no single test to determine when the record adequately shows an 'unreasonable restraint of trade'; but a practice such as that here involved, which is adopted for the purpose of arriving at a determination of prices to be quoted to individual customers, inevitably suggests the probability that it so materially interfered with the operation of the price mechanism of the marketplace as to bring it within the condemnation of this Court's decisions.").

126. *Id.* at 339-40.

127. *Id.* at 340.

128. United States v. U.S. Gypsum Co., 438 U.S. 422 (1978).

prohibition on discriminatory discounts required verification to satisfy the statutory exception for a good faith matching of a rival's price:[129] "Regardless of its putative purpose, the most likely consequence of any such agreement to exchange price information would be the stabilization of industry prices."[130] The Court, however, also noted that:

> The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed, such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act. . . . A number of factors, including most prominently the structure of the industry involved and the *nature of the information exchanged*, are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication.[131]

What the Court did not say was that the conventional rule of reason applied. Rather, its statement about factors focused on understanding the function (i.e., the likely effects) of the information pooling or exchange in the context of the specific industry.[132] Indeed, the "structure of the industry" phrase would seem to focus on factors that would make restraint of competition a plausible strategy based on the uniformity of the product and the nature of rivalry in sales.[133] Certainly, as the number of rivals declined, i.e., as concentration increased, the inference that any exchange of information among such rivals would restrain their competition increased.

Further confusion came from the *Citizens & Southern* decision in 1975 which involved the acquisition of a group of affiliated banks after state law allowed banks to expand geographically.[134] The government contended that these small banks were independent of the large bank that was a minority stockholder in them. The Court, however, took the view that the small banks were affiliates and part of a joint enterprise. Hence, the extensive evidence of information exchange among these banks that led to coordinated rates for loans and deposits was not evidence of an

129. *See* 15 U.S.C. § 13(b). (A firm charged with price discrimination may rebut "the prima-facie case . . . by showing that his lower price . . .was made in good faith to meet an equally low price of a competitor").

130. *U.S. Gypsum Co.*, 438 U.S. at 457.

131. *Id.* at 441 n.16 (emphasis added) (citations omitted).

132. *Id.*

133. *Id.*

134. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975).

illegal cartel. Instead, such exchanges were inherent in the affiliate relationship and thus ancillary to the underlying joint venture.[135]

Unfortunately, the lower courts have assumed that the *Gypsum* and *Citizens & Southern* decisions required that the conventional rule of reason used in cases involving joint ventures, transactions, and other similar contexts should apply to information exchange and pooling. The lower courts, therefore, have often required proof of dominance in a relevant market or proof of actual adverse effect on competition as predicates to finding exchanges of competitively sensitive information to be anticompetitive and per se unlawful.[136] Indeed, even the *Areeda* treatise, the most prestigious such work in antitrust, endorsed this position based on the assertion that exchange of information among competitors can be "procompetitive."[137]

In sampling these decisions, there is a striking lack of identification of the purported desirable effects of information exchange.[138] These cases rarely advance concrete claims that the specific exchange in some way facilitated more efficient market behavior. Rather, the cases presume desirable consequences in general and so impose on the plaintiff the burden of proving that there were adverse effects on competition. The plaintiff usually must also show that those effects occurred in a properly defined product and geographic market in which the rivals had collective market power. This ignores the implication from *American Column* that the proper way to determine an information exchange's legality is to focus on the function of the exchange.[139]

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135. *Id.* at 100, 109. *Cf.*, Peter C. Carstensen, *Regulating Banking in the Public Interest: The Case for an Open Approach to Chartering and Branching*, 57 TEX. L. REV. 1085 (1979) (describing and evaluating the restrictions on bank expansion under state and federal law).

136. *See, e.g.*, Found. for Interior Design Educ. Rsch. v. Savannah Coll. of Art & Design, 244 F.3d 521, 531 (6th Cir. 2001) (stating that the exchange of information can establish a violation of § 1 of the Sherman Act if it "produced adverse, anti-competitive effects within relevant product and geographic markets."); *In re* Baby Food Antitrust Litig., 166 F.3d 112, 126 (3d Cir. 1999) ("[C]ommunications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'"); Omnicare, Inc. v. UnitedHealth Grp., 629 F.3d 697, 707 (7th Cir. 2011) ("Information exchange can help support an inference of a price-fixing agreement . . . but, like all circumstantial evidence of conspiracy, it is not on its own demonstrative of anticompetitive behavior, even when pricing data is what is exchanged . . . .").

137. Five Smiths, Inc. v. Nat'l Football League Players Ass'n, 788 F. Supp. 1042, 1047 (D. Minn. 1992) ("[A]lthough information exchanges between competitors may affect price, such arrangements are 'universally excluded from the per se rule against price fixing' because of their procompetitive effects.") (quoting 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1510c, at 422 (1986)). The current edition, PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶ 2110-2115 **(**4th ed. 2019), retains the ambiguous analysis but seems to lean more toward skepticism with respect to many of the justifications for such exchanges of competitively sensitive information among rivals.

138. *See supra* note 136.

139. Am. Column Co. v. United States, 257 U.S. 377 (1921). One of the more extreme statements implies that the exchange of price information can never by itself violate antitrust law. *See* Cont'l

Today, the leading court of appeals decision written by then Judge and now Justice Sotomayor is *Todd v. Exxon*.[140] The case involved the pooling of information about employee classifications and the related wage levels that allowed the participating petroleum firms to benchmark their own systems. By standardizing job classifications and wage categories, participating industry rivals could restrict wage competition as well as restrict raising wages. Indeed, the only plausible function for such a scheme was to deter wage competition and wage increases. Moreover, the firms involved acknowledged that they had gained economically due to the exchange.[141]

Although the participants shared sensitive and confidential information on a continuing basis with the stated objective of standardizing their job classification systems, the trial court dismissed the complaint because of its belief that the market for the types of employees at issue was not unique to the industry at hand.[142] Hence, the benchmarking process could have had no effect on wages because the plaintiffs had a broader employment market and so standardized wage categories could have no effect. That of course then raised the question of why rivals would spend time, significant staff resources, and considerable money on a third-party service if the results would have had no economic effect. Nor did it change the functional explanation for the pooling of information.

In reversing the trial court's decision, Justice Sotomayor's opinion focused on the plausible allegations of a unique market for employees within the oil and gas industry even though individuals with the same skills as those employees were employed in other industries. Thus, the issue was whether the employers were "rivals" dealing with a subset of individuals with transferable skills within the oil and gas industry or whether the market was a nearly perfectly competitive one in which individual employees could consider all possible employers needing a specific skill. If the latter was correct, then arguably there was no harm to the plaintiff-employees even if the companies' conduct was an unlawful restraint. Hence, for purposes of resolving the question of how to characterize the information pooling's effect on the plaintiffs in their private damage action, it made sense to look at the information pooling's

Cablevision of Ohio, Inc. v. Am. Elec. Power, 715 F.2d 1115, 1119 (6th Cir. 1983) ("Accordingly, in the absence of a purpose or effect to restrain competition, or some other evidence of an actual agreement to restrain competition, we hold that the exchange of price data does not offend § 1 of the Sherman Act.").

140. Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001).

141. *See In re* Comp. of Managerial Pro., & Tech. Emps. Antitrust Litig., No. 02-CV-2924, 2008 WL 3887619 (D. N.J. Aug. 20, 2008). The decision, as discussed *infra* at notes 146-48, rejected antitrust liability but acknowledged that the defendants had reported that their wage payments were reduced as a result of this information exchange.

142. Todd v. Exxon Corp., 126 F. Supp. 2d 321 (S.D.N.Y. 2000) (assuming, without a record, that since the plaintiff was an accountant that those skills would transfer into any possible accounting job).

impact on wages for employees in the oil and gas industry. But, of course, market definition and market power measures are only indirect evidence of harm while direct measures of adverse changes in prices or wages are better evidence of effect.

The *Todd* opinion distinguished between conspiracies to fix wages and conspiracies to exchange information and held that the latter were subject to the "rule of reason" in light of the *Citizens & Southern* case, an inapposite decision.[143] *Gypsum*, which the *Todd* opinion then cites for its "rule of reason,"[144] had not used the term "rule of reason" when it had rejected a per se condemnation of all information. Indeed, *Gypsum* had focused on determining the function of the information exchanged and not on market power. Although the *Todd* opinion's focus on market definition served to refute the unfounded supposition of the trial court that there was free movement of labor among various industries, this approach reinforced the apparent need to establish market power as a predicate to finding that an exchange of sensitive information among rivals is unlawful. Following its market power analysis, the opinion focused on the exchange itself and, like *Gypsum*, pointed out that the information being exchanged had only one plausible function: to restrain wage competition.[145] Whether the legal treatment of information exchanges would have been different if the opinion had presented these two analyses in the opposite order is an interesting speculation.

On remand, a different trial judge in a different circuit after years of discovery and motion practice dismissed *Todd* on summary judgement.[146] That opinion focused on effects in rejecting the claim that the exchange of information restrained competition.[147] This is an example of how economic arguments mislead the analysis. For example, the goal of this exchange was to standardize categories of employment, which restrained the rivals. The record showed that the rivals claimed that it had had that

143. Todd v. Exxon Corp, 275 F.3d at 198-99 ("[T]he dissemination of price information is not itself a *per se* violation of the Sherman Act.") (quoting United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113 (1975)). The Supreme Court held that the banks involved were de facto branches of the parent bank, and so the information exchange was within the overall entity. *Citizens & S. Nat'l Bank*, 422 U.S. at 110-13. The Court made clear the same exchange would have raised serious questions if it had occurred among unrelated rivals. *See id.* at 113-14.

144. Todd v. Exxon Corp., 275 F.3d at 199 ("[T]he basic framework for the *rule of reason* inquiry in this context" are the factors set forth in the *Gypsum* opinion, see *supra* text accompanying note 130 (emphasis added)).

145. *Id.* at 206-09, 211-13.

146. *See In re* Comp. of Managerial Pro., & Tech. Emps. Antitrust Litig., No. 02-CV-2924, 2008 WL 3887619 (D. N.J. Aug. 20, 2008).

147. *Id.* (requiring proof of a relevant market despite evidence of harm). Because this was a private damage case, the lack of effect on wages, regardless of market definition, could have been a legitimate basis for the dismissal.

effect.[148] That many employees at some cost and risk to themselves might be able to find employment in other industries, however, did not mean that the restraint had no effect on employees who remained employed in the industry. The standardization and related wage normalization avoided head-to-head competition involving wages. This effort had required substantial investments by the rivals, and it would have made no sense unless its intended function was to stabilize and restrain wages competition among the participants. At the same time, these claims may not have been very suitable for class action litigation given the range of individual employment situations.

Despite the result in *Todd*, in 2012, a damage action brought on behalf of nurses focused on the exchange of wage information among a group of hospitals that were competing employers at a time when nurses were in short supply in the area.[149] The complaint asserted both a conventional wage fixing claim and one based on the exchange of information which, it was alleged, allowed the hospitals to avoid vigorous wage competition. At the summary judgement stage, the trial court rejected the claim of a conspiracy to fix wages but refused to dismiss the claim of an unlawful exchange of information.[150] The decision recognized that an agreement to exchange confidential information could be illegal. However, in keeping with the existing precedents, the court also required that there be evidence of actual effects.[151] Because this was a damage claim, this is an essential element of the overall case, but the court failed to distinguish the role that an effect plays in such a suit.[152]

Since 2010 there have also been several government cases and investigations that have focused on the legality of information exchanges. In 2010, the DOJ commenced an investigation of the Agri Stats program of collecting, processing, and distributing standardized information about highly confidential business characteristics from rivals in the hog, poultry, and turkey industries.[153] This data was only available to participating rivals and was subject itself to confidentiality requirements.[154] In October of 2012, the DOJ closed the investigation

148. *Id.* at *9.

149. Cason-Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603 (E.D. Mich. 2012); *see also* Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130 (N.D.N.Y. 2010) (finding that information exchange on nurses' salaries could support the inference that there was a per se illegal conspiracy to fix wages, and sustaining an alternative claim that the agreement to exchange wage information could be unreasonable and harmed the plaintiff class).

150. *Cason-Merenda*, 862 F. Supp. 2d at 628-42.

151. *Id.* at 646-48.

152. *See supra* notes 21-22 and accompanying text.

153. "Beginning in September 2010, the United States' Department of Justice Antitrust Division ("DOJ") embarked on an investigation of Agri Stats. That investigation concluded on October 3, 2012." *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2018 WL 3586183, at *1 (N.D. Ill. July 6, 2018).

154. *See* Complaint ¶¶ 7, 27, 67, and 68, United States v. Agri Stats, Inc., No. 0:23-cv-03009 (D.

without taking any action.[155] This is significant because private damage cases involving pork, poultry, and turkeys identified Agri Stats as having a significant role in the parties' ability to suppress production. The poultry cases, first filed in 2016, included 2010 to 2012 in the period in which the Agri Stats information exchange was at least a facilitating device for the output limiting conspiracy.[156] Later complaints identified Agri Stats as an actual co-conspirator, and in at least some of the complaints the focus was entirely on its collection and processing of information as unlawful.[157] Some of the pork and poultry defendants settled with substantial payments, and Pilgrim's Pride, one of the largest poultry processors, admitted to price fixing and paid a $107 million fine.[158]

Despite its inaction with respect to Agri Stats, in 2018, the DOJ challenged an information exchange that involved the sale of spot advertising on television stations.[159] The information shared included available supply and other metrics internal to each competitor that were both competitively sensitive and highly confidential.[160] The government challenged the exchange itself and did not allege that there was any specific price or output conspiracy but instead focused on the unavoidable restraint on competition that arose from sharing the information about the quantity of available spot advertising slots.[161] Further, the complaint did not allege any relevant markets although it characterized the type of ads as unique products.[162] The case settled with injunctions against sharing such information.[163] The follow-on private damage case survived a motion to dismiss based on the trial court's finding that the adverse effects on advertisers from the information exchange were sufficiently identified.[164] Again, the role of conventional market definition was not relevant to the result.[165] Rather, the court's analysis focused on direct

Minn. Sept. 28, 2023).

155. *Id*.

156. *See, e.g., In re Broiler Chicken Antitrust Litig.*, 2018 WL 3586183, at *8.

157. *See, e.g.*, Olean Wholesale Grocery Coop., Inc. v. Agri Stats, Inc., No. 19 C 8318, 2020 WL 6134982 (N.D. Ill. Oct. 19, 2020) (turkeys).

158. *See* Press Release, Office of Public Affairs, Department of Justice, One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and is Sentenced to a $107 Million Criminal Fine (Feb. 23, 2021), https://www.justice.gov/opa/pr/one-nation-s-largest-chicken-producers-pleads-guilty-price-fixing-and-sentenced-107-million.

159. *See* Complaint at 2, United States v. Sinclair Broad. Grp., Inc., No. 1:18-cv-02609 (D.D.C. Nov. 13, 2018).

160. *Id.* at 6-7.

161. *Id.* at 6-8.

162. *Id.* at 7-8.

163. *See, e.g.*, Final Judgement, United States v. Sinclair Broad. Grp., Inc., No. 1:18-cv-02609-TSC (D.D.C. Dec. 3, 2019), https://www.justice.gov/media/1037931/dl?inline.

164. *In re* Local Advertising Antitrust Litig., No. 18 C 6785, 2020 U.S Dist. LEXIS 208215, at *5 (N.D. Ill. Nov. 6, 2020).

165. *Id.* at *44-46.

evidence of effect on the plaintiffs which is essential in a private damage case.[166] The local advertising case provides an example of the difference between a government case and a private damage action. Litigants seeking damages must establish not only that the defendants' conduct was an agreement in restraint of trade but also that the class of plaintiffs, advertisers in this case, had suffered economic harm while the government need only establish the first element to be entitled to relief.[167]

In 2022, the DOJ sued Cargill, a major poultry integrator, for engaging in a more than twenty-year conspiracy with many of its major competitive rivals to share confidential information about wages and benefits.[168] The lengthy complaint implicitly identified Agri Stats[169] as providing significant coordination for this information exchange starting in 2010, i.e., in the period that the DOJ had previously decided did not constitute a violation of antitrust law.[170] The focus of the complaint was only on the exchange of employment information, despite the extensive documentation of the exchange of all kinds of confidential information related to the parties' production.[171] Cargill consented to an injunction prohibiting it from continuing to engage in such information exchanges, but only those with respect to employment.[172]

In 2023, Agri Stats again appeared, and this time as a defendant in two cases. In June, the trial court granted it a summary judgement dismissal as a "co-conspirator" in a poultry conspiracy case.[173] Some of the rivals did admit to exchanging copies of Agri Stats reports as a way to reassure each other of their conduct.[174] The court stated, however, that the evidence did not show that Agri Stats had provided to the poultry rivals detailed information about the rivals' prices, supplies, and other competitively sensitive information.[175] Hence, the court rejected the claim that Agri

166. *Id.* at *43.

167. *Id.* at *20-21.

168. *See* Complaint at 5, 9-10, United States v. Cargill Meat Sols. Corp., No. 1:22-cv-01821-ELH (D. Md. July 25, 2022), https://www.justice.gov/atr/case/usv-cargill-meat-solutions-corp-et-al.

169. *See id.* ¶ 22 ("Consultant Co-Conspirator 1.").

170. *See supra* notes 161-66 and accompanying text.

171. *See* Complaint, *supra* note 168, ¶ 207 ("The Defendants' agreement to collaborate on compensation decisions, exchange current and future compensation information, and facilitate those collaborations and exchanges suppressed poultry processing plant worker compensation. It constitutes an unreasonable restraint of interstate trade and commerce in the nationwide and in local labor markets for hourly and salaried poultry processing plant workers.").

172. *See* Proposed Final Judgment, United States v. Cargill Meat Sols. Corp., No. 1:22-cv-01821-ELH (D. Md. July 25, 2022), https://www.justice.gov/atr/case-document/file/1528346/download.

173. *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2023 WL 4303476 (E. D. Ill. June 30, 2023) (considering motions to dismiss various defendants).

174. *Id.* at *25.

175. *Id.* at *24.

Stats was a participant in the conspiracy.[176] Having ruled out per se liability, the court then rejected the alternative theory that the Agri Stats conduct violated the rule of reason, which in the court's view, governed information pooling and sharing.[177]

Only three months later, in September 2023—nearly thirteen years after closing its earlier investigation—the DOJ sued Agri Stats, asserting that its collection, pooling, and distribution of confidential and sensitive competitive information to pork, poultry, and turkey processors was illegal.[178] The conduct at issue was apparently the same that the DOJ had investigated in 2010 through 2012, although its anticompetitive effects were much clearer because of intervening private damage cases as well as its own case against Cargill.[179] The government's complaint laid out in detail how Agri Stats recruited poultry, turkey, and pork processors to agree to participate in an exchange of competitively sensitive, confidential information by assuring them that their rivals would be doing the same.[180] The stated goal of the exchange was to facilitate increased profitability of the three industries.[181] Weekly reports provided comparative data on all the rivals.[182] The identity of the rivals was nominally concealed, but in fact, well-informed individuals could easily determine the identity of each of the reporting firms.[183]

Among other things, each participant was given detailed information about its pricing of very specific commodities relative to other participants.[184] It is obvious, given the great variety of the participants' products, that an overt price fixing agreement with respect to so many commodities would be impractical. However, the information about what others were doing could and did increase the individual firms' low-end prices; while the firms retained higher prices if they already had them.[185] In other words, the complaint alleged that the information exchange itself

176. *Id.* at *26 ("Plaintiffs simply have not produced sufficient evidence for a reasonable jury to find by a preponderance of the evidence that Agri Stats agreed with the producer defendants to restrict supply and increase the price of Broilers.").

177. *Id.* at *26-27.

178. Complaint, United States v. Agri Stats, Inc., No. 0:23-cv-03009 (D. Minn. Sept. 28, 2023), https://www.justice.gov/d9/2023-09/agri_stats_complaint.pdf.

179. *See supra* notes 161-66 and accompanying text.

180. Complaint, *supra* note 178, ¶¶ 103-107.

181. *See, e.g.*, *id.* ¶ 105.

182. Contrary to the view of the court in the poultry litigation, the allegations were that much of the data was current and not forty-five days old. *Compare In re Broiler Chicken Antitrust Litig*., 2023 WL 43034762023, at *26 ("The Agri Stats information is generally 45 days old.") *with* Complaint, *supra* note 178, ¶ 80 (providing weekly reports by Agri Stats on inventory of certain kinds).

183. Complaint, *supra* note 178, ¶¶ 6, 89-96.

184. *Id.* ¶¶ 28-47. This directly contradicts that finding of the district court in the poultry case. *See supra* text accompanying note 175.

185. Complaint, *supra* note 178, ¶¶ 52-66.

functioned, and the parties understood it to function, as a means of avoiding price competition.[186]

The complaint identified a hub and spoke type of conspiracy with Agri Stats at the center as the promoter and organizer of the information exchange, explicitly intending to facilitate price increases for the various products.[187] Each processor joined only because they knew that their rivals were also participating in the conspiracy.[188] This was very similar to the situation in the early cases of *American Column* and *Linseed Oil*.[189]

The legal theory of the complaint was ambiguous. It defined markets and claimed that Agri Stats served 80% (or more) of the rivals in these markets.[190] It asserted that the agreement created an "unreasonable" trade restraint.[191] But there were no allegations that would suggest that there was or could be any basis to a claim that the agreement could be reasonable if it were modified.[192] Indeed, the complaint asked that Agri Stats be forbidden altogether from engaging in such information exchanges, which is consistent with a functional analysis leading to a per se illegality.[193] Thus, this lawsuit shows that the government has recognized, however belatedly, that real competitive harm results from exchanging competitively sensitive information among rivals.

The earlier *Broiler* decision is distinguishable in that the plaintiffs seemed to have lacked the detailed evidence set forth in the government's complaint. Moreover, the theory of the private action was that Agri Stats was itself a direct participant in a conspiracy to reduce production of poultry in order to raise prices. In contrast, the government's case focused on the inevitable anticompetitive results of an agreement to exchange detailed competitively sensitive information among rivals. Agri Stats organized, administered, and coordinated that agreement.

These most recent government cases (*Cargill*, *Local TV Advertising*, and *Agri Stats*) suggest a revision of the government's views on the standards for determining the legality of exchanging competitively sensitive information among rivals; whether directly or indirectly through a third party. However, since the defendant did not choose to contest either the advertising or the poultry workers' wage case, the courts have not had an opportunity to revisit the legal issues. Agri Stats has declared

186. *See, e.g.*, *id.* ¶¶ 67-70.

187. *Id.*

188. *Id*. (describing Agri Stats's "give to get" policy).

189. *See supra* notes 86-96 and accompanying text.

190. Complaint, *supra* note 178, ¶¶ 119-151.

191. *Id.* ¶¶ 162, 164, 166.

192. *Id.* ¶ 167.

193. *Id.* ¶ 168 ("[P]ermanently enjoin Agri Stats . . . from facilitating the exchange of sensitive information . . . .").

it will vigorously contest the government case.[194] Perhaps this will provide the opportunity for a restatement of the controlling law. Further, the decision to excuse Agri Stats from any potential liability for participating in the alleged poultry output conspiracy demonstrates the negative effect of the lack of clear standards governing such information exchanges as well as the apparent problem of inadequate discovery in private litigation.

B The FTC and DOJ's Efforts to Provide Guidelines

The ambiguous and evolving efforts of the DOJ and FTC to provide additional guidance on the standards governing exchanges and pooling of information among competitors reflects the perplexing state of the decisional law. In 1996, the agencies issued a set of statements about antitrust enforcement ("Health Care guidance"), including two parts on information exchange.[195] Those statements addressed two situations: the provision of information about charges from competing health care providers to insurers, and pooling of price and cost data shared among competing providers.[196] The Health Care guidance declared that price and cost (i.e., compensation) information could allow providers "to price services more competitively and to offer compensation that attracts highly qualified personnel."[197] But "[w]ithout appropriate safeguards . . . [such] exchanges . . . may facilitate . . . reduce[d] competition on prices or compensation . . . ."[198] The statement then sought to define a safe harbor for such information pooling. It required that a third party collect and process the information, that the information be at least three months old, and that the information have come from at least five providers with sufficient aggregation that identification of specific providers' compensation or prices was not feasible.[199] The underlying premise of this safe harbor is that a health care provider has a legitimate "interest in obtaining information useful in adjusting the prices it charges or the wages it pays."[200] But exchanges outside this safe harbor were not

194. *DOJ Lawsuit Against Agri Stats Is Wrong on the Law and Bad for Consumers*, AGRI STATS, INC. (Sept. 28, 2023), https://www.agristats.com/news ("Agri Stats plans to vigorously defend the DOJ lawsuit[.]"). This press release also refers to the 2012 closing of the prior investigation into this conduct. *See supra* notes 153-58 and accompanying text.

195. U.S. DEP'T OF JUST. & FED. TRADE. COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996), https://www.justice.gov/atr/page/file/1197731/download.

196. *Id.* at 43-48, 49-52.

197. *Id.* at 49.

198. *Id.*

199. *Id.* at 50.

200. *Id.* at 50-51.

condemned categorically.[201] "Non-provider" surveys might allow purchasers of health insurance to gain useful information, but exchanges of expected prices or wages were likely "to be considered anticompetitive" although the legal consequence was left vague unless there was an overt price fixing agreement.[202]

The overall implication of this guidance was that a wide range of information pooling would be acceptable even if it was kept confidential. The guidance did note that if parties were unsure of the acceptability of their pooling, they could seek review under either the DOJ's business review procedure or the FTC's advisory opinion system.[203] In the subsequent decades, the DOJ issued a number of business review letters that approved various plans for information exchange.[204] Since 1996, there have been about twenty such requests to which the DOJ's Antitrust Division ("Division") has issued letters approving each information exchange.[205] None of the requests approved were even remotely similar to the Agri Stats system of pooling detailed confidential business information.[206]

In fact, in 2003 the Division objected to a proposal to establish a database for producers and distributors of chemicals to help them locate the information about product availability. [207] As originally proposed, the database would have made it possible for participants to see what competing producers were offering, including prices. After the parties modified the proposal, the database would have limits so that producers could only view their own offerings, and the authorized distributors would be similarly constrained. [208]

One other recent clearance involved a system to create benchmarks for evaluating the contribution that quality health care made toward cost savings at hospitals. The goal was to facilitate individual hospital rewards to doctors whose work contributed to such savings.[209] There, the

201. *Id.*

202. *Id.* at 51.

203. *Id.* at 52.

204. The DOJ's Antitrust Division includes on its website a directory of all its letters and provides a subject index. U.S. DEPT. OF JUSTICE: ANTITRUST DIV., DIGEST OF BUSINESS REVIEWS TOPICAL INDEX 1968-2015, https://www.justice.gov/atr/digest-business-reviews-topical-index-1968-2015. The list goes only through 2015.

205. *Id.*

206. *See supra* text accompanying notes 161-66, 181-201.

207. *See* Letter from R. Hewitt Pate, Acting Assistant Att'y Gen., Dep't of Just., Antitrust Div., to William Jibilian, Attorney-at-Law (May 13, 2003), https://www.justice.gov/atr/response-brochem-marketing-incs-request-business-review-letter (responding to Brochem Marketing, Inc.'s request for business review letter). The initial request was made in July 2002, modified in November 2002, and finally approved in May of 2003. *See id.*

208. *Id.*

209. *See* Letter from William J. Baer, Assistant Att'y Gen., U.S. Dep't of Just., Antitrust Div., to

underlying information was public, and the proposed system would have provided information about the overall average cost savings but would not have revealed the compensation of individual doctors.

These two specific letters bracket the period of investigation of Agri Stats and are suggestive that Agri Stats's information exchange conflicted with the kinds of exchanges that the Division had approved.

In 2016, the FTC and DOJ issued *Antitrust Guidance for Human Resource Professionals* ("HR guidance") which declared that "[s]haring information with competitors about terms and conditions of employment can also run afoul of the antitrust laws."[210] Unlike the earlier Health Care guidance or the inaction in 2012 with respect to Agri Stats, the HR guidance was more explicit about ways to find an antitrust violation: "While agreements to share information are not per se illegal and therefore not prosecuted criminally, they may be subject to civil antitrust liability when they have, *or are likely to have*, an anticompetitive effect."[211] This minimizes the need to prove market power because it focuses on the potential for harming competition in labor markets. The implication is that the function of the agreement to exchange information is central to its legality.

The statement also cautions that exchanging sensitive information in contexts such as merger or joint venture negotiations needs to be carefully policed and consistent with the legitimate needs of the transaction.[212] There is also a reiteration of the general statements from the early Health Care guidance about using old data processed by a third party and keeping it anonymous and aggregated.[213] Finally, there is again the reminder that before entering into an exchange involving sensitive information, the parties can seek review and clearance from the DOJ or FTC.[214]

The 2016 HR guidance on information exchange is more skeptical about the legitimacy of exchanging competitively sensitive information than the Health Care guidance. This suggests that twenty years'

Colin R. Kass, Proskauer Rose LLP (Jan. 16, 2013), https://www.justice.gov/atr/response-greater-new-york-hospital-associations-request-business-review-letter (responding to Greater New York Hospital Association's request for business review letter).

210. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016), https://www.justice.gov/atr/file/903511/download [hereinafter ANTITRUST GUIDANCE].

211. *Id.* (emphasis added).

212. *Id.* at 5. This is the context where the conventional rule of reason applies because the exchange is ancillary to a transaction. But also, parties need to exercise care to avoid unreasonable exchanges of information. *See* Michael C. Naughton, *Gun-Jumping and Premerger Information Exchange: Counseling the Harder Questions*, ANTITRUST, Summer 2006, at 66; James R. Loftis, III & Jeanne M. Forch, *Avoiding Potential FTC Challenges: Practical Guide to Premerger Exchanges of Information*, ANTITRUST, Summer 1990, at 10.

213. ANTITRUST GUIDANCE, *supra* note 210, at 6.

214. *Id.*

experience and the contemporary evidence of how such exchanges had adversely affected wages caused some reconsideration of the overly generous rule of reason framework.[215] But the HR guidance also refers to the 1996 statement as one providing more guidance when wage or salary surveys "are less likely to raise antitrust concerns."[216]

Finally, in 2023 the Division and the FTC withdrew the Health Care guidance, but they have not yet replaced it.[217] The speech announcing the withdrawal appeared to retain the ambivalent views underlying the old guidance.[218] Relying on *Gypsum*'s footnote, the speech suggested that both market structure and the nature of the information exchanged remain relevant.[219] But, it then pointed out that from the *American Column* decision until the *Todd* decision the number of competitors at play and, by implication, the structure of an industry, was not in fact an issue.[220] The same was said of the footnote's second factor, with respect to the freshness of data and its potential aggregation.[221] The speech then pointed to the *Cargill* and *TV Spot Advertising* cases as demonstrations of the "broader range of harm[s]" that can occur. It recognized that information exchanges can soften "competition through tacit coordination, facilitated by information sharing."[222] So, the old guidance is out, but so far there is no suggestion of what criteria or standards will now govern enforcement policy. The net result is an open-ended rule of reason serving as the framework within which exchanges will be evaluated. Without a clearer framework to replace the discredited old guidance, the withdrawal of that old guidance does not provide for effective public or private enforcement related to the exchanges.

C. The EU's Standards Governing Information Exchange

The EU has also confronted cases involving the exchange of competitively sensitive information.[223] Its responses elaborated on the

215. *Id.* at 4-6.

216. *Id.* at 5.

217. Mekki Speech, *supra* note 1.

218. *See id.* ("[T]he burden shifting framework of the rule of reason . . . assess the actual or *likely* effects of this conduct." This is information which is "not part of a per se conspiracy" and so not "condemned under the per se rule") (emphasis in the original).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. Case T-180/15, ICAP v. Eur. Comm'n, EU:T:2017:795 (Nov. 10, 2017); Case C-609/13 P, Duravit v. Eur. Comm'n, EU:C:2017:46 (Jan. 26, 2017); Case C-74/14, Eturas v. Lietuvos Respublikos Konkurencijos Taryba, ECLI:EU:C:2016:42 (Jan. 21, 2016); Case C-286/13 P, Dole Food Co., Inc. v. Eur. Comm'n, EU:C:2015:184 (Mar. 19, 2015); Case C-67/13 P, Groupement des Cartes Bancaires v.

distinctions on which its restraint of trade law rests. Article 101 (1) of the Treaty on the Functioning of the European Union ("TFEU") distinguishes between restraints that are illegal by "object" and those that are illegal by "effect."[224] The Court of Justice explained "that it is necessary, first, to consider the precise purpose of the concerted practice, in the economic context in which it is to be pursued."[225] Once it is apparent that a concerted practice has as its object, the prevention, restriction, or distortion of competition, there is no need to take account of its actual effects on the market.[226] While any agreement that violates either standard is "void,"[227] Article 101 (3) TFEU authorizes waiver of the prohibition if the restraint "contributes to improving the production or distribution of goods or to promoting technical or economic progress" and certain other conditions are satisfied.[228]

Regarding the exchange of information among competitors, the Court of Justice emphasized that "each economic operator must determine independently the policy which he intends to adopt on the common market."[229] While the Court acknowledged that market operators take into

Eur. Comm'n, ECLI:EU:C:2014:2204 (Sept. 11, 2014); Case C-8/08, T-Mobile Netherlands v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit, EU:C:2009:343 (June 4, 2009); Case C-194/99 P, Thyssen Stahl v. Eur. Comm'n, ECLI:EU:C:2003:527 (Oct. 2, 2003); Case C-7/95 P, Deere v. Eur. Comm'n, ECLI:EU:C:1998:256 (May 28, 1998); Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, Suiker Unie v. Comm'n, ECLI:EU:C:1975:174 (Dec. 16, 1975).

224. Consolidated Version of the Treaty on the Functioning of the European Union art. 101, May 9, 2008, 2008 O.J. (C115) 47 ("The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their *object or effect* the prevention, restriction or distortion of competition within the internal market . . . .") (emphasis added).

225. Case C-8/08, T-Mobile Netherlands v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit, ECLI:EU:C:2009:343, ¶ 28 (June 4, 2009).

226. *Id.* ¶ 29 (citing Joined Cases 56/64 and 58/64 Consten & Grundig v. Comm'n, ECLI:EU:C:1966:41 (July 12, 1966)).

227. TFEU art. 101(2) ("Any agreements or decisions prohibited pursuant to this Article shall be automatically void.").

228. *Id.* at art. 101 (3) (authorizing the waiver of that prohibition provided that consumers share in the benefit, the restraint is the least harmful necessary to achieve the legitimate objectives, and it does not create the potential to eliminate competition in "a substantial part of the products in question"). Prior to 2004, companies had to notify the European Commission of an agreement, e.g., an information exchange. Starting with Regulation 1/2003, companies assess its lawfulness by themselves (2003 O.J. (L 1/1); recently, the Commission adopted a more flexible antitrust Informal Guidance Notice for companies seeking informal guidance on the application of EU Competition Rules to novel or unresolved questions. Commission Notice on Informal Guidance Relating to Novel or Unresolved Questions Concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union That Arise in Individual Cases (Guidance Letters), 2022 O.J. (C 381) 9. For a discussion on whether Article 101 (3) TFEU is similar to a rule of reason, see RENÉ JOLIET, THE RULE OF REASON IN ANTITRUST LAW – AMERICAN, GERMAN AND COMMON MARKET LAWS IN COMPARATIVE PERSPECTIVE, 5 (1967) ("To say the least, such statements reveal a great deal of confusion as to the actual function of the rule in American law itself."); Alison Jones, *Analysis of Agreements Under U.S. and EC Antitrust Law – Convergence or Divergence?*, 51 ANTITRUST BULL. 691 (2006).

229. Case C-8/08, T-Mobile Netherlands v. Raad van Bestuur van de Nederlandse

account each other's actions, the Court explained that the requirement of independence

> strictly preclude[s] any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question . . . .[230]

Contrary to the United States, the EU takes a harder line on information exchanges related to prices. As early as 1968, the European Commission ("EC") expressed concerns about competitor cooperation that revealed orders, sales, investments, or prices.[231] Ten years later, in 1978, the Commission was unsure whether figures on prices and terms for discounts amounted to a restriction of object or effect, but it interpreted both as a distortion of competition.[232] More than three decades later, exchanges of information on current or future prices were explicitly condemned as a restriction of competition by object.[233] Revised guidelines retain essentially the same analysis.[234] This presumption of illegality has its roots in decisions such as *T-Mobile*[235] and *Dole*.[236]

In 2001, in *T-Mobile*, a group of mobile telecommunications operators offering services in the Netherlands held a meeting discussing the reduction of future standard dealer remunerations for postpaid subscriptions. In this case, the Court of Justice concluded that "an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object," even if said exchange was limited to a single meeting.[237] The Court of Justice—to which the

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Mededingingsautoriteit, ECLI:EU:C:2009:343, ¶ 173 (citing Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie v. Comm'n, ECLI:EU:C:1975:174 (Dec. 16, 1975)).

230. *Id.* ¶ 33.

231. Commission Notice Concerning Agreements, Decisions and Concerted Practices in the Field of Co-operation Between Enterprises, 1968 O.J. (C 75) 3.

232. *See generally Commission Seventh Report on Competition Policy* (April 1978), http://aei.pitt.edu/31208/1/COMP_1977%2D(7th).pdf.

233. Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C 11) 13 ¶ 73 [hereinafter Cooperation Guidelines (2011)].

234. 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 ¶ 414 [hereinafter Horizontal Guidelines].

235. Case C-8/08, T-Mobile Netherlands v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit, EU:C:2009:343, ¶ 28 (June 4, 2009).

236. Case C-286/13, Dole Food Co. v. Eur. Comm'n, EU:C:2015:184, ¶ 119 (Mar. 19, 2015).

237. Case C-8/08, T-Mobile Netherlands v. Raad van Bestuur van de Nederlandse

decision had been referred by the National Court—also confirmed that the presumption of a causal connection between a concerted practice and subsequent market behavior had to be applied by national courts.[238] It is presumed that undertakings continually take account of information they have received from competitors as long as they are active on the market.[239] This presumption is subject to proof to the contrary, according to which the burden of proof shifts to a defendant to rebut any of the accusations.[240]

In *Dole*, the Court of Justice confirmed that the presumption of a causal connection also applied to pre-pricing communications.[241] Banana traders had discussed quotation prices important for the banana trade and prices obtained in some transactions.[242] Actual prices were linked to these quotation prices, and the fact that employees involved in pre-pricing communications had participated in the internal pricing meetings was enough for the Court of Justice to uphold the General Court's judgment (which had confirmed the Commission's decision) that the pre-pricing communications' object was the restriction of competition.[243]

In light of climate change concerns, the EC recently rewrote its Cooperation Guidelines covering Sustainability Agreements to ensure that "antitrust rules do not stand in the way of agreements between competitors that pursue a sustainability objective."[244] The Guidelines list several examples of agreements that fall outside the scope of Article 101 (1) TFEU[245] and describe types of benefits that exempt agreements from antitrust scrutiny.[246] The EC aimed to keep up with digitalization, and thus, broadened its definition of "information exchange," expanding it to any type of physical information sharing and data sharing between actual or potential competitors.[247] The EC specifically overhauled its Chapter on Information Exchanges to mirror the latest case law regarding "commercially sensitive information."[248] The list now entails, for example: current pricing and future pricing intentions; current and future

Mededingingsautoriteit, ECLI:EU:C:2009:343, ¶ 41 (June 4, 2009).

238. *Id.* ¶ 53.

239. *See* Case C-74/14, Eturas v. Lietuvos Respublikos Konkurencijos Taryba, ECLI:EU:C:2016:42, ¶ 33 (Jan. 21, 2016).

240. *See id.* ¶ 50 (Jan. 21, 2016) (rebutting the causal connection).

241. Case C-286/13, Dole Food & Co. v. Eur. Comm'n, EU:C:2015:184, ¶ 127 (Mar. 19, 2015).

242. *Id.* ¶ 14.

243. *Id.* ¶ 134.

244. European Commission Press Release IP/23/2990, Antitrust: Commission Adopts New Horizontal Block Exemption Regulations and Horizontal Guidelines (June 1, 2023).

245. Horizontal Guidelines, *supra* note 234, ¶ 527.

246. *Id.* ¶ 556.

247. *Id.* ¶¶ 367, 368; *see* Mekki Speech, *supra* note 1 ("[D]ata intermediaries can enhance—rather than reduce—anticompetitive effects.").

248. Horizontal Guidelines, *supra* note 234, ¶ 384.

production capacities; current or future commercial strategy; and future product characteristics which are relevant for consumers.[249] The EC reminds undertakings that it is "not necessary to show that those competitors formally undertook to adopt a particular course of conduct, or that the competitors colluded in relation to their future conduct on the market."[250]

In line with recent economic research, the new Guidelines consider an exchange of aggregated data capable of violating Article 101 (1) TFEU.[251] In its previous Guidelines, the EC declared an exchange of aggregated data "less likely to lead to restrictive effects."[252] However, economic experiments yielded different results; collusion was possible even with aggregated data as soon as the possibility to communicate was given. The element of communication—via written messages or face-to-face communication—enabled participants in these experiments to reach a collusive outcome no matter the type of data aggregation.[253] Since communication has such an overwhelmingly negative effect on competitive results, the EC recommends the installation of "clean teams" to ensure that only a limited group of employees has access to competitively sensitive information.[254] Generally, the EC highlights the role of independent third parties as a major contribution to a legitimate information exchange.[255] These third parties will from now on be held liable if they fail to maintain the confidentiality of entrusted data and, ultimately, the legality of such an exchange.[256]

These Guidelines employ a functional analysis that distinguishes those exchanges that only serve to restrain from those that have some legitimate justification, but which might still have adverse competitive effect. Overall, then, the EU takes a harder line on information exchanges among competitors and implicitly imposes on the competitors the burden to justify their exchanges. Some scholars have claimed that this approach is overall hostile in comparison to the American approach.[257] But other

249. *Id.* ¶ 414.

250. *Id.* ¶ 375.

251. *Id.* ¶ 391; *see supra* Section II.D.

252. Cooperation Guidelines (2011), *supra* note 233, ¶ 89.

253. *See supra* text accompanying note 64; Mekki Speech, *supra* note 1 ("[T]he distinctions between past and current or aggregated versus disaggregated data may be eroded.").

254. Horizontal Guidelines, *supra* note 234, ¶ 407.

255. *Id.*; *see supra* Section III.B.

256. Horizontal Guidelines, *supra* note 234, ¶ 401.

257. *See* Kenneth Khoo & Jerrold Soh, *The Inefficiency of Quasi*-Per Se *Rules: Regulating Information Exchange in EU and U.S. Antitrust Law*, 57 AM. BUS. L.J. 1 (2020) (claiming the EU approach results in higher error costs but lacking any clear examples of such errors); Howard Rosenblatt & Tomas Nilsson, *Analyst Calls and Price Signaling Under EU Law*, 2012 ANTITRUST SOURCE 1, 4 ("[A]dvancements in economic analysis typically favor more nuanced competitive assessments over

observers see the Guidelines as generally helpful, if sometimes lacking specificity.[258]

Illustrative of its policy, the EU challenged a collusive arrangement among major truck manufacturers; the arrangement included exchanging proposed list price increases for medium and heavy trucks and the timing, as well as the sharing of costs for new emission technologies from 1997 until 2011.[259] The Commission described the market as highly cyclical; its products had to be specified according to customer requirements with hundreds of different options and variants.[260] Besides public registries, regular exchanges within the industry associations increased transparency, as did the exchange of computer-based truck configurators facilitating the calculation of a list price for each possible truck configuration.[261] The exchange of list prices helped to estimate competitors' approximate net prices.[262] During meetings (which took place several times a year), the manufacturers discussed, and in some cases agreed on, their respective list price increases.[263] Manufacturers sent emails to their competitors asking for future intended list price increases, and a summary of the requested information was then sent back to all competitors.[264] The European Commission was convinced that

> [t]he single anti-competitive economic aim . . . was to coordinate each other's gross pricing behavior . . . in order to remove uncertainty regarding the behaviour of the respective Addressees . . . . The collusive practices followed a single economic aim, namely the distortion of independent price setting and the normal movement of prices for Trucks . . . .[265]

Final prices for sales resulted from discounts off these list prices. The theory is relatively straight forward: using higher list prices means that net prices will also be higher.[266] The EU imposed a nearly three billion

bright line tests."); Federico Ghezzi & Mariateresa Maggiolino, *Bridging EU Concerted Practices with U.S. Concerted Actions*, 10 J. COMPETITION L. & ECON. 647 (2014).

258. *See generally* Florian Wagner-von Papp, *Information Exchange Agreements*, *in* HANDBOOK ON EU COMPETITION LAW - SUBSTANTIVE ASPECTS, 130-73 (Ioannis Lianos & Damien Geradin, eds., 2013).

259. *See generally* Council Regulation 1/2003 & Commission Regulation 773/2004 of July 19, 2016, Commission Decision Relating to a Proceeding Under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement (AT.3984 – Trucks), 2016 O.J. (C 2016) 4673.

260. Eur. Comm'n, *AT.3984-Trucks Council Regulation 1/2003 & Commission Regulation 773/2004 of July 19, 2016*, EC.EUROPA.EU ¶ 26, ec.europa.eu/competition/antitrust/cases/dec_docs/39824/39824_8750_4.pdf.

261. *Id.* ¶ 46.

262. *Id.* ¶ 47.

263. *Id.* ¶ 51.

264. *Id.* ¶ 59.

265. *Id.* ¶ 71.

266. *See* Harrington, *supra* note 16.

Euro fine on the companies.[267] However, when faced with cartel damage claims, the defendant truck manufacturers maintained unsuccessfully that although they may have participated in an information exchange, it did not result in any actual price increases for its customers. Thus, no injury had occurred, but the German courts rejected that argument.[268] Similarly, after several lower courts had accepted the no harm argument and dismissed private damage claims, the German Federal Court of Justice, in 2022, upheld a damage claim based on an information exchange among suppliers of drugstore products.[269] This follow-on case rested on an earlier case brought by the German Federal Cartel Office ("Bundeskartellamt").[270] A primary issue in the private action was the proof of harm. The opinion distinguished between the right of the public authority to condemn this kind of naked restraint regardless of its economic impact from the obligation of a private damage claimant to prove that it had suffered harm. However, the court found that there was a factual presumption of injury due to an exchange of price information among competitors.[271]

The presumption of illegality toward exchanges of price information is deeply embedded in European competition law. The Commission's Guidelines focus its analysis on the function of the exchange of information. Still, the Commission enjoys the privilege of a lower burden of proof when defendants must rebut any accusations of an illegal information exchange. National courts also ease the burden of proof for claimants in a class action suit.

267. European Commission Press Release, IP/16/2582, Antitrust: Commission Fines Truck Producers € 2.93 Billion for Participating in a Cartel (July 19, 2016).

268. *See* Thomas Thiede, *German Federal High Court of Justice Rules on Private Enforcement in Trucks Cartels*, KLUWER COMPETITION L. BLOG (Jan. 12, 2021), https://competitionlawblog.kluwercompetitionlaw.com/2021/01/12/german-federal-high-court-of-justice-rules-on-private-enforcement-in-trucks-cartel/.

269. Case KZR 42/20, ECLI:DE:BGH:2022:291122UKZR42.20.0.

270. *See* Bundeskartellamt Press Release, Multi-Million Fines Imposed on Manufacturers of Drugstore Products on Account of Anti-Competitive Information Exchange (Mar. 18, 2013), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/18_03_2013_Drogerieartikel.html.

271. *See also* Alex Petrasincu & Merlin Gömann, *Facilitating the Presumption of Injury Resulting from Exchanges of Pricing Information – The Schlecker Judgment of the German Federal Court of Justice*, HAUSFELD COMPETITION BULL. (Feb. 23, 2023) https://www.hausfeld.com/what-we-think/competition-bulletin/facilitating-the-presumption-of-injury-resulting-from-exchanges-of-pricing-information-the-schlecker-judgment-of-the-german-federal-court-of-justice/; Henner Schläfke & Miriam Swamy-von Zastrow, *Schlecker Judgment by Germany's Federal Court of Justice,* NOERR INSIGHTS (Jan. 16, 2023), https://www.noerr.com/en/insights/das-schlecker-urteil-des-bgh; Johannes Scherzinger, *Antitrust Litigation: Cartel Damages Also in Case of Exchange of Information,* RÖDL & PARTNER INSIGHTS (Feb. 22, 2023), https://www.roedl.com/insights/antitrust-law/damages-claims-antitrust-law-information-exchange-schlecker-judgment.

D. Functional Analysis Creates a Presumption of Illegality

The central conclusion of the foregoing analysis is that most exchanges of competitively sensitive information are naked agreements that do not further any legitimate joint productive activity or transaction. Moreover, a functional analysis of such exchanges creates a strong inference that their only function is to restrain competition among the participating rivals like other cartelistic restraints. Hence, the appropriate legal analysis would seem to be one of per se illegality.

This conclusion, unfortunately, must be tempered by the acknowledgement that there are a few circumstances in which such an agreement would impose no restraint on the participants' competitive freedom of action. The most obvious examples involve information exchange ancillary to another productive transaction. While those exchanges can present significant competitive risks, the analysis must be framed around the standard antitrust rule of reason criteria. Moreover, that type of case is itself obvious in terms of the underlying transaction involving the participants. Indeed, as discussed earlier, the functional approach to the analysis of restraints has easily accommodated these situations by excluding them from the per se category.

What makes information exchanges more difficult is that there are some that are not ancillary, but which also do not result in a restraint on the participants. As prior analysis has shown, these situations are limited, but there are also good reasons to allow such exchanges because of their likely positive effect on the efficiency of enterprises and the improved workability of market processes. Consequently, it is a better, more conservative course, to apply a presumption of illegality to any naked exchange of sensitive competitive information. Because such a presumption is rebuttable, parties would have the opportunity to offer a justification that proves the exchange did not function to restrain their competition.

IV. TACIT COLLUSION AND INFORMATION EXCHANGE

One significant application of a focus on unlawful information exchange should be cases involving tacit collusion.[272] In such cases, the potential defendants argue that their parallel conduct with respect to prices or output is the result of the inherent working of an oligopolistic

272. *See* William Page, *Tacit Agreement Under Section 1 of the Sherman Act*, 81 ANTITRUST L.J. 593, 599 (2017) (tacit agreements involve interdependent conduct coordinated by communications of competitive intentions that lack any efficiency justification).

market.[273] Each competitor adjusts its competition in light of its expectations of how its rivals will respond. This deters price cutting and encourages keeping prices up or output restricted even when the products are imperfect substitutes. Courts refuse to find such tacit collusion unlawful with respect to prices or output when there is no evidence of an express understanding among the rivals on those points.[274]

But to sustain such tacit coordination, each participant must have confidence that its rivals are behaving similarly. This is where information exchange becomes significant.[275] If each firm has reliable information about competitively significant actions of its rivals, that creates the context in which tacit collusion becomes feasible.[276] The rivals do not need to meet and agree on specific prices or output because each, as a rational actor, will have the incentive to control its competition in a manner that will advance its own self-interest.[277] Deviation from the tacit norm will be promptly revealed and invite retaliation. Hence, the information exchange understanding itself inhibits, i.e., restrains, the competitive actions of each rival.[278]

In tacit collusion, each rival exercises control over its output or price without an express restrictive agreement based on an awareness of what its rivals are doing and have the capacity to do. Such awareness is very likely to stem from an understanding to share competitively sensitive information directly or through some third party. Thus, when a pattern of parallel conduct exists in an oligopolistic industry, the question becomes: what facilitates such behavior, and is any of that facilitation itself the result of an agreement among the rivals? While publicly available information, including the kinds of forward-looking statements required of publicly traded companies, may explain why each rival knows what its competitors are doing, it is much more likely that competitors have found a common understanding to provide more detailed and competitively

273. *See* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

274. *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir., 2015); *In re* Baby Food Antitrust Litigation, 166 F.3d 112 (3d Cir. 1999).

275. *See* Kai-Uwe Kühn, *Fighting Collusion by Regulating Communication Between Firms*, 16 ECON. POL'Y 167, 188 (2001) ("[I]nformation exchange can have significant collusive potential.").

276. Haan et al., *supra* note 69 (the experimental evidence shows that tacit collusion requires explicit communication to make such coordination possible).

277. *See* Kühn, *supra* note 275, at 192-95 (describing how information exchange in two EU cases by itself resulted in market exploitation).

278. Kühn would condemn various communications because they create a danger of price fixing or market allocating collusion without apparently focusing on whether such exchanges themselves were the product of an unlawful agreement. *Id.* at 195 ("[S]ome forms of communication should be forbidden as infringing Art. 81(1) . . . because they create a significant danger for collusion but at the same time appear not to generate significant efficiency gains."). Our view as stated in the text is that agreements to exchange competitively sensitive information are themselves unlawful agreements in restraint of competition which is essential to apply § 1 of the Sherman Act.

sensitive information to each other. Identifying that channel of communication would provide the basis for a successful antitrust case.[279] The *Cargill* case is a good example of one in which the government did not allege an express conspiracy to restrain wages or other employee benefits, but instead claimed that the decades-long exchanges of detailed information—directly and through third parties—resulted in a continued restraint on competition.[280]

It is likely that plaintiffs' attorneys in damage cases have been unwilling to focus on pursuing agreements to exchange competitively sensitive information because any such claim would trigger a "rule of reason" standard. Because plaintiffs are notoriously unsuccessful in such claims,[281] their incentives are to pursue a per se price fixing claim and rely on the information exchange only to support an inference of such an agreement. Cases such as *Todd*,[282] *Cason-Merenda*,[283] *Local TV Advertising*,[284] and the pork and poultry cases involving Agri Stats[285] illustrate the evolving focus on information exchange as itself a violation in private litigation. Certainly, the *Cargill* and *Local TV Advertising* settlements[286] illustrate how such information exchanges themselves cause restraints on competition and so provide the basis for both legal liability and damage claims.

The problem remains, however, that courts are likely to insist on a full rule of reason approach (as occurred in *Todd*[287]) before they are willing to condemn even blatantly anticompetitive information exchanges. This, in turn, is likely to deter the bringing of plausible cases. If courts were to hold such agreements presumptively illegal as this Article recommends, then it would be much more likely for plaintiffs to focus their attention on such agreements when the evidence of an explicit agreement on price or output is tenuous.

V. A FRAMEWORK FOR APPLYING A PRESUMPTION OF ILLEGALITY TO INFORMATION EXCHANGES

While the thesis of this Article is that the exchange of competitively

279. *See id.* at 169.

280. *See supra* notes 176-80 and accompanying text.

281. *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265 (1999); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 2009 GEO. MASON L. REV. 827.

282. Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001).

283. Carson-Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603 (E.D. Mich. 2012).

284. Complaint, *supra* note 159.

285. *See supra* text accompanying notes 161-66.

286. *See supra* text accompanying notes 167-80.

287. *See supra* text accompanying notes 146-52.

sensitive information among rivals is usually a naked restraint of competition, there are too many steps to illegality to justify a simple per se label for the exchange of competitively sensitive information. At the same time, if key elements are present, a court should only take a "quick look" to determine that such an exchange is probably illegal. Hence, a better description is that a *presumption of illegality* will exist if certain foundational facts are established. Moreover, the analysis in the preceding Parts provides the basis for a workable and focused framework for the evaluation of these claims.

Once these elements are shown, the conduct should be presumptively illegal. Rebuttals should require proof that the information serves some legitimate interest of each rival in improving its unilateral decision making or provides otherwise unavailable information about conditions that facilitate the overall better operation of the market. In addition, it is useful to consider the analysis of information exchanges ancillary to some other productive transaction or venture. Finally, the impact of private damage claims on the basic framework needs consideration. The following subsections address these issues.

A. The Plaintiff's Initial Burdens

Initially, there needs to be a determination 1) that the participants are rivals, 2) that they agreed to exchange information, 3) that the information being exchanged is competitively sensitive,[288] and 4) that the participants are not engaged in a joint productive venture or transaction in which the information exchanged facilitated that joint venture or transaction.[289] If the defendants dispute any of these elements, the burden would fall on the plaintiff to prove the disputed point. However, most of these issues are often likely to be easily determined. In appropriate cases, therefore, partial summary judgements could resolve these issues even if the defendants are inclined to dispute them.[290]

1. The Defendants are Rivals

Unless the market is perfectly competitive, the participants will be rivals unless they operate in completely distinct product or geographic

288. *See supra* text accompanying notes 14-16 (defining "competitively sensitive information").

289. Procedurally, there should not be a serious problem in an injunctive action being heard by a judge. A jury form that asks for decisions of specific issues should suffice to provide guidance to the jury and provide for informed appellate review.

290. For the party with the burden of proof to seek partial summary judgment is unusual, but in context of these issues a court might well find this to be a good strategy to keep the case focused on the primary issues.

markets.[291] Hence, the plaintiff in an information exchange case is likely to be able to draw on corporate reports and similar documents that establish that the defendants identify each other as "competitors," which in context means economic rivals. Those same reports will provide information about both the products each produces and the markets in which they buy and sell. In combination, this information should largely preclude any significant dispute over the status of the defendants.

2. The Agreement to Exchange Information

In many situations, as the *Agri Stats* and *Todd* cases illustrate, the existence of an agreement to exchange information will be undeniable. Indeed, the most likely context for a challenge is when there is an acknowledged information exchange, but no evidence of an explicit understanding regarding specific dimensions of competition.[292] One circumstance where agreement could be an issue is if the exchange occurred through public announcements of plans or price changes. At least in the case of publicly traded companies, such announcements are arguably required.[293] Hence, reciprocal statements, even though they have the effect of communicating an understanding about competition, present real challenges under existing law to establish the agreement element.[294] When closely held rivals also participate, however, the inference of agreement is much stronger.

A second potentially complex case would arise if the means of sharing information took the form of rivals buying from each other. Such cross buying, in addition to signaling prices, can be a means of sharing overcharges or limiting the likelihood of potential mavericks dumping goods on the market.[295] But it can also be how rivals ensure that they have the product that they contracted to provide but for some reason are not able to produce.

Hence, while in the classic case, the agreement to exchange information is uncontestable, in other cases, this may prove as challenging

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291. Where the information exchange involves buying input rather than selling products, the fact that the rival buyers do not compete in the downstream markets in which they sell is not relevant. The focus has to be on the market, buying or selling, to which the information exchange applies.

292. *See, e.g.*, Cason-Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603, 649 (E.D. Mich. 2012) (rejecting a summary judgement claim of wage fixing but allowing a conspiracy to exchange wage information to go forward to trial).

293. The Securities Exchange Act requires publicly traded firms to give the market notice of material information. *See generally* 15 U.S.C. §§ 78a-78rr.

294. *See* Harrington, *supra* note 9.

295. A classic example occurred in the *Madison Oil* case where the major refiners each took a "dancing partner" to ensure that excess gasoline was removed from the market. *See* United States v. Socony-Vacuum Oil, 310 U.S. 150 (1940); *see also In re* Stone Container Corp., No. C-3806 (F.T.C. May 18, 1998).

an issue as it is in many price fixing cases. The plaintiff will have the burden of proving an agreement, and so when faced with cases of cross selling or public statements, must identify evidence that supports rejection of the non-collusion claim. Such evidence could include a showing that cross selling was unnecessary because each party had sufficient internal supply. Similarly, when closely held enterprises join in making public statements about plans, the inference of agreement to share information is more plausible since this is the kind of information that those businesses normally keep confidential.

3. The Competitive Sensitivity of the Information Exchanged

The information being exchanged must be "competitively sensitive." As explained earlier, there are good tests for determining whether information is competitively sensitive, including a firm's own definition of what must be kept confidential.[296] Hence, while defendants might dispute whether specific information is appropriately classified as confidential, the fact question will usually be amenable to a quick resolution. This will be clearest if the parties attempt to maintain secrecy with respect to the exchange itself. This strongly implies, indeed, arguably proves, that the information is competitively sensitive. For example, Agri Stats imposed strict confidentiality requirements on the information it provided to competing poultry and pork producers. That some exchanges designed to provide benchmarks for firms might well justify confidentiality is related to the justification for the exchange and not its initial characterization.

The public revelation of information would, in contrast, imply that it is not competitively sensitive. But the ways in which the public can access that information may suggest that its putative accessibility does not equate with real access. Hence, the nature of the information being provided is more significant than the extent of its access.

4. The Absence of Any Productive Joint Venture or Transaction Involving All the Parties

If all the parties to a competitively sensitive information exchange are engaged in a productive transaction or joint venture with each other, then the agreement to exchange information may be ancillary to that activity. Such a primary transaction may well create risks of opportunistic behavior or require sharing of information to ensure its successful

296. *See supra* text accompanying notes 14-16 .

operation. Hence, antitrust law has always been deferential to most arguably ancillary restraints.[297]

But the distinction between an arguably ancillary restraint and a naked restraint in the context of information exchange is relatively straightforward. First, all the parties to the exchange have to be participants in the venture. This is likely to exclude most exchanges that are sources of concern. Second, the parties have to concede the existence of the agreement to exchange information as well as explain the scope of the exchange and its relationship to the transaction or venture. Thus, this defense requires conceding the other issues related to the prima facie case. If the claim of ancillarity is weak because of unrelated participants or the lack of linkage between the information being exchanged and any legitimate interest or need of the transaction, then this defense can result in a concession of liability. Moreover, where it is a plausible response, it is likely that the existence of the venture or transaction would be known, and so a claimant, if it thought that there were also unjustified anticompetitive consequences, would likely proceed via a different path.

5. The Implication of the Prima Facie Case

If the plaintiff establishes the four elements, then there should be a presumption of illegality since any restraint on competition would necessarily be a naked restraint. The consistent theme of antitrust law is that naked restraints of competition are illegal.[298] The policy reasons include both economic considerations and judicial administrability. Cartelistic conduct harms the competitive process and usually results in economic harm to either producers or consumers, or both. In addition, there are no consistent criteria for a court to determine how much elimination of competition is desirable. Because the four elements exclude arguably ancillary restraints, the reasonable presumption is that any such agreement has as its purpose or function the restraint of competition that naturally follows from knowledge of what rivals are doing.

While it is tempting to impose a per se illegal label on this conduct, as shown earlier, there are potential justifications for such exchanges that are consistent with a claim that they do not in fact impose a restraint on the freedom of action of the parties. To avoid liability, the parties to such an exchange should be required to present compelling evidence that contradicts this logical inference.[299] Hence, a clear presumption of

297. *See supra* note 281.

298. *See* Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 94.

299. This conclusion rests on the premise that the risk of error is greater if it is easier for defendants

illegality should arise if the plaintiff has shown that the exchange satisfies the four elements set forth here.[300] Moreover, parties asserting a claim that the information only served to improve individual rival decision making seek to justify what is a prima facie naked restraint on competition by claiming that was the information exchange's only role. Such a defense justifies imposing the burdens of proof and persuasion on such a party. The greater risk is that the conduct in fact does harm competition and is not necessary for the purported justification. By imposing the burden on the proponent of such a defense, the risks of competitively harmful mistakes are reduced.[301]

B. Rebuttals: Improved Internal Decision Making or Improved Market Knowledge

The analysis of claims in information exchanges shows that there are possible rebuttals that could overcome the presumption of illegality. Each has specific dimensions that provide criteria for determining whether it is a convincing rebuttal. The core of these defenses is that the exchange is justified and explained by how it informs the decisions of individual rivals, as well as how it does not reduce competition. A critical review of the claimed justification should include an inquiry as to whether alternatives exist that would be both less likely to have any restraining effect, and likely to provide the key information that provides the justification.

1. Benchmarking Operations

If the rivals propose to justify their exchange as a means of benchmarking their costs of doing business, they should have a carefully delineated methodology to achieve that limited objective. First, the results should provide only aggregated averages on cost factors with, if desired, some measures of the range of variance in specific costs among the participants. There is no need in such an exercise to provide plant-by-plant data regardless of how well identity might be concealed. Similarly, the limited objective of such comparisons means the data can and should be sufficiently dated such that it does not allow immediate forward-looking interpretation. The repetition in performing this data collection would also be significant. The more frequently this is done, the more unlikely it is to have as its objective improving assessment of production

to justify such restraints than if the plaintiff has to rebut claims of justification.

300. Harrington & Leslie, *supra* note 47 (reaching a similar conclusion with respect to exchanges of proposed list prices even when such prices are used only as the initial step in negotiating final prices).

301. This would more closely parallel the EU approach.

costs. Hence, when benchmarking is the justification, there should be relatively obvious structure and timing to the collection and distribution of the information that is consistent with that justification.

The burden should be on the defendants not only to produce evidence to support that justification but also to persuade the trier of fact that benchmarking is the goal and only use of the information exchanged. After the fact justification of exchanges on this basis are likely to be very problematic unless the parties, *ex ante*, approached the problem with the risk of antitrust liability in the forefront of the analysis so that there was a careful review of what information was necessary to obtain useful benchmarks with as limited an exchange of sensitive data as possible.[302]

2. Improving Overall Knowledge of Market Facts

As discussed earlier, there could be circumstances (however rare) in which rivals could plausibly claim that pooling current price and output information would move a market to a more efficient operation. Better informed market participants generally advance the overall social goal of workable competition. Indeed, the rivals might claim that any price effects were the unavoidable incident of a legitimate pooling of information that caused rivals to make changes in their individual businesses in ways that resulted in higher prices or lower output.[303] If basic market information is available from other sources, even if it is imperfect, this basic market information would support rejecting this claim, unless the defects in the public data were very substantial. Thus, the details of the exchange in context of other sources of information should reveal whether the justification is plausible and legitimate. As with benchmarking, the information should be on a sufficiently general, anonymous, and lagging so that its ability to facilitate direct price coordination rather than reflect market interaction is limited. Further, the fewer rivals there are, then the less plausible it is that there is a need to provide this kind of information. Each such rival would have the capacity to learn a great deal about market conditions from its own interactions with customers and suppliers. Hence, the justification for providing improved market information would seem largely pretextual and a cover for an effort to coordinate prices.

302. Indeed, this is an example of a case displaying that prior review and internal memos developing the plan can be powerful defense materials to the extent they show both awareness of the risks and a clear effort to find a solution that minimizes that risk.

303. This, it should be recognized, is a highly unlikely scenario. One possible hypothetical would involve a market with highly fluctuating prices and quantities because of predictions of demand resulting in uneven supply. In such a situation, better demand prediction might result in prices more consistently above the lowest prices in the cycle, but they should also be below the highest prices. It would also seem essential that this demand/supply projection be available to all stakeholders.

The most significant repudiation of the claim of improving market knowledge would be limiting access. Excluding either customers or suppliers would directly negate the justification because it would worsen a market information imbalance rather than improve it. Thus, Agri Stats's confidentiality requirements for its reports would require the rejection of a defense based on improved market knowledge. Overall, this justification is less likely to be persuasive than a properly developed benchmarking information exchange.

3. Other Examples

Sharing credit information, as analyzed earlier, involves a significant potential for collective coercion if the participants refuse to deal with a prospective customer with a negative credit report. Here, the conduct of the participants will provide evidence of the function of the agreement.

In addition to credit checks, there are other potential justifications for sharing information that is otherwise sensitive and competitively significant. This means that the parties should have the opportunity to offer potential justifications for such sharing. But because of the substantial potential for restraint on competition, a court should take a critical view and impose on the defendant the burden of establishing that the justification was indeed legitimate.

4. Responses to the Justifications

Even if the justification appears to have merit, the plaintiff might show that the claimed justification is pretextual. Generally, the line of proof would focus on the actual need for the information being produced in relation to the claimed justification. For example, if benchmarking exercises did not result in changes in actual operations, or if price exchanges duplicated information from other sources that provided sufficient price information, the justification of increased market knowledge would be a mere pretext.

Alternatively, the challenger might accept the claim that there is justification for an exchange of information, e.g., to help benchmark production costs, but then show that there was a set of data that would have provided the information necessary for that legitimate purpose that would not have created the inhibition on competition. [304] Once again, the focus is on the nature of the information exchanged and whether that was reasonable given that each of the rivals must engage in unilateral decision

304. The assumption is that if there were evidence of overt collusion on prices, outputs, or inputs, the role of the information exchange would be secondary.

making about how to compete in the market. Thus, the focus should remain on the merits of the exchange and not a more general market analysis.[305]

C. Exchanges of Information Ancillary to Legitimate Productive Transactions or Ventures

The analysis in Parts II and III assume that the parties had no relationship with each other except as business rivals. Such situations should be distinguished from contexts in which the parties are engaged in a joint venture or transaction to which the restraints at issue are or are arguably ancillary. If the parties are transferring productive assets, there is likely to be a need to share otherwise sensitive information necessary to make the transaction viable.[306] Similarly, if the parties are involved in a joint venture and are also rivals, there may well be a plausible justification that risks of opportunistic behavior necessitate a significant sharing of sensitive information to guarantee that illegal conduct is not occurring. In both situations, the justification for the exchange of information is ancillary to the transaction or venture and reasonably necessary for its effective completion. The ancillary restraint doctrine thus provides a shield for such a restraint, unless the restraint is unreasonable.

Indeed, in such contexts, the courts usually require evidence of market power as a screen to eliminate restraints associated with a transaction or venture that does not have any market effect even if the restraints are overreaching. This is a presumption of legality. It protects even restraints that are only arguably ancillary restraints.[307] This makes sense because it eliminates from judicial review situations where there is unlikely to be any significant adverse effect on the overall market and avoids creating a deterrent to ordinary business transaction restraints where they only affect the parties involved. The strength of that presumption of legality is powerful, which is why, generally, such cases fail in the courts.[308]

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305. A less draconian standard would hold that if justification for the exchange is conceded, further analysis should be contingent on a showing of either collective market power generally or of specific price or output effects. In the absence of such information, the argument would be that there is little reason for judicial intervention in business decisions by way of finetuning the review of the exchange.

306. The 2016 HR guidance recognizes that such transactions might justify exchanges of confidential and sensitive information but cautions that appropriate safeguards are essential. *See* ANTITRUST GUIDANCE, *supra* note 210 and accompanying text.

307. For an explanation of the framework that includes presumptions of legality and illegality, see Peter C. Carstensen & Richard F. Dahlson, *Vertical Restraints in Beer Distribution: A Study of the Business Justifications for and Legal Analysis of Restricting Competition*, 1986 WIS. L. REV. 1, 63-73; *see also* Peter C. Carstensen, *Function Versus Consequence in Restraint of Trade Analysis*, 53 U. BALTIMORE L. REV (forthcoming 2024).

308. *See supra* note 281.

For purposes of this exposition, the ancillary restraint explanation appears as a defense. The more likely situation is that the issue would arise in the context of a challenge to the legitimacy of a joint venture or transaction. As the HR guidance points out, there needs to be careful control over access to such information and it needs to be limited to that which is necessary to the transaction.[309] The exchange of unnecessary information might in turn support an inference that the putative venture is a cover for an anticompetitive exchange of information. However, the exchange of more information than is necessary in the context of a legitimate productive transaction or venture may well not trigger liability.[310] If the parties themselves are not dominant in the market, either as sellers or buyers, it is unlikely to cause any significant harm to the competitive process. Thus, where the exchange is at least arguably ancillary to a legitimate transaction like other arguably ancillary restraints, it is likely to be subject to a friendlier review.

D. The Implication of Proof of "Effect" in Private Cases

As prior discussion has pointed out, in a private damage suit, the plaintiff also must establish antitrust injury and impact. The injury element is relatively easy. The naked harm to competition is the sort of result that classically satisfies the injury requirement. The potentially more challenging issue is establishing that the conduct had an impact, or "effect," on the market. This is where courts have frequently looked for market definitions and proof that the conduct reflected that harm. The *Todd* case illustrates this problem.

Information exchange agreements that impose restraints on the parties should, like other naked restraint cases, result in a holding that the restraint is unlawful. This would still leave the plaintiffs in damage cases with the task of proving that they had in fact suffered damages.[311] This would disconnect the "effects" question from that involving the legality of the restraint. While establishing such losses is often feasible, it is also plausible to believe that, in some cases, despite the intent of the parties to restrain their competition, it will prove impossible to come up with a convincing measure of those losses, especially in class action cases where the loss must be one that is generally suffered.

309. *See supra* text accompanying notes 219-21.

310. *See supra* note 281.

311. *See supra* notes 277-80 and accompanying text (the German court presumed harm in information exchanges cases but still required the claimant to show its actual loss; this illustrates a standard that is similar to that used in American cartel cases and that ought to apply to naked information exchanges).

CONCLUSION

The exchange of competitively sensitive information among rivals is very likely to result in the reduction of the rivals' competitive vigor. As a result, it should generally be forbidden. Indeed, such exchanges often provide the basis for tacit collusion. By shifting focus to these agreements and their inherent anticompetitive effect, competition law can better sanction such undesirable conduct that harms consumers, suppliers, or both.

There are a few exceptions, however, that can require further review of the justification for the conduct. But when an agreement to exchange or pool competitively sensitive information operates to induce a restraint on competition, it should be declared illegal to preserve the vitality of the market system. Recent cases and economic models have shown that anticompetitive results are the most likely outcome of these agreements, but the formal legal standards for judging such conduct remain too tolerant. Any such exchange should be presumptively illegal with the parties overcoming that presumption only if there is clear and convincing evidence that the exchange has not restrained the competitive discretion of the participants.