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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

ROUNDTABLE ON FACILITATING PRACTICES IN OLIGOPOLIES

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Facilitating Practices in Oligopolies, which was held at the Competition Committee in October 2007.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les pratiques de facilitation dans le cadre des oligopoles, qui a eu lieu en octobre 2007 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable and the written submissions, several key points emerge:

- 1) *The concept of “facilitating practices” refers to conduct by firms, typically in an oligopolistic market, which does not constitute an explicit, “hardcore” cartel agreement, and helps competitors to eliminate strategic uncertainty and coordinate their conduct more effectively. Information exchanges are the most common facilitating practice, but competition authorities have investigated a wide range of other practices as well.*

The concept of “facilitating practices” describes conduct by firms, typically in an oligopolistic market, that falls somewhere between an explicit, “hardcore” cartel agreement and pure and simple oligopolistic interdependence and helps firms to reduce uncertainty in the market and coordinate their conduct more effectively.

Member countries have investigated a broad range of conduct as facilitating practices. Most cases concern arrangements among competitors to exchange information, for example historic or future price information or information about future strategic conduct. Other types of facilitating practices include pricing systems that facilitate collusive outcomes, such as multiple basing point pricing systems, and interlocking directorates which can facilitate coordination among competitors. Facilitating practices also can include vertical arrangements that may facilitate coordination among suppliers, such as certain minimum advertised price programs. Last, some facilitating practices can implicate single firm conduct laws, such as category management arrangements which may allow a “category captain” – a supplier appointed by a retailer -- to obtain sensitive information about smaller, competing suppliers.

- 2) *As firms should not be condemned for actions that represent merely a rational adaptation in an oligopolistic market, an unlawful facilitating practice should be found only where a competition authority or court can identify culpable conduct for which meaningful relief can be ordered. Thus, there may be markets in which competition authorities observe parallel conduct and supra-competitive outcomes without an additional facilitating practice, but intervention through competition law enforcement is not advisable because there is no meaningful relief.*

Distinguishing between lawful conduct that is the result of oligopolistic interdependence and certain additional conduct that can be characterized as unlawful facilitating practice can be particularly challenging, and there is no bright line test to make this distinction. Sometimes, terms such as “tacit agreement” or “implicit agreement” are used to describe such practices, but there is no uniform, generally accepted use of these terms and therefore they do not add much clarity to the problem.

Competition authorities or courts may be confronted with oligopolistic markets that are not competitive and where prices are at supracompetitive levels and therefore customers are harmed, but where they cannot identify any culpable conduct. Rather, each oligopolist has been acting rationally, given the structure of the industry. Most competition regimes do not condemn

conduct that is merely a rational adaptation in an oligopolistic market, even if it can harm consumers, in large part because there is no meaningful relief.

The discussion focused on the example of the gasoline industry, which has been investigated by several member countries for possible collusion and the use of unlawful facilitating practices. The discussion confirmed that it can be difficult to condemn parallel conduct in such an industry, which tends to be highly concentrated and where products are homogeneous and prices are highly transparent, unless a competition authority obtains additional, at least indirect evidence that suppliers have colluded or engaged in other practices which can be addressed in a meaningful remedy.

In industries in which supracompetitive outcomes can be observed but where it is difficult to establish that oligopolists engaged in culpable conduct, alternative approaches which do not require the establishment of unlawful agreement or culpability may be more appropriate. One example is the instrument of market investigations under the UK Enterprise Act, which allows the Competition Commission to examine the structure of the market and conduct of the players within the market, and to impose solutions without the need to identify culpable conduct or the possible imposition of sanctions.

- 3) *Most facilitating practices can / may have procompetitive effects or anticompetitive effects, depending on the circumstances in which they occur. Thus, facilitating practices typically can be condemned only after a careful examination of the circumstances in which they occur, their anticompetitive effects, and possible efficiencies. In certain circumstances, however, a competition authority may be able to conclude that a practice is anticompetitive without analysis of actual or likely anticompetitive effects.*

Most conduct characterized as facilitating practice can have procompetitive effects and anticompetitive effects, depending on the circumstances in which it occurs. For example, information exchanges can restrict competition, in particular when the information exchanged concerns future prices or strategic conduct. But information exchanges can also have a wide range of benefits, including providing better information to customers, benchmarking among industry participants, more accurate forecast of supply and demand, and more efficient allocation of production.

Given the ambiguous nature of most conduct considered a facilitating practice, a careful examination of a specific practice, its anticompetitive effects and efficiencies, as well as its objective or purpose, will usually be necessary to determine whether a given practice can be considered unlawful. During the roundtable discussion it was suggested that such an examination could include several steps, including an analysis of the relationship between the facilitating practice and the structure of the market to develop a theory of harm that explains how a practice can harm competition; the identification of actual or highly likely consumer harm; and an investigation of the objective or purpose of a practice.

In particular in cases examining past facilitating practices there can be a question whether it should be sufficient to argue that a practice has likely anticompetitive effects or whether there must be evidence of actual harm to competition. A plaintiff's/competition authority's role will be facilitated if proof of likely effects is sufficient. Some legal systems might be more demanding in these cases, however, and require evidence of actual anticompetitive effects.

In exceptional cases, on the other hand, the circumstances may support a presumption that certain practices are anticompetitive so that a competition authority can condemn such practices under an

abbreviated analysis without proof of actual anticompetitive effects. The UK's Independent Schools case was used during the roundtable to illustrate this situation; in this case, the competition authority concluded after a careful examination of several factors surrounding the exchange of information on future tuition rates that the practice was anticompetitive, without the need to engage in a full effects analysis. Ultimately, this analysis may not be so different from an analysis of facilitating practices where a competition authority relies on likely anticompetitive effects and where the standards of proof are not very exacting.

- 4) *Purely unilateral acts, such as public, unilateral price announcements, might facilitate coordination among competitors. In most countries, however, such conduct cannot be condemned unless it can be shown that firms have reached some type of agreement or coordinated action concerning their future conduct. In a few countries, however, competition authorities can prosecute purely unilateral acts as facilitating practice without the need to show that firms reached an agreement on certain conduct, which gives them greater flexibility to go after unilateral conduct that clearly has anticompetitive effects.*

Purely unilateral acts, such as unilateral price announcements or announcements of future strategic conduct, can have the effect of lessening competition. In most competition regimes, however, such practices can be condemned as unlawful only if the competition authority/plaintiff can show that as a result of the practice firms have reached some type of agreement on their future conduct. This may sometimes require an expansive interpretation of the concept of "agreement" to reach such conduct. In some competition regimes, the agreement requirement may be satisfied if it can be shown that recipients or addressees of a unilateral announcement did not protest and that the announcement resulted in actual anticompetitive effects.

In a few countries, however, purely unilateral acts that have anticompetitive effects can be condemned as unlawful without the need to show agreement, making it easier for competition authorities to go after conduct that clearly is anticompetitive.

In some countries, competition authorities may be able to use provisions applicable to dominant firm conduct to reach unilateral conduct that can be considered a facilitating practice, such as unilateral price announcements. This may include situations where a dominant firm announces certain conduct with the expectation that other firms will adopt parallel conduct. However, such provisions have to be enforced carefully to prevent their application to purely oligopolistic, interdependent conduct, for example when smaller rivals follow the price leadership of a dominant firm.

SYNTHÈSE

du Secrétariat

Les débats qui se sont tenus lors de la table ronde et les contributions écrites mettent plusieurs points en évidence :

- 1) *Le concept de « pratiques de facilitation » désigne un comportement par les entreprises, en général sur un marché oligopolistique, qui ne constitue pas une entente injustifiable explicite, et qui aide les concurrents à supprimer l'incertitude stratégique et à coordonner plus efficacement leur action. Les échanges de renseignements constituent la pratique de facilitation la plus répandue, mais les autorités de la concurrence ont également enquêté sur un large éventail d'autres pratiques.*

Le concept de « pratiques de facilitation » désigne un comportement par les entreprises, en général sur un marché oligopolistique, qui se situe entre l'entente injustifiable explicite et la pure et simple interdépendance oligopolistique, et grâce auquel les entreprises réduisent l'incertitude sur le marché et coordonnent plus efficacement leur action.

Les pays membres ont mené des enquêtes sur une large gamme de conduites assimilables à des pratiques de facilitation. La plupart des cas concernent des accords passés entre concurrents en vue d'échanger des renseignements, par exemple des informations sur les prix historiques ou futurs ou des renseignements sur les stratégies futures. Les autres types de pratiques de facilitation incluent les systèmes de tarification qui facilitent les collusions, comme l'utilisation de systèmes de fixation des prix à points de référence multiples ou le cumul de mandats d'administrateurs sans fonction de direction de nature à favoriser la coordination entre concurrents. Les pratiques de facilitation peuvent également faire intervenir des accords verticaux susceptibles de faciliter la coordination entre fournisseurs, comme certains dispositifs de prix minimum annoncés. Enfin, il peut s'agir de lois sur les pratiques unilatérales d'entreprises, comme les dispositifs de gestion par catégorie qui peuvent permettre à un « capitaine de catégorie » - un fournisseur désigné par un détaillant - de se procurer des informations sensibles sur des fournisseurs concurrents plus petits.

- 2) *Les entreprises ne devant pas être sanctionnées pour des actions qui constituent une simple adaptation rationnelle sur un marché oligopolistique, une pratique de facilitation illégale est avérée uniquement si une autorité de la concurrence ou un tribunal est en mesure d'identifier une pratique illégale pour laquelle il existe une voie de recours efficace. Par conséquent, il peut exister des marchés dans lesquels les autorités de la concurrence décèlent des conduites parallèles et des résultats supra concurrentiels sans pratique de facilitation supplémentaire, mais où l'intervention des services d'application du droit de la concurrence ne se justifie pas parce qu'il n'existe pas de voie de recours efficace.*

Il peut être très difficile de distinguer une conduite légale qui résulte de l'interdépendance oligopolistique et une conduite constituant une pratique de facilitation illégale et il n'existe pas de test de conformité absolu. Parfois, les termes « accord tacite » ou « accord implicite » sont

employés pour qualifier ces pratiques, mais en l'absence d'utilisation uniforme et globalement acceptée de ces termes, ils n'apportent pas un éclairage très utile.

Les autorités de la concurrence ou les tribunaux peuvent être confrontés à des marchés oligopolistiques qui ne sont pas concurrentiels et où les prix se situent à des niveaux supraconcurrentiels, de sorte que les consommateurs sont lésés mais aucune conduite illégale ne peut être incriminée. Chaque membre de l'oligopole a agi d'une manière rationnelle en fonction de la structure du secteur. La plupart des régimes de concurrence ne sanctionnent pas les conduites qui constituent une simple adaptation rationnelle sur un marché oligopolistique, même si elles peuvent porter préjudice aux consommateurs, essentiellement parce qu'il n'existe pas de voie de recours efficace.

Les débats portent sur l'exemple dans le secteur de l'essence, sur lequel plusieurs pays membres ont enquêté parce qu'ils soupçonnaient des collusions ou le recours à des pratiques de facilitation illégales. Ces débats confirment qu'il peut être difficile de réprimer les conduites parallèles dans un tel secteur, souvent caractérisé par une forte concentration, des produits homogènes et des prix très transparents, sauf si une autorité de la concurrence se procure des preuves supplémentaires, au moins indirectes, que les fournisseurs se sont rendus coupables de collusion ou d'autres pratiques pouvant donner lieu à une voie de recours efficace.

Dans les secteurs où des résultats supra concurrentiels sont manifestes mais où il est difficile de prouver que les membres d'oligopoles ont eu des agissements illégaux, des approches alternatives qui ne nécessitent pas d'établir l'existence d'un accord illégal ou d'une culpabilité peuvent être plus efficaces. La possibilité d'enquêter sur les marchés prévue par la Loi sur les entreprises au Royaume-Uni en est un exemple ; elle autorise la Commission de la concurrence à examiner la structure du marché et la conduite des acteurs du marché, et à imposer des solutions sans devoir désigner un coupable ni infliger des sanctions.

- 3) *La plupart des pratiques de facilitation peuvent avoir des effets pro concurrentiels ou anticoncurrentiels, en fonction des circonstances dans lesquelles elles surviennent. C'est pourquoi ces pratiques ne peuvent être en général condamnées qu'après un examen minutieux des circonstances, de leurs effets anticoncurrentiels et des gains d'efficacité possibles. Toutefois, dans certains cas, une autorité de la concurrence peut conclure qu'une pratique est anticoncurrentielle sans analyser ses effets anticoncurrentiels réels.*

La plupart des conduites dites de facilitation peuvent avoir des effets pro concurrentiels ou anticoncurrentiels, en fonction des circonstances dans lesquelles elles surviennent. Par exemple, les échanges de renseignements peuvent restreindre la concurrence, surtout lorsque les informations échangées concernent les stratégies ou les prix futurs. Toutefois, les échanges de renseignements peuvent aussi procurer de nombreux avantages, notamment une meilleure information des clients, une comparaison entre les acteurs du marché, une prévision plus précise de l'offre et de la demande et une répartition plus efficace de la production.

Compte tenu de la nature ambiguë de la plupart des conduites considérées comme des pratiques de facilitation, il faudra généralement procéder à un examen détaillé d'une pratique spécifique, de ses effets anticoncurrentiels éventuels et de ses gains d'efficacité, ainsi que de son objectif ou de sa finalité, afin de déterminer si une pratique donnée peut être jugée illégale. Les participants à la table ronde suggèrent que cet examen pourrait comporter plusieurs étapes, dont l'analyse du lien entre la pratique de facilitation et la structure du marché afin d'élaborer une théorie du préjudice expliquant en quoi une pratique peut entraver la concurrence ; la détermination du préjudice réel ou très probable pour le consommateur ; et l'examen de l'objectif ou du but de la pratique.

Dans les enquêtes sur les pratiques de facilitation passées, on peut se demander s'il suffit d'alléguer qu'une pratique a probablement des effets préjudiciables à la concurrence ou s'il faut prouver que la concurrence est effectivement lésée. La tâche du plaignant ou de l'autorité de la concurrence sera facilitée si la preuve d'effets probables est suffisante. Toutefois, certains systèmes juridiques peuvent être plus exigeants à cet égard, et exiger d'administrer la preuve d'effets anticoncurrentiels effectifs.

En revanche, dans les cas exceptionnels, les circonstances peuvent corroborer la présomption que certaines pratiques sont anticoncurrentielles de sorte qu'une autorité de la concurrence peut les condamner au moyen d'une analyse abrégée sans preuve d'effets anticoncurrentiels réels. L'affaire des écoles indépendantes au Royaume-Uni est mentionnée pour illustrer cette situation ; dans cette affaire, l'autorité de la concurrence a conclu, à l'issue d'un examen détaillé de plusieurs facteurs entourant l'échange d'informations sur les frais de scolarité futurs, que cette pratique était anticoncurrentielle, sans qu'il soit nécessaire d'entreprendre une analyse approfondie de ses effets. En fin de compte, cette analyse peut ne pas différer beaucoup d'une analyse des pratiques de facilitation dans laquelle l'autorité de la concurrence se fonde sur les effets anticoncurrentiels probables en appliquant des critères de preuve peu contraignants.

- 4) *Les conduites purement unilatérales, comme les annonces publiques unilatérales de prix, peuvent faciliter la coordination entre concurrents. Toutefois, dans la plupart des pays, ces conduites ne peuvent être condamnées qu'à condition de prouver que les entreprises ont conclu un accord ou coordonné leur conduite future. Néanmoins, les autorités de la concurrence d'un petit nombre de pays peuvent poursuivre les conduites purement unilatérales considérées comme des pratiques de facilitation sans devoir prouver que les entreprises se sont entendues sur une certaine conduite, ce qui leur confère une plus grande marge de manœuvre pour réprimer les conduites unilatérales clairement préjudiciables à la concurrence.*

Les conduites purement unilatérales, comme les annonces unilatérales de prix ou les annonces sur les stratégies futures, peuvent restreindre la concurrence. Toutefois, dans la plupart des régimes de la concurrence, ces pratiques ne peuvent être condamnées comme illégales que si l'autorité ou le plaignant est en mesure de prouver que les entreprises se sont ainsi entendues sur leur conduite future. Cela peut parfois nécessiter une interprétation large du concept « d'accord » relatif à une telle conduite. Dans certains pays, la règle de l'accord est satisfaite si l'on peut prouver que les destinataires d'une annonce unilatérale n'ont pas protesté et que l'annonce a entraîné des effets anticoncurrentiels réels.

Néanmoins, les autorités de la concurrence d'un petit nombre de pays peuvent poursuivre les conduites purement unilatérales considérées comme des pratiques de facilitation sans devoir prouver la réalité d'un accord, ce qui leur confère une plus grande marge de manœuvre pour réprimer les conduites clairement dommageables à la concurrence.

Dans certains pays, les autorités de la concurrence peuvent se prévaloir des dispositions applicables au comportement adopté par une entreprise dominante pour instaurer une conduite unilatérale pouvant constituer une pratique de facilitation, comme les annonces de prix unilatérales. Il peut s'agir de situations dans lesquelles une entreprise dominante annonce une certaine conduite dans l'espoir que d'autres entreprises lui emboîteront le pas. Toutefois, ces dispositions doivent être appliquées avec discernement pour éviter qu'elles ne visent les conduites interdépendantes purement oligopolistiques, par exemple lorsque des rivaux plus petits s'alignent sur les prix fixés par une entreprise dominante.

BELGIQUE

Réponse de la Belgique

1. *Scope*

Il existe un large éventail de pratiques envisageables qui permettent aux firmes de coordonner leur comportement sans entrer explicitement dans un "hard core" cartel. Il est difficile de répondre dans l'abstrait.

Jusqu'à présent, la Belgique n'a pas investigué ou observé certaines pratiques en particulier.

2. *Under what circumstances can competition law intervene against practices and conduct that may help firms to reduce strategic uncertainty and more effectively coordinate their conduct ?*

Tout comme pour le 1.1., il existe un large éventail de pratiques envisageables et il est difficile de répondre dans l'abstrait.

Non, la réciprocité n'est pas requise pour estimer qu'un échange d'informations est illégal. Il peut être illégal qu'une firme rende disponible des informations unilatéralement pour ses concurrents.

Oui.

Non.

3. *Standard of liability*

Non, le partage d'information n'est pas prohibé "per se"

Oui, il faut prouver que le partage d'informations a des effets anticompétitifs ou en a vraisemblablement.

Si la conduite a une efficacité plausible, c'est suffisant pour affaiblir le dossier d'un plaignant, il n'est pas nécessaire de faire un exercice plus large pour rechercher un équilibre des effets restrictifs et des efficacités.

4. *Remedies*

Il faut cesser les pratiques ou bien il y aura des amendes qui seront prononcées.

Non.

Par exemple des lignes directrices.

CZECH REPUBLIC

Information exchanges establishing competition law violation; Information sharing arrangements constituting cartel agreements

1. Introduction

This paper is the Czech Republic's contribution to the roundtable discussion on cartel investigation held as part of the OECD Competition Committee meeting in October. In our contribution, we did not dwell on competition theory in this area, and decided to use practical examples from the decision-making practice of the Office for the Protection of Competition (the "Office") instead. This was due to yet not completely clarified theoretical basis and precise terminology in the area of detection of anticompetitive behaviour not constituted by purely hard core cartel, but rather by coordinated conduct of undertakings, and exchange of information with an adverse impact on competition. We believe that practical examples from our jurisdiction will best illustrate the approach of the Office to specific cartel investigation.

2. "Building savings banks" case

The Office has recently investigated a case of long-term implementation of an agreement on exchange of information between competitors on the market – all the building savings banks active on the national market for building savings. At the same time, the case did not exhibit the characteristics of a hard core cartel. Despite strong suspicions to the contrary, no price coordination or other coordination of market behaviour was proven in the proceeding.

In its decision, the Office subsequently declared that by agreeing on a system of monthly exchanges of statistical data on its business results in the sector of building savings, the building savings banks had entered into a prohibited information exchange agreement capable of distorting competition on the market for building savings – the saving phase. By such conduct, all the parties to the proceeding violated the prohibition set out in Section 3 paragraph 1 of the Czech Act on the Protection of Competition, i.e. the prohibition on agreements distorting or capable of distorting competition.

It was proven in the proceeding that at a meeting of "Association of Building Savings Banks" held on December 18, 1997, the parties approved the structure and content of their activity overviews, and subsequently agreed on the frequency with which such information (plus other items as agreed) would be provided. The information exchanged between the parties on a monthly basis subsequently included information on number of new agreements, target amounts and market shares calculated on the basis of the two types of figures. The information was distributed together with a comparison with the preceding month, and it was thus possible to track the developments in market shares of the individual building savings banks over time, starting from the month just elapsed.

It was further proven in the proceeding that information was exchanged regularly on a monthly basis as of a certain date, and the parties to the proceeding shared certain other, more detailed information – on the amounts saved, termination of savings agreements upon the elapse of the five-year period, information on bridge loans, on current and newly drawn loans (both number and amounts), information on the structure of the loans, etc. Such information and data were of such nature and quality (in terms of volume, structure and topicality, or rather frequency of exchange) that no individual party to the proceeding would

have been able to obtain the same on its own, without cooperating with its competitors. The detailed tables contained more than forty different pieces of information on the economic operations and activities of each building savings bank over the preceding month.

As the entire building savings market has been stable in the long run, and individual entities on the market are able to estimate how their competitors would respond to any potential change (whether external, or a change in their own competition policies), and as it is a transparent market as regards business conditions of the individual building savings banks, which conditions are publicly known, as are the fees charged by the building societies to clients for services, the Office viewed the information exchange as a serious restriction of independent decision-making on the part of the individual parties to the proceeding in competition on the market.

The above-described sharing of information ultimately led to a situation where none of the parties to the proceeding retained the advantage of a correctly chosen and applied business strategy for an extended period of time. As all the other competitors were immediately informed about the effect of specific behaviour on market share size and amount of deposits, they were able to “catch up” with the undertaking quickly. This situation could to a significant extent lead to elimination of competition between the individual players on the market.

Building societies basically replaced the monitoring of other entities on the market, commonly practiced in the commercial environment, learning about their chosen business strategy and specific actions taken in the competition on the market – including estimates of market share and its development over time – with exchange of information. The agreement and its performance completely satisfied the parties’ need to learn about current steps and success rate of their competitors. It was no longer necessary to verify any changes of business terms at branch offices of building societies, to follow their promotional campaigns and pump employees for information – the success of a strategy chosen by a competitor, including the exact impact on market shares, was apparent from accurate information provided by the competitor every month.

The Office thus believed that the system of information exchange over time was harmful as such. Overall, the statistical data and the periodical exchange thereof represented an irreplaceable and indispensable comfort for all the entities on the market, a comfort they could not have obtained in any other way than by mutual and illicitly close cooperation. Costs that would have to be incurred by each entity to obtain a comparable amount of accurate monthly information would be considerable.

The availability of the information in terms of content and periodicity brought about by the agreement between the building societies would have been impossible without the mutually agreed exchange. In its decision, the Office thus assumed as a proven fact that in the absence of the said agreement between the parties, the competitors on this highly concentrated market would have possessed distinctively different information, and in particular substantially less information.

As regards the impact of the parties’ conduct on the relevant market, the Office noted that the agreement jeopardised competition on the market for building savings – the saving phase. The potential distortion of competition in the case at hand was due to the fact that any change in the business policy of any building savings bank could be virtually immediately compared to the development of its market share and the volume of deposits, target amounts and loans. Given the proven transparency of the market, the parties to the proceeding could thus immediately detect the success of a particular business strategy and its effect on market share and other indicators in the statistical overview. The information exchange agreement was able to reduce or even completely eliminate the degree of uncertainty on the part of individual parties to the proceeding as to the predictability of behaviour of their competitors. In the absence of the information exchange agreement, the information level of the parties to the proceeding in the market

would have been substantially different because the discovery of evidence conducted showed that the parties to the proceeding were unable to obtain similar information over such a short period of time, or to obtain information of the same quality with respect to business behaviour of their competitors and the success or lack of success of the behaviour thereof.

The second potential negative impact of the information exchange agreement was seen in the risk of facilitation of removing the consumer benefit of the high income yield in the area of building savings. For instance, such potential negative impact of the information exchange agreement can be illustrated by means of a model situation where one of the parties to the agreement would decide to increase fees related to saving in a building society, e.g. the fee for savings account administration. Following the unilateral increase of the fee, the information exchange under the agreement would enable both the party who increased the fee and the other parties assess, with a delay of a single month, how the end consumers responded to the change, i.e. whether the party who increased the fee experienced a decline in the number of new agreements, or not. In the absence of the information exchange agreement, not only the party who changed its fee policy, but also the other five parties to the proceeding, would remain uncertain as to how the new fee policy of one party would be reflected on the market. However, as the parties to the proceeding did conclude and did implement the information exchange agreement, and exchanged relevant, up-to-date and highly detailed information, all the market participants would have been able to compare – virtually immediately – the impact of a changed fee policy of one party on its position on the market for building savings.

The party to the agreement who increased the fee would be able to determine very quickly on the basis of information being exchanged how the consumers responded to such measure, whether there were perhaps unusual developments in market shares in the segment of newly concluded agreements. If it discovered that the fee increase did not elicit a negative response on the part of consumers, or that the negative response was not so significant and the party still benefited from this step, then the party would not be in doubt as to whether it should reduce the fees again, and could moreover contemplate a further increase of fees. The following month, other parties to the proceeding would discover that the change of the fee policy by one party to the proceeding did not significantly affect its market position, and all parties could then change – gradually increase – their fees on the basis of such real test.

The above-described case is interesting for other reasons as well. For instance, the parties argued that the agreement cannot constitute an agreement distorting competition if government agencies took a proactive part in their conduct. However, the Office concluded that the agreement had not been initiated by government agencies. Even the potential involvement of government agencies in conduct related to the establishment of the agreement, or the distribution of information overviews to government agencies does not rule out unlawfulness of the parties' conduct. Exemption from the application of the law would be relevant only if parties to the proceeding were performing legal obligation imposed on them by order by the government agency. The scope, method and frequency of information exchange, as well as the level of detail of the information being exchanged in this case, went well above and beyond both existing information duties which, moreover, only apply to individual parties to the proceeding vis-à-vis government agencies, and information requirements on the part of the government agencies which were not based on the law or any administrative decision, and were performed by the parties to the proceeding voluntarily.

The parties to the agreement further argued that the information exchange agreement was not a prohibited agreement because it did not pertain to information having the nature of a business secret which is one of the prerequisites for a breach of competition rules. The Office acknowledged that information exchanged between the parties did not qualify as business secret. However, that was due to the fact that the parties to the agreement deliberately waived their right to keep them secret, at least vis-à-vis the other

parties to the agreement. The Office concluded, however, that if it is stipulated that an information exchange agreement can be anticompetitive only if the information being exchanged is of confidential or sensitive nature, or rather, if it has the nature of a business secret, what that is deemed to mean is a situation where the information would be of such nature in the absence of the agreement in question. Information shared by undertakings – competitors – thus always loses its confidential, sensitive nature, or rather the nature of a business secret. In the case at hand, it was quite apparent that the information being exchanged between the parties to the agreement, e.g. information on newly concluded agreements, monthly sales, etc., would under different circumstances, or on different markets not distorted by the agreement, be confidential and sensitive, or rather would have the nature of a business secret.

3. Detection of a meticulously organised cartel

Thanks to the existence of the Office's Leniency Programme, a significant cartel of manufacturers of gas-insulated switchgear ("GIS") has recently been detected. Although this was a hard core cartel, the organisation of the horizontal cartel agreement is worth mentioning in connection with the topic of our roundtable discussion.

The cartel members met once a year at a general meeting in order to confirm the continued existence of the cartel, to determine a general strategy and resolve conflicts, if any. Every two weeks, the European Committee and the Japanese Committee would hold committee meetings at various airport centres and hotels in order to discuss the requirements of their members, allocation of individual projects, determination of project prices, etc. According to ABB, which provided evidence of the cartel under the Leniency Programme, two meetings usually took place on two consequent days. On the first day, all the European cartel members would meet. Representatives of the parties to the proceeding took part in the meetings, together with persons familiar with the details of the individual projects. On the following day, both Committees would meet at a joint meeting. Pursuant to the agreement they had concluded, the European Committee consisted of ABB, ALSTOM, Siemens and AEG or Schneider, alternating after one year. The Japanese Committee consisted of representatives of Hitachi, Mitsubishi and Toshiba. Pursuant to the applicable provision of the agreement, decisions adopted at the Committee meetings were binding for both the European and Japanese groups of GIS manufacturers. Later on, a working level and a steering level were created. The steering level met less regularly than the working level, and its main purpose was to serve as a body deciding on issues of greater importance and on resolution of disputes between cartel members.

Each group, i.e. both European and Japanese, appointed a company to serve as a secretary. Such company served as a contact point and played a key role in the organisation of meetings, gathered, i.e. received, information from the companies involved, and distributed it to others. The parties to the agreement advised their Secretary of upcoming projects and presented their requirements and interest to take part in the projects. All the notifications of future projects in countries covered by the agreement and other important information were shared by the European and Japanese Secretaries.

Further, "job meetings" were held where members of the cartel group to which the project was allocated would meet. According to ABB, so as to avoid suspicions of a cartel, and as most customers required 3 or 4 bids for every tender, several cartel members would generally take part in the tender. At the job meetings, the company to which the project was allocated by the cartel, would advise the other cartel members of its bid price, so that the other cartel members could agree how much higher their bids should be, or even determine their bid prices precisely. Such decisions were binding on all the members, and any breaches would be followed by sanctions imposed on the company who failed to comply with the agreed procedure.

The cartel members gradually began to communicate also by e-mail and mobile phones. They used private email addresses on public servers, such as yahoo or hotmail. According to ABB, the addresses were based on code names which were changed frequently, and so were the addresses. Attachments containing messages addressed to the cartel members were attached to the email messages. The messages were coded. Codes were used in the electronic correspondence, and indicated in the heading of each email to be able to identify which company is sending the message. According to ABB, mobile phones used for communication between the cartel members were provided by Siemens.

The cartel functioned in this manner since its establishment on April 15, 1988, at least until March 3, 2004 when the last round of electronic communication between the cartel members demonstrably took place. For this anticompetitive conduct, the Office imposed thus far the highest fine in the 16 years of its existence – a total of CZK 941,881,000, i.e. over EUR 3.3 million.

4. Conclusion

It is possible to conclude that the operation and organisation of a cartel may have, in particular in the case of stable and long-term violations of competition rules, highly specific and complex features. Both of the above cases tackled by the Czech Competition Office can be called highly sophisticated, subtle and very efficient horizontal agreements under which a vast amount of information was being exchanged. What is important is the fact that the information and data so exchanged were subsequently used in evidence against the parties to the administrative proceedings conducted by the Office. However, given the complexity of such cases, it is not easy for a competition authority to prove unequivocally the existence of the anticompetitive conduct, and to punish the same as appropriate. The Office did succeed in the cases described above, and the negative effect on competition was eliminated.

DENMARK

As a member of the EU, Denmark follows the system within the EU and, thus, the principles set forth by EU case law under Article 81 of the EC-treaty. Therefore, information exchange which would be viewed upon as a violation of competition law in the EU would also constitute a violation under The Danish Competition Law. The Danish Competition Law is administrated by The Danish Competition Authority and The Danish Competition Council which decide whether the competition law has been violated. However, neither The Danish Competition Authority nor The Danish Competition Council has the authority to impose administrative fines. It is only The Public Prosecutor for Serious Economic Crime that can impose fines.

1. Scope

Firms can participate in different forms of co-operation which can contribute to reducing strategic uncertainty and more effectively coordinating their conduct without entering into explicit “hard core” cartel agreements. One form of co-operation is through trade organizations. Trade organizations often publish different statistics on turnover, sales, cost factors and the development of the market within a specific line of business. Other ways of co-operating are when two or more firms agree on a co-operation on the execution of a certain task for instance research or transport. This form of co-operation entails that the firms coordinate a part of their business (for instance research or transport) and that the firms directly or indirectly receive information on each others activities and plans through the cooperation. In general it is more alarming the more activities the companies co-operate on, and the more knowledge they receive on each others prices, plans or other competition sensitive information the worse it is.

2. Under what circumstances can competition law intervene against practices and conduct that may help firms to reduce strategic uncertainty and more effectively coordinate their conduct?

Facilitating practices such as exchange of information and co-operation on logistics, transport etc. can restrict competition if the information is able to disclose the market strategies of companies or if the information works as a recommendation of a certain market conduct. Information which discloses or works as a recommendation of the above mentioned could be considered unlawful under the Danish Competition Act. However, it is of course necessary to be able to prove that the information exchange has as it's direct or indirect object or effect to restrict competition.

Sending out guidance/directions on price calculation with a time rate schedule or with a cost index which could be considered as a recommendation on increasing the price level has in Denmark been declared as having as its direct or indirect object to restrict competition and thus unlawful.

Sending out statistics within a line of business which are sufficiently aggregated (where the information does not enable one to identify sensitive information from individual companies) and where the information is sufficiently old has not been considered as unlawful under the Danish Competition Act.

The evidence needed in order to be able to intervene against above mentioned practices and conduct depend on whether the case is handled within the criminal system under The Public Prosecutor for Serious Economic Crime or within the administrative system under The Danish Competition Authority.

In order for The Public Prosecutor for Serious Economic Crime to intervene it would be necessary to prove, that the practise or conduct is done intentionally or with coarse negligence in order to restrict competition. Thus, the standard of proof of an infringement of the regulation on prohibition of cartels is appreciably higher within the criminal system than within the administrative system. Within the administrative system the standard of proof does not require the same standard of evidence of the existence of an agreement.

In the DAG-case¹ the Danish trade organization of reuse of cars sent out a table containing cost accounting for environmental treatment of cars to its members. The table appeared as a detailed instruction on calculation of costs in connection to environmental treatment of cars or as fixing prices for environmental treatment of cars. The Danish City Court found that the table clearly restricted competition. DAG was fined 50.000 kr. (6,666. Euro).

Generally information exchange is divided into two categories:

- 1) Recommendations, suggestions and guidance/directions from trade organizations to the members.
- 2) Actual information exchange, where trade organizations or other units gather, process and send out information and data from the undertakings or other sources.

The first category covers one-way communication for instance where an organization seeks to regulate the market conduct of the members. If the information under the first category is capable of unifying the market conduct of the undertakings in relation to essential competition parameters, the exchange of information would be considered unlawful.

As an example of the first category The Danish Competition Authority has reported a trade organization of owners of bus companies to the The Public Prosecutor for Serious Economic Crime. The organization encouraged the members to increase their prices on tourist trips with a 4 % oil fee. This encouragement was sent out to the members with some statistics which showed what a reasonable oil fee would be in the future. Furthermore, the organization had sent a letter to the members, which described the grounds for the price increase to the customers. The organization had pre-formulated the letter. The members only had to sign the letter and send it to their customers. The investigations carried out by The Danish Competition Authority did not show evidence that the members had followed the encouragement. However, The Danish Competition Authority found that the mere fact that such an encouragement was sent out to the members was to be regarded as a violation of competition law.

The second category of information exchange covers two-way communication, where trade organizations and other units gather information and data from undertakings and send it out to the undertakings in a processed form. This kind of information exchange can create a high degree of transparency which can be in favour of competition as well as restrict competition. The second category also covers information exchanged through companies co-operating on research, transport, distribution, logistics etc.

An example which covers two-way communication is the decision of The Danish Competition Council in the local banks corporation-case². In this case 7 local banks exchanged commercial information on interest change, employee wages, fee income and commission income. This information exchange was

¹ Sentence pronounced on the 28th of February 2005 in case nr. 38.13554/04 by the Danish City Court upon the Danish trade organisation for reuse of cars (Dansk Autogenbrug, DAG).

² Decision of The Danish Competition Council on the 28th of March 2007.

found unlawful by The Danish Competition Council. The decision has been appealed to the Danish Competition Appeals Tribunal.

Another example within the second category is a system of co-operation on exchange of information between supermarket chains and their suppliers on a category basis. The system is called Category Management and operates within the Danish market for fast moving consumer goods. A category constitutes for instance of dairy products within which a supermarket chain wishes to enter into a binding agreement with suppliers on development of sales in the supermarkets within the specific category. A supplier must then undertake the role of category captain that is to undertake the responsibility of running the development of sales in the supermarkets within the category and in that relation present plans for which products supermarkets should make their priorities, plans on space management, promotion etc. As part of the co-operation the supermarket chains have to supply the category captain with detailed information on supermarket sales, profits, quantity etc. as well as information on the competitors of the category captain. Category Management in Denmark may entail some extra risks of restricting competition on both the retail level as well as the supply level because the market is very concentrated. There are only three major retail chains and within a number of categories the market is dominated by one large supplier. Hence, Retailers as well as suppliers may get competition sensitive information about their competitors. This may unify their market behaviour at the retail level for instance if the retailers use the same category captain and imply foreclosure of competition to the category captain. The Danish Competition Authority was asked whether such a system of category management would pose a problem in relation to competition law if it was implemented in one of Denmark's larger supermarket chains with approximately 20 % share of the retail market. The Danish Competition Authority expressed serious concern that the system could restrict competition. However, investigations are still pending and the case is not definitively determined. Consequently, The Danish Competition Authority would like to know whether any other national competition authorities have dealt with similar cases and if so how the national authorities have handled the cases and what decisions they have reached in that relation.

Information exchange on prices, recommended prices, price levels, rebates, price increases or minimum prices will be considered as having the object of restricting competition and thus unlawful, irrespective of whether the exchanged information falls within the first or the second category.

Announcements which can work as bearing mark are considered to be a price recommendation.

For instance a trade organisation BYG Data A/S sent out guidance on how to calculate offers on painting buildings which was found unlawful by The Danish Competition Authority³. The posts in the guidance consisted among other things of collectively agreed price-rates and different additions, which the user had to type in himself. This was due to the fact that the additions were related to the user in question. BYG Data A/S had pre-inserted some numbers for the additions in order to make the usage of the system clear. The Danish Competition Authority found that members of BYG Data A/S could perceive these numbers as recommended rates. The programme could therefore restrict competition and had in fact done so.

Information exchange on actual individual prices, future prices and maximum prices is as a rule of principle unlawful. Exchange of historical individual prices can under some circumstances be lawful. The more aggregated and the older the information is the more it is likely that the historic prices would be lawful. Thus, the level of aggregation of the information plays a big role. The aggregated information must not be able to identify and directly or indirectly disclose individual competition sensitive information on prices, turnover, costs of competitors or other conditions which can reduce the uncertainty of the market position or market conduct of the companies.

³ Decision of The Danish Competition Authority on the 19th of December 2001 in the BYG Data A/S-case.

Information exchange on sales and production which discloses the future plans for sales and production of a given undertaking is as a rule of principle unlawful.

Information exchange on costs in form of guidance on calculations, statistics, and overviews of the individual costs of an undertaking or overviews of the total costs within a line of business can harm competition if it works as a price recommendation or if the exchange discloses the individual cost of a given undertaking. An announcement from a trade organization on its estimate of the percentage increase in costs within a certain line of business within a given period of time can be viewed as an indirect recommendation on what the members can expect the price increases to be. This, regardless of whether the information concerns costs which have been defrayed or future costs. Thus, such an announcement can be regarded as unlawful according to the Danish Competition Act⁴.

For instance The Danish Competition Authority intervened in 2005, when an association for tree growers in an attempt to make it easier for the members to calculate their costs and thereby making them more aware of price and costs published a forecast on expected supply and demand on different European markets and a calculation table on their website. The calculation table deducted estimated costs and earnings/profits in the retail stage and freight, costs and earnings/profits in the wholesale stage from an expected consumer price. The calculation ended up with a remainder described as a producer price, and which could only be understood as a sales price. Furthermore, the association encouraged the members to increase their prices. The Danish Competition Authority ordered the association to withdraw the calculation and the encouragement on price increase. Unfortunately, the association published a new price recommendation in 2006 and The Danish Competition Authority has reported the association to the Public Prosecutor for Serious Economic Crime for infringement of the prohibition of cartels.

If the information exchange emanates from trade organizations, it is not necessary to prove that the member firms agreed to share the information. Nor is reciprocity required in order to find the information exchange unlawful. The same would be the case where the change of information emanates from cooperation on distribution, logistics etc. The mere fact that the information has been exchanged or has been made available for the firms within a given line of business can be sufficient to establish a competition law violation cf. the above mentioned DAG-case and a second case about an association within the forest market. The association published a trade barometer which was not based on actual information on supply and demand or prices in an earlier period but on the prediction of what prices would be in the future. The Danish Competition Authority found that the trade barometer constituted a restriction of competition and reported the association to The Public Prosecutor for Serious Economic Crime.

Depending on the information exchanged and if there is a to-way-communication between two or more companies it would not be necessary to show, that firms have agreed to share information. For instance if two firms send information on sales, production and prices to each other it would probably not be necessary to show agreement on sharing information in order to establish a violation of competition law. However, some kind of reciprocity is required to find that one-way information exchange is unlawful. Thus, if one firm unilaterally makes information available to competitors for instance information about intended price increase it would be necessary to present some kind of evidence of an agreement or concerted practices among the competitors to find the information exchange unlawful.

Market structure, the nature of competition, market mobility, development etc. do have an effect on whether information exchange is considered to be unlawful. However, these factors cannot be used as a filter to decide in which cases intervention should be considered. Furthermore, it has to be taken into consideration whether the information exchange has as its object or effect to restrict competition. If

⁴ Se Decision of The Danish Competition Council of the 29th March 2006 in the Craftsman council-case.

information sharing has the object of restricting competition it can be considered as a “per se” violation of competition, for instance price agreements. On the other hand if the information exchange only has the effect of restricting competition it would be necessary to make a concrete assessment in which the above mentioned factors would be taken into consideration.

3. Standard of liability

Under the Danish Competition Law there might be circumstances when it can be justified to subject pure facilitating practices such as information sharing to a “per se” type prohibition without detailed examination of circumstances and effects. For instance in the above mentioned case about the association within the forest market the members reported their sales prices on raw wood when the members entered into a contract with a buyer. These contracts are usually entered into on 6 months basis. The reported contract prices were then published by the association and made available to all members. Thus, competitors were able to see future prices (6 months ahead) and would be able to adjust prices. This could be an example of information sharing which is so close to being a hard core cartel that the conduct could be subjected to a “per se” type of prohibition. Thus, when information exchange has as its object to restrict competition it could be subjected to a “per se” type of prohibition.

Pure information exchange which has not as its object to restrict competition would not be subject to a “per se” prohibition. The factors which in this case could be used to decide whether the information sharing is unlawful could be similar to the factors which are considered when deciding whether a restriction meets the conditions for an exemption from the prohibition against cartels. The situation will always undergo a concrete assessment looking at whether the efficiencies counterbalance the restrictive effects and taking factors as market structure, development, market mobility etc. into consideration.

4. Remedies

The remedies in cases where The Danish Competition Authority and Council intervene are administrative not penal. The remedies against purely facilitating practices are the same as when an intervention is made against a cartel. The orders which may be issued can for instance be termination of agreements, decisions, trading conditions etc. in full or in part.

One way to provide guidance to market participants could be through information campaigns/activity. For instance by publishing leaflets with examples on what types of information exchange could be seen as a violation of competition law. The Danish Competition Authority has for instance in chapter five of the Competition Report 2007 published some guidelines on what type of exchange of information could be regarded as a violation of The Danish Competition Law. Information activity aimed at the market also happens through meetings with companies and trade organizations and through publication of the decisions reached by the authorities.

FRANCE

Communication et échanges d'information sur les marchés oligopolistiques : analyse économique et jurisprudence récente du Conseil de la concurrence

Le Comité concurrence de l'OCDE organise le 18 octobre 2007 une table ronde sur le thème "*Cartels: Approaches to cartel investigations*". Dans sa note du 17 juillet, le président du Comité précise que la réunion se concentrera sur les pratiques, souvent qualifiées de facilitatrices, qui ne relèvent pas de l'entente expresse, citant les exemples du "*cheap talk*" et des échanges d'information. Le Conseil de la concurrence présente ici, au travers de sa jurisprudence récente, la méthodologie qu'il suit pour analyser les pratiques de ce type.

Introduction

Le Conseil de la concurrence n'a jamais considéré que toute communication entre entreprises nuit nécessairement à la concurrence et aux consommateurs, ni que les échanges d'information sont anticoncurrentiels *per se*. Au contraire, le Conseil établit, dans chaque cas, un bilan : il évalue la vraisemblance et l'ampleur des effets anticoncurrentiels et, le cas échéant, des gains d'efficacité ; il soupèse les deux types d'effet pour apprécier l'impact net de la pratique sur l'intensité de la concurrence. Cette logique générale, ainsi que l'allocation de la preuve qui en découle, est la même pour les échanges d'information que pour bien d'autres pratiques : l'autorité doit démontrer l'effet potentiellement négatif de la pratique sur le fonctionnement du marché, en décrivant de manière concrète les mécanismes par lesquels elle modifie les incitations des acteurs à se faire concurrence ; à l'issue de cette première étape, c'est aux entreprises de prouver l'existence de gains d'efficacité susceptibles de compenser l'effet nuisible de la pratique.

La méthodologie suivie par le Conseil de la concurrence pour établir l'effet potentiellement négatif des échanges d'information s'inspire du raisonnement du Tribunal de première instance des communautés européennes dans l'arrêt *John Deere*¹ : « *Le Tribunal estime, en revanche, que, comme le soutient cette fois la Commission, la généralisation, entre les principaux offreurs, d'un échange d'informations précises et selon une périodicité rapprochée, [...] est de nature, sur un marché oligopolistique fortement concentré, [...] où, par suite, la concurrence est déjà fortement atténuée et l'échange d'informations facilité, à altérer sensiblement la concurrence qui subsiste entre les opérateurs économiques.* » Le Conseil vérifie que le marché présente un caractère oligopolistique, avec des barrières à l'entrée élevées, que les informations sont échangées selon une périodicité rapprochée et qu'elles sont précises, stratégiques et confidentielles. Il porte une attention particulière à l'utilisation concrète que les entreprises font des informations échangées et à la manière dont l'information acquise modifie leurs stratégies.

La littérature économique a identifié de nombreux canaux par lesquels les échanges d'informations entre entreprises affectent le jeu de la concurrence, induisant, selon les cas, des effets favorables ou défavorables aux consommateurs (partie I). En pratique, le bilan concurrentiel doit tenir compte de nombreux facteurs, relatifs à la nature des données échangées, aux conditions de l'échange lui-même ainsi qu'à l'environnement concurrentiel dans lequel il s'opère (partie II). Dans plusieurs affaires récentes

¹ Arrêt « *John Deere Ltd* » du TPI du 27 octobre 1994, confirmé par la Cour de justice dans un arrêt du 28 mai 1998.

traitées par le Conseil de la concurrence, les entreprises s'échangeaient des données portant sur les prix pratiqués et les quantités vendues par chacune d'entre elles. Le Conseil n'a pas présumé l'effet anticoncurrentiel de telles pratiques ; il l'a démontré en s'appuyant sur des raisonnements économiques corroborés par les faits relevés dans chaque affaire. En particulier, il a pris soin de décrire comment les entreprises utilisaient concrètement les données qu'elles s'échangeaient et comment l'usage de l'information acquise avait réduit leurs incitations à se faire concurrence agressivement (partie III).

1. Les effets des échanges d'information mis en évidence par la théorie économique

L'abondante littérature économique sur la théorie de l'oligopole analyse les incitations des entreprises à s'échanger des informations et l'impact des échanges sur les prix et quantités d'équilibre, le surplus des consommateurs et les profits des entreprises. On peut distinguer deux grandes branches de cette littérature, selon que l'analyse se place dans un cadre statique ou dans un cadre dynamique.

L'analyse des incitations des entreprises à se faire concurrence dans un cadre dynamique conduit à des résultats simples et robustes, qui sont de nature à fonder un raisonnement juridique sur les effets anticoncurrentiels d'un échange d'information (partie I.1.). Les travaux théoriques sur les oligopoles statiques sont plus difficiles d'utilisation. Ces travaux insistent sur l'incertitude de l'environnement, qui empêche les entreprises d'anticiper parfaitement les décisions de leurs concurrentes. Cette littérature², d'une grande complexité, est peu opératoire, car ses résultats dépendent de caractéristiques fines du marché : mode de concurrence (en prix versus en quantités), nature des signaux reçus par les entreprises et de l'information échangée, forme précise de l'incertitude (sur la demande ou sur les coûts des entreprises), etc. Une autorité de concurrence ne peut pas, en général, observer ni prouver ces caractéristiques, si bien que ces résultats ne permettent généralement pas de qualifier juridiquement un échange d'information anticoncurrentiel. La littérature statique fournit néanmoins quelques intuitions intéressantes sur les gains d'efficacité des échanges lorsque les entreprises font face à un environnement incertain (partie I.2).

1.1 Les effets anticoncurrentiels

Les trois problèmes auxquels sont confrontées des entreprises en situation de collusion sont :

- le problème de la stabilité interne : comment éviter que chaque entreprise ne baisse ses prix pour accroître son profit immédiat ?
- le problème de la coordination : comment déterminer une ligne d'action commune ?
- le problème de la stabilité externe : comment éviter que de nouvelles entreprises n'entrent sur le marché et ne déstabilisent la stratégie commune ?

Comme l'écrivent M. Levenstein et V. Suslow³ : "*Upon its creation, a cartel immediately faces three key problems: coordination, cheating, and entry.*" Communiquer et s'échanger des informations peut aider les entreprises à résoudre les deux premiers problèmes.

² Les travaux théoriques postulent une structure informationnelle qui précise ce que chaque entreprise sait et ne sait pas sur la demande, sur ses propres coûts et sur ceux de ses concurrents. Pour une revue récente de cette littérature, voir par exemple Michael Raith (1996), A General Model of Information Sharing in Oligopoly, *Journal of Economic Theory*, 71, pp.260-288.

³ Margaret Levenstein et Valerie Suslow (2006), What determines cartel Success?, *Journal of Economic Literature*, vol. XLIV, pp.43-95.

1.1.1 Les échanges d'information améliorent la stabilité interne de la collusion

Dans un cadre statique, la collusion est fondamentalement instable à cause d'un problème de « dilemme du prisonnier » : chaque participant a intérêt à baisser ses prix et le seul équilibre de Nash est l'équilibre concurrentiel. Dans un article fondateur⁴, James Friedman a montré comment l'introduction de la dynamique résout le dilemme. Lorsque les interactions sont répétées, chaque entreprise compare le gain instantané à dévier du sentier collusif en baissant ses prix pour attirer à soi la demande et les pertes futures que ce comportement occasionne, sous la forme de représailles des concurrents qui peuvent décider de revenir à l'équilibre concurrentiel après avoir observé la déviation. Cet arbitrage donne lieu à une contrainte d'incitation, qui exprime la stabilité interne de la collusion⁵ : les entreprises choisissent de rester sur le chemin collusif pourvu qu'elles soient suffisamment patientes, c'est-à-dire qu'elles valorisent assez leurs gains futurs.

Le modèle théorique de Friedman décrit la situation dans laquelle chaque entreprise observe parfaitement les actions de ses concurrents et toutes les variables économiques pertinentes, en particulier l'évolution de la demande. Dans un tel environnement, les déviations sont vite repérées. On retrouve les trois critères de la position dominante collective énoncés dans l'arrêt *Airtours*⁶ :

- chaque membre doit connaître le comportement des autres. La transparence doit être suffisante pour détecter les déviations ;
- il existe un mécanisme de représailles dissuadant les déviations ;
- la ligne de conduite commune ne peut pas être contestée par les concurrents et les consommateurs

Les deux premières conditions traduisent la stabilité interne, la troisième exprime la stabilité externe de la collusion. Dans un tel contexte, les entreprises n'ont pas besoin de s'échanger des informations : elles peuvent parvenir, *en l'absence de toute concertation*, à maintenir un prix supraconcurrentiel. Cette situation est parfois désignée sous le terme de « collusion tacite » par les économistes, ce qui peut engendrer une certaine confusion, puisque, précisément, elle ne présuppose aucune concertation⁷. La question de la stabilité interne concerne tout l'éventail des situations collusives, de l'entente expresse de prix ou de répartition de marché jusqu'à la position dominante collective (ou « collusion tacite »).

En pratique, les hypothèses d'observabilité parfaite évoquées ci-dessus sont rarement satisfaites. George Stigler (1964) a exprimé l'idée que, dans un environnement caractérisé par une demande aléatoire et une observation imparfaite des comportements des concurrents, les problèmes d'incitation rendaient la collusion impossible : tout cartel serait inévitablement miné par des *baisses de prix secrètes*⁸. Un article important de Green et Porter (1984) a toutefois contredit cette analyse en démontrant que, lorsque les entreprises n'observent pas parfaitement la demande et les actions de leurs concurrentes, toute possibilité

⁴ James Friedman (1971), A Non-cooperative Equilibrium for Supergames, *Review of Economic Studies*, 38(113), pp.1-12.

⁵ Une deuxième contrainte d'incitation, relative à la crédibilité des représailles, assure que les concurrents auront bien intérêt à les mettre en œuvre après une déviation.

⁶ Arrêt du Tribunal de première instance du 6 juin 2002 (affaire T-342/99)

⁷ Seule une intervention ex ante, dans le cadre du contrôle des concentrations, peut, le cas échéant, permettre de prévenir l'apparition de ce type de situation.

⁸ George Stigler (1964), A Theory of Oligopoly, *Journal of Political Economy*, Vol. 72, pp. 44-61.

de collusion ne disparaît pas⁹. Dans un tel environnement, la collusion est seulement plus difficile à soutenir et moins profitable pour les entreprises : l'incapacité de ces dernières à distinguer les chutes de demande de déviations unilatérales de l'accord collusif entraîne des guerres de prix temporaires¹⁰. Lorsque les entreprises n'observent ni les actions de leurs concurrents ni la demande, il est essentiel pour elles de limiter au maximum toute possibilité de baisses de prix secrètes, celles-ci risquant d'entraîner de coûteuses guerres de prix.

L'exemple du cartel du sucre, actif entre 1927 et 1936 aux Etats-Unis, est particulièrement éclairant à cet égard¹¹ : ce cartel n'a jamais fixé un prix ou une quantité ; il définissait seulement des règles de travail. La collusion était tacite sur les prix, mais explicite sur les pratiques contractuelles de vente : distribution, marketing, traitement du sucre endommagé, stockage, paiement à crédit, transport, délai de livraison, etc. *Tout était fait pour rendre les baisses de prix transparentes et réduire le délai de détection des déviations.* En particulier, les prix étaient publics, non discriminatoires et annoncés à l'avance. Les membres du cartel ne pouvaient pas consentir une réduction à un client particulier : l'uniformité des tarifs permettait de mieux surveiller les prix. La communication au sein du cartel servait à chasser toutes les opportunités de baisses secrètes et également à éviter les malentendus - éviter, par exemple, que des baisses de prix ne soient, à tort, comprises comme des déviations unilatérales de la stratégie collusive.

En résumé, les échanges d'information peuvent être analysés comme des « pratiques facilitatrices » qui améliorent la stabilité interne et la profitabilité de la collusion, en permettant la détection des déviations (baisses de prix secrètes). Le degré d'information sur la demande ou les coûts est un élément clef pour déterminer si l'équilibre observé sur le marché est un équilibre collusif ou un équilibre coordonné (bien souvent, il se situe entre ces deux points polaires). Dans tout ce texte, le terme *collusion* n'implique pas *concertation explicite*. Il faut insister sur le fait que la question de la stabilité interne concerne tout l'éventail des situations collusives, de l'entente expresse de prix ou de répartition de marché jusqu'à la position dominante collective (ou « collusion tacite »). Les pratiques facilitatrices sont donc nuisibles même si les entreprises déterminent par ailleurs leurs stratégies d'une manière indépendante, en ne considérant que leur objectif propre de maximisation du profit.

1.1.2 Les échanges d'informations peuvent contribuer à résoudre le problème de coordination

Les équilibres dans les modèles dynamiques sont le plus souvent multiples. Dans le modèle le plus simple, tout niveau de prix compris entre le prix concurrentiel (le coût marginal) et le prix de monopole est un prix d'équilibre. La multiplicité des équilibres pose aux entreprises un problème de la coordination : pour déterminer leur propre stratégie, elles ont besoin d'anticiper celles de leurs concurrents, mais la multiplicité des équilibres les gêne puisque plusieurs stratégies d'équilibre sont possibles a priori. La difficulté d'anticiper les comportements des concurrents, ou *incertitude stratégique*, ne provient pas ici d'un aléa sur la demande ou sur les coûts, mais de la multiplicité des équilibres elle-même.

⁹ Edward J. Green, Robert H. Porter (1984), Noncooperative Collusion under Imperfect Price Information, *Econometrica*, Vol. 52, No. 1, pp. 87-100.

¹⁰ Rappelons qu'*a contrario*, sous l'hypothèse d'observation parfaite, les repréailles ne se produisent jamais à l'équilibre (leur crédibilité suffit à ce qu'elles ne soient jamais mises en œuvre).

¹¹ David Genesove et Wallace Mullin (2001), Rules, Communication, and Collusion: Narrative Evidence from the Sugar Institute Case, *The American Economic Review*, Vol. 91, No. 3, pp. 379-398.

Si les entreprises ne communiquent pas et s'il n'existe pas de « point focal » naturel¹², la maximisation du profit joint est difficile : les entreprises ne peuvent se coordonner que par tâtonnement, en expérimentant des variations de prix, ce qui est coûteux et risqué pour elles :

- Si une entreprise perçoit le prix courant sur le marché comme trop faible, elle ne peut le signaler à ses concurrentes qu'en augmentant son propre prix ; mais une telle hausse de prix unilatérale lui fait perdre des parts de marché durant le processus d'ajustement ;
- Si au contraire le prix lui paraît trop élevé, elle ne peut le signaler qu'en réduisant son prix ; mais une telle baisse de prix risque d'être comprise comme une déviation unilatérale et de déclencher une guerre des prix.

La communication permet d'éviter ce coûteux processus de tâtonnement et de déterminer une ligne d'action commune ; elle aide les entreprises à se coordonner sur le niveau de prix collectivement optimal pour elles. Certains travaux en laboratoire¹³, reproduisant un environnement concurrentiel avec plusieurs équilibres, ont démontré que la communication entre des joueurs leur permet de se rapprocher de l'équilibre le plus favorable pour eux. Dans ce contexte, l'incertitude stratégique apparaît donc proconcurrentielle.

En théorie, la collusion pourrait se passer de communication dans un environnement stable ; les entreprises pourraient par exemple avoir recours à des accords de répartition de marché se fondant sur une base historique : les prix s'ajusteraient ainsi aux chocs d'offre et de demande sans déclencher de guerre de prix. Toutefois, comme l'a indiqué le Conseil dans l'affaire 04-D-43 du 8 septembre 2004 sur les marchés publics de transports scolaires de la ville de Grasse, lorsque des perturbations empêchent de reproduire l'accord passé, la communication devient indispensable pour maintenir la collusion : « *Mais [l'équilibre non coopératif] ne peut s'établir et perdurer que si le marché fonctionne sur un mode suffisamment stable et transparent pour que chaque opérateur puisse correctement prévoir le comportement de ses concurrents et vérifier la validité de sa prévision. Dans le cas contraire, avec une information imparfaite et une modification des règles du jeu, les concurrents doivent échanger des informations pour pouvoir choisir la bonne stratégie. L'équilibre devient alors collusif.* » Dans cette affaire, les perturbations consistaient en des modifications des modalités de l'appel d'offres, s'agissant notamment du découpage des lots. Face à ces perturbations, les entreprises devaient communiquer pour résoudre le problème de coordination.

D'une manière générale, des entreprises en situation de collusion ne peuvent pas prévoir à l'avance l'ensemble des conditions économiques pertinentes pour l'exercice de leur activité, notamment en raison de l'existence inévitable de chocs d'offre et de demande. Les économistes disent qu'elles font face à un problème de « contrat incomplet » : « *Although [oligopoly] is often thought of as a market-structure problem, it becomes a contracting problem when it is phrased in terms of the comparative efficacy of cartel agreements* »¹⁴. Les échanges d'informations apparaissent indispensables pour résoudre le problème

¹² Un point focal peut être considéré comme un référentiel sur lequel les entreprises peuvent se coordonner. Ce référentiel peut être simple ou sophistiqué mais doit, en tout état de cause, pouvoir être compris par les membres de la coordination. Un point focal naturel est le prix. Les quantités ou les capacités, les quotas, la répartition géographique ou par clients des marchés, le boycott d'un concurrent, etc, peuvent être également considérés comme de possibles points focaux. Lors de l'ouverture de marchés géographiques anciennement cloisonnés, un point focal naturel consiste pour chaque entreprise à ne pas tenter de pénétrer le marché de ses concurrents. Dans l'affaire 02-D-44 du 11 juillet 2002, la non-concurrence des entreprises mères à une filiale commune pouvait également constituer un point focal naturel.

¹³ John B. Van Huyck, Raymond C. Battalio, Richard O. Beil, Tacit Coordination Games, Strategic Uncertainty, and Coordination Failure, *The American Economic Review*, Vol. 80, No. 1 (Mar., 1990), pp. 234-248.

¹⁴ Oliver Williamson. *The Mechanisms of Governance*. New York: Oxford University Press, 1996.

de coordination : ils sont nécessaires pour permettre à la structure collusive de s'adapter aux chocs non anticipés.

1.2 *Quelques effets proconcurrentiels*

1.2.1 *Ajustement de la production à des conditions variables de demande*

La littérature sur les oligopoles statiques démontre qu'un échange d'informations *peut* apporter des gains d'efficacité. Une meilleure information des entreprises sur les conditions du marché (du côté de l'offre ou de la demande) peut permettre d'orienter la production vers les entreprises ou les marchés où la demande est forte et/ou les coûts faibles. Ces mécanismes de réallocation des quantités, qui peuvent, sous certaines conditions, profiter aux consommateurs et à l'efficacité économique globale, sont cependant complexes.

Pour illustrer cette complexité, considérons un monopole faisant face à une demande incertaine et distinguons deux situations selon que le monopole choisit la quantité ou le prix :

- Dans la première situation, si le monopole choisit la quantité avant de connaître la demande, le prix s'ajuste *ex post* pour équilibrer le marché. Si, au contraire, le monopole acquiert l'information sur la demande avant de déterminer la quantité, il produit plus si la demande est élevée, moins si elle est basse. Cet ajustement des quantités bénéficie en général au consommateur : l'acquisition d'information par le monopole lui est donc favorable ;
- Dans la seconde situation, si le monopole choisit le prix avec de connaître la demande, c'est la quantité qui va s'ajuster *ex post*. Si, au contraire, le monopole acquiert l'information avant de déterminer le prix, il fixe un prix élevé si la demande est forte, un prix bas si elle est faible, ce qui nuit aux consommateurs : dans ce cas, ceux-ci préfèrent donc faire face à un monopole *non* informé.

En résumé, dans cet exemple, la valeur de l'information est positive pour les consommateurs si le monopole choisit ses quantités, négative s'il choisit ses prix¹⁵. Ce résultat illustre que les équilibres statiques dépendent de manière fine des caractéristiques du marché. Encore cet exemple est-il simplifié à l'extrême puisqu'il s'agit d'un monopole et que toute interaction stratégique est absente.

On peut cependant retenir que lorsque la demande ou les coûts sont aléatoires et lorsque les entreprises observent imparfaitement les conditions de marché, l'accroissement de leur information sur la demande ou les coûts peut permettre une meilleure allocation de la production (vers les entreprises ou des marchés qui connaissent des chocs positifs), ce qui peut bénéficier aux consommateurs.

1.2.2 *Autres gains d'efficacité possibles*

L'information des consommateurs : Si la communication entre les entreprises est publiquement observable, elle conduit à diffuser des informations auprès des consommateurs, ce qui leur permet de mieux exercer leur choix et, toutes choses égales par ailleurs, leur est bénéfique. La meilleure information des consommateurs peut se traduire par un accroissement de l'élasticité de la demande, qui peut jouer

¹⁵ En l'absence d'incertitude, la distinction suivant la variable stratégique (prix ou quantité) n'est pas pertinente : il est rigoureusement équivalent que le monopole choisisse son prix ou sa quantité.

positivement sur la concurrence (une plus grande élasticité augmente le gain immédiat à dévier d'un accord collusif).¹⁶

L'amélioration de l'efficacité interne des entreprises : La disponibilité de données agrégées permet à chaque entreprise de comparer ses performances à la moyenne du marché. De telles comparaisons permettent d'inciter les employés et les filiales en mesurant leur performance relative (*yardstick competition*) ; elles sont utiles, voire nécessaires, pour mettre au point des dispositifs de surveillance et de rémunération incitative des dirigeants d'entreprise. En revanche, des données individualisées par entreprise ne sont pas pertinentes dans ce contexte, car les chocs individuels qui affectent chacun des acteurs du marché doivent précisément être ignorés dans ces comparaisons. Calculer des moyennes sur les entreprises permet de se débarrasser de la variabilité individuelle et de ne tenir compte que de la performance générale du marché.

La prise en compte des défaillances de marché liées aux asymétries d'information : Dans certains secteurs comme l'assurance ou la banque, partager des informations sur les caractéristiques de risque des assurés peut être proconcurrentiel, car cela permet de réduire les asymétries d'information qui nuisent au fonctionnement du marché et, finalement, aux consommateurs eux-mêmes.

2. Le bilan concurrentiel des échanges dépend de nombreux facteurs

L'autorité de concurrence doit apprécier l'effet *net* de la pratique, c'est-à-dire la mesure dans laquelle, toutes choses égales par ailleurs, l'échange d'information accroît le caractère collusif du marché. Elle doit donc considérer comme situation de référence la situation hypothétique où la pratique n'aurait pas eu lieu, et où, hormis cette modification, l'environnement concurrentiel (la structure de marché, le mode de concurrence, etc.) serait inchangé. En particulier, elle doit tenir compte de l'information déjà publiquement disponible sur le marché et apprécier si *l'accroissement* d'information entraîné par la pratique modifie les incitations des entreprises, et le cas échéant des consommateurs, et affecte la concurrence.

Les effets potentiels des échanges dépendent de la nature des informations échangées et des conditions de l'échange lui-même (partie II.1). L'analyse concurrentielle dépend, en premier lieu, de savoir si les données portent sur le futur, notamment sur les intentions des entreprises, ou sur des données passées¹⁷. Dans le premier cas, c'est la problématique de la coordination qui est en jeu (partie II.2) ; dans le second, c'est celle de la stabilité interne de la collusion et de la surveillance des concurrents (partie II.3).

2.1 Quelques caractéristiques importantes des échanges d'information

S'agissant de la nature des informations, la principale caractéristique est temporelle : la communication entre les entreprises peut porter sur le passé, le présent ou le futur. Les données échangées peuvent concerner de nombreuses variables stratégiques : prix, quantités, chiffres d'affaires, capacités, etc. Les informations concernant les intentions des entreprises quant à leurs actions *futures* peuvent concerner, outre les variables énumérées ci-dessus, des décisions stratégiques très diverses : lancement d'un nouveau produit, politique d'investissement, par exemple l'installation d'une usine, le montant ou l'orientation des efforts de recherche et développement, etc. Les affaires du Conseil présentées ci-dessous mettent principalement en jeu des données présentes et passées.

¹⁶ Voir cependant les développements de la section II.2, ainsi que la note 20.

¹⁷ Le cas limite des informations portant sur le moment présent relève davantage de la problématique de la surveillance des concurrents que de celle de la coordination. Ce cas sera donc traité avec celui des données passées. Il sera évoqué à propos de l'affaire des carburants sur autoroute. Voir aussi la note 20.

Une caractéristique importante des informations échangées est leur niveau d'agrégation. Elles peuvent être individualisées, c'est-à-dire porter sur chaque entreprise nominativement désignée ou être agrégées au niveau du marché. Elles peuvent être, ou non, décomposées par produits, par offres commerciales, par segments de clientèle, etc.

Les informations diffèrent également par leur degré de confidentialité. Les informations les plus confidentielles (secrets d'affaires) ne peuvent être obtenues autrement que par échange volontaire. Mais des informations peuvent parfois être obtenues sans échange, à un coût plus élevé ; le coût d'acquisition de l'information reflète alors le degré de transparence du marché.

Enfin, les économistes distinguent les informations suivant leur caractère plus ou moins *vérifiable*. Une information non vérifiable (*soft*) peut être forgée ou manipulée ; c'est le cas d'une déclaration d'intention sur une action future qui n'emporte aucun engagement vis-à-vis d'un tiers. L'échange d'informations *soft* est connu sous le nom de *cheap talk*.

S'agissant des conditions de l'échange, les deux caractéristiques principales des échanges sont sa fréquence et son caractère public ou secret. Une périodicité rapprochée permet d'échanger des données actualisées fréquemment, en fonction des conditions du marché. La fréquence des échanges et la fraîcheur des données conditionnent la valeur stratégique de l'information.

Le caractère public de l'échange fait principalement référence à l'information des consommateurs. Les consommateurs ne peuvent adapter leurs décisions en fonction des informations échangées que s'ils en ont connaissance. Ils sont donc, a priori, défavorisés par un échange secret. D'un autre côté, le fait que l'information soit échangée publiquement peut renforcer sa crédibilité, en particulier si la déclaration publique (s'agissant en particulier de l'annonce d'une action future) implique un engagement vis-à-vis des consommateurs.

2.2 *La communication sur les intentions futures : un sujet débattu*

La communication sur les intentions futures peut permettre aux entreprises de mieux se coordonner, et de faire l'économie de coûteuses guerres de prix. Le cas américain *US v. Airline Tariff Publishing (ATP) Company* illustre la manière dont le *cheap talk* peut aider à résoudre le problème de coordination. La société ATP était une *joint venture* entre l'ensemble des compagnies aériennes américaines, qui collectait et stockait les prix affichés dans les systèmes centraux de réservation. Avant l'intervention du Département de la Justice, les compagnies pouvaient annoncer des hausses de prix à partir de dates futures, dites *first ticketing dates*, et les retirer, sans coût, dans le cas où elles constataient que les concurrents n'avaient pas suivi les hausses. Les prix annoncés étaient donc purement virtuels, puisqu'il n'y avait aucun engagement vis-à-vis des consommateurs. Les entreprises évitaient ainsi le processus de tâtonnement décrit à la section I.1.b. L'action du DOJ a conduit à un arrêt de la pratique de la *first ticketing date*. Mais le système d'annonce à l'avance a été conservé, car il était justifié par des gains d'efficacité (l'annonce à l'avance améliore la gestion des capacités).

Kühn (2001) a suggéré d'interdire toute discussion secrète sur des plans de production ou des prix futurs^{18,19}. Selon lui, l'objet de telles discussions ne peut être que la recherche d'une meilleure coordination et aucun gain d'efficacité ne peut en être attendu, dans la mesure où elles n'emportent aucun

¹⁸ Kai-Uwe Kühn, Fighting Collusion: Regulation of communication between firms, *Economic Policy*, Vol. 32, Avril 2001, pp. 167-204.

¹⁹ "I suggest a prohibition of any private discussion of future output prices or production plans as a violation of Art. 81(1)."

engagement vis-à-vis des consommateurs²⁰. La recommandation de Kühn est débattue par les économistes. En effet, elle se fonde sur deux présupposés qui peuvent être discutés : (i) le seul objet du *cheap talk* est de supprimer l'incertitude stratégique ; (ii) supprimer l'incertitude stratégique a nécessairement un effet néfaste sur les consommateurs. Des économistes ont contesté ces deux points et relèvent que le *cheap talk* peut, dans certaines circonstances, conduire à des gains d'efficacité.

Sur le premier point, Kühn a soutenu que des annonces concernant les intentions futures des entreprises ne peuvent pas être un moyen crédible de transmettre de l'information sur la demande ou sur les coûts ; en effet, les entreprises auraient intérêt à manipuler les informations échangées, leur faisant perdre toute crédibilité. D'autres économistes²¹ ont répondu que la crédibilité de tels messages peut être assurée, au moins partiellement, par l'interaction répétée des entreprises dans un cadre dynamique : si une entreprise transmettait des informations fausses sur la demande, le mensonge finirait par apparaître et serait sanctionné par des représailles. Pour ces économistes, on ne peut donc pas exclure que le *cheap talk* permette, dans certains cas, de transmettre au marché des informations sincères sur la demande, ce qui, on l'a vu, peut être proconcurrentiel (grâce à des réallocations efficaces de la production). Sur le second point, dans le même esprit, des économistes font valoir que des annonces d'extensions de capacité, d'ouvertures de nouvelles usines, de lancements de nouveaux produits, de plans de R&D, de découvertes technologiques, pourraient permettre d'éviter de mauvaises décisions : surproduction, accumulation inefficaces de stocks, etc. Dans une course technologique, connaître tôt l'identité du gagnant peut permettre d'éviter un gâchis de ressources. Il ne peut donc être exclu que la communication des entreprises sur leurs intentions futures puisse, dans certaines circonstances, permettre des gains d'efficacité susceptibles de compenser les effets négatifs liés à la facilitation de la coordination.

2.3 *L'échanges de données présentes ou passées : individualisation et agrégation*

L'analyse des échanges d'information portant sur le passé fait moins débat. L'effet anticoncurrentiel potentiel passe par l'accroissement de la probabilité et de la rapidité de détection des déviations. En théorie, selon le mécanisme exposé section I.1.a, une information agrégée au niveau du marché permet aux entreprises de déterminer, lorsqu'elles constatent une baisse de leurs ventes, si cette baisse est due à un choc négatif qui a affecté l'ensemble de la demande ; dans le cas contraire, elles peuvent suspecter une déviation unilatérale. En pratique, des données individualisées par entreprise sont beaucoup plus efficaces pour accroître la stabilité interne de la collusion : elles permettent d'identifier les déviants, de cibler sur eux les punitions, et donc, *ex ante*, d'accroître la crédibilité des représailles. Du côté des justifications proconcurrentielles, des informations individualisées ne sont généralement pas nécessaires pour la réalisation de gains d'efficacité, s'agissant au moins des gains qui concernent les incitations des collaborateurs et le *benchmarking*.

Outre le caractère individualisé des données échangées, leur degré de fraîcheur et leur niveau d'agrégation influencent l'effet potentiel de l'échange. *La fraîcheur des données conditionne le délai de détection des déviations et la mise en œuvre des représailles*. S'agissant du niveau d'agrégation par produits, par offres commerciales, etc., on peut penser qu'un niveau plus fin de l'information permet, jusqu'à un certain point, de surveiller plus efficacement les concurrents. Toutefois, au-delà d'un certain niveau de finesse, on atteint la limite de la complexité gérable par les entreprises et des données relativement synthétiques peuvent être plus efficaces pour suivre l'évolution des positions des concurrents.

²⁰ A contrario, il ne faudrait pas penser que toute communication publique sur les prix qui comporte un engagement vis-à-vis des consommateurs a nécessairement des effets positifs sur la concurrence ; ainsi, les pratiques de garantie de prix bas ou les engagements de remboursement de la différence induisent des effets stratégiques qui peuvent pénaliser les consommateurs.

²¹ Voir le commentaire de Carmen Matutes dans Kühn (2001), précité.

Incidentement, il est utile d'observer que le mécanisme par lequel l'échange d'informations accroît la stabilité interne de la collusion en permettant d'identifier le comportement des concurrents vaut également pour des marchés d'appels d'offres, pourvu que les appels d'offres ne soient pas ponctuels, mais qu'ils se reproduisent dans le temps, à intervalles suffisamment rapprochés. Le mécanisme s'applique dès lors qu'il y a interaction répétée.

L'affaire des tracteurs anglais²² illustre bien ce raisonnement. Ce cas concernait un marché de 20 000 unités par an, en déclin, très concentré, les quatre premiers opérateurs représentant 80 % du marché. Le système d'échanges était très détaillé, basé sur les informations nécessaires pour immatriculer un nouveau tracteur : nom du producteur, numéro de série du tracteur, marque, code postal de l'acheteur, volume exact des ventes et les parts de marché correspondant à chaque modèle et aux différentes catégories de puissance (au niveau national, régional et par comté). Dans les faits, ce système permettait d'identifier et d'individualiser toutes les ventes. La concurrence sur ce marché ne fonctionnait pas avec des prix affichés, mais plutôt avec des prix négociés, un peu comme si chaque vente individuelle correspondait à un marché d'appel d'offres. Pour surveiller ces enchères, les entreprises avaient besoin de savoir si, pour chaque enchère, celle qui était supposée l'emporter, l'avait effectivement emporté. L'information échangée en l'espèce permettait de répondre précisément à cette question et de détecter immédiatement tout producteur déviant. Les justifications alléguées par les entreprises mises en cause étaient relatives à la mise en œuvre des garanties et aux incitations de la force de vente. Ces arguments ont été rejetés, des données individualisées n'étant nécessaires pour atteindre aucun de ces deux objectifs.

C'est sur cette logique générale que se fonde l'économiste Kai-Uwe Kühn pour recommander un traitement sévère (en droit communautaire) des échanges d'informations individualisées relatives à des prix ou des quantités passés²³. Il suggère en effet de considérer que de tels échanges contreviennent automatiquement à l'article 81(1) et qu'ils ne peuvent être exemptés qu'au titre de la prise en compte du progrès économique prévue à l'article 81(3) : *“Individualized information exchange about past prices and quantities should be considered an anti-competitive agreement in the sense of Art. 81(1). I have shown that it is very difficult to justify information exchange of individualized data in theory and in individual cases. It is very hard to construct hypothetical situations in which very disaggregated data on past actions is really necessary to achieve substantial efficiency gains. One should, of course, allow exemptions according to Art. 81(3), but these should only be permitted if the concerned firms can demonstrate that the scheme is strictly necessary for achieving some efficiency gains that could not be achieved through other methods.”*

Suivre cette recommandation imposerait un standard faible à l'autorité de concurrence et élevé aux entreprises ayant commis ces pratiques. On verra plus loin que la pratique décisionnelle du Conseil de la concurrence ne présente pas une telle asymétrie, le Conseil s'imposant un niveau de preuve élevé pour démontrer l'effet potentiel négatif de ce type d'échange d'informations. En revanche, il considère bien que la charge de la preuve des gains d'efficacité pèse sur l'entreprise mise en cause.

2.3.1 La question de la crédibilité des échanges d'information et le rôle du mensonge

Comme pour le *cheap talk* et la communication sur les intentions futures des entreprises, on peut s'interroger sur la crédibilité des échanges d'information portant sur des données passées, les entreprises ayant souvent la capacité de manipuler les données et de transmettre volontairement à leurs concurrentes des données erronées. De ce point de vue, diverses situations sont envisageables. Il peut tout d'abord arriver que l'entreprise émettrice (celle qui envoie l'information) soit capable, dans une certaine mesure, d'en prouver la véracité ; s'il s'agit d'une information sur un client ou sur un prix pratiqué, elle peut par exemple montrer une facture à son concurrent. Les coûts de manipulation et de vérification des données

²² Arrêt *John Deere* du TPICE, précité.

²³ Kühn (2001), précité.

échangées conditionnent leur crédibilité²⁴. Il arrive également que les entreprises puissent vérifier la cohérence des données : ainsi, lorsque la taille totale du marché est connaissance commune et que les entreprises²⁵ s'échangent des données sur leurs ventes individuelles, chacune peut vérifier que la somme des ventes déclarées par les autres correspond à la donnée publique. Dans ce contexte, un mensonge a de fortes chances d'être détecté et sanctionné. D'une manière générale, les entreprises peuvent être, partiellement, disciplinées par l'interaction répétée (un mensonge finit par être découvert et sanctionné), ce qui n'exclut pas qu'elles puissent parfois choisir de se mentir. A cet égard, la Commission européenne avait noté, dans l'affaire des plaques de plâtre²⁶, que : « *Finalemment, le fait que les parties aient, à certains moments, sciemment échangé des données incorrectes, confirme que cet échange était effectivement utilisé comme mécanisme de surveillance et ne porte pas atteinte au caractère anticoncurrentiel de l'échange.* »

3. La jurisprudence récente du Conseil de la concurrence

Les trois affaires présentées ci-dessous concernent, pour l'essentiel, l'échange de données portant sur le présent ou passé²⁷. Pour ce type d'échanges, les principaux facteurs retenus par la jurisprudence française sont les suivants :

- les informations sont précises, stratégiques et confidentielles ;
- le nombre d'acteurs sur le marché est réduit (marché oligopolistique) ;
- l'échange est secret et sa périodicité est élevée ;
- les barrières à l'entrée sur le marché sont élevées.
- l'effet actuel ou potentiel, concrètement mesurable au cas d'espèce, de l'échange d'informations sur l'incertitude concurrentielle.

Conformément à la théorie exposée plus haut, les trois premiers éléments assurent que l'échange d'informations permet de renforcer la stabilité interne de la collusion, en améliorant à la fois *la probabilité et la rapidité* de détection des déviations et de mise en œuvre des représailles. Le quatrième critère, relatif à la stabilité externe de la collusion, est nécessaire pour que l'échange puisse avoir un effet sensible sur les prix ; en l'absence de barrières, toute hausse des prix provoquerait des entrées qui annuleraient l'effet initial.

Le Conseil de la concurrence n'applique pas ces critères mécaniquement. Dans chaque cas, il décrit comment les entreprises utilisent concrètement les informations qu'elles s'échangent pour se surveiller mutuellement et réduire leurs incitations à baisser les prix.

Deux des trois affaires ne comportaient aucun grief d'entente expresse sur les prix. Dans la troisième, celle de la téléphonie mobile, le Conseil a condamné, de manière indépendante, une entente expresse et la pratique d'échange d'information. Cette approche est cohérente avec une observation faite à plusieurs

²⁴ Notons qu'une information vérifiable sans coût n'a nul besoin d'être échangée.

²⁵ On suppose ici qu'il y a au moins trois entreprises. Avec deux entreprises seulement, la connaissance de la taille du marché et de sa propre activité permet à chaque entreprise de calculer, par différence, celle de son concurrent.

²⁶ Décision COMP 37/152 du 27 novembre 2002.

²⁷ Dans l'affaire des palaces parisiens, quelques données prévisionnelles ont également été échangées, cf. *infra*.

reprises ci-dessus : le mécanisme par lequel une transparence accrue affecte les incitations des entreprises à se faire concurrence ne présuppose aucunement l'existence d'une concertation explicite entre elles.

Les entreprises mises en cause n'ont proposé de justifications de la pratique en termes de gains d'efficacité que dans une seule des trois affaires, celles de palaces parisiens ; dans ce cas, l'argument d'efficacité a été facilement écarté.

3.1 Les carburants sur autoroute

Dans sa décision 03-D-17 du 31 mars 2003, le Conseil avait condamné les compagnies pétrolières pour avoir mis en place un système d'échanges d'information au niveau des stations-service. Les distributeurs de carburant s'échangeaient quotidiennement leur prix par téléphone.

Le marché de la distribution des carburants sur autoroute présentait clairement le caractère d'un oligopole fermé, l'accès des nouveaux entrants sur ce marché étant soumis à la condition de l'obtention d'une autorisation d'exploiter une station service soit auprès de l'Etat soit auprès d'une société d'autoroute. *« Or, ces autorisations sont de longue durée (au minimum 20 ans) et leur nombre est limité, puisque cantonné aux autoroutes existantes et il ne progresse que très faiblement car on construit peu de nouvelles autoroutes. »*

L'accroissement de la transparence que le Conseil reprochait aux compagnies prenait la forme d'une réduction substantielle des coûts de collecte de l'information pour les firmes : les échanges téléphoniques évitaient aux gérants des stations-service de se déplacer physiquement pour relever les prix de leurs concurrents. Ce système rendait plus facile et moins coûteuse la détection d'une éventuelle baisse des prix, réduisant ainsi les incitations des pétroliers à se faire concurrence agressivement. *« Le fait que chaque compagnie fournissait des informations sur les prix qu'elle pratiquait en échange d'informations sur les prix pratiqués par ses concurrents établit l'accord de volonté entre elles pour accroître artificiellement la transparence des prix sur un marché oligopolistique. Cet accroissement artificiel de la transparence des prix se faisait à leur seul profit puisque les consommateurs n'étaient pas destinataires de l'information obtenue. »*

Dans son arrêt du 9 décembre 2003, la Cour d'appel de Paris a annulé cette décision, considérant que l'échange d'informations *« bien qu'ayant favorisé une mise en œuvre plus rapide des stratégies commerciales individuellement adoptées par lesdites compagnies, ne traduit pas l'existence entre elles d'une concertation destinée à fausser les règles normales de la concurrence sur le marché concerné »*. La Cour n'a donc pas admis que la réduction des coûts d'acquisition de l'information était de nature à affaiblir les incitations des compagnies à s'écarter d'un équilibre à prix élevés.

Le Conseil avait relevé que les consommateurs n'étaient pas destinataires de l'information échangée ; ils devaient se contenter de l'affichage des prix à l'entrée des autoroutes par les sociétés d'autoroute, lequel était incomplet (le Conseil avait vérifié ce point). Les pouvoirs publics ont, quelques années après cette affaire, rétabli, de manière réglementaire, la symétrie informationnelle entre compagnies pétrolières et consommateurs. L'arrêté du 12 décembre 2006 relatif à l'information du consommateur sur les prix de vente des carburants dispose ainsi : *« Tout distributeur exerçant une activité de vente au détail des carburants affiche ses prix de vente au détail aux consommateurs du supercarburant sans plomb 95, du gazole et du superéthanol E85 sur le site Internet www.prix-carburants.gouv.fr. Toute modification du prix de vente est en outre immédiatement affichée. »* En théorie, cette généralisation de la transparence à l'ensemble des stations-service situées en France, accompagnée de la garantie de l'Etat quant à l'exactitude et la fraîcheur des données affichées, a deux effets potentiels : d'un côté, la diffusion d'informations aux consommateurs accroît leur capacité à faire jouer la concurrence ; de l'autre, la transparence permet aux opérateurs de surveiller leurs comportements en temps réel, ce qui réduit leurs incitations à se faire

concurrence agressivement. Évaluer lequel de ces deux effets domine est une question empirique difficile. La DGCCRF a lancé en 2007 une enquête nationale qui vise à vérifier le respect par les professionnels de leur obligation d'affichage sur le site internet d'une information exacte mais aussi à détecter d'éventuels alignements de prix contestables.

Dans cette affaire, les informations échangées portaient sur les prix présents. Dans les deux suivantes, elles concernaient le (proche) passé et comprenaient des données sur les *quantités* vendues.

3.2 *Les palaces parisiens*

Dans sa décision 05-D-64 du 25 novembre 2005, le Conseil a relevé que les six palaces parisiens s'échangeaient, de manière hebdomadaire ou mensuelle, des informations sur les taux d'occupation, le prix moyen par chambre louée (rapport entre le chiffre d'affaires hébergement et le nombre de chambres louées) et le revenu moyen par chambre disponible (rapport entre le chiffre d'affaires hébergement et le nombre de chambres disponibles). Les informations étaient individualisées, c'est-à-dire associées à chaque hôtel.

Le Conseil a vérifié le caractère oligopolistique du marché en se basant sur plusieurs facteurs. Le dossier démontrait que les six *Palaces* concernés ne considéraient pas les hôtels quatre étoiles comme des concurrents directs. En effet, les clients intéressés par des séjours luxueux valorisent en général la présence de caractéristiques : localisation prestigieuse, proportion élevée de suites, restaurant gastronomique et installations de très haut niveau. Or, seuls le Bristol, le Crillon, le George V, le Meurice, le Plaza Athénée et le Ritz réunissaient l'ensemble de ces caractéristiques. Les six *Palaces* avaient des recettes moyennes par chambre supérieures aux autres hôtels de luxe (au-dessus de 500 € par nuit), traduisant leur capacité à vendre un grand nombre de nuitées à des prix très élevés. Enfin, le Conseil a relevé la présence de barrières à l'entrée élevées, « *non seulement à cause du coût de l'achat et de l'entretien d'un hôtel de prestige comportant des prestations luxueuses au cœur de Paris, mais aussi parce que la construction d'une image de marque est lente et exigeante.* » Ces éléments, combinés au nombre limité d'acteurs, démontrait le caractère oligopolistique du marché.

Le Conseil a pris soin de démontrer que les données échangées étaient confidentielles, autrement dit que les opérateurs ne pouvaient pas y accéder sans l'échange d'information. Il a vérifié que n'étaient diffusées publiquement que des informations agrégées, à savoir les moyennes des indicateurs précédents calculées sur l'ensemble des six palaces parisiens. Le Conseil en a conclu que : « *La mise à disposition réciproque, par les palaces, d'informations nominatives, calculées mensuellement ou hebdomadairement, permet donc d'acquérir auprès des concurrents une information non disponible sur le marché et non communiquée aux clients, ce qui correspond aux critères de la jurisprudence communautaire John Deere.* »

La fréquence des échanges étant hebdomadaire ou mensuelle (selon les périodes), les données échangées étaient d'une grande fraîcheur. Les échanges facilitaient la surveillance des actions des concurrents, en permettant aux hôtels de distinguer une déviation unilatérale d'un choc de demande, comme l'illustre la déclaration du directeur de l'un des palaces citée au §235 de la décision : « *Les échanges d'informations entre hôtels leur permettent de confronter leur propre vision du marché pour voir, à titre d'exemple, si une baisse d'activité enregistrée provient d'une erreur de gestion ou d'une mauvaise appréhension du marché ou si, au contraire, elle correspond à une réelle tendance du marché, sans pour autant que ces échanges soient suivis d'une concertation tarifaire entre les palaces* ». La surveillance directe des prix des concurrents, si elle n'était pas théoriquement impossible, était en pratique difficile voire impossible à mettre en œuvre. « *La multiplicité des tarifs existants, ainsi que les réductions accordées à certains clients, elles aussi, fort nombreuses, rendraient extrêmement coûteux un système de surveillance exhaustif qui concernerait tous les segments de clientèle.* »

Les palaces ont contesté le caractère informatif des indicateurs échangés, faisant valoir qu'une même valeur de ces indicateurs pouvait recouvrir des réalités très différentes. En réponse à cette objection, le Conseil a démontré que la variabilité des situations compatibles avec une valeur donnée des différents indicateurs était, en réalité, assez limitée ; il a expliqué, à l'aide d'exemples concrets, comment on peut interpréter les variations conjointes du taux d'occupation et du prix moyen d'un palace. Le Conseil en a conclu que les indicateurs permettaient à chaque palace de suivre, à un rythme rapproché, l'évolution des performances des autres. « *La connaissance de ces indicateurs facilite sans aucun doute l'interprétation d'une éventuelle déviation au sein de l'oligopole : croisés avec l'évolution du taux d'occupation, les changements de prix moyens sont, de ce fait, plus facilement interprétables qu'examinés seuls. Au surplus, ils permettent de mesurer immédiatement les résultats d'une modification des prix publics.* » Le Conseil a également relevé l'utilisation concrète que les palaces faisaient des données échangées ; ils s'en servaient notamment pour établir des tableaux de bord permettant de suivre les positions des concurrents, ce qui traduisait bien l'objectif de surveillance des échanges d'informations.

Les entreprises mises en cause ont cherché à justifier les échanges par la volonté de motiver leurs équipes commerciales ; selon elles, les échanges permettaient à chaque palace de comparer ses performances à celles du marché. Cet argument n'a pas été retenu pour les raisons indiquées plus haut : le benchmarking ne nécessite pas de données individuelles, mais seulement des données agrégées, lesquelles étaient disponibles par ailleurs.

Enfin, on peut noter que cette affaire comportait également quelques échanges d'informations portant sur le futur, en l'espèce des prévisions de taux d'occupation. Le Conseil a relevé la distinction conceptuelle entre les mécanismes économiques correspondant aux deux types d'information - la coordination pour les échanges portant sur le futur (cf. *supra*, II.2), la surveillance pour les données passées (cf. *supra*, II.3) : « *La logique d'accroissement de la transparence du marché pour favoriser l'équilibre collusif demeure sans qu'il s'agisse ici de mesurer des performances passées mais plutôt de donner des indications sur les objectifs commerciaux poursuivis.* » Le Conseil a relevé que la plupart des échanges de ce type sont intervenus après le choc négatif de demande consécutif aux attentats du 11 septembre 2001, ce qui est cohérent avec la nécessité d'une coordination accrue créée par une modification non anticipée de l'environnement.

3.3 *L'affaire de la téléphonie mobile*

Dans sa décision 05-D-65 du 30 novembre 2005, le Conseil de la concurrence a constaté que les trois opérateurs de téléphonie mobile avait échangé mensuellement, entre les années 1997 et 2003, des données sur le nombre de nouveaux abonnements souscrits (ou ventes brutes) et sur le nombre des résiliations, les ventes nettes s'obtenant par différence.

Comme dans l'affaire des palaces, le Conseil a commencé par établir le caractère oligopolistique du marché, rappelant le raisonnement suivi par le Tribunal de première instance dans *John Deere* : « *Les critères qui fondent l'analyse du juge communautaire sont donc ceux d'un oligopole fermé, en raison de l'existence d'importantes barrières à l'entrée, sur lequel les positions des entreprises sont relativement stabilisées* ». Le Conseil explique qu'en l'espèce, les barrières à l'entrée sur le marché sont très élevées « *compte tenu de la rareté des fréquences, de l'obligation d'obtenir une licence qui en découle et des coûts fixes extrêmement importants liés au déploiement.* » La présence de fortes barrières a, par ailleurs, été prise en compte dans l'appréciation du dommage²⁸.

²⁸

« *Le dommage à l'économie doit être apprécié au regard de la durée des pratiques, soit trois ans et de la taille très importante du marché concerné. [...] Il y a lieu de relever également que l'entente a impliqué les trois seuls opérateurs proposant des services de téléphonie mobile sur un marché fermé, l'activité d'opérateur mobile étant soumise à l'obtention d'une licence et aucun MVNO n'ayant eu accès au réseau*

Le Conseil a également pris soin de démontrer que les données échangées étaient confidentielles, en particulier qu'elles étaient différentes de celles que publiait le régulateur sectoriel. *« En effet, avant avril 2000, l'observatoire publiait, certes, des données mensuelles, mais ne fournissait que les ventes nettes. Les opérateurs ne pouvaient donc identifier ce qui, dans cet indicateur, relevait, d'une part des ventes brutes, et d'autre part des résiliations. Or, l'observation distincte de ces deux indicateurs donne des informations très différentes sur l'effort concurrentiel des opérateurs, essentiellement perceptible à travers les ventes brutes. De plus, après avril 2000, la publication de l'observatoire n'est intervenue que tous les trois mois et s'est limitée à des données trimestrielles. »* A partir d'avril 2000, la fréquence des échanges d'information était trois fois supérieure au rythme de publication des données par le régulateur.

Le Conseil a vérifié que l'échange de données de ventes brutes apportait aux opérateurs, par rapport à la seule connaissance des ventes nettes, un gain significatif en terme de surveillance des stratégies des concurrents, ce qui réduisait d'autant leurs incitations à baisser les prix. *« Ce qui importe, selon la jurisprudence John Deere, n'est pas la précision, mesurée en termes abstraits, des informations échangées mais bien le lien entre la nature de ces informations et la possibilité pour les opérateurs de surveiller l'impact de leur politique commerciale, et de celle de leurs concurrents, sur leurs ventes. »* Comme dans l'affaire des palaces, une surveillance directe de la stratégie des concurrents était rendue difficile par le nombre élevé de paramètres commerciaux : commissions versées aux distributeurs, subventions des terminaux, multiples formules d'abonnements et de cartes prépayées, etc.²⁹ *« Sur un marché sur lequel la transparence des prix est gênée par la multiplicité des formules d'abonnements et de cartes prépayées, l'existence de multiples options qui permettent de différencier les offres, la fréquence des mises sur le marché de nouvelles offres et l'existence de plusieurs réseaux de distribution susceptibles d'accroître encore la différenciation des offres, l'observation de l'évolution des ventes brutes est le seul indicateur capable de renseigner de façon synthétique sur « l'effort concurrentiel » fait par les concurrents. »* Le Conseil a montré que le nombre de nouveaux abonnés acquis chaque mois était considéré par les opérateurs eux-mêmes comme un résumé pertinent de l'efficacité de la stratégie d'un opérateur. Il s'est appuyé sur les comptes-rendus de réunions internes attestant que les données échangées étaient commentées dans les conseils d'administration et conseils exécutifs et que des décisions stratégiques étaient prises sur cette base. L'utilisation des données échangées, dans les faits, démontrait leur caractère stratégique.

Dans son arrêt du 29 juin 2007, la Cour de cassation a relevé que les données échangées ne distinguaient pas les forfaits et les cartes prépayées. Le Conseil, quant à lui, avait observé que les dirigeants des trois entreprises, s'ils regrettaient l'absence de ventilation entre les deux types d'offres et souhaitaient la création d'indicateurs plus représentatifs, devaient se contenter des données non ventilées existantes ; dans les faits, c'étaient bien ces données non ventilées qui servaient de base à leurs analyses de marché.

Un autre élément relevé par le Conseil confirmait la valeur ajoutée des données brutes pour la surveillance des concurrents : les ventes nettes peuvent être affectées par des artefacts statistiques, comme le nettoyage de fichiers opéré par la société Bouygues Télécom en 2002. Une telle opération affecte les ventes nettes (mais pas les ventes brutes), sans pour autant refléter un comportement commercial réel. Symétriquement, le comportement des abonnés qui résiliaient leur abonnement chez un opérateur pour en

des opérateurs sur la période en cause. Or ces trois sociétés ont été choisies par l'Etat, lors de l'attribution de leur licence, non seulement en raison de leur capacité à construire et à financer des réseaux ayant justifié des investissements très importants -ce qu'elles ont démontré- mais aussi de leur aptitude à animer le marché par une concurrence durable et bénéfique au consommateur, objectif que l'entente a volontairement contrarié».

²⁹

Cette remarque vaut, a fortiori, pour les consommateurs eux-mêmes pour qui les tarifs de la téléphonie mobile sont très difficiles à interpréter.

souscrire un autre chez le même opérateur, n'apparaissait pas dans les ventes nettes ; il ne pouvait être retracé qu'au travers des résiliations. Au total, les statistiques échangées résumaient de manière simple, pour le seul bénéfice des opérateurs, l'effet de tarifs très complexes. L'échange d'information a donc significativement accru la transparence du marché³⁰, ce qui a pu réduire, par le mécanisme évoqué plus haut (partie II.3), les incitations des entreprises à se faire concurrence.

Dans l'affaire des palaces comme dans le cas *John Deere*, le grief d'échanges d'information n'est pas adossé à une entente explicite. Le cas des mobiles est légèrement plus compliqué de ce point de vue, puisque le Conseil a, dans la même décision, sanctionné les opérateurs pour une entente expresse de stabilisation des parts de marché durant la période 2000-2002, et, *par ailleurs*, pour l'échange d'informations qui s'est poursuivi au cours d'une période différente, recouvrant celle de l'entente expresse (1997-2003)³¹. Les deux griefs étaient donc bien distincts, même si le Conseil a relevé que l'échange d'informations a pu faciliter la surveillance de l'accord sur la stabilisation des parts de marché durant la période de recouvrement des deux pratiques. La Cour d'appel a confirmé, dans un arrêt du 12 décembre 2006, le grief d'échange d'information, indépendamment de la référence à l'entente démontrée par ailleurs. La Cour de cassation, dans son arrêt du 29 juin 2007, a toutefois reproché à la Cour d'appel de ne pas avoir « *recherché de façon concrète, comme elle y était invitée, si l'échange d'information [...] avait eu pour objet ou pour effet réel ou potentiel [...] de restreindre ou de fausser de façon sensible la concurrence* ». La Cour de cassation a considéré que la Cour d'appel n'avait pas « *légalement justifié sa décision* » et a cassé l'arrêt de la Cour d'appel, sans nullement remettre en cause le raisonnement tenu par le Conseil dans sa décision.

4. Conclusion

Le Conseil de la concurrence n'a jamais considéré les échanges d'information comme anticoncurrentiels *per se*. Il apprécie leur objet et leurs effets au cas par cas. Le Conseil a eu à connaître récemment de plusieurs affaires où les entreprises s'échangeaient des données individualisées portant sur des prix ou des quantités présents ou passés. Pour certains économistes³², de tels échanges devraient être considérés comme violant automatiquement l'article 81(1) du Traité et ne pouvoir être exemptés qu'au titre de l'article 81(3) - un standard de preuve favorable à l'autorité de concurrence et difficile pour les entreprises mises en cause. La pratique décisionnelle du Conseil de la concurrence traduit une approche différente : le Conseil s'impose à lui-même un niveau de preuve élevé.

Loin de le présumer, il démontre *l'effet potentiel sensible* des échanges d'informations sur le jeu de la concurrence, comme le demande l'arrêt précité de la Cour de cassation. Sa méthode repose sur l'utilisation de raisonnements qualitatifs fondés sur une théorie économique du cas et étayé par les faits de l'espèce ; la démonstration prend en compte un grand nombre de caractéristiques de l'environnement (structure et degré de transparence du marché), des informations échangées (degré de fraîcheur, individualisation, niveau de désagrégation) et de l'échange lui-même (fréquence, caractère public ou secret). Surtout, le Conseil explicite, dans chaque affaire particulière, le mécanisme économique concret par lequel l'échange d'informations modifie les incitations des acteurs à se faire concurrence. Il porte une attention particulière

³⁰ L'accroissement de la transparence provenait également de la fréquence des échanges trois fois plus élevée que celle de l'actualisation des données par le régulateur (à partir de l'année 2000).

³¹ Le cas des mobiles ressemble à l'affaire des plaques de plâtre précitée (COMP 37/152, 27 novembre 2002), qui combinait un grief de stabilisation de parts de marchés (entente expresse) et un grief d'échanges d'information. En l'espèce, les informations échangées portaient sur les volumes de ventes sur les marchés allemand, français, britannique et du Benelux.

³² Kühn (2001), précité, cf. *supra*, partie II.3.

à l'utilisation concrète que les entreprises font des informations échangées et à la manière dont l'information acquise modifie leurs stratégies.

Aller au-delà de ce standard déjà élevé paraît hors de portée. En particulier, prouver un effet *réel* des échanges d'informations ne semble pas possible dans la plupart des cas concrets ; il faudrait identifier avec précision la situation contrefactuelle où l'échange n'aurait pas eu lieu, ce que les méthodes économétriques les plus modernes peinent à faire.

HUNGARY

1. Definition

The GVH – the competition authority of Hungary – analysed practices facilitating the coordination of business strategies, mainly in procedures initiated against hardcore price fixing of market sharing agreements. With one exception these practices were therefore assessed as complementary elements of the targeted illegal behaviour and were considered in the light of those agreements.

Practices facilitating collusion were defined as “concerted practices” and were usually prohibited in line with the hardcore agreement deriving from, or based on that scheme. A clear distinction is made however between two possible effects of such a concerted practice. First it is taken into account as a foundation of a direct price fixing among competitors, and second as a behaviour eliminating or reducing the effect of competition that would otherwise coerce the application of more competitive strategies. It might therefore be considered as a complementary, indirect infringement or as an independent, direct infringement as well.

Such a concerted practice may take many forms. It may take place if undertakings participate on meetings where information is exchanged on future behaviour. Similarly it might be considered as a concerted action if one of the parties regularly sends its prices to competitors while these latter do not protest against it. Evidently it also qualifies as a concerted practice if there is a formal mechanism for the exchange of sensitive information. That was the case when information was collected and shared by the association of the given (cement) sector. Similarly a forum for the exchange of information was set up by multiplex cinemas of Budapest, when regular bilateral meetings were held between film distributors and cinemas to determine the rental fee, based on thoroughly detailed price and volume data. Though this was a purely vertical net of relationships as almost all cinema groups were vertically integrated into the level of distribution, there was no doubt that competitors’ sensitive data was available for the cinemas. However this scheme was finally not assessed by the GVH as it mainly concentrated on the actual price fixing.

2. The test of illegality

The test applied by the GVH is based on the requirement that market actors should bring their decisions independently. This requirement excludes the possibility of all direct or indirect contacts among market participants independent of each other. Should therefore an undertaking reveal its future behaviour (prices to be adopted, costs, stocks etc.) – in order to influence the behaviour of its competitors – and encourage them to behave similarly, it shall reasonably be aware that competitors would at least have regard to that communication while formulating their own strategies. This thereby results in the replacement of the risks of competition with their cooperation. Accordingly undertakings commit antitrust violation in the form of concerted practices if they participate in a mechanism that substitutes the uncertainties generated by competition, and necessarily implies that undertakings can take into account during the formulation of their strategies the information received from competitors.

From the above it can be deduced that a concerted action is illegal if it has a clear anticompetitive object (e.g. provision of future price data) or, if such an effect can not be demonstrated *prima facie* (lack of direct evidence of the hard core infringement, provision of more indirect data), than its effect should be

subject of scrutiny. However up till now none of this latter situation arose in which the parties argued about countervailing efficiencies.

Unless an anticompetitive objective is clear, the GVH analyses the substance, actuality, generality of the information, the frequency of its communication and the importance of the undertakings participating in the exchange, in sum the actual impact on the elimination of uncertainties of competition. Interestingly it is not always a determining factor whether the information exchanged was secret or could have been known from other sources. In the cartel case of foreign currency exchange outlets one of the parties has sent every morning its prices it intended to apply. Though due to the nature of the service in question, shortly after this communication that information was to become public anyway, the GVH found that it necessarily had to have and it did have influence on the pricing of notified competitors. It can also be seen that reciprocity is not a necessary precondition of the establishment of an infringement. It is also clear that the existence of an agreement is not a precondition of the establishment of illegality, once it is obvious that information was actually exchanged or shared.

Though normally information exchange schemes were analysed in connection with hardcore cartels, such a connection is not a necessary element of illegality. In the cement case the GVH assessed an information system operated by the Hungarian Cement Association. The investigation did not reveal any evidence, upholding that undertakings have fixed prices or allocated markets. It was however established that the scheme related to the monthly exchange of confidential, company-specific information and the information shared was not obtainable from other sources. The monthly database contained overall data on production and sales volumes per undertaking and per factory as well. The GVH established that company-specific information, that is capable to influence competition and excludes inherent uncertainty and risk of competition should not be exchanged between competitors. The regular following up of information on producing, sales and stocks broken down into factories and cement-types throughout years enabled market players to foresee each others steps. The GVH established that the various forms of information sharing had an anti-competitive object and effect.

3. Exemptions

Not all type of information sharing between undertakings is to be qualified as anti-competitive. In particular on a market with many players the ascertainment or exchange of non company-specific information (consequently totalised data) may be regarded as an expressly pro-competitive behaviour. However the information sharing systems of which object or effect is to reduce the risk coming from the competitors' unpredictable behaviour are contrary to the above mentioned object of competition policy. This means that per se prohibition of facilitating practices like information sharing cannot be justified.

JAPAN

We appreciate that the OECD is holding the Roundtable on “Cartels: Approaches to cartel investigations” and will discuss “facilitating practices.” This roundtable is a timely effort and will allow the competition authorities in member countries to share an awareness of the issues they are facing and to study other countries’ experiences. In addition, we welcome this roundtable since we will be able to introduce to other countries the clarification of criteria on the Antimonopoly Act (“AMA”), which is recently under further development, as well as our experience in strictly enforcing the Act.

The Japanese AMA prohibits unreasonable restraint of trade as follows:

Article 3: No entrepreneur shall affect private monopolisation or unreasonable restraint of trade.

Article 2 (6): The term "unreasonable restraint of trade" as used in this Act means business activities, by which any entrepreneur, with other entrepreneurs, by concerted actions, mutually restrict or conduct their business activities in such a manner as to fix prices, etc., thereby causing a substantial restraint of competition in any particular field of trade.

If the “facilitating practices” we discuss fall under this definition, they will be prohibited by the AMA as unreasonable restraint of trade. In this case, the JFTC would issue cease-and-desist orders and other necessary measures.

In actual cases, one of the issues will be whether a facilitating practice is a “concerted action,” which is an element of unreasonable restraint of trade. Regarding this concerted action, the leading case law states that it is not necessary to show explicit agreement but sufficient to show tacit agreement in order to prove the concerted action as the liaison of intention. This case law supports the JFTC positions and other case laws (e.g. Tokyo High Court ruling on November 9, 1956) since the JFTC’s hearing decision on August 30, 1949.

1. Lawsuit brought by Toshiba Chemical Corporation seeking to overturn a JFTC decision (Decision issued on September 25, 1995)

“In order to prove that the act of the plaintiff corresponds to “concerted actions,” which is prohibited by Article 3 of the AMA as ‘unreasonable restraint of trade,’ it is necessary to show that a “liaison of intention” among entrepreneurs existed at the time of the price-raising by these entrepreneurs.

The said ‘liaison of intention’ means that an entrepreneur recognises or predicts the implementation of the same or similar kind of price-raising among entrepreneurs and accordingly, intends to collaborate with such a price-raising. In order to prove ‘liaison of intention,’ it is not sufficient to show the recognition or acceptance of an entrepreneur’s price-raising by another entrepreneur. However, an explicit agreement that binds the related parties is not necessary to prove ‘liaison of intention.’ In other words, ‘liaison of intention’ can be proven by showing the mutual recognition of other entrepreneurs’ price-raising and the tacit acceptance of such price-raising of another.

By the nature of such an agreement, when companies make an agreement considered as ‘unreasonable restraint of trade,’ they usually try to prevent making such an agreement explicitly to the public. If we

interpreted that an explicit agreement was necessary to prove ‘unreasonable restraint of trade,’ the entrepreneurs could easily slip through the web of the law and therefore, it is obvious that such an interpretation would not be appropriate to the realities. We should consider the recognition and intention of the entrepreneurs by examining various circumstances before and after the price-raising and then evaluate whether there is a mutual recognition or acceptance among entrepreneurs regarding the price-raising or not.

In that point of view, if an entrepreneur exchanges information about price-raising among other entrepreneurs and accordingly, does the same or a similar act with others, it is unavoidable for us to presume that the parties had a relationship in order to expect the concerted act from each other; therefore, the said ‘liaison of intention’ exists unless there is a special occasion to show that the price-raising was implemented individually by a company’s own decision that the price increase was capable of meeting price competition in the relevant market and there is no relationship between that company’s price-raising with that of other companies”.

The factual context, specific actions taken to solve problems and others in the case are as follows.

1.1 *The factual and legal context, including an explanation of why the practice poses a competition problem*

1.1.1 *Relevant market*

The market of paper phenol copper clad laminates for domestic users. (Including paper polyester copper clad laminates, which is the equivalent of paper phenol copper clad laminates.)

1.1.2 *Act applied in this case*

Article 3 of the AMA (Unreasonable Restraint of Trade)

1.1.3 *Main background of this case*

The Japan Thermosetting Plastics Industry Association

The cartel members in this case belonged to the “Japan Thermosetting Plastics Industry Association” (“Association”) consisting of manufacturers of thermosetting resin, as well as the “Committee of Laminates,” which was one of the Association’s committees by item and was organised by executive officers in charge of the item in each company. The Committee of Laminates had subordinate bodies such as the “Operations Committee,” which consisted of directors and section chiefs in each company, and the “Overseas Committee.” The Committee of Laminates also had an “Osaka Committee” and “Nagoya Committee,” which consisted of directors, section chiefs, branch managers and so on.

Power of the influence of price-raising by three major companies regarding the relevant product

The relevant product in this case was mainly used for base materials of printed-wiring boards for household electronic appliances such as televisions, tape recorders, etc. The sales amount of the related parties constituted a large share of the whole sales amount of copper clad laminates for printed-wiring boards at the time in 1987. The total sales of the major three companies accounted for 70% of the relevant market and therefore, the movements of these three companies could greatly influence the market of the copper clad laminates for printed-wiring board.

Market trend and situation regarding the transaction prices of the relevant product on and after 1985 in Japan

In comparison with the other copper clad laminates for printed-wiring boards, paper phenol copper clad laminates were mass-produced and not largely product-differentiated. Because of those reasons, the price competition among the manufacturers and distributors was vigorous. Additionally, the manufacturers that assembled electrical appliances and were the ultimate customers of the relevant products had significant buying power.

Furthermore, the sales price of the relevant product tended to decline for both exporting and domestic users. On the other hand, the material price of the relevant product tended to rise at the time. Considering this situation, the related parties needed to not only prevent a price decline but also to raise the price of the relevant product.

1.1.4 Relevant evidence and fact-findings (based on the Tokyo High Court ruling on September 25, 1995)

Existence of previous exchanges of information and opinions

Evidence shows that the members had exchanged opinions regarding the price of paper phenol copper clad laminates, etc., at an Association committee and other opportunities since the beginning of 1987; e.g., in the "Usual Operations Committee" held on May 21, 1987, they exchanged opinions regarding raising the sales price in Japan of the relevant product after gradually raising its export price, and then agreed to the policy. (The evidence can be found in the record of the participants' statements in the meetings and the Committee's participants list.)

Information and opinions that had been exchanged were related to the price-raising of the relevant products

Evidence shows that the situation of raising the export price of paper phenol copper clad laminates was reported, and that the members then exchanged concrete information and opinions regarding the rate of the price raise for domestic users, the price and the time. Evidence also shows that the three leading companies which expressed their intention to raise the price of the relevant product subsequently requested the other five companies to follow their decision and to raise the price of paper phenol copper clad laminates and that the other five companies did not object to the request of the three companies at the "Temporary Committee," which began around 1:30 p.m. on June 10, 1987. (This evidence can be found in the record of the participants' statements in the Committee meeting.)

Concerted act as a result

Evidence shows that the eight companies after the said meeting gave instructions in their office to raise the price of paper phenol copper clad laminates and that the eight companies announced their price-raising to their users and requested the same price-raising.

In accordance with the relevant evidence enumerated above, the Tokyo High Court found that Toshiba Chemical Corporation knew that the other seven companies intended and agreed to raise the price of paper phenol copper clad laminates, and based on the prediction that the other seven companies would raise the price of paper phenol copper clad laminate, Toshiba Chemical Corporation raised the price, which is equivalent to the decision made at the committee on June 10, 1987. Therefore, the Tokyo High Court concluded that a concerted action based on "liaison of intention" to raise the price of paper phenol copper clad laminate existed, Toshiba Chemical Corporation had the intention to follow the other seven companies' price-raising, and the other seven companies were also aware of Toshiba Chemical

Corporation's intentions. In other words, even though the companies did not make an explicit agreement that bound the related parties, "tacit agreement" among related parties can be found by proving (a) the existence of a previous exchange of information and opinions, (b) that information and opinions which had been exchanged were related to price-raising of the relevant products and (c) concerted act as a result.

1.2 Description of the specific actions taken to solve this problem

1.2.1 Elimination measures

The JFTC ordered seven companies to undertake the elimination measures described below. (The decision was issued on August 8, 1989.) The Tokyo High Court also ordered the Toshiba Chemical Corporation to undertake the same elimination measures. (The decision was issued on September 25, 1995.)

- (a) The related parties shall abandon the agreement made on June 10, 1987, regarding the price-raise for the domestic users of paper phenol copper clad laminates.
- (b) The related parties shall not take a concerted act to raise the price for the domestic users of paper phenol copper clad laminates in the future and shall decide the price based on each party's own will.
- (c) The related parties shall notify their customers (distributors and consumers) of paper phenol copper clad laminates of the context of (a) and (b) above. (How the notification should take place shall be approved by the JFTC in advance.)

1.2.2 Surcharge

The JFTC ordered the seven companies, which accepted the recommendation issued by the JFTC ahead of Toshiba Chemical Corporation, to make a surcharge payment of 547,190,000 total yen (on July 11, 1990). The JFTC also ordered Toshiba Chemical Corporation to make a surcharge payment of 54,160,000 yen (on August 5, 1996).

Concerning information activities, which are related to "facilitating practices", the JFTC has established and published guidelines and shown its view, particularly on information activities by trade associations and past example cases in which they were found to be illegal under the AMA. The relevant chapter of the guidelines is illustrated as follows.

2. Trade Association Guideline (Abstract)

2.1 Information activities

2.1.1 Diverseness of information activities

Trade associations engage in information activities in their respective fields for a variety of reasons. For example, they collect objective information concerning products, technological trends, management expertise, the market environment, statistics concerning industrial activities, legislative or administrative trends, and socioeconomic conditions. Trade associations also provide this information to the members, related fields of business, and consumers, in order to develop an accurate understanding of society's demands on their respective fields of business and to accommodate those demands, to improve consumer convenience, or to understand and introduce the actual conditions in the fields of business concerned. There is a wide range of information activities such as these that do not pose any particular problem in light of the AMA.

2.1.2 *Conduct suspected of constituting a violation*

However, there are also cases in which a trade association's information activities make it possible for competing firms to predict the specific contents of such important competition-related factors such as pricing concerning present or future business activities among them. In light of this, information activities of the kind described in (i) below are suspected to constitute violations of the AMA.

If an information activity of this kind results in the formation of a tacit understanding or common intent among the members to restrain competition, or if it is used as a means or a method of restraining competition, the case shall in principle be found to constitute a violation of the Act.

That is, if a trade association's information activities lead to restrictive conduct by the association, such as fixing prices, restricting resale prices, restricting quantities, restricting customers, allocating markets, allocating contracts, predetermining the bidder expected to win a contract, restricting the construction or expansion of facilities and restricting entry, or if they accompany such restrictive conduct, such cases shall be found to constitute a violation of Article 8-(1).

In addition, if firms, through information activities by a trade association, formulate an agreement concerning the restriction of competition with respect to such matters as price, quantity, customers, sales channels, or facilities, and those firms substantially restrain competition in a market, their conduct shall constitute a violation of Article 3 (Unreasonable restraint of trade).

- Collecting or offering information from or to the members, or promoting the exchange of information among the members, where such information specifically relates to important factors on competition, concerning the present or future business activities of the members, such as the following: specific plans or prospects regarding the prices or quantities of goods or services supplied or received by the members; specific details of members' transactions with or inquiries from customers; and the limits of anticipated plant investment.

[Specific cases of violations]

The Case against X Trade Association of Distributors of Petroleum Products (Recommendation Decision No. 9 of 1979)

In this case, at a joint meeting of the trade association's presidents' council (comprised of 66 chief executives of the member firms) and sales council (comprised of the member firms' gas station managers and others of similar rank), the association exchanged information concerning a predicted rise in the purchasing price of gasoline, and also considered various measures, such as raising the retail price of gasoline. Also, at joint executive meetings held with other associations, the association exchanged opinions with regard to future increases in gasoline prices. Based on these discussions, the association, through its implementation committee (comprised of 17 executive committee members), decided upon a price that served as a benchmark for an increase in the retail gasoline prices of the member firms. This was found to constitute a violation of Article 8-(1)-(i).

The Case against Y and Other Vinyl Tile Manufacturers (Recommendation Decision No. 8 of 1979)

In this case, four companies, at successive meetings that included board meetings of the association to which they belonged, exchanged information concerning market conditions and exchanged opinions regarding the range of selling price increases for vinyl tile market goods as

well as the price levels after such increases had been implemented. As a result of further discussions, the companies involved entrusted the task of determining specific prices to Company Y, which served as the head company of the association. Accordingly, Y indicated specific prices for each participating company. Furthermore, each company informed the others of the planned date of implementation of the price increases, and then increased the selling price of market goods. This was found to constitute a violation of Article 3.

The Case against Z and Other Manufacturers and Distributors of Paint Emulsions (Recommendation Decision No. 5 of 1988)

In this case, ten companies established a group called Council A in order to facilitate mutual cooperation. For some time, the companies exchanged price-negotiation information at the district meetings of Council A whenever the prices of paint emulsions were revised. In order to cope with a rise in the cost of monomer, a raw material used to make emulsions, at the Council A's central committee, the companies exchanged information concerning the estimated range of the price increase. They then offset the cost increase by increasing the selling prices of their paint emulsions, and also set the standard range of price increase for each type of product. To ensure these price increases, the companies also decided to exchange information concerning the status of price-increase negotiations. This was found to constitute a violation of Article 3.

2.1.3 Conduct that does not, in principle, constitute a violation

In contrast, the types of conduct such as those described below usually do not have the effect of restraining competition, and therefore in principle do not constitute violations of the AMA:

- Offering, for purposes of improving consumers' convenience, information on such matters as the proper use of products or services in the field to consumers.
- Collecting and offering general information on such matters as technological trends, management expertise, market environment, legislative or administrative trends, and socioeconomic conditions in the field, information that is in fact provided by government agencies, private research organisations and so forth.
- In order to obtain and disseminate information on general business performance in the field, collecting, at the discretion of the members, general information on the historical results of members' business activities, such as the quantities or monetary value of previous production, sales and plant investment; statistically and objectively processing such information; and publicly disseminating that information in rough form without disclosing the actual quantities or monetary amounts relating to the individual members. In addition, in cases in which the member in question has already publicly announced its specific quantities or monetary amounts, the association may disclose this relevant information.
- For the purpose of providing the members and users with information on historical prices, collecting, at the discretion of the members, general information on the members' historical prices; statistically and objectively processing such information; deriving an accurate indication of price distributions and trends; and offering such general information to the members and users without disclosing the prices of the individual members.
- Offering the members information materials or technology indicators that enable fair and objective comparisons of price-related matters such as expense items, degree of difficulty of operation, and quality of goods or services whose prices are difficult to compare in the market.

- Collecting and offering general information on overall demand trends in the field; or formulating and disseminating rough forecasts of demand, based on objective facts.
- Collecting and offering to the members objective information concerning the credit standings of customers for the purpose of ensuring safe transactions by the members.

In addition, the JFTC Competition Policy Research Center has conducted research on “the targets of investigation, the elements of illegality and circumstantial evidence in cartel and bid-rigging cases”, which referred to the application of economic analysis on information exchange activities and other activities.

In actual cases, facilitating practices are analysed in a comprehensive manner with other evidence. We think other jurisdictions are dealing with facilitating practices in the same way. We are also making efforts not to shrink normal business activities in terms of competition policy but to prevent information distribution activities and concerted activities from leading to cartels.

KOREA

1. Introduction

Generally, Korea's approach to regulation of cartels without explicit agreement is similar to other countries'. In other words, the bedrock principle of antitrust law is that major premise of proving illegality of a cartel is the existence of "agreement," whose scope is broadening in step with the changes of the time and the environment. For instance, it is becoming more and more difficult to prove the evidence of illegal cartel because cartel participants immediately destroy the evidence or leave no evidence deliberately. Moreover, the method they reach an agreement is becoming more diverse and clever thanks to development of information and communications technology. Thus, it is widely accepted that there is no limit to the method of cartel agreement, which in a broad sense refers to "meeting of minds." In Korea, too, the major premise that proof of existence of an "agreement" is a prerequisite to demonstration of illegality of a cartel is acknowledged, but the dominant view is that a cartel agreement includes even the cartel participants' mutual awareness or tacit understanding of the existence of "meeting of minds."

Cartel facilitating practices can be defined as a series of practices that can give rise to anti-competitive effect on the concerned market by making it easy for participants to achieve "meeting of minds" without any explicit agreement. The fact that such a practice per se cannot constitute an illegal concerted act, regardless of the format and without "meeting of minds" among participants, is an effective principle in Korea as in other countries. Nevertheless, due to the difficulties mentioned above regarding proving of an illegitimate cartel agreement, Korea has adopted a system that assumes illegality of a cartel when certain conditions are met. Therefore, cartel facilitating practices in Korea can be meaningful as a factor materializing the de facto presumption of cartel agreement.

With regards to the types of cartel facilitating practices, exchange of information and advance announcement of price, which normally increase market transparency allowing for parallelism among competing enterprisers, are the most common. However, if we define cartel facilitating practices as all practices making it easy for enterprisers to profit from tacit coordination of actions, the scope is not limited to exchange of information among competitors. For instance, if cartel facilitating practices are determined based on their source, they can be categorized into two types; the one where cartel facilitating practices are triggered by one or multiple enterprisers and the one where emergence of external factors causes apparent convergence among enterprisers. The first type can ultimately lead to apparent agreement of practices of enterprisers competing in the relevant market, without the presence of an explicit agreement, through the repetitive process of enterprisers' sending signals amongst each other regarding their intended plans and responding to those signs. Meanwhile, the second type involves external factors giving rise to concerted behaviours by competing enterprisers, and, for example, the guidelines on price and production volume issued by the government can have an actual binding power. This can be also included as a type of cartel facilitating practices, for enterprisers converge their respective economic activities without an explicit agreement.

The following part of the report will look at the KFTC laws and regulations on cartel facilitating practices without an explicit agreement and its actual enforcement, and the weight given to cartel facilitating practices in past deliberations of the KFTC. In addition, the report will review Korea's unique circumstances under which government agencies' non-authoritative act can facilitate cartels and the KFTC's basic stance in regulating such an environment.

2. KFTC Laws and Regulations on Cartel Facilitating Practices: Presumption of Cartel Agreement

2.1 *Significance*

The basic view on cartel facilitating practices is focused on proving illegality of practices that lead to cartel formation despite absence (or invisibility) of "agreement." More specifically, distinct from the case where collection of direct evidence of cartel agreement failed despite the existence of itself, cartel facilitating practices concern "enterprisers' practice" or "circumstances" that trigger anti-competitive effect by achieving apparent convergence of practices of rival enterprisers when there was no agreement in the first place. Regardless of the type, the KFTC takes the same legal procedures when approaching the matter. Before directly measuring and comparing the illegality of or potential efficiency gains from cartel facilitating practices, the KFTC first "presumes existence of agreement" once the criteria, which entail the presence of both apparent agreement of practices and anti-competitive effect, are met. Then the KFTC focuses on to what extent the cartel facilitating practices are used as a supplementary evidence for anti-competitive effect of the concerned agreement. The provision on presumption of cartel requires only the proving of indirect evidence of agreement, such as apparent agreement of enterprisers' practices, instead of a proof of "agreement among enterprisers," in consideration of the fact that it is difficult to prove cartel agreements due to their secret nature. This way, the provision can secure efficacy of cartel regulation. In other words, although it is hard to claim illegality of coincident appearance of behaviours resulting from "mere conscious parallelism" without direct and indirect contact among competing enterprisers, existence of agreement beyond simple coincidence of actions is acknowledged in case existence of circumstantial evidence, including cartel facilitating practices, is identified¹.

2.2 *Types of Presumption*

A written agreement or contract serves as the typical direct evidence of agreement, while the testimony of participants of the agreement can also provide effective direct evidence. When there are such direct evidence, the existence of agreement can be acknowledged immediately, which is the most ideal way to prove illegal cartel. Nevertheless, in most cases, agreement participants do not leave such direct evidence, thus making it necessary to prove the existence of agreement through de facto or de jure presumption.

First, evidence that enables indirect confirmation of facts requiring proof is called indirect (or circumstantial) evidence, and presumption of facts requiring proof based on indirect evidence is referred to as "de facto presumption" as opposed to "de jure presumption." One of the key issues related to de facto presumption concerns "conscious parallelism," where participants' practices appear similar and participants make decisions conscious of each other's practices. Conscious parallelism alone is insufficient to prove cartel agreement and there must be additional circumstantial evidence in order for the illegality of the presumed agreement to be recognized. With regards to this, Article 19 (5) of the Monopoly Regulation and Fair Trade Act (MRFTA)² stipulates "de jure presumption," which provides that ① when there is concurrence of two or more enterprisers' practices and ② when there are certain essential facts indicating

¹ As will be seen below, the relatively easy condition for presumption of agreement contrasts with the European Court of Justice (ECJ)'s stance, which levies a serious responsibility on the European Commission (EC) to prove the existence of agreement. However, since presumption of agreement is overturned relatively easily when certain requirements are met, we can say there is a balance between the two.

² Paragraph 5, Article 19 of the MRFTA: "Where two or more enterprisers are committing any acts listed in the subparagraphs of paragraph (1) that practically restrict competition in a particular business area, they shall be presumed to have committed an unfair collaborative act despite the absence of an explicit agreement to engage in such act."

practical restriction of competition, illegal cartel shall be presumed. When factual or circumstantial proof against involvement of agreement in enterprisers' practices is proposed, the presumption may be overturned.

2.3 *Presumption Requirements and Effect: Supreme Court of Korea's Judgment*

The presumption provision of the MRFTA has partly contributed to solving problems such as cartel facilitating practices, where proof of agreement is difficult. The following Korean Supreme Court's rulings in the so-called "coffee case"³ and the "tissue case"⁴ in 2002 clarified the requirements for presumption of agreement and its effect. Presumption stipulated in Article 19 (5) of the law is "de jure presumption" which is distinguished from "presumption of agreement based on circumstantial facts or of tacit understanding (de facto presumption)".

- A. The requirements for presumption provided in Article 19 (5) of the law include the following; first, two or more enterprisers must commit any acts listed in the subparagraphs of paragraph (1)⁵ ("identical behaviours") and second, they must substantially restrict competition in a particular business area ("substantial anti-competitiveness"). In other words, existence of additional circumstantial evidence of presence of agreement is not a requirement for presumption of agreement as far as the law is concerned.
- B. When Article 19 (5) of the law is applied, existence of agreement is only presumed, not recognized conclusively. Therefore, presumption of agreement can be overturned citing factual or circumstantial proof against involvement of agreement violating antitrust law in enterprisers' practices. Once presumption is overturned, the parties claiming existence of a cartel, including the KFTC, must prove the existence of agreement based on circumstantial evidence according to Article 19 (1) of the law.

³ See 2002.3.15. Korea Supreme Court Decision 99DU6521, 6514

⁴ See 2002.5.28. Korea Supreme Court Decision 2000DU1386

⁵ Article 19 (1) is the principle provision on cartel prohibition, which is as follows:

Article 19 Prohibition of Improper Concerted Acts

(1) No enterpriser shall agree with other enterprisers by contract, agreement, resolution, or any other means to jointly engage in an act, or let others do this kind of activities, falling under any of the following subparagraphs, that unfairly restricts competition (hereafter referred to as "improper concerted acts")

1. An act fixing, maintaining, or changing prices;
2. An act determining terms and conditions for transactions of goods or services, or payment of prices thereof;
3. An act restricting production, delivery, transportation, or transaction of goods or services;
4. An act limiting the territory of trade or customers;
5. An act preventing or restricting the establishment or extension of facilities or the installation of equipment necessary for the production of goods or the rendering of services;
6. An act restricting the types or specifications of goods or services in producing or transacting goods or services;
7. An act of jointly carrying out and managing the main parts of a business, or establishing a company, etc. to jointly carry out and manage the main parts of a business; or
8. Any practice that substantially lessens competition in a particular business area by means, other than those under Subparagraph 1 to 7, of interfering with or restricting the activities or contents of business.

In such a case, the court uses the following criteria⁶ to judge whether presumption of agreement can be overturned when opposing facts or circumstantial proof exist. Among the criteria, the third one can be applied in the process of judging whether cartel facilitating practices have triggered creation of illegal cartels.

- When seemingly identical or similar pricing, which in reality has been done independently based on each enterpriser's respective management decision, happened to coincide.
- When external factors (e.g. production cost increase) common to all enterprisers in competition affected each enterpriser's decision on pricing to the same extent, thereby making it inevitable for enterprisers to act similarly at a similar timing.
- When the enterpriser with price leadership set the price out of its own independent judgment and other enterprisers unilaterally followed to adopt the same price, particularly in an oligopolistic market. However, when an enterpriser's price leadership is deemed to have been achieved based on the enterpriser's prediction that other enterprisers would model after its pricing as they had done in the past, the case should be excluded from this criteria, which implies its illegality is recognized. And when runner-up enterprisers imitated the pricing of the enterpriser with price leadership based on express or tacit coordination or understanding amongst themselves, only the concerted act among the runner-up enterprisers will be questioned, and the concerted act in question will be judged by the presence of substantial anti-competitive effect based on the concerned enterprisers' influence over pricing, including their market share.

2.4 Past Application of the Presumption Provision and the Approach to Actual Analysis

Out of the 261 cases that the KFTC imposed corrective orders or stronger remedies according to Article 19 of the MRFTA ("Prohibition of Improper Concerted Acts") between Jan. 1, 1995 and Dec. 31, 2005, the cases in which the KFTC acknowledged existence of agreement based on the presumption provision of Article 19 (5) account for 61 (23%). The share of such cases began to rise dramatically from 1996 to peak at 37% in 1998 and to stay at around 30% till 2000. Then since 2001, it started to decline, whose pace accelerated as of late. This downward trend can be explained by the fact that the KFTC, encouraged by the court's tendency to easily recognize overturn of presumption, has made efforts to secure direct evidence of agreement during investigation in order to avoid the application of the provision on presumption of agreement as much as possible, and also by the fact that active implementation of the Leniency Program has made collection of direct evidence easier.

Regardless of the court's attitude⁷ towards cases related to Article 19 (5) of the MRFTA, the KFTC has done its best to secure every direct and indirect evidence that would be useful for proving existence of agreement, and ① applied Article 19 (1) of the MRFTA without application of the presumption provision when collected evidence is deemed sufficient to directly prove existence of agreement and ② applied the presumption provision of Article 19 (5) when the secured evidence is deemed insufficient while still presenting all pieces of evidence collected as proof⁸.

⁶ See supra note 3 and 4.

⁷ With identical appearance of behaviors and substantial anti-competitiveness, which are presumption requirements under the law, a cartel is legally presumed even without circumstantial evidence.

⁸ In Jul. 2007, the KFTC revised the presumption provision reflecting the comprehensive approach the KFTC takes when actually applying it. Under the revised provision, presumption is allowed only when there is a high probability of an act being conducted collectively by enterprisers in light of various factors

When applying the presumption provision to prove the illegality of cartel facilitating practices that lead to formation of cartels without express agreement, collection of circumstantial evidence is essential to strengthen presumption because presumption of cartel based solely on coinciding practices can easily be overturned by the counterpart. As a result of reflecting these needs, the following is the circumstantial evidence that can be used to support presumption of agreement stipulated in the Review Threshold for Concerted Act⁹ enacted in May 2000.

2.4.1 When there is evidence of direct/indirect communication or information exchange

- when records in the memorandum, such as price increase and production cut, is the same among concerned enterprisers;
- when enterprisers held secret meetings after which their act began to coincide;
- when enterprisers agreed to exchange information on price or production output, or held regular meetings for information exchange;
- when a certain enterpriser expressed its intention to raise price or to cut output and executed after watching other rival enterprisers' response.

2.4.2 When it is recognized that an act can contribute to concerned enterprisers' interest only when it is conducted collectively and that it will be against each concerned enterpriser's interest if it is conducted individually

- when enterprisers increased price in a same manner despite absence of cost increase factor and overcapacity or demand decline;
- when enterprisers raised price simultaneously despite accumulated inventory.

2.4.3 When concerned enterprisers' coinciding practices cannot be explained with the market situation

- when the price remains still and rigid despite the changes in supply and demand conditions, differences in the source of raw material supply and geographical location of the supplier and the consumer;
- when the scope of price change is the same among enterprisers despite different raw material cost, manufacturing process, wage increase rate and bill discount rate;
- when it is impossible to form a high price in a short period of time without involvement of a concerted act in light of the market situation

including semblance of cartel, characteristics of the relevant trade area or goods and services, economic reason and repercussions of the act concerned and the frequency and nature of contact among enterprisers. This amendment was made to achieve harmony with foreign institutions and increase the legitimacy of law enforcement.

⁹ Review Threshold for Concerted Act, enacted on May 8, 2002, the KFTC Regulation No. 20

2.4.4 *When enterprisers' acts are hard to coincide without an agreement due to the concerned industry's structure*

- when individual enterprisers have the same price in spite of a high degree of product differentiation;
- when enterprisers' acts coincided under circumstances where such coincidence is unlikely, such as a market with low frequency of transactions and a market with expert knowledge

More specifically, of criteria (A), particularly "the example 4 lacking direct evidence", is directly related to the theme of this roundtable, "cartel facilitating practices". Other criteria may be used as a standard for circumstantial evidence for proof of tacit coordination¹⁰, but in the case of Korea, all of the above-mentioned criteria are comprehensively considered in dealing with actual cases according to the Review Threshold for Concerted Act.

2.5 *Examples of Presumption of Agreement by the KFTC*

Examples of presumption of agreement in the KFTC's deliberation on cartel facilitating practices show that the KFTC does not presume agreement just based on a mere apparent coincidence but does so when there is substantial circumstantial evidence in addition, which is also the case in the U.S.. The followings are the actual cases handled by the KFTC involving presumption of agreement.

In a case about a price increase by three sulphuric acid manufacturers (Resolution 94-41), the KFTC decided that the three companies' act of exchanging information on price could be viewed as an agreement for a price cartel, considering that they notified sales agencies of their plan to raise price so that their rival companies can be informed of this in advance and that they increased price by the same extent at a similar timing.

In a case concerning three plasterboard manufacturers (Case No. 9707GROUP0969), the KFTC presumed agreement among the three companies citing the firms' advance release of their price increase plans through sales agencies, the price that rose despite no change in price increase factor or demand, the convergence of each company's previously-different price level after a price revision and the admission of advance exchange of price information by an executive of a company in question.

In a case on a price cartel by Korean Air and Asian Airlines (Resolution 2001-084), the KFTC decided that the two airliners had engaged in an illegal concerted act by increasing airfare by the same rate at the same timing¹¹ because, though it failed to find any evidence of express coordination or communication, it judged that one airliner's price increase plan released through the Computerized

¹⁰ According to the categorisation standard of the 2006 OECD "Global Forum on Prosecuting Cartel without Direct Evidence of Agreement," (B) and (C) can be classified as "firm conduct evidence" among indirect evidence while (D) comes under "market structure evidence."

¹¹ Details of the Fare Increases by Two Airlines

	Oct 1999		March 2001	
	Increase	Effective Date	Increase	Effective Date
Korean Air	19.6%	18 Oct 1999	12.1%	20 Mar 2001
Asiana Airlines	19.6%	13 Oct 1999	12.3%	2 Apr 2001

Reservation Systems (CRSs), where the details of each airliner's pricing plan is openly disclosed, had triggered the other airliner to follow suit¹².

3. Cartels Involving Administrative Guidance: Examples of convergence of practices among rival enterprisers caused by external variables

3.1 *Significance and Strength of Administrative Guidance*

Administrative guidance refers to actions taken by administrative agencies aimed at achieving administrative goals, which expects the counterpart's voluntary cooperation, and in reality, it takes various forms including order, recommendation, request and warning. Administrative guidance, which is unique to a small number of countries including Korea and Japan, is similar to cartel facilitating practices in its effect since it has a large potential to cause apparent coincidence of enterprisers' practices on the price or output imposed by an external force without the need for express agreement or separate price manipulation intended to limit competition among rival enterprisers.

Price transparency, as generally referred to, has two faces. On the one hand, it benefits consumers by lowering transaction costs including the cost of search and contract, but on the other hand, it facilitates collusion among rival companies without any express agreement. Similarly, administrative guidance has its strength in that it does not require any specific authorizing provision because it is based on the premise of the counterpart's voluntary cooperation and that it can efficiently achieve policy goals while securing compliance. But at the same time, in the case of administrative guidance that proposes to enterprisers certain standards for price and transaction terms, it can result in standardization of transaction terms having the same effect as cartels.

3.2 *The KFTC's Principle of Law Enforcement on Cartels Involving Administrative Guidance*

As mentioned earlier, administrative guidance issued by public institutions can be perceived as cartel facilitating practices in itself on the premise that "practices" as in "cartel facilitating practices" include not only the enterprisers' "act" but also the "environment" that triggers cartel formation without express agreement. Although there is no provision based on which to determine whether public institution-issued administrative guidance per se is in violation of the MRFTA, such administrative guidance is similar to cartel facilitating practices in that enterprisers can take advantage of the guidance to create a cartel. For instance, administrative guidance may result in coincidence of behaviours among enterprisers without artificial coordination restricting competition.

When enforcing the law on cartels involving administrative guidance, the KFTC abides by the following principles. First, the general principle is that administrative guidance's involvement in a cartel cannot, in principle, be a reason for exempting the cartel from the application of the MRFTA¹³. Nevertheless, when it is clear that a cartel was formed as a result of administrative guidance, which has a clear foundation in the laws administered by other legitimate governmental bodies and was issued within the scope of the law to achieve a specific policy goal, the cartel in question may be exempted from the application of the MRFTA. To sum up, the basic principle towards administrative guidance that can prompt cartel creation among enterprisers without any express agreement is that exemption from the

¹² In this case, Article 19 (1), instead of Article (5), was applied based on the judgment that the anti-competitive converged act indicates tacit agreement or understanding among enterprisers.

¹³ Article 58 of the MRFTA ("Legitimate actions taken pursuant to acts and subordinate statutes"): This Act shall not apply to the acts of an enterpriser or an enterprisers organisation conducted in accordance with any Act or any decree to such an Act.

application of the law cannot be granted to cases where enterprisers took advantage of administrative guidance to reach a separate agreement and where administrative guidance was issued unofficially without a legal foundation in other authoritative statutes. The same framework can be applied when analyzing cartel facilitating practices, which means information exchange among rival companies. Thus, what matters the most in proving illegal cartel is the identification of a separate "agreement" among the rival enterprisers.

3.3 *Review by Type*¹⁴

First, when a cartel was created through an agreement among enterprisers after an administrative guidance issued separately on each enterpriser, the involved enterprisers are in violation of the MRFTA. Examples include the case where enterprisers responded to an administrative guidance instructing enterprisers to limit the price increase rate to five percent and less by reaching a separate agreement among themselves to increase price by five percent or by acting collectively after agreeing on a price increase rate prior to the guidance.

Second, if it is certain that a cartel was created as a result of enterprisers' individual compliance with administrative guidance, Article 19 (1) of the MRFTA does not apply, for there does not exist an "agreement." One possible example is when the government's legitimate execution of its price approval authority resulted in a similarity of enterprisers' price and other transaction terms.

Third, when a cartel was formed as a consequence of administrative guidance inducing agreement among enterprisers, in other words, if administrative guidance instructed enterprisers to raise or cut price at an appropriate level, two interpretations are possible. If the administrative agency has a specific right to issue such administrative guidance based on other Acts, enterprisers' compliance with the guidance can be considered "legitimate practice in accordance with the law," but in case the administrative agency unofficially issued such guidance without legal authority or based on the comprehensive authority under other agencies' statutes, enterprisers' compliance with the guidance is illegal in principle. Yet, when it is judged that the administrative guidance has an actual binding power, it can be taken into consideration in deciding the level of sanctions, including surcharges.

3.4 *Review of Actual Cases*

- **Anti-competitive practice by Korea Federation of Aluminum Industry Cooperatives** (Seoul High Court 91GU2030): "Since administrative guidance is only a non-authoritative act without a binding power, enterprisers organizations should have determined themselves whether their practice violated the MRFTA Even if the agreement between the plaintiff and a third party was triggered by the Ministry of Trade and Industry's administrative guidance, we cannot say, just based on this, that the illegality disappears or that the order of remedies cannot be allowed as it is against the principle of estoppel."
- **Cartel of six wholesalers in the Garak-dong Agricultural & Marine Products Wholesale Market** (Seoul High Court 2003NU5817): "Even if the Korea Agro-Fisheries Trade Corporation instructed wholesalers to directly or collectively decide the terms of consignment fees or subsidies, the six wholesalers' practice cannot be perceived as legitimate under Article 58 of the

¹⁴ Refer to the KFTC's "Review criteria for cartels involving administrative guidance" enacted in Dec. 2006 for more details. Of the three types introduced in the text, the second is the most similar to cartel facilitating practices, and absence of agreement allows for a claim of existence of tacit coordination through determination of illegality based on the presumption provision or through circumstantial evidence.

MRFTA, whose intent and related rules stipulate that the Korea Agro-Fisheries Trade Corporation, which oversees the wholesale market, has no authority to directly decide or give instructions on consignment fee or subsidy rates, over which the wholesale market corporation has authority."

4. Conclusion

To introduce Korea's approach to cartel facilitating practices that have the effect of coordinating rival companies' practices without any express agreement, this paper has looked at the requirements and effect of the KFTC's presumption system and also the actual examples of KFTC's deliberations and cases handled. In addition, general principles for law enforcement on cartels involving administrative guidance, which is unique to Korea and has the similar effect as cartel facilitating practices, have been introduced.

Acts conducted by enterprisers to better coordinate their practices and reduce strategic uncertainties without engaging in a hardcore cartel agreement include price adjustment through increased price transparency, runner-up companies' imitation of leading firm's announced pricing scheme and concerted appearance of behaviours among rival enterprisers after a convergence point on price or other transaction terms has been proposed from outside. Cartel facilitating practices per se does not entail liability as a matter of course, but there have been many cases where they were recognized as one of the actual circumstantial evidence. In such a case, they are reviewed together with other factors, such as the market structure, reasonable motive or reason for a concerted act, practices against one's interest that would not have been conducted had it not been for the concerted act and previous violations.

To increase the possibility of blocking anti-competitive effect of cartel facilitating practices in advance, regulation is needed to certain extent on the attempt of collusion as well. This requires continuous strengthening of capacity to collect wide-ranging data on industry trends, enterpriser's pricing, profitability and previous practices, which will be used for economic analysis aimed at proving existence of agreement.

NETHERLANDS

In this paper some comments are offered on facilitating practices with special attention to the role of information exchange. What follows is not an official policy document but a discussion piece aimed at contributing to the discussion at the roundtable. It is also not meant to be an all-encompassing analysis, but a discussion of a few aspects that the Netherlands Competition Authority (hereafter: NMa) considers to be relevant.

1. Legal Background

Article 6 of the Dutch Competition Act prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the Dutch market.

An agreement can be said to exist when the undertakings concerned adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. In order to prove the existence of an agreement it is sufficient that the undertakings have expressed their joint intention to behave on the market in a certain way.

When undertakings have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour, their conduct is considered to be a concerted practice. To prove the existence of a concerted practice the NMa first has to demonstrate the alleged concertation between the undertakings. Secondly it is necessary for the undertakings to remain active in the relevant market. Thirdly there must be a causal connection between the concertation and the conduct on the market (Judgment of the Court of Rotterdam on 14 July 2006 in the ‘mobile operators case’). It may be presumed that undertakings taking part in a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market. This presumption is subject to proof to the contrary.

Although often ancillary to other per se violations of article 6 of the Dutch Competition Act such as price fixing or market sharing the exchange of information may separately constitute an infringement of article 6 Mw. In the past the NMa has investigated cases where firms exchanged information regarding future plans (these cases will be discussed later in the text). In these cases the NMa classified the conduct as a concerted practice. The NMa also maintained that the conduct had as its *object* the prevention, restriction or distortion of competition. The Court of Rotterdam confirmed NMa’s finding of a concerted practice with its object the prevention, restriction or distortion of competition in the judgment “Fietsfabrikanten” (see the ‘bicycle case’ later in the text) and the judgment “Mobiële operators” (see the ‘mobile operators case’ later in the text).

In cases when the object of the information exchange is not the restriction of competition, the NMa would determine if the exchange has the effect of restricting competition.

2. Scope

The OECD asks:

- Which practices can firms use to reduce strategic uncertainty and more effectively coordinate their conduct without entering into explicit, “hard core” cartel agreements?
- Which practices have you investigated in cases or observed in markets in general?

2.1 *Background information*

Economic theory defines collusion as a situation where firms’ prices are higher than the competitive benchmark (this benchmark is usually defined by the outcome of the one-shot Bertrand or Cournot game since collusion would not arise in such a context). Collusive prices can range between prices just above such a benchmark level and the (near)monopoly level.

Modern oligopoly theory shows that collusive outcomes can be Nash equilibria in repeated games. In the context of repeated games players can be induced to act more in their collective interest when actions contrary to collective interest can be identified and punished by so called trigger strategies. Typically however there are many possible cooperative outcomes ranging from levels just above the noncooperative static outcome to the monopoly level. Successful coordination thus requires that the oligopolists solve the coordination problem and ‘agree’ on one of the outcomes.

Oligopoly theory makes no reference to the mode of communication involved in coordination. Collusion can be tacit or explicit. In theory oligopolists can collude tacitly. We use the term ‘tacit’ in ‘tacit collusion’ to refer to the absence of explicit verbal communication about prices, quantities and punishment schemes in order to sustain collusion. In such cases firms usually communicate via the market, such communication takes the form of signalling via the marketplace.

2.2 *Facilitating practices*

We use the term facilitating practice to refer to conduct that helps achieve or maintain a collusive outcome. Here are some well known examples of facilitating practices classified according to the role they play:

2.2.1 *Practices that facilitate monitoring*

Resale price maintenance

Resale price maintenance can help cartel members monitor each other and thereby enhance cartel stability. It can do so by helping cartel members distinguish between changes in the retail prices due to changes in the retail costs from changes in the retail price due to ‘cheating’.¹

Information exchange

Firms can also exchange information -for example concerning past prices- in order to monitor an existing cartel. Note that such communication takes one out of the domain of purely ‘tacit’ and into the domain of the ‘explicit’ when such communication takes place via explicit verbal communication. Yet, it

¹ See Motta M. (2004) *Competition Policy: Theory and Practice* . Cambridge University Press for a more detailed discussion.

could be so that such information exchange is used to support an implicit consensus regarding for example the geographical division of the market (the consensus could have been the result of historical growth for example).² In this case the underlying consensus has not been verbally communicated; explicit verbal communication concerns only the monitoring aspect. It could also be so that the information exchange is used to support a verbally agreed upon underlying cartel agreement.

2.2.2 *Practices that facilitate punishment*

As mentioned above firms can use dynamic strategies to align the individual interests of the firms with the collective interests. Such strategies can be used both in the case of tacit collusion and of explicit collusion. In the latter case firms might communicate explicitly and agree (or concert) on the use of such strategies.

2.2.3 *Practices facilitating coordination on one of the many collusive outcomes*

As noted above, oligopolists are sometimes confronted with the coordination problem since typically many cooperative equilibria are possible. Of course firms can solve the problem simply by verbally communicating. Sometimes this communication amounts to a traditional explicit cartel. In such a case it is common to refer to hard core cartels. Sometimes however the communication is less structured and less formalized. Such communication is can be referred to as “cheap talk”. Such communication can be categorized as a facilitating device. Note that in the ‘Bicycle case’ (see below) this type of communication is classified as ‘information exchange’. In fact the term ‘information exchange’ is not only used in cases involving monitoring but also in cases involving coordination on future conduct.

Coordination does not necessarily involve explicit communication. Sometimes firms can solve this problem by using a (historically originating) focal point. Sometimes these focal points are provided by regulators that decree maximum prices. The focal point thus facilitates coordination. In other cases firms might solve the coordination problem by creating ‘focal points’ themselves for example through signalling on the market. Such signalling might thus be called a facilitating practice.

It is however important to note that conduct that can be described as a facilitating practice can also be pro-competitive. The use of meeting-competition clauses provides an example. Meeting-competition clauses can help cartels monitor each other by using the customers to identify and report deviations. However, meeting-competition clauses also have efficiency explanations. Such clauses might for example have insurance properties for risk-averse buyers.³

2.3 *Which practices has the NMa investigated?*

As noted above firms can use explicit communication to solve the coordination problem. Sometimes explicit communication amounts to an explicit cartel. Sometimes however communication is less structured and formalized. The NMa has experience with two such cases. See the following boxes for details of two cases where NMa’s decision was also the object of judgment of the Court of Rotterdam:

² Imagine a case where the firms traditionally had legal monopolies in their respective regions. The market division implied by this traditional division might provide the firms with focal points regarding the division of the market long after the legal basis of the monopolies is removed.

³ See Motta M. (2004) *Competition Policy: Theory and Practice* . Cambridge University Press for a more detailed discussion.

The 'Mobile operators case'

In this case several mobile operators on the Dutch market coordinated their behaviour regarding the fees they paid to their dealers as incentive for every new post-paid contract or prepaid package the dealer would sell to the consumer. In a meeting attended by the mobile operators, one of them announced a reduction of the incentive fees concerning post-paid contracts. The level of the fees and the planned moment of the reduction of the fees were mentioned. A couple of months after the meeting the mobile operators actually reduced the incentive fees they paid to their dealers for post-paid contracts.

The Court considered the behaviour of the mobile operators to be a concerted practice because the undertakings concerned spoke with each other about their planned (normally secret) market behaviour with a certain degree of reciprocity.

The Court judged that the exchange of confidential information with regard to the post-paid contracts had as its object the restriction of competition. The reduction of the incentive fees for dealers of post-paid contracts has consequences for the prices on the retail market. The dealer passes part of the fees it receives on to consumers. If the incentive fees are reduced the consumers are expected to pay higher prices. An autonomous reduction of the dealer fees by only one of the operators might lead to a situation where subscribers will change to other operators. This might in turn cause a (considerable) loss of market share. When all operators simultaneously reduce the incentive fees this problem is avoided. The Court therefore concludes that the object of the coordination was to preserve the existing market shares. Accordingly, the coordination was found to have as its object the restriction of competition on the retail market.

The 'Bicycle case'

In the so-called Bicycle case, Dutch bicycle producers organised a meeting during which representatives of the undertakings discussed planned price increases of the recommended retail prices and reductions of dealer fees. The NMa also suspected that the producers discussed about the margin that a particular company organising company bicycle projects is expected to pay to the dealers. The legal question was if these discussions could be interpreted as a concerted practice.

The Court ruled that the bicycle companies exchanged sensitive information. The undertakings concerned discussed intended recommended retail price increases. Such an increase would enable them to pass recent cost increases on to the consumers. They each announced their intended prices increase. By exchanging this information the participants at the meeting got to know each other's strategy. The Court noted that the increase of the recommended retail prices at the beginning of the bicycle season is directly related to the pricing policy of the bicycle producer and that the pricing policy is an essential factor in the competition with other bicycle producers.

This was not interpreted to involve a unilateral announcement of one bicycle company to others because it was clear that the undertakings spoke with each other about the payment conditions and price adjustments.

The undertakings concerned also announced their planned reductions of dealer fees for certain periods of the year to stimulate the dealers to buy bicycles during the winter season. The Court ruled that by the coordination of reductions of dealer fees the undertakings coordinated the prices the dealers pay for the bicycles.

After judging that the undertakings concerned stayed active in the market and that there was a causal link between their market behaviour and the coordination, the Court concluded that the exchange of information with regard to the recommended retail prices and the reduction of dealer fees had as their object the restriction of competition. The fact that there was a coordination in a horizontal relation with regard to the pricing policy of the bicycle producers was decisive.

With regard to the margin that the company organising company bicycle projects should pay, the Court concluded that there was no proof of a concerted practice. The Court concluded that it was not proved that this topic was discussed during the meeting. The fax from one company to another - where it was written that the company had agreed to discuss the margin with the company organising company bicycle projects- was considered to be a unilateral announcement.

In these cases the NMa qualified the conduct as a concerted practice with its object the restriction of competition. The ‘bicycle case’ was considered to be a forbidden form of ‘information exchange’. In both cases the parties were all physically present in the same location in the same time, they talk about future prices/strategies, the discussion had a reciprocal character (see however the last paragraph of the previous box).

3. Under what circumstances can competition law intervene?

The OECD asks:

- Under what circumstances can conduct consisting only of facilitating practices (not part of an explicit, “hard core” cartel agreement) be considered unlawful? What factors can be used to distinguish in these cases between unilateral actions by firms and coordinated actions that could potentially be subject to a prohibition against unlawful agreements?
- In order to establish liability, is it necessary to prove that firms agreed on facilitating practices? For example, is it necessary to show that the firms agreed to share information, or can the mere fact that they exchanged information be sufficient to establish a competition law violation?
- Is reciprocity required to find that information exchanges are unlawful? Conversely, could it be unlawful if one firm unilaterally makes information available to competitors or the market place, for example information about intended price increases or other future competitive conduct?
- Do market structure, the nature of competition, and other factors affect the analysis; can they be used as filters to deciding in which cases competition law intervention should be considered? For example, the literature on information sharing has suggested that information tends to have positive welfare effects with Cournot competition and negative effects with Bertrand competition. Could that distinction be usefully applied by competition authorities to intervene more aggressively against information sharing arrangement when the nature of competition makes negative welfare effects more likely?
- Have there been cases in which you decided to intervene against pure facilitating practices which were not part of a hard core cartel arrangement? What triggered the cases and how did they end? Have there been cases where you decided against intervening because certain conduct, even though it may have been harmful, likely would not have been considered unlawful under your competition laws?

3.1 *Information exchange*

3.1.1 *Information exchange facilitating coordination*

As mentioned above NMa has intervened in cases involving information exchange regarding future conduct/strategies. In these cases there was no finding of an agreement. The communication was characterized as a concerted practice with its object the restriction of competition. The finding of a concerted practice with its object the restriction of competition was confirmed by the courts. The NMa and the courts focused on certain aspects of the communication - such as physical presence, the degree of reciprocity of the interaction - in the finding of a concerted practice and establishing liability.

3.1.2 *Information exchange facilitating monitoring*

Information exchange as a device for monitoring collusion can also be subject to competition law scrutiny. When there is direct proof of the hard core cartel, evidence on such information exchange will be usually presented as ancillary evidence. We believe that it might also be possible to find a violation in cases involving the use of such information exchange (even in the absence of (direct proof of a) hard core cartel). This might perhaps be the case when there is evidence that firms are regularly exchanging firm specific, past (but recent) and disaggregated price data. When it is clear that parties have regularly been on the giving and/or receiving end of the exchanged information it might be possible to infer a concerted practice.

3.2 *Other facilitating devices*

In principal there is no reason why a competition authority should not intervene against other facilitating devices that can be used to monitor collusion. This would however require the finding of an agreement or a concerted practice regarding the use of the facilitating device. For example, consider a hypothetical and perhaps unrealistic case where firms agree/concert regarding the use of the meeting-competition clause. Suppose that the content of the communication makes it clear what the object of the agreement is. For example assume that the firms involved explicitly state that the object was to maintain/obtain uniformity regarding the prices. Consider further that the structure of the industry is consistent with one supportive of 'tacit collusion'.⁴ In such a case it might be possible to find a violation even without showing the actual effects of the agreement/concerted practice. However, the empirical significance of such cases is not clear.

3.3 *Could it be unlawful if one firm unilaterally makes information available to the market place?*

It is generally believed that article 6 of the Competition Act does not apply to purely tacit collusion or unilateral conduct. The requirement of a form of direct or indirect contact seems to rule out the possibility that the notion of concerted practice includes tacit collusion. In fact some commentators speak of a gap between antitrust economics and antitrust law since modern industrial economics makes no reference to the mode of communication in defining collusion and refers to a situation when the prices are higher than a competitive benchmark. Not all facilitating practices involve explicit communication. Firms can exchange information on the market, individually adapt facilitating contract clauses and/or use dynamic strategies such as Tit for Tat. Even though these practices do not involve explicit communication (these could be called 'tacit' facilitating devices), they can all facilitate firms in reaching or sustaining a collusive outcome. Unilateral price signalling is in theory enough to facilitate coordination. So why only focus on explicit communication when applying article 6 of the Dutch Competition Act?

We believe that the focus on explicit communication does not imply a serious tension with modern economic theory. Modern oligopoly theory shows that (tacit) collusion is possible. But it also shows that this requires the ability to monitor and punish. It also shows that the oligopolists have to be able to solve the coordination problem; that is they have to be able to 'agree' on one of the many possible cooperative outcomes. Solving this problem without explicit communication using only 'tacit' forms of communication (such as market signalling) can be very costly. Explicit communication can be much cheaper. This viewpoint thus puts into perspective the empirical significance of tacit collusion. Tacit collusion seems in any case to depend on a highly specific kind of market structure.

⁴ Both the case of explicit cartels and the case of tacit collusion require that the firms have the incentives to implement the collusive 'agreement'. Therefore the factors that are identified in the literature as factors supporting tacit collusion are considered to apply to explicit cartels.

Another aspect regarding the focus on, at least, some explicit communication concerns remedies. When firms use ‘tacit’ facilitating practices it might be possible to order the firms to cease using the practices. But what kind of signal would that give to other firms in other oligopolistic industries: that they should be careful in adopting practices which are part and parcel of competition such as announcing their prices (for fear of being convicted of illegal information exchange), not to respond to price cuts (for fear of being convicted for the use of an illegal dynamic strategy), not to monitor the prices of competitors? There would also be serious practical problems. Since conduct that can be described as a facilitating practice can be employed for procompetitive reasons one would have to eliminate other possible explanations in order to find a violation of competition law. The fact that these facilitating practices are accompanied by parallel pricing would of course help. But then again one would have to be able to account for alternative explanations of the parallel pricing. Many commentators have reflected upon the serious difficulties involved in inferring collusion on the basis of ‘price parallelism’ even when there is evidence of the use of facilitating practices (sometimes however explicit communication can be inferred as the Dyestuffs case helps illustrate). Inferring collusion on the basis of price levels is also fraught with difficulties.⁵ Some commentators are also fearful that allowing courts to find violation in such cases might open the doors for finding violation in cases where there is no collusion.⁶

This suggests that collusion involving only tacit means of communication (tacit facilitating practices) might not be a wide spread phenomenon. Proving a violation in cases without explicit communication can be very difficult and even more difficult to remedy. The focus on explicit communication also significantly eliminates the difficulty involved in delineating for instance unilateral conduct from unlawful multilateral conduct. Thus the laws focus on cases involving explicit forms of communication in the application of article 6 of the Dutch Competition Act seems justifiable.⁷

3.4 Reciprocity

As stated above the establishment of liability will require some degree of reciprocity. This is also stated as a necessary condition for the finding of a concerted practice. In the ‘bicycle case’ the court found that the parties had to explicitly distance themselves from the discussion in order to escape liability. See box for details.

‘The Bicycle Case’

One of the undertakings argued that its representative had dissociated himself from the discussion during the meeting. The Court stated however that the undertaking did not *substantially* dissociate itself by not *clearly* and *firmly* expressing its disapproval. The reaction of the company’s representative during the meeting was as follows:

“I stick with 5% reduction in winter, what you do is your business, I do not want the NMa to come after me.” This statement can, according to the court, not be qualified as an instance of clear and firm dissociation. The company is thus found liable. The court referred to the fact that the producer mentioned what price increase he would actually apply. The court stated that in doing so the firm contributed, perhaps unintentionally, to increasing the transparency on the market. However, the court mentioned that this argument was redundant concerning the establishment of liability. The decisive factor was the fact that the company had not clearly and firmly distanced itself.

⁵ See Motta M. (2004) Competition Policy: Theory and Practice . Cambridge University Press for a discussion of these points.

⁶ See Gregory Werden (2004), Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory, 71 Antitrust L.J.

⁷ We do not suggest that competition law in general can not play an effective role regarding tacit collusion. Merger control, for example, can play an effective role in the prevention of tacit collusion.

With regard to one of the topics the Court concluded that there was no proof of a concerted practice since there was no evidence that the topic was discussed during the meeting. A fax from one company to another was considered to be a unilateral announcement (see the box titled 'bicycle case').

In both the 'bicycle case' and the 'mobile operators case' the parties were physically present at the same location at the same time, they talked about future prices/strategies, the discussion had a reciprocal character (the Court used the term 'over en weer' in the 'mobile operators case' which can be translated as mutually, reciprocally). These factors can indeed help establish liability. But we do not believe that all of these factors have to be present in all of the cases. Inferring reciprocity will usually depend on the specific facts of the case. Consider the following hypothetical example:

Suppose that the competition authority receives a tip. According to the tip firm A regularly faxed its future price plans to firm B. The tip also contains detailed information regarding the level of the planned price increase in the last instance of faxing. The competition authority then observes that the prices indeed go up to the level mentioned in the tip. The market conditions do not seem to justify the price increase. The competition authority conducts a dawn raid and finds copies of the faxes in the drawer of the director of firm B. There is no evidence that firm B has communicated with firm A. Firm B cannot provide a sound explanation for the price increase. The competition authority could then reasonably infer reciprocity and intervene.

Note that this case differs from a case where firm A announces a price increase via the market. Whereas public price announcements are seen as common competitive practices, faxing private price announcements to competitors is not (of course one should always be open minded regarding alternative explanations). So the risks associated with banning such communication through a remedy seem to be much more limited.

This of course does not imply that information exchange between firms using explicit communication is always suspicious. There are some forms of information exchange that can be pro competitive. We believe that the analysis of the nature of the information exchange and the context wherein such exchange takes place is in most cases necessary. See below for further detail.

4. Standard of liability regarding information exchange

The OECD asks:

- Can there be circumstances when it is justified to subject pure facilitating practices such as information sharing (not part of a broader "hard core" collusive arrangement) to a "per se" type prohibition without detailed examination of circumstances and effects?
- If pure information sharing is not prohibited "per se," what factors should be used to decide whether an information sharing practice was unlawful? Would it always be necessary to show that information sharing had anticompetitive effects?
- How should enforcers or courts deal with possible countervailing efficiencies? For example, in many cases defendants may argue that information exchanges can bring about productive efficiencies and increase welfare. If the conduct has plausible efficiencies, would that be sufficient to undermine a plaintiff's case or would it be necessary to engage in a broader balancing exercise of restrictive effects and efficiencies?

It seems almost impossible to derive general conclusions regarding the standard of liability concerning information exchange as such. For information exchange comes in many forms and shapes. It is

widely acknowledged that some forms of information exchange are generally procompetitive. The treatment of public announcements aiming at increasing transparency for consumers should in general be very different from the treatment of private announcements mainly meant to increase transparency among competitors for example. It is common to invoke a few relevant aspects of information exchange in deciding the ‘lawfulness’ of a particular case of information exchange. Factors that are most commonly invoked are

- the ‘intended audience’: Information aimed at the public is usually considered innocent. Information aimed at a competitors can be a signal of anticompetitive conduct
- the time span: Past data can be used to monitor cartels, future data can help achieve a collusive outcome
- the level of aggregation: Firms specific data is met with greater suspicion than aggregate data
- content of information: Exchange of price and/or quantity information is met with a greater degree of suspicion than for example exchange of information regarding less ‘competition sensitive’ information.

It is usually difficult to draw general conclusions when one considers the factors in isolation. However, there is growing consensus that a combination of some factors can be indicative of anticompetitive use (consider for example information exchange involving the exchange of private, firm specific and future data). It might thus make sense to develop per se prohibitions against such forms of information exchange. However, such prohibitions are only desirable when one can conclude on the basis of empirical and theoretical arguments that the particular form of information is anticompetitive in the vast majority of the cases.

We believe that only in the exceptional cases when the anticompetitive object is clear one could refrain from showing anticompetitive effect. The example above, involving the repeated faxing of private information to competitors might be a candidate for such a case. In many cases involving information exchange however such inference will not be warranted. In cases where the nature of information exchange is ‘softer’ and/or where the alternative explanations of the parties are credible one should show anticompetitive effect in order to find a violation.

5. Remedies

The OECD asks:

- What would be the remedy in cases where competition authorities intervene against purely facilitating practices?
- Should the likely availability of remedies guide the decision whether to intervene in the first place?
- How can competition authorities provide guidance to market participants to help them avoid situations where their conduct might be found to violate competition law?

The discussion above shows that we consider the availability of remedies and the repercussions of such remedies for other firms in other industries to be relevant in deciding whether or not to intervene in the first place.

Official guidelines can be useful in communicating the vision of the competition authorities regarding information exchange, in explicating some of the theoretical considerations and in providing example assessments. These aspects could be repeated or emphasised in speeches and press releases. Of course the consistent application of the communicated line by the competition authority will be important in the long term effectiveness of any guidance. Such decision practice might be important in showing that the competition authority practices what it preaches. In some cases the NMa would consider giving guidance in the form of an informal opinion.⁸

⁸ Generally speaking the NMa uses the following criteria in order to decide whether or not to give an informal opinion:

- The question at hand shall involve a new case/ issue of legal interpretation;
- Economic interests shall be sufficiently substantial;
- No similar case shall have been submitted to a (European) Court;
- Parties have done their utmost to gain clarity on their legal situation.

NEW ZEALAND

1. Facilitating practices

The topic of this Roundtable is described as the difficult grey area between explicit ‘naked’ cartels and conduct purely resulting from oligopolistic interdependence. It refers to the wide range of facilitating practices, being less than an agreement on price, that firms may engage in “to make a concentrated market operate more like a well-functioning oligopoly or cartel.”¹

Facilitating practices generally relate to measures that communicate information about prices, quantities, standards or costs of products supplied or acquired in a market and any changes in those factors over time. However, firms require such information in order to make their own decisions about investment and the quality, quantity and price of products they will supply in a market. In addition, the availability of such information often assists acquirers of those goods or services in making informed product choices. Therefore, practices that facilitate the availability of such information and reduce uncertainty may be procompetitive.

Competition concerns with facilitating practices will generally arise in concentrated markets where market structures are such that firms have incentives to coordinate. Such market conditions have been well canvassed at a previous OECD Roundtable on Oligopoly.² In such cases, facilitating practices reduce the costs of coordination, either by signalling supply intentions or enabling firms to detect deviations from intended coordinated supply levels. By reducing the costs of coordination, firms may be able to achieve outcomes consistent with a cartel by means other than entering into ‘naked’ agreements.

A previous roundtable by the Global Forum on Competition described such practices in the context of circumstantial evidence of a cartel agreement.³ The background note to that roundtable outlines that facilitating practices in such cases may include:

- information exchanges, such as ‘cheap talk’ about current prices, costs, business plans, capacity utilisation, or other non-public business sensitive information;
- price signalling conduct, such as public announcements of future prices or pricing policies;
- freight equilisation schemes, whereby products are sold on a delivered basis or using a ‘basing point’ system, thus making it easier to define the cartel price and monitor it;

¹ Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, Harvard University Press, 2005. Chapter 6, *Combination of Competitors*, page 132 defines a ‘facilitator’ in terms of a condition or practice in this way. Hovenkamp also distinguishes ‘facilitating practices’ from ‘conscious parallelism’. With facilitating practices being ‘communications (often nonverbal) that make the cartel work better’ (page 127) as opposed to ‘conscious parallelism’ being ‘when firms reach a price consensus without explicitly communicating about anything’ (page 135).

² OECD Committee on Competition Law and Policy, *Roundtable on Oligopoly*, DAF/CLP(99)25.

³ Global Forum on Competition, *Prosecuting Cartels Without Direct Evidence of Agreement*, DAF/COMP/GF (2006)7.

- price protection (meeting competition) and ‘most favoured nation’ clauses, which can discourage discounting and serve as enforcement or punishment mechanisms in a cartel; and
- product standardisation agreements, designed to exclude new entry (or, we would add, that could be used to limit non-price competition between competitors).⁴

2. New Zealand competition law

New Zealand’s competition law, the Commerce Act 1986 (‘the Act’), contains a *per se* prohibition against horizontal arrangements relating to fixing, controlling or maintaining prices (section 30) and a generic prohibition against arrangements that substantially lessen competition (section 27). In both cases, the prohibitions require that the anticompetitive practice is carried out pursuant to a ‘contract, arrangement or understanding’. Such arrangements may be less than an enforceable contract. However, in order to contravene the prohibitions, the courts require:

- a meeting of the minds; and
- the meeting of the minds must give rise to an agreed course of conduct with a clear expectation as to the future conduct.

The New Zealand Court of Appeal in *Giltrap City Ltd v CC* stated:

Before there can be an arrangement under s27 (or for that matter an understanding) there must be a consensus between those said to have entered into the arrangement. Their minds must have met – they must have agreed – on the subject matter. The consensus must engender an expectation that at least one person will act or refrain from acting in the manner the consensus envisages. In other words, there must be an expectation that the consensus will be implemented in accordance with its terms. If no specific action or inaction is envisaged on anyone’s part, it would be difficult to find an arrangement under s27, if only for want of the existence of the necessary purpose or effect of substantially lessening competition.⁵

Consequently, only practices arising from explicit coordination between two or more firms would contravene these prohibitions in the Act. However, facilitating practices are one form of circumstantial evidence, along with the existence of other ‘plus factors’, that has been used in the absence of direct evidence to prove the existence of such arrangements. An example is a successful case by the New Zealand Commerce Commission (NZCC) against three oil companies relating to the simultaneous withdrawal of a free car wash offer with every \$20 purchase of petrol.⁶ However, the topic of circumstantial evidence of cartel agreements was considered at the previously mentioned roundtable held by the Global Forum on Competition and so a discussion of the issues will not be repeated in this submission.

Rather facilitating practices relating to communications between parties may of themselves contravene the Act if the practices arise from an explicit ‘contract, arrangement or understanding’. That is, two or more parties must have agreed to the practice. Consequently, conscious parallelism (being a price consensus reached without firms communicating or having a meeting of minds) is unlikely to contravene the competition law in New Zealand.

⁴ Ibid, page 22.

⁵ *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 at paragraph 17

⁶ *CC v Caltex NZ Ltd* (1999) 9 TCLR 305

If the facilitating practice is agreed, then in order to contravene the Act it would be necessary for the agreed practice to either:

- have the purpose, or effect or likely effect, of ‘controlling or maintaining’ the prices of products supplied by one or more of the parties to the agreement (the *per se* prohibition under section 30); or
- have the purpose, or effect or likely effect, of substantially lessening competition (the generic prohibition in section 27).

The *per se* prohibition in section 30 is likely to impose the lower evidential burden in relation to contravening facilitating practices. The use of the terms ‘controlling or maintaining’ price in that section would address circumstances where price may not be the specific subject of the agreement, but nevertheless the arrangement interferes with the competitive determination of price. This matter was considered in *CC v Caltex NZ Ltd*, where the term ‘controlling’ was defined as ‘to restrain or direct the free action’ of price. The court also noted that it was not necessary for there to be certainty or agreement on what the new price levels would be. Consequently, more than mere evidence of an agreement to exchange information would be required for a facilitating practice to contravene the *per se* prohibition.

Potentially, firms may also contravene the Act if their actions are characterised as ‘an attempt’ to enter into an anticompetitive agreement. Sections 80(1)(b) and 80(1)(d) of the Act impose liability on persons who ‘attempt’ to contravene, or ‘induce, or attempt to induce’ any other person to contravene the Act. Based on Australian cases, it is likely that any contravention of these sections would involve more than statements of unilateral intentions to do something or refrain from doing something. Rather there must be a suggestion express or implied that others might act in the same way.⁷

To date there have been no court judgements in New Zealand in relation to potentially contravening facilitating practices. However, the NZCC has carried out a number of investigations into facilitating practices, particularly in relation to its authorisation procedure under the Act.

3. Authorisation of facilitating practices

Under the Act, parties may apply to the NZCC for authorisation of practices that would otherwise lessen competition. The NZCC may grant authorisation if the public benefits of the practice outweigh the associated competition detriments. The effect of the authorisation is to grant immunity to the authorised practice from the prohibitions in the Act.

The NZCC has received a number of applications for authorisation in relation to facilitating practices. The parties to the proposed arrangements generally seek authorisation to give them assurance that the arrangement will not face a litigation risk under the Act.

Given the authorisation context in which the NZCC is carrying out these investigations, the forward looking nature of the analysis is not able to take into account the actual effect of the proposed agreements on price and competition in the market. This information would be highly relevant in an investigation of a trade practice under sections 30 and 27 of the Act, which would generally be backward looking. However, the following three cases usefully discuss the NZCC’s analytical framework for considering price information schemes.

⁷ *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) ATPR 40-385.

3.1 *New Zealand Medical Association⁸ - an information exchange scheme*

In 1988, the New Zealand Medical Association (NZMA) applied to the NZCC for authorisation of an agreement reached between the Minister of Health and the NZMA in respect of general medical practitioners' fees for child patient consultations. Included in the agreement were the following conditions:

- practitioners will pass on to the patient the increase in the government subsidy for patient consultations;
- Divisional Fee Complaints Officers will publish in the press, at six-monthly intervals, the range of total fees for paediatric consultations charged by practitioners in the region, and each practitioner would be required to place notices in their waiting room of their usual total fee; and
- the NZMA will set up a fee monitoring and complaints procedure to carry out the arrangement and to protect against overcharging.

The NZCC considered the application in terms of sections 30 and 27 of the Act and determined that the arrangement was unlikely to contravene the Act. In summary, the NZCC noted:

- the purpose of the arrangement was not anticompetitive, but rather was designed to provide consumer information and to protect the consumer against overcharging;
- the arrangement was unlikely to have the effect of substantially lessening competition, as it did not restrict or impose any obligation upon the practitioners in relation to the price of paediatric services. The NZCC said:
 - If it does not restrict any competitor, it can hardly constitute a restriction on competition in the market for paediatric services. If it does restrict competition, it is only in respect to 'overcharging' [which was not defined]. That could not be said to be a restriction which, in terms of 'lessening competition' is 'real or of substance' in terms of the Act.⁹
- the arrangement would not 'fix, control, or maintain price' as there was no evidence of an expectation or intention by NZMA or the practitioners that any particular price, or price within a range of prices, were to be charged. The correspondence made clear that each member of the NZMA is required to establish his or her standard paediatric consultation fee as a matter of independent judgment.

As part of its determination, the NZCC also noted that there were circumstances in which information and notification arrangements could contravene the Act. Consequently, it outlined some general principles for information exchanges that would normally not substantially lessen competition:

- the agreement is a genuine information exchange and does not have the intent or effect of controlling or recommending prices or other terms of supply;
- the information is collected independently and with anonymity of records being preserved;

⁸ Commerce Commission, *Decision No. 220: NZ Medical Association*, 13 September 1988

⁹ *ibid*, paragraph 19.

- the agreement assures the anonymity of members participating and the information disclosed is of a generalised nature, naming no particular producer or consumer;
- the industry structure is such that it does not allow the identification of any particular members, producers, or consumers from the information obtained;
- the scheme is voluntary;
- the results of the information agreement are available to any person (including non-industry members) on request;
- the information exchange is not used as a vehicle for recommending or policing pricing or other policies;
- the information is based on details of past historical fact. Pre-notification of prices or trading terms is likely to result in a price recommendation agreement in another form and may affect competition; and
- the frequency with which the members provide the information and how up to date it is will be relevant in assessing the likely competitive effects of the arrangement.¹⁰

Given that the information exchange was unlikely to substantially lessen competition, and for other reasons related to Crown immunity, the NZCC declined jurisdiction in respect of the application.

3.2 *Chemists' Guild of New Zealand (Inc)*¹¹ - recommended price scheme

In 1986, the NZCC received an application, referred to it by the Examiner of Commercial Practices, from the Chemists' Guild of New Zealand (Inc) for approval of:

- the issue of a product information catalogue incorporating recommended retail prices for pharmaceuticals, health and beauty products and veterinaries to Guild members;
- the issue of a part-charges guide;
- the issue of retail price lists for anorexians, hypno-sedatives and minor tranquillizers; and
- a national price-off scheme or special ling programme operated by the Guild.

Section 2(8) of the Act provides that recommendations by a trade association to its members are deemed to be a contract, arrangement or understanding for the purposes of the Act. However, section 32 of the Act provides an exemption from the *per se* prohibition against price fixing in section 30 in relation to recommended prices where 50 or more suppliers of the product are parties to the agreement. Consequently, a recommended price guide issued by a trade association of not less than 50 members is not unlawful *per se* and would need to be considered in terms of the generic prohibition in section 27 of the Act.¹²

¹⁰ These principles were based on guidelines issued by the Australian Trade Practices Commission.

¹¹ Commerce Commission, *Decision No. 167 Chemists' Guild of New Zealand (Inc)*, 12 June 1986.

¹² The policy rationale for section 32 is that a trade association with 50 or more members is likely to be genuinely set up to address matters of common interest and not a ruse for price fixing. In addition, the high

The Guild claimed in the application that the arrangement for release of price information would not have the purpose, or effect or likely effect, of substantially lessening competition. In particular, the Guild claimed that the recommended prices would not contravene the Act for the following reasons:

- the prices were recommendations only and were claimed to be merely a duplication, for the convenience of members, of prices recommended by the manufacturers and were not prices set by the Guild or its members;
- the chemists were under no obligation to charge these prices and they would not be subject to penalty, inducement or coercion of whatever kind should they depart from the recommendations; and
- the Guild had more than 50 members, so the exemption in section 32 applied.

In considering the application, the NZCC outlined, by way of guidance for the future, actions that would indicate that price lists were not genuine recommended prices. These were:

- the pressing of members not to discount from the recommended price or the pressing of members to use the margins recommended;
- the offering of inducements or special privileges to members to achieve the foregoing;
- the pressuring of suppliers not to supply, or to supply upon relatively unfavourable terms, members who discount;
- announcements by the association to members that the price in question will rise or the making of similar statements to the effect that the recommended prices have some form of status or validity; and
- agreements by individual members with each other to keep the recommended price.

In terms of the competition analysis, the NZCC outlined that the inherent nature of recommended price schemes, even with 50 or more members, is that they tend to create uniformity of prices and to create a convenient 'price leadership' situation which tends to limit variation from the listed prices. The NZCC considered the following factors relevant in determining whether such schemes would likely substantially lessen competition:

- the number of association members compared to others in the market;
- the amount of business done by association members as compared with the market as a whole;
- the degree to which members accept and adopt the recommendations;
- the degree to which the price list and the association's involvement in the recommendations inhibit members in engaging in competition with each other; and

costs of coordinating and enforcing a cartel of 50 or more members would likely mean that any recommended price could not practically be used as a focal point for price fixing. However, the NZCC notes that the OECD has recommended that section 32 should be repealed. See OECD, *Product Market Competition and Economic Performance in New Zealand*, Economics Department Working Papers No. 437, ECO/WKP(2005)24.

- the ease of entry to the market by non-members of the association.

After outlining these matters, the NZCC declined to consider the Guild's application further on the grounds that the claimed benefits of the arrangement could be achieved by other means that would not result in competition detriments. The applicants had not provided sufficient information to justify authorising the arrangement as outlined in the application.

3.3 *The New Zealand Wholesale Electricity Market*¹³ – a bids and offers scheme

In 2002, the NZCC received an application by the administrator of New Zealand's wholesale electricity market to make publicly available, two weeks after the event, the identities of market participants making bids or offers together with the quantities and prices bid or offered. The proposed new rule was a change from the existing rule whereby this information was released four weeks after the trading period.

As industry background, the New Zealand wholesale electricity market is oligopolistic, characterised by high concentration and significant vertical integration of generation and retail activities. The four main companies – Contact Energy Limited, Genesis Power Limited, Meridian Energy Limited and Mighty River Power Limited, make up approximately 85 percent of New Zealand's electricity generation and retail supply.

More than 60 percent of New Zealand's electricity generation capacity is hydro-based, using river flow systems and water stored in natural or man-made lakes. The remaining 40 percent non-hydro generation is mainly thermal (powered by gas or coal), with a small amount of geothermal cogeneration and wind based generation.

The wholesale price of electricity as determined by the market is dependent upon the marginal cost of generation for any level of demand. Given the reliance on hydro-based generation, this marginal cost of generation is in turn dependent upon different hydrological conditions. In times of low water inflows into hydro power station catchment areas and high demand for electricity, the value of stored water increases greatly and gas or coal fired generation becomes the marginal price setter.

At the time of the application, the Marketplace Company Limited (M-Co) administered the wholesale electricity market. The rules for the operation of the market were based upon multi-lateral contracts between the industry participants. These rules provided for the information disclosure scheme. The types of information disclosed by M-Co included hydrological data on hydro power station storage reservoir levels and river flows feeding such storage lakes, meteorological information on temperatures and forecast weather patterns, and information on the operational status of generation and transmission equipment. In addition, the system provides pre-dispatch and dispatch schedules and, subsequent to each trading period, information on average power generated, a set of final *ex post* prices for each node and trading period, and final bids and offers.

As mentioned, the application for authorisation only related to a more timely disclosure of final bids and offers, with the change being a reduction from four to two weeks after the event. The terms for the release of this information were agreed between the market participants as part of the market rules, and therefore the information disclosure could be considered in terms of sections 30 and 27 of the Act.

¹³ Commerce Commission, *Decision No. 474: The Market Administrator of the New Zealand Electricity Market – The Marketplace Company Limited*, 23 December 2002

In considering the application, the NZCC noted that the major generators, absent any disclosure of bids and offers, already had an intimate knowledge of their competitors' offering strategies. This knowledge had its genesis in:

- market information already disclosed under the market rules;
- the vertically integrated nature of the market participants;
- the oligopolistic nature of the market;
- the intimate knowledge that the four main companies have of each others' equipment as a result of the employment of many of their executives in the former Electricity Corporation of New Zealand, which prior to the creation of the four companies, owned 96 percent of New Zealand's then generating capacity; and
- the analytical resources market participants are able to bring to bear.

Given this high degree of existing knowledge, the NZCC considered that the competitive detriment from the more timely release of the bids and offers information was likely to be minimal. The NZCC also took into account the potential for the release of the information to be pro-competitive. In particular, the earlier release of the information would enable more timely identification, and possible constraint, of temporary market power. Importantly, major electricity users supported the change for these reasons.

Consequently, the NZCC considered that the more timely disclosure of final bids and offers after the trading period would be unlikely to lessen competition and it declined jurisdiction in respect of the application. A full copy of the NZCC's decision is available on the NZCC's website: www.comcom.govt.nz.

4. Conclusion

Facilitating practices would likely only contravene the Act if they arise from an agreement. In addition, in order to contravene the Act, the agreed practice must have the purpose, or effect or likely effect, of controlling or maintaining price (in the case of a horizontal agreement) or, more generally, substantially lessening competition. The range of sanctions available under the Act for contravening facilitating practices would be the same as for naked cartel agreements.

Conscious parallelism is unlikely to contravene the Act. However, both conscious parallelism and facilitating practices are forms of circumstantial evidence, along with other 'plus factors', that could prove the existence of a naked cartel agreement in the absence of direct evidence.

SPAIN

1. Introduction

Antitrust exercises an effect-based control over firm's practices, but it lies on a formalistic and legal toolkit when assessing those practices. This makes extremely complicated the job of competition agencies in the control of doubtful cases for two reasons. First, because once the legal line has been set, in terms of requisites to find a practice as having an anticompetitive effect, companies might enter into new behaviour "close to the line", but sometimes with the same anticompetitive effect. And second, because companies call for (and makes a lot of sense) an undeniable degree of legal certainty, so antitrust agencies should not draw lines too widely.

Having said that, the Spanish Competition Authority (Comisión Nacional de la Competencia) would like to share its experience and to debate with the rest of delegations with regard to a type of practice which is sometimes "close to the line" in the treatment of cartel investigations: **unilateral information signalling (and subsequent adaptation by the rest of the operators) in oligopolistic markets**.

Spanish competition law, in line with OECD countries, not only prohibits "hard core" agreements, but also other types of practices which replace competition with coordination with an equivalent effect. For instance, Article 1 of the Spanish Competition Act is drafted mirroring Article 81 of the EC Treaty and prohibits not only "agreements" but also "concerted practices", similarly to many jurisdictions.

Thus, given that prohibition is similar among countries, it is convenient to have common views about its scope and to find a coherent approach with regard to cases close to the boundaries. In this context, the concept of 'facilitating practices' is of the maximum importance, in so far as it covers practices from undertakings, different from explicit agreements on price or output levels, the object or effect of which is to restrict competition.

When these 'facilitating practices' are performed between two or more undertakings, they might be generally examined under the notion of concerted practices and the discussion focuses on its effects and rationality. But what happens when undertakings, without having previously agreed on anything, perform individual actions that allow them to coordinate their conduct in the market (i.e. price and/or output level), and such coordination gives rise to monopoly or oligopoly results? Are such individual actions that allow coordination prohibited under the provisions of 'agreements', 'concerted practices', 'combinations', 'conspiracy' and similar?

Taking into account an increasing number of cases involving this kind of practices, the Comisión Nacional de la Competencia (CNC) is considering to apply the test explained bellow, though admitting that it is not a consolidated view and that it may raise some comments, which would be very well welcome.

2. Oligopoly market outcomes

Although economic theory does not provide with a standard set of conditions to describe an oligopoly, we may define, for the purpose of our explanation, a '**pure oligopoly**' as a situation where market

conditions¹ are such that mere independent although interdependent undertakings' behaviour naturally leads to a result where price is above the competitive level, output is reduced and firms' benefit is positive. From a competition policy approach, the bad news of the latter is that such an inefficient market outcome is achieved as a mere consequence of the strategic interdependence among firms.

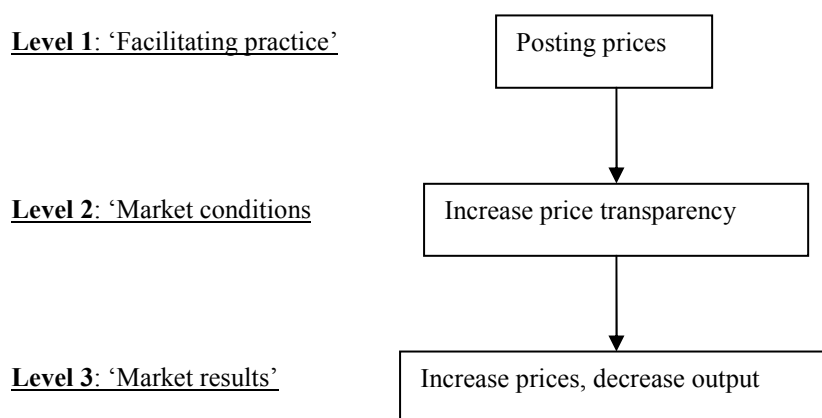
On the contrary, such inefficient outcome is not expected to be naturally achieved when 'pure oligopoly' conditions are not met. In such circumstances, 'pure oligopoly' results would be 'naturally' unsustainable, because every firm could lower its price and benefit from the subsequent increase of its market share. For example, in markets where firms make secret rebates to their customers (lack of transparency) there is a big incentive for firms to lower 'actual' prices in order to increase their market share, so in the end prices will tend towards the competitive ones, even if the market is composed by a few similar firms selling a standardised product. For the purpose of our explanation, we can say that such markets are 'imperfect' or '**impure oligopolies**', because one or more 'pure oligopoly' conditions are not satisfied, and consequently the 'pure oligopoly' results are not 'naturally' attained.

3. Facilitating practices

Obviously, when 'pure oligopoly' conditions are not met, the same inefficient result might be attained if firms agreed on price or output levels, but this explicit, "hard core" kind of agreements is almost always prohibited. Thus, as a consequence of the improvement of cartel detection techniques, firms have developed (consciously, or not) a less obvious way to reach 'pure oligopoly' results: '**correcting**' the **structural conditions that make their oligopolies 'impure'**. This is, firms can unilaterally or coordinately develop mechanisms to overlap or modify those markets conditions that impede that a non-competitive result is sustained, thus converting non 'pure oligopoly' markets into 'pure oligopoly' ones. For example, firms can agree on technical specifications on the products they sell, thus standardising the product and enabling that 'pure oligopoly' results arise 'naturally'.

As it may be seen in Figure 1 below, facilitating practices change the initial market conditions, temporarily or permanently, and this change in conditions allows that a 'pure oligopoly' result is reached 'naturally' just as a result of independent but interdependent behaviour. Then, in this context, facilitating practices might be defined as actions performed by undertakings which overlap 'impurities' to reach a 'pure oligopoly' result.

¹ There is no consensus in which these conditions are. For simplicity, we will assume that they include few and similar competitors, similar cost structures, product homogeneity and instant price transparency.

FIGURE 1: INDIRECT EFFECTS OF FACILITATING PRACTICES

4. Agreed and non-agreed facilitating practices

When facilitating practices have been agreed between undertakings, they may be addressed through the same legal or statutory provisions that prohibit agreements to fix prices or output levels. In such a case, the problem for a competition enforcer is to find evidence of the consensual element and to prove that its object and/or effect harm competition. For simplicity, hereinafter we will refer to 'practices with a consensual element' as 'agreements' or 'agreed practices'.

Nevertheless, we can find practices which facilitate coordination and have not been agreed. Then the problem is that, as an 'agreement' has not been performed, it is difficult to know if such practices may be addressed under the same provisions that prohibit 'agreements'. In the following sections, we will discuss the elements that would justify and make desirable the intervention of competition authorities when dealing with non agreed facilitating practices and the problems about fitting non agreed practices within the boundaries of the provisions related to 'agreements'.

5. Identifying undesirable facilitating practices

So, if we focus on facilitating practices that have not been previously agreed, the first issue that should be addressed is: **what defines a practice as a 'facilitating' one: its 'facilitating' object or its 'facilitating' effect?**

An **effect-based approach is not enough** as firms may develop practices that may increase coordination possibilities, but whose main aim is different from distorting competition or may have an objective justification. A good illustration can be found in the *Wood Pulp*² case. One of the most relevant characteristics of a 'facilitating practice' is that it is most of the times a common commercial practice (precisely because it has been designed not to be detected), and works as a 'facilitator' only when it is implemented under appropriate circumstances, this is, when the rest of the 'pure oligopoly' conditions are satisfied. Then, firms may develop 'facilitators' for different reasons than seeking coordination.

² Judgement of the ECJ of 31 March 1993 in joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, ECR 1993 I-01307.

Albeit not being a sufficient condition, nevertheless, we believe that it is a necessary one that a **practice has effects** on market outcomes in order to merit intervention, since enforcement should focus where competition is distorted. Anyway, we must clarify what kind of ‘effects’ we are talking about. As we may see in Figure 1 above, a ‘facilitating practice’ primarily affects market conditions, and only subsequently affects market outcomes, as once conditions have been changed ‘pure oligopoly’ results would ‘naturally’ arise without the need for any further agreement. However, effects over market outcomes may take time to occur, and they may not be obvious, so potential effects should also be taken into account.

Therefore, when assessing if a practice could be considered as an unlawful facilitator, we should look not only at its effects over market conditions but also at the purpose for what the practice was implemented –its object. However, as undertakings do not want to be detected, they will not normally write down about their intentions, and therefore the aim of a practice has to be inferred from the facts. When doing this, as it has been noted in the previous discussion, we must take into account that a ‘facilitating practice’ is a common practice which would not have a facilitating effect in a different context. Hence, there is no alternative than to look at the specific environment in which the practice has been performed, and at if the performer had a purpose different from the seeking for coordination³. This will normally depend on two concerns: the probability of success of a practice as a ‘facilitator’ and the rationality of the practice if it did not ‘facilitate’.

So, when scrutinising a practice’s object, two steps could be taken. The first one would be analysing what its **‘most plausible purpose’** is. In order to answer it, all the relevant market factors should be taken into account to assess what result the firm expected to produce with its conduct; this is, asking about its probable effects. Then, if the response to the first question is ‘facilitating coordination’, the second question to be posed would be whether there is an **objective justification** for it. Generally, it could be assumed that there is no objective justification for a conduct whose ‘most probable effect’ is allowing coordination when the conduct has a cost which could not be recovered by the undertaking if the effects of that conduct were not the ones qualified as the ‘most probable effect’ (sunk costs). This is, when it could be assured that the conduct would be irrational if it didn’t increase coordination and thus the ‘pure oligopoly’ results.

For example, if firms publicly post their future prices in a market characterised by few and similar competitors selling a standardised product, it could be inferred that the ‘most probable effect’ of such a conduct will be increasing coordination, but there could be an objective justification for posting prices (for example, that knowing future prices is essential for consumption planning). When such an objective justification cannot be found, it could be concluded that, absent coordination, posting prices might be irrational, because there would be no benefit in revealing one’s future prices whereas it would provide rivals with a decisive advantage.

6. Individually performed facilitating practices?

The second issue that it should be addressed is whether **it is necessary or not that a ‘facilitating practice’ has been previously agreed** in order to be caught under the same provisions that prohibit ‘agreements’. When undertakings agree on a practice whose object and/or effect is ‘smoothing out’ market ‘impurities’ and thus allowing the ‘pure oligopoly’ results to be ‘naturally’ attained, it is obvious that the practice may be caught under the same legal or statutory provisions that prohibit price and output agreements. But what happens if a firm individually takes a step which might lead to the same effect in terms of altering market conditions as if it had been previously agreed? If this kind of facilitating practice

³ As for what follows, when we refer to enabling, facilitating or increasing coordination, we do in the previously stated sense: converting ‘impure’ oligopolies into ‘pure oligopolies’, temporarily or definitely.

were not caught under competition toolkit, some practices that really harm competition in terms of market outcomes and social welfare would be permitted and, perhaps, therefore encouraged.

If a firm performed an action that modified market conditions, thus allowing ‘tacit’ coordination to arise, deliberately with this aim (suppose it would be irrational if it were not aimed at seeking coordination), then there would be no reason why we should not consider that action as an undesirable ‘facilitating practice’. In fact, the European Court of Justice has established that Article 81 of the EC Treaty strictly precludes ‘*any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market*’⁴.

Then if one undertaking, on its own initiative, performs an action that, if followed by competitors, facilitates coordination; and, without the existence of an actual plan, competitors follow the action in an appropriate way, this might be prosecuted as an ‘agreement’ in the above given sense, because the former discloses its course or conduct to the latter who, accordingly, do the same. Here we might say that there has been an invitation and an acceptance of the invitation, so the facilitating practice would consist in the sum of all individual actions.

Similarly, we believe that when one undertaking, on its own initiative, performs an action whose object and effect is to facilitate coordination among competitors (perhaps because such an action discloses the course or its conduct to its competitors), this action and its subsequent coordinated effects should also be addressed under the ‘agreements’ provision. In fact, we might say that the first mover sent an invitation, but no acceptance was needed to produce its effects on market conditions and subsequently on market outcome.

In conclusion, the above described practices should be addressed because they might seriously distort competition. A different debate could be the degree of responsibility and, therefore, to what extent the involved undertakings should be fined.

7. Test proposal

As a conclusion of all our previous discussion, we would like to share the test that we currently (but not definitely) apply with the rest of Authorities. In order to assess if a non agreed allegedly facilitating practice is unlawful, we should answer the following questions:

7.1 *Has the practice affected initial market outcomes?*

Firstly, we should evaluate up to what extent the practice has affected or is highly likely to affect market outcomes, in order to assess whether or not intervention is desirable. In this case, real effects should be identified, but it is also necessary to look for probable future changes, that is, potential effects.

7.2 *Has the practice produced real effects over market conditions?*

The next step is to assess up to what extent market conditions have changed as a result of the investigated practice. This is an objective assessment, because we are just comparing final market conditions with initial ones, and we are not taking into account who, or how many undertakings have performed the allegedly anticompetitive practice.

⁴ Judgement of the ECJ of 16 December 1975 in joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, ECR 1975 p. 01663, para. 174..

It is important to note that at this stage of the procedure we are looking at actual effects of the practice, not at potential effects. The reason is that there would be no real or potential effects on the market outcome if a practice had not changed market conditions. Secondly, we must note that, at this point, we are analysing effects over market conditions, not over market outcomes. We will focus on market conditions because, as we have previously remarked, a 'facilitating practice' primarily alters market conditions, and only subsequently affects market outcomes.

The third step, once we have determined which market conditions have changed, is to identify which undertakings are responsible for such changes. Every initiating action performed by a single undertaking might constitute a 'facilitating practice' if it sufficed to allow coordination among undertakings. Also, the initial action might not be enough to permit 'natural' coordination to arise, and then would need a competitors' reply, in the form of a similar action. In such a case, the facilitating practice would be composed of all subsequent actions of the undertakings.

In consequence, the key questions that summarise the previous concerns are:

- How have market conditions changed as a result of the allegedly facilitating practice?
- How have competitors reacted?
- Was competitors' reaction necessary to produce real effects over market conditions?

7.3 *Which was the object of the investigated practice?*

As it has been stated above, a practice which has the effect of facilitating coordination should not be considered unlawful unless it is proven that it was aimed at that. But when assessing the aim of such a practice, we must note that there will not be any direct evidence of the object, because we are assessing practices which have not been agreed between competitors, and therefore we will have to infer the aim of the practice from the facts, taking into account the competitive environment as well as its effects over market conditions.

As for the exercise of inferring the aim from the facts, we might have to answer the following two questions:

7.3.1 *Which was the 'most plausible purpose' of the practice?*

This is, taking into account the initial market conditions, we must assess how probable it was that the investigated practice approached them to the 'pure oligopoly' ones and which was the interest of the undertakings in doing so.

7.3.2 *Would the practice be rational, if it did not lead to an increase in coordination?*

In the answer to this question we will analyse the rationality of the undertakings' actions, taking into account all the expected benefits and costs of the practice (especially sunk costs) in the case that it did not lead to an increase of coordination. Thus when doing so, we will examine, as well, if there could be an alternative justification for the practice.

8. Answer to the questions

8.1 Scope

- *Which practices can firms use to reduce strategic uncertainty and more effectively coordinate their conduct without entering into explicit, “hard core” cartel agreements?*

Firms can use a wide range of practices with that purpose, such as posting future prices, reducing capacity, withdrawing from geographical or product markets, exchanging relevant information, etc. Nevertheless, there are not *per se* ‘facilitating practices’, and therefore they must be assessed under a ‘rule of reason’ approach.

- *Which practices have you investigated in cases or observed in markets in general?*

The Spanish Competition Authority has investigated a large number of cases where ‘facilitating practices’ such as information exchanges were involved. For example, in proceedings 432/98, the former *Servicio de Defensa de la Competencia* (now integrated into the *Comisión Nacional de la Competencia*) concluded that a series of interlining agreements between four airlines constituted a ‘concerted practice’, as the mentioned agreements linked prices among companies and thus facilitated coordination, but the Supreme Court rejected the argument because it was covered under a block exemption.

The *Comisión Nacional de la Competencia* is currently investigating some cases where undertakings have posted their future price increases, thus allowing rivals to meet theirs and producing an allegedly ‘unnatural’ parallel behaviour. The market is characterised by very few players, high barriers of entry, and high switching costs (costs of changing of prices).

8.2 *Under what circumstances can competition law intervene against practices and conduct that may help firms to reduce strategic uncertainty and more effectively coordinate their conduct?*

- *Under what circumstances can conduct consisting only of facilitating practices (not part of an explicit, “hard core” cartel agreement) be considered unlawful? What factors can be used to distinguish in these cases between unilateral actions by firms and coordinated actions that could potentially be subject to a prohibition against unlawful agreements?*

The Spanish Competition Act, even following European principles, has a wider scope to address behaviours among several competitors. Article 81 of the EC Treaty prohibits ‘agreements’ and ‘concerted practices’ among undertakings whose object or effect is the restriction of competition. Article 1 of the Spanish Competition Act 15/2007⁵ prohibits not only anticompetitive ‘agreements’ and ‘concerted practices’, but also ‘consciously parallel practices’ among undertakings. The provision does not clarify which is the difference between ‘concerted’ and ‘consciously parallel’ practices, but the Resolutions of the former *Tribunal de Defensa de la Competencia* (now integrated in the *Comisión Nacional de Competencia*) have given light to this issue. In its Resolution of 6 March 1992⁶, the *Tribunal* states:

“The supposition that a consciously parallel conduct must come inevitably from an agreement in order to be prohibited is not imposed by law...” (free translation of: *“la suposición de que detrás de la conducta conscientemente paralela ha de encontrarse inexorablemente, para que sea prohibida, un acuerdo, no viene impuesta por la ley...”*).

⁵ The concept was already considered in the previous redaction of Article 1 under former Competition Act 16/1989.

⁶ Case 306/91 *Henkel Ibérica*, available at www.cncompetencia.es.

And, later on, the cited Resolution explains that, whereas both the ‘agreement’ and the ‘concerted practice’ need a consensus among undertakings, this consensus is not necessary in the case of the ‘consciously parallel practice’, which only requires undertakings to (i) consciously perform (ii) a parallel action which (iii) restricts competition. Unfortunately, the Resolution does not apply the concept to specific practices, and there have been no further Resolutions about ‘conscious parallel practices’, so we have little further explanation on the three requirements: parallelism, consciousness of parallelism and restriction of competition.

We are aware that the concept of ‘consciously parallel practices’ is not a way to address the mere parallel behaviour among undertakings, as far as parallelism can be just a result of their reciprocal interdependence. But it could be a way to address ‘facilitating practices’. In short, the fact that undertakings act in a parallel way does not imply that competition is restricted, but when parallelism comes from a ‘facilitating practice’, there is an obvious distortion of competition, and therefore the three requirements stated above for ‘consciously parallel practices’ are satisfied. In such circumstances, the intervention of competition enforcers becomes desirable.

So ‘consciously parallel practices’ are closely linked to ‘facilitating practices’. A ‘facilitating practice’, as explained above, may be initiated by a sole undertaking and have no benefit for its performer if it does not make competitors react in a similar way; then it would be aimed at producing a consciously parallel reaction in competitors. Therefore, the success of a ‘facilitating practice’ consists in creating a ‘consciously parallel practice’. So a ‘facilitating practice’ could be found to be contrary to Article 1 of Spanish Competition Act 15/2007 because both its object and its effect are creating a ‘consciously parallel practice’.

- *In order to establish liability, is it necessary to prove that firms agreed on facilitating practices? For example, is it necessary to show that the firms agreed to share information, or can the mere fact that they exchanged information be sufficient to establish a competition law violation?*

Exchanges of information between competitors might constitute a violation of competition law, as they reduce ‘uncertainty’ about rivals’ strategies, ‘autonomy’ in the decision-making process and, therefore, allow coordination. But such practices must be addressed under a ‘rule of reason’ approach, which implies that it is always necessary to put such exchanges of information in the context of market conditions in order to understand how competition has been affected, and to check whether there are possible efficiencies.

When firms explicitly agree on an exchange of information that is harmful for competition, such an agreement may be addressed under Article 81.1 of the EC Treaty and of Article 1.1 of Spanish Competition Act both because its object and effect is (facilitating) the restriction of competition.

But such a conduct may also be addressed under the same legal provisions even if has not been explicitly agreed, within the concept of a ‘concerted practice’, which does not require the working of an actual plan but the replacement of competition risks with an increased predictability in competitors’ actions and/or reactions. In such cases, we believe that it should be proven that the exchanges of information must in somehow change market conditions and allow coordination having effects on the market outcome.

- *Is reciprocity required to find that information exchanges are unlawful? Conversely, could it be unlawful if one firm unilaterally makes information available to competitors or the market place, for example information about intended price increases or other future competitive conduct?*

When a firm unilaterally provides its competitors with information about itself, it is disclosing its intended course of conduct and then reducing its rivals' uncertainty. As stated above, we believe that such an action may be in itself enough to allow coordination, as it may produce that rivals' best reaction is to set the same price or to imitate the intended conduct. But in order to be prosecuted as unlawful, we believe that it should be proven that such an unilateral exchange of information was aimed at producing coordination and that it produced real effects on the market outcomes.

- *Do market structure, the nature of competition, and other factors affect the analysis; can they be used as filters to deciding in which cases competition law intervention should be considered? For example, the literature on information sharing has suggested that information tends to have positive welfare effects with Cournot competition and negative effects with Bertrand competition. Could that distinction be usefully applied by competition authorities to intervene more aggressively against information sharing arrangement when the nature of competition makes negative welfare effects more likely?*

The answer is yes. The suggested 'rule of reason' approach implies that in order to assess if an action facilitates coordination, market structure, the nature of competition and other relevant factors must be taken into account. As explained above, we will find that depending on what the circumstances are, an action may increase coordination or not, therefore such a practice should be considered unlawful only when it increased coordination and when it may be proven that it was aimed at it..

- *Have there been cases in which you decided to intervene against pure facilitating practices which were not part of a hard core cartel arrangement? What triggered the cases and how did they end? Have there been cases where you decided against intervening because certain conduct, even though it may have been harmful, likely would not have been considered unlawful under your competition laws?*

As mentioned in answer to question 2 above, the *Comisión Nacional de Competencia* is currently investigating different cases of posting prices which allegedly would facilitate coordination among undertakings.

8.3 Standard of liability

- *Can there be circumstances when it is justified to subject pure facilitating practices such as information sharing (not part of a broader "hard core" collusive arrangement) to a "per se" type prohibition without detailed examination of circumstances and effects?*

No. As explained above, 'facilitating practices' object must be assessed under a 'rule of reason' approach.

- *If pure information sharing is not prohibited "per se," what factors should be used to decide whether an information sharing practice was unlawful? Would it always be necessary to show that information sharing had anticompetitive effects?*

An information sharing (two or more undertakings) practice would be unlawful under Article 81.1 of the EC Treaty and, equally, under Article 1.1 of Spanish Competition Act unless it satisfied conditions of Article 81.3 of the Treaty and/or Article 1.3 of Spanish Competition Act. So both object and effects need to

be assessed. But we believe that it is not necessary to determine the exact effects, only to prove that they have existed as a consequence of the practice.

- *How should enforcers or courts deal with possible countervailing efficiencies? For example, in many cases defendants may argue that information exchanges can bring about productive efficiencies and increase welfare. If the conduct has plausible efficiencies, would that be sufficient to undermine a plaintiff's case or would it be necessary to engage in a broader balancing exercise of restrictive effects and efficiencies?*

Both efficiencies and restrictive effects must be assessed in order to find the net effect of the conduct and how it is distributed.

8.4 Remedies

- *What would be the remedy in cases where competition authorities intervene against purely facilitating practices?*

Remedies should be addressed at the cease of the conduct and at the incentives of the undertakings to perform 'facilitating practices'.

- *Should the likely availability of remedies guide the decision whether to intervene in the first place?*

In markets where a remedy can be effectively imposed (i.e. its effects are totally removed) after a 'facilitating practice' has been performed, firms can be discouraged to develop such practices. In markets where remedies cannot be effectively imposed, it might be appropriate to design *ex ante* regulatory mechanisms that impede 'facilitating practices'.

- How *can* competition authorities provide guidance to market participants to help them avoid situations where their conduct might be found to violate competition law?

'Facilitating practices' must be restricted to those practices which are specifically aimed at seeking coordination among undertakings, i.e. which are irrational if coordination is not attained. General guidance on prohibited agreements whose object is to restrict competition should therefore suffice.

TURKEY

1. Scope of Facilitating Practices

Examples for “facilitating practices”, practices that enable undertakings reach uncompetitive compromises and continue those compromises, are price announcements which are made in advance and are not binding, delivery pricing, information exchange, most favoured customer requirement, respond to competition requirement, and vertical restrictions where certain conditions are met.

1.1 *Facilitating Practices: Information Exchange*

Regarding information exchange, attitude of the Turkish Competition Authority (TCA) may be given by citing two examples:

The expressions in the statement, which was sent to Turkish Cement Manufacturers' Association on 15.05.1998, specifying the conditions to be met in order to grant a negative clearance¹:

“...Together with the features of the cement market, information exchange systems including the interchanging of quantity data on an undertaking basis have the potential to facilitate the creation of structures and practices which the Competition Law aims to prevent. It is clear that in such market, frequent and detailed information exchange may be a means to create artificial market conditions containing abnormally transparent and stable flow of goods in order to eliminate the flexibility of the practices of economic units and risks inherently existing in competition. Similar information exchange systems carrying detailed information on an undertaking basis may lead to these consequences: determining undertakings' conducts according to factors other than individual choices made under free competitive conditions, coordinating market behaviour, supervising the operation of anticompetitive structures.

Due to the concerns mentioned above, practices that are still carried out by your Association cannot be granted negative clearance.

The following principles should be followed at data collection and distribution stages in order to eliminate the concerns and prevent infringements of Competition Law:

1. The tables showing the data related to quantities (production, sales, inventory, export, etc.) should be prepared in a manner that prevents their disclosure on the basis of an undertaking or groups of undertakings which form an economic unit. Therefore, these tables should contain only data related to total production, sales, import, export and inventory for each geographic region. If the number of groups of undertakings forming an economic unit is less than three in a region, the data related to that region should be shown in a table combined with the data from one of the neighbouring regions so that it would not be possible to make calculations on an individual basis.

¹ Negative clearance certificate is granted in line with Article 8 of the Act No 4054 on the Protection of Competition (Turkish Competition Act) if a certain agreement, concerted practice, decision or a merger and an acquisition do not violate the relevant provisions of the Turkish Competition Act.

2. Tables showing comparisons between undertakings depending on any kind of data should not be prepared.
3. Statistical data included in the tables should not be discussed in meetings where representatives of undertakings are present.
4. Any comment, analysis or advice, as well as the distributed statistics that may affect competitive behaviour of undertakings should not be given.
5. Tables showing the quantities of the production of each good in a certain period should be prepared in accordance with the principles related to the concealment of individual information. Therefore, product types should be divided into three groups at the most and published in regional sums.
6. Estimations related to the future conditions of prices, sales and use of capacity rates should not be made.
7. Associations of Undertakings should ensure that officials responsible for the collection and tabling of data conceal competition sensitive information (in particular individual quantity data collected from undertakings) from members of the Association and third parties.
8. In case there is a possibility that competition sensitive information related to a particular undertaking could be inferred, summaries and total sums should not be published.
9. Tables showing monthly data should not be distributed in two months following the respective month.
10. The relationships with public bodies that request statistical information (TSI [State Statistics Institute], SPO [State Planning Organisation], etc) may continue in the same way.

In order for your practice which is the subject of the application to be assessed under the scope of negative clearance, it should be rearranged according to the principles cited above and draft tables showing the corrected version of the practice should be handed in to the [Turkish Competition] Authority urgently.”

The statements in TCA’s decision on Fertiliser Producers’ Association dated 08.08.2002:

“In order to prevent potential competition infringements and create competitive market structure, at data collection and distribution stages;

- 1- The tables showing the data related to quantities (production, sales, inventory, export, etc.) and use of capacity rates should be prepared in a way to prevent their disclosure on the basis of an undertaking or groups of undertakings forming an economic unit. Moreover, fertiliser producers should send these data to Fertiliser Producers’ Association (GUD) in sums instead of detailed information (e.g. summaries of fertiliser deliveries to their dealers on a city basis),
- 2- Any comment, analysis or advice, as well as the distributed statistics that may affect competitive behaviour of undertakings should not be given,
- 3- Tables showing the quantities of the production of each good in a certain period should be prepared in accordance with the principles related to the concealment of individual information,

- 4- Information related to the future conditions of prices, sales and use of capacity rates should not be published,
- 5- GUD should ensure that officials responsible for the collection and tabling of data conceal competition sensitive information (in particular individual quantity data collected from undertakings) from members of GUD and third parties,
- 6- Tables showing monthly data should not be distributed in two months following the respective month,

and it was decided that GUD should be informed of the obligation to follow the aforementioned principles.”

1.2 Facilitating Practices: Delivery Pricing and Vertical Restrictions

As regards to delivery pricing and vertical restrictions, Cement II decision dated 01.02.2002 of the TCA can be seen as an example. Delivery pricing carried out by the undertakings under investigation and tacit collusion/conscious parallelism created by vertical restrictions imposed to apply those delivery pricing activities are laid down in the following extracts from that decision:

“In order to make an assessment related to the vertical restrictions in cement sector, first of all, the pricing system used in the sector should be explained.

Almost all of the undertakings under investigation apply a pricing policy that is similar to what is called “multiple basing-point pricing system”. These practices are akin to the system which was prohibited by the Supreme Court of the United States in 1948.² The similarity results from the fact that other cement factories make sales in their region at a price that is parallel to the prices applied by the nearest cement factory to that region. In this system, as price is determined according to the transportation costs of other factories to a region, price levels in factory centres are generally high. However, sometimes higher price levels occur in supply-demand balance in some regions, therefore there are price differences in two regions at the same distance away from the factory centre. In these cases, dealers in the lower price region are prevented from making sales to higher price region. The difference between the system in Turkey and in the US is that there are no standard transportation tariffs. While the system in the US ensures that prices remain the same once it has been established, in Turkey, transportation is carried out by the dealers, creating uncertainty and consequently causing differences in transportation costs, which requires that the agreements should be renewed.

When this system is used with a distribution system that depends on dealers’ transportation means, like the Turkish system, dealers naturally want to sell cement to regions where prices are at the highest level. At this point, there are controls and sanctions on dealers. Different packaging for different regions, watching transportation vehicles, giving prices to dealers who inform that goods are delivered to a different region are among the controlling mechanisms. Sanctions range from restrictions on cement volumes given to dealers, giving fines equal to the price difference between purchasing region and selling region or fines at predetermined amounts to refusing to supply and even termination of contracts. It is clear that these practices impose additional restrictions to dealers. According to Turkish competition legislation, those dealers could only be imposed active sales prohibitions like “not to search customers, open branches or establish distribution depots outside the contract area”. However the existing system stipulates that goods are delivered to the area where they are purchased without making discrimination between active and passive sales. This “hardcore

² Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948).

infringement” does not have to be analysed under “rule of reason”. Nevertheless, a broad analysis was made about this system in order to dispel the suspicions. These analyses show that the practices have three objects:

First object is to charge high prices by relying on the dominant position or market power, in factory area where the competitors do not enter due to the agreement or unilateral company policy. The system mentioned above enables market sharing, the main condition for price differentiation, and allows profit marginalisation via higher prices in markets where dominant position or market power occurs, without being affected by the price levels in other markets. Undertakings that do not carry out this practice completely are regarded “weak” in the sector.

The second object is to make a distinction between markets where prices are lower as a result of competition and agreement regions.

The third object is to prevent competition which may occur thanks to dealers. Cement dealers whose main field of activity is transportation or who simultaneously carry out transportation activities with their own trucks have, at least in theory, the opportunity to make sales to regions that they want, independent of transportation costs. When large price differences are added to the abovementioned issues, it means that all of the conditions for parallel trade are met. It is clear that interregional trade would distort market balances which are created by an agreement or unilateral company policy and which are based on the rule of not entering to the primary market of the competitor. Therefore, dealers’ sales areas are attempted to be controlled and usually this attempt is successful. When this control is not gained, high price levels to be established depending on the agreement or unilateral company policies are impaired.

Undertakings under the investigation defended themselves stating that “prices are set through subsidisation in order to compete with the cement factory holding a dominant position in the region where the goods will be sent, and therefore intervening to this system will eliminate competition provided by the system.”

On the contrary, the TCA has found that although cost and price structures allow, undertakings could not enter to the market where competing factories are established because of agreements or unilateral company policies that rely on the fear of retaliation. The TCA has also found that there are high anticompetitive prices due to dominant position or market power in the factory area, where competing undertakings could not enter because of the agreement or unilateral company policy even if it is profitable. Besides it has been found that in markets where market power is lower or does not exist at all prices are not below cost. Undertakings who think that price policies are competitive maintain their activity without violating the Turkish Competition Act (for instance by extending the allegedly subsidised prices to all regions). At this point a question arises: why does the defence stating “intervention to the system will eliminate competition” object to “the situation that will be favourable to undertakings”? The answer to this question will explain the nature of the existing practices which eliminate economic efficiencies. In order to decrease fix and total costs in cement sector, use of capacity rates should be increased. However the increase in production and sales, i.e. the supply, in the framework of basic principles of economy, generally lead to a decrease in prices. The way to prevent this, to some extent, without reducing the profitability is to make differentiation between markets where dominant position or market power exists and other markets. The existing system pursues also this object in addition to the abovementioned issues. Thanks to the intervention of the TCA to practices violating the Turkish Competition Act, capacities cannot be reduced on account of the nature of the cement sector and the excess supply will provide competitive prices in the framework of existing conditions. The existing system, as laid down in D.E.

Waldman's article dated 1988³ in detail, promotes uncontrolled increase of the capacities. It is expected that, after the TCA's decision, those conditions that reduces economic efficiencies will be removed."

1.3 *Facilitating Practices: Price Announcements*

Private Schools' Association Decision of the TCA dated 11.02.1999 can be given as an example for price announcement. In the decision, first of all, the drawbacks of information exchange about prices in respect of competition law are stated. On the other hand, it has been found that there were not any negotiations about price in annual meetings held by Private Schools Association. Therefore it has been ruled that the Turkish Competition Act was not violated.

2. *Circumstances Facilitating Practices are considered Unlawful*

Facilitating practices that are not part of explicit hardcore cartel agreements can be considered unlawful in two conditions. One of them is the case where facilitating practices are the result of agreements and concerted practices between undertakings, and decisions of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition according to Article 4 of the Turkish Competition Act. The decisions cited above are taken under that article. Second case is where more than one undertaking abuse their dominant position in a market for goods or services within the whole or a part of the country through concerted practices in the framework of Article 6 of the Turkish Competition Act. It should be noted that there are not any TCA decisions on this issue; however, there are arguments that there may be practices in this respect. According to these arguments unilateral actions that do not depend on any agreement, concerted practice or decision of an association of undertakings and therefore do not fall under Article 4 may be considered as abuse under Article 6 of the Turkish Competition Act in case of collective dominance and may be prohibited.

Factors that can be used to distinguish between unilateral actions by firms and actions created by agreements and concerted practices are the same as those used to find cartels.

2.1 *Liability regarding Facilitating Practices*

As it is stated under the previous heading, in order for facilitating practices to be unlawful under Article 4, agreements and concerted practices between undertakings, and decisions of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition should be proved to exist. On the other hand, unilateral practices cannot be intervened under Article 4. Although it is suggested in the doctrine that these can be intervened under Article 6 of the Turkish Competition Act, the TCA has not given a related decision up to now.

2.2 *Factors affecting the Analysis*

As it is emphasised in Cement II and Fertiliser decisions, the structure of the market, the nature of competition and similar factors are important for analysis. In this framework, whether the market is oligopolistic, transparency of the market, barriers to entry, cost structures, the nature of demand, technological innovations, capacity, past practices, buyers' power and similar factors should be taken into account.

³ WALDMAN, D.E. (1998), "The inefficiencies of 'unsuccessful' price fixing agreements", The Antitrust Bulletin, Spring 1998, p. 67-93.

2.3 *Facilitating Practices Intervened that are not part of a Hard Core Cartel*

In the Turkish Cement Manufacturers' Association, Fertiliser Producers' Association and Cement II decisions, facilitating practices were intervened although they are not part of a hardcore cartel agreement. The decisions in question are examined in detail above.

There have been no cases where the TCA decided against intervening because certain conduct, even though it may have been harmful, likely would not have been considered unlawful under the Turkish Competition Act.

3. Standard of Liability

It should be kept in mind that facilitating activities may be the result of competition or in some cases may increase competition. For example as regards to price announcements, informing customers individually increases costs in some markets and sometimes it is impossible. Likewise, announcements allow customers to make plans. Undertakings that make an announcement may sometimes have to confront considerable cost burden because of an increase in sales at low prices. Therefore, consumers in the market may object to competition authorities' intervention to price announcements. As a result, per se approach, which ignores the characteristics of the market and undertakings, should not be adopted.

However, it should not be thought that facilitating practices should always be subject to rule of reason analysis and detailed examination should be done in relation to the restrictive effect on competition in every case. For instance, if there are factors such as transparency, entry barriers, stagnant demand, and stagnancy in technology in an oligopolistic market that witnessed cartels in the past, information exchange agreements may not be allowed without a detailed analysis in terms of restrictive effects on competition. In this framework, the approach in the UK Tractors Decision⁴ of the European Commission, which was approved by CFI⁵ and ECJ,⁶ is thought to be correct. In fact, a similar approach was taken by the TCA in the abovementioned Turkish Cement Manufacturers' Association, Fertiliser Producers' Association decisions.

Regarding countervailing efficiencies, a broader balancing exercise of restrictive effects and efficiencies is necessary.

4. Remedies

The regulation made by "market investigation mechanism" in UK is thought to be ideal. In this framework, competition authorities should find, via conducting sectoral inquiries, anticompetitive conditions in the market resulting from undertakings' unilateral facilitating practices that are not part of any agreement, concerted practice or a decision of association of undertakings⁷. The decision on the termination of the relevant facilitating activities should be taken afterwards. On the other hand, undertakings should not be imposed penalty due to those unilateral actions or liability to pay damages as a result of damages actions.

⁴ Case C-7/95P etc., John Deere Ltd v. Commission (UK Tractors) [1998] ECR I-3111.

⁵ Case T-35/92 etc., John Deere Ltd v. Commission (UK Tractors) [1994] ECR II-957

⁶ UK Agricultural Tractor Registration Exchange (1992) OJ L68/19.

⁷ There should not be any obstacles to intervene upon these.

UNITED KINGDOM

1. Introduction

This roundtable is concerned with the circumstances in which competition law should intervene when firms engage in conduct short of explicit, 'hard core' agreement on price, output or customer or market allocation to soften competition among them and reach collusive outcomes. A number of issues or questions have also been identified for discussion.

This submission does not purport to provide a comprehensive survey of these issues, however, but rather describes by way of example of the OFT's experience in this area a recent OFT case involving information sharing, namely the exchange by independent fee-paying schools of information on fee increases¹. The case is illustrative of some of the issues that may arise in such cases and we hope it may be of some assistance to other authorities with similar cases.

2. Independent Schools – case summary

The OFT's investigation concerned the exchange of information amongst fifty fee-paying independent schools regarding their intended fee increases. The investigation was conducted under the UK Competition Act 1998 and resulted in the issue of a decision in which the OFT found that the schools had infringed the Chapter I prohibition in the Act. The Chapter I prohibition is modelled on Article 81 of the EC Treaty and prohibits agreements between undertakings or concerted practices which affect trade within the UK and which have as their object or effect the prevention, restriction or distortion of competition². The OFT made no finding as to the effect of the infringement, however, but limited its decision to a finding that the parties' conduct had an anti-competitive object.

The information exchanged was specific information regarding the schools' future pricing intentions. In particular, it concerned the schools' intended fees and fee increases for both boarding and day pupils, which were set annually with effect from the beginning of each academic year, that is, from September.

The information exchange occurred on a regular and systematic basis and was organised by the bursar of one of the schools (Sevenoaks), to whom each school submitted details of its current fee levels, proposed fee increases (expressed as a percentage) and the resulting intended fee levels. The Sevenoaks bursar subsequently circulated this information amongst the schools in tabular form, this process of information exchange and the resulting tables of information being referred to in the OFT's decision as the 'Sevenoaks Survey' or 'Survey'.

The preparation and circulation of the Survey took place between January and June each year and was timed to provide schools with information on competitor fee increases early in their budgetary cycles. The schools decided their fee increases for September in May or June of the same calendar year. The budgetary

¹ OFT decision CA98/05/2006, 20 November 2006, published on the OFT website at http://www.of.gov.uk/shared_of/ca98_public_register/decisions/schools.pdf.

² The OFT also has the power to apply Article 81 and, indeed, is required to do so in cases where there is an appreciable effect on trade between EU Member States.

process would start during the Spring term, which ran from January to March, and the earliest date by which any of the schools decided their fees for September was March of the same calendar year. As a result, each of the schools received at least one version of the Sevenoaks Survey before it finalised its own fee increase(s) for the new academic year starting in September. Equally, each school submitted information regarding its own intended fee increase(s) for inclusion in the Survey before the other schools had finalised their fee increase(s) for the new academic year.

Through their participation in the Sevenoaks Survey, the schools exchanged on a regular and systematic basis highly confidential information regarding each other's pricing intentions for the coming academic year that was not made available to parents of pupils at schools or published more generally. The OFT concluded that this arrangement constituted an obvious restriction of competition whereby the schools knowingly substituted practical co-operation for the risks of competition amounting to an agreement and/or concerted practice having as its object the prevention, restriction or distortion of competition. Further, the OFT held that it was implicit in the way that the Sevenoaks Survey operated, and the fact that it was intended that the information exchanged should be reasonably reliable, that there was at least a 'gentleman's agreement' amongst the schools that the fee increase figures submitted to the Survey would accurately reflect actual future fee levels.

The OFT therefore concluded that the schools were party to an agreement and/or concerted practice having as its object the prevention, restriction or distortion of competition in breach of the Chapter I prohibition.

The schools each admitted that they had participated in the exchange of information through the Sevenoaks Survey and that they had thereby committed an infringement of the Chapter I prohibition. No admission was made by any of the schools as to whether the infringement had any effect on fee levels and, since the OFT is not required to show any such effect to establish an infringement of the Act, the decision made no finding on this point.

3. Issues arising - establishing an agreement and/or concerted practice

As in the case of Article 81, for the Chapter I prohibition to apply, there must be direct or indirect contact between the undertakings concerned. Where an undertaking merely intelligently adapts its behaviour to its competitor's existing or anticipated conduct, this will not be prohibited, even though the overall effect of such behaviour may in some circumstances be very similar to where the parties expressly collude. Rather, for the OFT to take action under the Chapter I prohibition (or Article 81), it must establish the existence of an agreement between undertakings or concerted practice³.

Both the terms 'agreement' and 'concerted practice' are given a wide interpretation under EC law. The defining characteristic of an agreement for this purpose is that there must be a 'concurrence of wills' amongst the undertakings concerned⁴, who must have expressed their joint intention to conduct themselves in a particular way⁵. There is no need for the agreement to be formal or legally binding; a 'gentleman's agreement' will suffice. In the case of a concerted practice, it is sufficient that the parties knowingly substituted practical cooperation between them for the risks of competition⁶. Ultimately, the essential

³ Decisions by an association of undertakings are also covered by Article 81 and by the Chapter I prohibition.

⁴ See the CFI decision (subsequently upheld by the ECJ) in Case T-41/96 *Bayer v European Commission* [2000] ECR II-3383, at paragraph 69.

⁵ Case T-7/89 *Hercules Chemicals v European Commission* [1991] ECR II-1711, at paragraph 69.

⁶ Case 48/69 *ICI Ltd v European Commission* [1972] ECR 1969, at paragraph 64.

distinction drawn in the legislation is between independent conduct, which is allowed, and collusion, which (provided it is anti-competitive) is not, regardless of any distinction between the types of collusion⁷.

In this case, the OFT concluded that the exchange of information amongst the schools amounted to an agreement on two levels:

- First, each school submitted information as to its own pricing intentions on the understanding, and in the expectation, that in return it would receive a copy of the Sevenoaks Survey showing the intended price increases of the other schools, and
- Second, it was implicit in the way the Survey worked that there was a ‘gentleman’s agreement’ amongst the schools that the fee increase figures submitted by the schools would accurately reflect actual future fee levels⁸. The Survey thus gave rise to an understanding amongst the schools as to the future pricing levels of each school.

That is not to say that the schools agreed amongst themselves what the fees or fee increases should be, however. Rather, they agreed to exchange accurate information as to their intended fee increases on which each school was then able to rely when making its own pricing decisions.

4. Issues arising - characterisation of the infringement as an infringement by ‘object’

Such information sharing will only be prohibited under UK (or EC) law if the object or effect of the agreement or concerted practice was anti-competitive.

It is well established in EC law that where an agreement or concerted practice has an anti-competitive object there is no need to establish that it also had an anti-competitive effect. The ‘object’ of an agreement or concerted practice for these purposes is determined not by reference to the parties’ subjective intentions but by an objective analysis of its aims⁹. Examples of agreements or concerted practices that have been held by the European Court as having an anti-competitive object include price-fixing, whether horizontal or vertical¹⁰, market sharing¹¹ and agreements to limit output or sales¹².

As regards the exchange of pricing information, however, whilst there are a number of cases in which the European Court has found the exchange of such information amongst competitors to be anti-competitive, the information exchange in those cases has always been to underpin a wider price fixing and/

⁷ Case C-42/92P *Anic v Commission* [1999] ECR I-4125, at paragraph 87.

⁸ This is reflected in the fact that revised figures were submitted and updated versions of the Survey were circulated as each school’s budgetary process progressed.

⁹ Cases 28/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v Commission* [1984] ECR 1679, at paragraph 26.

¹⁰ See for example: Case 123/83 *BNIC v Clair* [1985] ECR 391, at paragraph 22; Case 27/87 *Erauw-Jacquery v La Hesbignonne* [1988] ECR 1919, at paragraph 15; see also Case T-14/89 *Montedipe SpA v Commission* [1992] ECR II-1155, at paragraphs 246 and 265; and Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, at paragraphs 101 and 109).

¹¹ See for example: Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, at paragraph 128; and Cases 96/82, etc. *IAZ v Commission* [1983] ECR 3369 at paragraphs 19 to 29.

¹² See for example: Case T-14/89 *Montedipe SpA v Commission* [1992] ECR II-1155, at paragraphs 246 and 265; and Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, at paragraphs 101 and 109).

or market sharing agreement¹³. The EC case law on pure information sharing is more sparse, being limited to the *UK Tractors* case, which involved the exchange of non-price related information and in which it was not contended that the arrangement had an anti-competitive object but rather an anti-competitive effect¹⁴.

The OFT nevertheless found that the exchange of information as to future fee increases in the Independent Schools case constituted an infringement of the Chapter I prohibition by ‘object’ on the basis that the infringement constituted an ‘obvious restriction of competition’¹⁵. In this connection, the OFT made the following observations in its decision:

- the exchange of pricing information is particularly sensitive from a competition law perspective;
- the mere disclosure of pricing information to competitors will almost certainly be anti-competitive where it is capable of influencing their future conduct on the market, as will its receipt;
- the exchange of future pricing information reduces uncertainties inherent in the competitive process and facilitates the coordination of the parties' conduct on the market;
- the threat to effective competition is especially obvious where an arrangement involves the regular and systematic exchange of specific information as to future pricing intentions between competitors;
- such an exchange of information risks facilitating parallel price increases whilst at the same time reducing, or even eliminating, the risk of losing customers to more efficient competitors that might not otherwise have increased their prices, and
- it is hard to envisage what legitimate purpose could be served by the exchange of such information, in particular in circumstances where the information remains otherwise confidential and is not shared with customers.

The OFT, therefore, concluded that the unilateral disclosure or exchange of future pricing information amongst competitors (in particular the private exchange, or unilateral disclosure, amongst competitors of specific future pricing intentions, especially where this is on a regular and systematic basis) has as its obvious object the prevention, restriction or distortion of competition. In the case of Independent Schools, it is relevant to note in this regard:

- First, that the schools set their fees annually and that, once set, the fees remained unchanged until the start of the next academic year in September,

¹³ See for example: Cases 40/73 etc. *Suiker Unie v Commission* [1975] ECR 1663; Case C-42/92P *Commission v Anic Participazioni* [1999] ECR I-4125; Cases T-25/95 etc *Cimenteries CBR SA and others v European Commission* ECR II-491 and Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc v Commission* [2001] ECR II 2035

¹⁴ Case T-34/92 *Fiatagri v Commission* [1994] ECR II-905, upheld on appeal in Case C-8/95 P *New Holland Ford v Commission* [1998] ECR I-3175; and Case T-35/92 *John Deere v Commission* [1994] ECR II-957, upheld on appeal in Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111.

¹⁵ See Cases T-374/94 etc. *European Night Services v Commission* [1998] ECR II-3141, at paragraph 136. See also Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, at paragraph 109 and Case T-14/89 *Montedipe SpA v Commission* [1992] ECR II-1155, at paragraph 265.

- Second, that the timing of the information exchange was such that with only few exceptions¹⁶, each of the schools received at least one version of the Sevenoaks Survey before it finalised its own fee increase(s) for the following academic year. Equally, each school submitted its own intended fee increase(s) for inclusion in the Survey before the other schools, or at least the vast majority of them, had finalised their fee increase(s) for the coming academic year,
- Third, that at the time it was exchanged the information was highly confidential and was not made available to parents of pupils or published more generally, and
- Fourth, that the exchange of information was done on a regular and systematic basis.

In the light of the OFT's finding that the exchange of information via the Sevenoaks Survey had as its object the prevention, restriction or distortion of competition, there was no need for the OFT also to demonstrate that the Survey had in fact had an anti-competitive effect in order to establish that there had been an infringement of the Chapter I prohibition.

5. Evidence of the information having been taken into account

Whilst the OFT was under no obligation to establish that the Sevenoaks Survey had had an anti-competitive effect and did not seek to do so, that is not to say that there was no such effect. Rather, the OFT declined to examine this issue in its decision or to make a finding either way. Indeed, this is no different from the OFT's normal approach to agreements or concerted practices that are infringements by 'object'.

Moreover, whereas it has suited the schools to describe the infringement in this case as having been purely 'technical', a proper reading of the evidence as set out in the OFT's decision reveals that the information exchange was not without practical consequence. Indeed, there is a presumption in EC law that undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on the market. This is particularly so, where the concertation occurs on a regular basis over a long period¹⁷.

The practical importance of the Sevenoaks Survey is illustrated by the following letter from one of the schools to the Sevenoaks bursar¹⁸:

'As you rightly infer, the annual survey summaries prove to be of immense value when preparing budget and fee proposals. In light of this, I should point out that our Finance and General Purposes Committee is scheduled for 17th May 2001. Therefore it is likely that I will receive the results of the Questionnaire II Survey too late to be of any real value to us at this meeting. Would it be at all possible for Questionnaire II returns to be made one week earlier thus enabling a summary to be circulated during the week commencing 7th May?

¹⁶ In a number of instances the earliest date for which the OFT was able to establish that one or more of the schools received the Survey post-dated the meeting at which those schools had decided their fee increases. In each of those cases, however, the schools in question had themselves submitted their own intended fee increase(s) for inclusion in the Sevenoaks Survey before the vast majority of other schools had finalised their fee increases for the following academic year. The OFT concluded that this was sufficient to find that the schools had participated in the Survey, including during those years where this was the case.

¹⁷ Case C-42/92P *Anic v Commission* [1999] ECR I-4125, at paragraph 121.

¹⁸ See OFT decision, at paragraph 1361.

May I just add that I am very grateful to you for your initiative in undertaking this annual survey’.

By way of response to this request, the Sevenoaks bursar wrote to all the schools as follows:

‘I have received a number of requests to bring forward by one week the circulation of the second summary. I am happy to do this if this is what the majority would like but it does mean that the second questionnaire must be completed and returned to me by no later than Friday 4 May’.

The evidence set out in the OFT’s decision also reveals numerous instances of the schools having taken the Sevenoaks Survey into account when setting their own fee increases¹⁹.

6. Seriousness of the infringement

As it made clear in its decision, the OFT regards the infringement committed by the independent schools as serious and one that, absent an agreed resolution, would have merited a financial penalty with a starting point of at least 5 per cent of the parties’ turnover in the relevant market, adjusted for duration and other factors, as provided for in the OFT’s published guidance on penalties²⁰.

As it is, the case was resolved by way of agreement with the parties and the OFT in fact imposed a nominal penalty of £10,000 per school. This should not be regarded as a reflection of the seriousness with which the OFT regarded the infringement, however. Rather, the imposition of a nominal penalty was based on a number of unusual features of the case, entirely independent of the seriousness of the infringement. The unusual features of this case warranting a departure from the OFT’s penalty guidance were:

- First, the voluntary admission on behalf of the schools that they had infringed the Chapter I prohibition by participating in the Sevenoaks Survey,
- Second, and unusually, the fact that the schools had agreed to make an *ex gratia* payment to fund a £3 million educational trust fund for the benefit of pupils who attended the schools during the academic years in respect of which fee information was exchanged, thus indirectly benefiting those whose interests the Competition Act was designed to protect, and
- Third, the fact that the schools were all non-profit making charitable bodies.

The OFT also noted in its decision that the schools had ceased the infringement immediately on becoming aware that participation in the Sevenoaks Survey was unlawful and had subsequently taken steps to ensure compliance with the Act. As the OFT made clear in the press release that accompanied the decision, however, this case was the first time that the OFT had imposed penalties on charitable bodies and it should not be assumed that the OFT would in future accept the payment of a relatively low penalty as being appropriate²¹.

¹⁹ See OFT decision at paragraphs 359-365, 381-392, 439-449, 485-489, 521-527, 543-548, 563-566, 581-583, 624-626, 623-660, 675-676, 692-700, 714-717, 746-753, 799-803, 833-843, 859-867, 882-887, 931-932, 947-948, 961-962, 974-983, 998-1001, 1030-1034, 1050-1051, 1067-1068, 1083-1086, 1113-1120, 1135-1148, 1164-1166, 1181-1183, 1199-1202, 1218-1227, 1242-1252 and 1268-1281.

²⁰ OFT’s guidance as to the appropriate amount of a penalty, OFT 423 (December 2004).

²¹ Published on the OFT’s website at <http://www.of.gov.uk/news/press/2006/166-06>.

7. Concluding remarks

Amongst the many unusual features of the Independent Schools case, it is also unusual in being one of the few cases involving the sharing of pricing information amongst competitors in which the information sharing does not underpin a wider price-fixing and/ or market-sharing agreement. Notwithstanding that fact, the case is nevertheless one which the OFT was able successfully to investigate and act on, using the tools normally associated with more explicit price-fixing or market-sharing behaviour.

In particular, the case was investigated under Chapter I of the UK Competition Act 1998 (the equivalent of Article 81, EC Treaty) and treated as an infringement by 'object', avoiding the need to establish effect. The case also resulted in the imposition of penalties, notwithstanding that these were nominal for reasons unrelated to the nature of the infringement or, indeed, the strength of the OFT's case.

In terms of the features of the case that made it particularly susceptible to investigation as an infringement by 'object' under Chapter I of the Act, these were as follows:

- The schools set their fees annually and, once set, the fees remained unchanged for twelve months,
- The information exchange was timed so as to take place during the schools' budgetary process such that each of the schools received and/ or submitted information before the fee increase(s) for the following academic year had been finalised,
- At the time it was exchanged, the information was highly confidential, and
- The exchange of information was done in a highly organised way and on a regular and systematic basis.

Of course, not all these features will be present in every information sharing case and the analysis of each case, including the application to it of the Chapter I prohibition (and/ or Article 81) would need to take account of the particular circumstances of the case under consideration.

UNITED STATES

Executive Summary

A “facilitating practice” is one that “makes it easier for parties to coordinate price or other behaviour in an anticompetitive way.”¹

The United States antitrust agencies – the Federal Trade Commission (“FTC”) and the Antitrust Division of the U.S. Department of Justice (“DOJ”) – analyze such practices on a case-by-case basis. Facilitating practices can, by definition, increase the incidence of horizontal coordination. That aspect is likely to be of antitrust concern. The same practices, however, may also produce efficiencies that have procompetitive effects. The agencies must balance these effects when deciding whether to bring an enforcement action.

Antitrust authorities need to distinguish between agreements to engage in facilitating practices and hard-core price-fixing, and to target the most severe deterrent efforts on the latter. The DOJ has sought to maintain a bright line between criminal activity – naked price-fixing – and other forms of horizontal conduct. DOJ focuses its criminal enforcement on the kinds of cases in which there is no plausible argument that defendants might have had some legitimate objective associated with their conduct. Because facilitating practices often have some plausible benefit, they are not addressed by means of criminal enforcement, although facilitating practices that are closely associated with hard-core price fixing will be of particularly high enforcement interest.

This submission describes specific cases in which the FTC and DOJ have assessed facilitating practices. The diverse contexts within which facilitating practices have been encountered illustrate how those practices may have different effects in different settings.

1. Introduction

Facilitating practices can be divided for convenience into two broad types. Some practices will facilitate agreement on the central provisions of price or output. These include things like agreements to exchange plans on future prices, or to take factory downtime. Others limit competition in collateral nonprice respects. They include restrictions on advertising or on overtime. These agreements can channel competition and thus limit the ways in which firms engage in nonprice or quality competition as a way of cheating on a price agreement. Expressed differently, one mechanism facilitates making an initial agreement on price, and the other tends to protect a price agreement that has already been reached. Regardless of its specific type, any particular facilitating agreement may produce anticompetitive effects, or efficiencies, or both.

The agencies assess facilitating practices in light of their individual purposes and effects. Sometimes facilitating practices may decrease competition, through such mechanisms as reducing the number of bidding variables on which the colluding firms would have to reach agreement, or helping to monitor defections from such an agreement. In other respects, however, the same practices may help to bring about

1. VI Areeda and Hovenkamp, *Antitrust Law*, para 1407b, at 29 (2d ed. 2003).

beneficial efficiencies. The reduction in bidding variables may facilitate collusion, but also can help buyers to make head-to-head price comparisons, and in that respect may tend to make a market more competitive rather than less. Similarly, mechanisms to monitor defections may also tend to make prices and bidding more transparent, which under some conditions may induce greater competitive efforts by other firms. Given these complexities, the agencies must attempt to balance the procompetitive and anticompetitive effects of changes to facilitating practices that would be caused by any enforcement actions.

The agencies' actions have accordingly addressed facilitating practices in a number of different ways. In some cases the agencies have formally challenged facilitating practices as anticompetitive. Thus the agencies have challenged agreements to restrict comparative advertising of car prices or requiring the submission of bills only for undivided days of time. In other cases, however, the agencies have refrained from challenging facilitating practices that seemed to produce significant offsetting efficiencies. A typical case of this sort might involve restrictions on advertising that seemed reasonably calculated to prevent consumer deception or confusion. And in still other cases, the agencies affirmatively sought a remedy mandating new practices that were facilitating practices in some respects, but that appeared beneficial in other, more important ways. A case of this sort was AOL/TimeWarner, in which an FTC settlement required use of a most favoured nation clause. Such clauses can sometimes inhibit individualized negotiations, as will be discussed below, but a most favoured nation clause nonetheless appeared useful in this case as a way of preserving access to bottleneck communications networks.

Section 2 of this submission describes a variety of matters in which the FTC has encountered facilitating practices. These include cases challenging restraints on advertising and distribution. Section 3 discusses how the DOJ targets its criminal enforcement on hard-core cartels and then describes a civil enforcement action taken against the Airline Tariff Publishing Company, which involved both price-fixing and agreement on an information exchange mechanism that facilitated price-fixing.

2. Federal Trade Commission Cases and Policy

The FTC has encountered facilitating practice issues both in policy debates and in its formal enforcement of the antitrust laws. The agency's most important recent experiences have involved five situations: (1) agreed-upon elements or reference points in pricing; (2) "minimum advertised price" requirements; (3) "most favoured nation" price clauses; (4) limitations on advertising; and (5) legislated facilitating practices, such as state "post and hold" statutes in the liquor industry. These five situations will be discussed under the subheadings that follow.

2.1 Agreed elements or reference points in pricing

Trade associations have sometimes attempted to reduce competition among their members by encouraging them to set prices around some common references. Prices based on a trade association's relative value scales or standardized activity codes may be relatively transparent, and in that respect may encourage competition. However, in some circumstances, including the case referred to below, the Commission has challenged those practices as facilitating collusion, arguing that procompetitive benefits were outweighed by the risk of anticompetitive effects.²

2. The Commission has successfully demonstrated that the trade associations have raised prices by using these techniques, even though in the absence of a trade association most of those industries would not have seemed susceptible to collusion, since they were not concentrated and not characterised by repeated interactions.

In 1994, the Commission issued a complaint against the International Association of Conference Interpreters (known by its French acronym, AIIC). AIIC is a voluntary professional association of interpreters, with 2,500 members from 68 countries who perform interpretation services at multi-lingual conferences or other high-level meetings. The complaint challenged AIIC's fee schedules, work rules, and other practices that supported the underlying agreements on price. The administrative law judge upheld those charges.³ He noted that members were paid AIIC's minimum daily rate 90 percent of the time from 1988 to 1991. He found that the effect of many of the other rules was to make price cutting easier to detect; thus they were facilitating practices. For example, rules requiring that travel expenses and per diem payments be stated separately on contracts would make cheating on them and on the minimum daily price easier to see. Similarly, the requirement that fees be paid on an indivisible daily basis made rates more standardized and more readily monitored by other members of the industry.⁴ AIIC appealed this initial decision to the full Commission, which upheld most of these charges in 1997. However, the Commission dismissed certain charges against Association rules governing work-day length, interpreter team size, and other non-price factors the effect on competition of which were uncertain.⁵

In 2000, the Commission accepted a consent to settle a complaint that the Wisconsin Chiropractic Association ("WCA") had proposed the use of common external reference points in order to limit competition and raise prices among its members.⁶ In 1997, the federal government and private insurance companies began accepting four new codes for chiropractic manipulations. The new procedure codes gave more detailed or precise descriptions of the particular services performed, and allowed chiropractors, like osteopathic physicians, to bill based on the number of body regions adjusted, rather than just for a single set amount. According to the complaint, shortly after the new codes were announced, the Association and its executive director conducted training seminars on the new codes. The executive director advised members that it was important for the new codes to be priced properly, and that the WCA's view was that proper pricing would be at the same level that osteopathic physicians billed for spinal manipulation services. He provided detailed data on osteopathic pricing, and encouraged chiropractors to raise their prices to those levels. After the new codes took effect, the executive director surveyed member pricing in certain localities, and reported that chiropractors in those areas had succeeded in raising reimbursement levels.⁷ The consent order was designed to prevent the concerted use of the facilitating practices alleged in the complaint.

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3. According to the administrative law judge, AIIC set minimum daily rates to be charged by members, required that all interpreters at a conference be paid the same daily rate regardless of skill or experience differences, specified the length of the working day and the number of interpreters to be hired at a conference, and required payment for travel expenses, per diem, canceled events, rest days and non-working days when the interpreter was away from his or her mandated professional address. AIIC rules also have restricted members' use of portable equipment; barred commissions to intermediaries, package fees, exclusive arrangements, moonlighting for permanently-employed interpreters, and the use of comparative advertising and trade names; required members to have a professional address and to give three months' notice before changing it; required charges for the recording of interpretation services and imposed limits on charitable work.
 4. International Ass'n of Conference Interpreters, FTC Docket No. 9270 (July 31, 1996) (press release: <http://www.ftc.gov/opa/1996/07/aiic-id.shtm>).
 5. International Ass'n of Conference Interpreters, FTC Docket No. 9270 (March 14, 1997) (press release: <http://www.ftc.gov/opa/1997/03/aiic-cd.shtm>).
 6. Wisconsin Chiropractic Ass'n C-3943 (March 7, 2000) (Analysis to Aid Public Comment) (press release: <http://www.ftc.gov/opa/2000/03/wischiro.shtm>).
 7. The executive director regularly provided fee surveys to the WCA's members. At times, these fee surveys reflected insufficiently aggregated data, thus effectively identifying current prices of individual chiropractic offices.

The Commission has also addressed relative value scales, a subject on which its views have evolved over time. “Relative value scales” are lists of assigned numerical values for various medical and surgical services, that serve to compare the value of the different services. These scales are useful in helping individual practices construct their fee schedules. They can also facilitate collusion, however. While the scales do not set actual transaction prices, competitors need to agree on only a single conversion factor in order to have identical prices across the board. The Commission issued an advisory opinion to the American Society of Internal Medicine in 1985, stating that the Society proposed a relative value scale that likely would raise anticompetitive effects.⁸ With the growth of managed care, however, and the increased use of relative value scales by health care managers, the Commission has modified or set aside some orders. Such modifications have given associations more freedom to discuss relative value scales with third-party payers, governmental entities, and their own members, while also serving to caution against entering into horizontal price agreements on the basis of such scales.⁹

2.2 *Minimum advertised price agreements*

Minimum advertised price agreements (or “MAP agreements”) involve the terms on which retailers are allowed to spend the cooperative advertising allowances that they receive from product manufacturers. Because MAP agreements can control the pricing strategies of a number of competing retailers, and are visible to competing manufacturers as well, they may be horizontal facilitating practices at both the retailing and manufacturing levels. After the Supreme Court’s 2007 decision in *Leegin*¹⁰, which held that purely-vertical resale price maintenance agreements could often be acceptable, as a practical matter, a MAP case without horizontal elements is unlikely to be sound.

Manufacturers commonly provide advertising allowances to the retailers who carry their products. The manufacturers feel that they have a right to a voice in how ads are designed, and prices advertised with their funds. They commonly specify the lowest price that can appear in such ads. The antitrust agencies have been reluctant to condemn this use of the manufacturers’ own advertising budget. In 1997, the FTC issued a policy statement outlining that it would treat such MAP programs under the rule of reason in light of their possible efficiencies.¹¹

In 2000, the Commission settled a case involving this broader use of MAP policies by the five largest distributors of pre-recorded music, who account for approximately 85% of the industry’s domestic sales. The complaints alleged that these companies adopted significantly stricter MAP provisions between late 1995 and 1996. Under the new MAP policies, retailers seeking any cooperative advertising funds were required to observe the distributors’ minimum advertised prices in all media advertisements, even those funded solely by the retailers. They were also required to adhere to distributors’ minimum prices on all in-store signs and displays. Virtually the only way in which prices could be shown was through a small label on the product itself. The complaints alleged that by defining the covered “advertising” so broadly, the manufacturers had effectively precluded many retailers from communicating prices below MAP to their

8. American Society of Internal Medicine, 105 F.T.C. 505 (April 19, 1985).

9. Consent orders were issued in American College of Obstetricians & Gynecologists, 88 F.T.C. 955 (1976) (consent order), *modified*, 104 F.T.C. 524 (1984); American Academy of Orthopaedic Surgeons, 88 F.T.C. 968 (1976) (consent order), *modified*, 105 F.T.C. 248 (1985), *order set aside*, 119 F.T.C. 609 (1995); American College of Radiology, 89 F.T.C. 144 (1977) (consent order), *modified*, 113 F.T.C. 280 (1990); Minnesota Medical Ass’n, 90 F.T.C. 337 (1977) (consent order); and California Medical Ass’n, 93 F.T.C. 519 (1979) (consent order), *modified*, 105 F.T.C. 277 (1985), *order set aside*, 120 F.T.C. 858 (1995).

10. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

11. *See Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs – Rescission*, 6 Trade Reg. Rep. (CCH) ¶ 39,057.

customers. The consent orders required the manufacturers to discontinue their MAP programs in their entirety for a period of seven years.¹²

A contemporaneous speech by FTC Commissioner Thomas Leary explained the ways in which this conduct might have facilitated horizontal agreements.¹³ Imposing the broader restraints reduced price competition among retailers, who could now no longer advertise the fact that they had discount prices. That led to higher retail prices, which led to less pressure from the retailers for the manufacturers to cut wholesale prices. Because all five manufacturers had instituted similar MAP policies simultaneously – and openly – they were able to take advantage of this reduced retailer pressure to raise their wholesale prices.

The CD MAP case was unusual in that the immediate effect of the facilitating practice was to lessen competition among a group of businesses, the retailers, which did not impose the practice in the first place. The Commission reportedly thought that these facts should be interpreted in light of the industry's history of interdependent behaviour at the manufacturer level.¹⁴ Still, one should be cautious about inferring a horizontal case when the affected parties and the actors are different entities, and Commissioner Leary noted that “there may not be many cases that are as extreme as this one appeared to be . . .”¹⁵ Nevertheless, such cases may arise.

2.3 *Most-favoured-nation clauses*

A most-favoured-nation clause is a provision in a sales contract, under which the seller agrees to give the buyer the benefit of any more favourable contract terms that it may later negotiate with some other purchaser. (The name itself is borrowed from international tariff negotiations.) Under certain narrow circumstances these clauses may tend to deter competitive price-cutting, and so may tend to facilitate the maintenance of cartel prices.

Under most ordinary circumstances, most-favoured-nation clauses are probably benign. It can make sense for buyers to seek this protection against future events, and for sellers to grant this guarantee in good faith in order to close a deal. If the market is unconcentrated and competitive, such clauses do little harm. Judge Richard Posner has described them as “standard devices by which buyers try to bargain for low prices.”¹⁶

Under some circumstances, however, these clauses may be more troublesome.¹⁷ A classic problem faced by a cartel is that its members try to cheat on it. Most-favoured-nation clauses can reduce the incentive to cheat, by increasing the costs of cheating. The low price offered on a particular contract would then become, not just a one-time occasion when the cheater could gain some incremental sales

12. Concerning the Market for Prerecorded Music in the United States, FTC File No. 971 0070 (C-3971 to C-3975) (May 10, 2000) (Analysis to Aid Public Comment).

13. T. Leary, *Distribution Law Developments at the Federal Trade Commission*, remarks before the Distribution and Dealer Termination Seminar (New York, June 26, 2000), <http://www.ftc.gov/speeches/leary/ddtny000626.shtm>.

14. *Id.* at p.3.

15. *Ibid.*

16. *Blue Cross & Blue Shield v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995).

17. For a general discussion see Jonathan Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of “Most-Favored-Customer” Clauses*, 64 ANTITRUST L.J. 517 (1996).

volume, but rather an occasion for across-the-board revenue losses as many of the firm's contract prices are reset.¹⁸

A number of specific circumstances would need to exist before those potential anticompetitive outcomes warrant much study, however. At a minimum, the contracts would probably have to be routinely used by most manufacturers in an industry, and by many of the customers. In addition, whether the clauses were requested or objected to by customers would be pertinent. It would also be relevant to know if there is one particularly large customer; most-favoured-nation clauses may be particularly effective in deterring discounts to smaller customers if the discount would have to be immediately offered to a much larger buyer.¹⁹

2.4 *Limitations on advertising*

A fourth facilitating practice reviewed by the FTC involves agreements to limit the use of truthful, no deceptive advertising. Limits on price advertising will tend to support any previous agreement that may have been made as to price. Limits on advertising nonprice factors will tend to moderate the intensity of competition in those nonprice respects, and dissuade firms from "competing away" the benefits of a price agreement.

In one case of this sort, the Commission issued a complaint alleging that the Arizona Automobile Dealers Association had agreed with its member dealerships to restrict non-deceptive comparative and discount advertising, and advertising concerning the terms and availability of consumer credit. The complaint challenged certain sections of the association's Standards for Advertising Motor Vehicles, which, among other things, prohibited members from advertising that prices are equal to or lower than a competitor's; that the advertiser will match or beat any price; or that the advertiser will offer compensation if it cannot do that. The complaint was settled with a consent agreement prohibiting such restrictions.²⁰

Advertising restraints can sometimes provide offsetting consumer benefits, however, insofar as they can prevent some consumers from being confused or misled. Balancing the procompetitive and anticompetitive effects in this area can be particularly difficult. In 1993, for example, the FTC issued a complaint against the California Dental Association (CDA). The Association's 19,000 members made up 75 percent of the dentists in the state. According to the complaint, the Association's rules prohibited several valuable categories of price advertising (including advertising of across-the-board discounts for seniors or others, and statements such as "care at reasonable prices"), and useful information about the nonprice characteristics of dental services (such as "special treatment for nervous patients").²¹ The Commission concluded that the Association rules improperly banned broad categories of claims, without distinguishing between the deceptive and the no deceptive. The case went to the U.S. Supreme Court on the issue of the proper application of the rule of reason; the Court remanded the case to the court of

18. This situation may have been present in the FTC's *Ethyl* case. There the Commission suggested that the unilateral adoption of these facilitating practices could be actionable – a proposition that the court rejected for lack of proof of actual anticompetitive effects. *See E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 140-41 (2nd Cir. 1984). The outcome might have been different had the postulated effects been shown.

19. *See Baker, supra*, at 521; *United States v. Eli Lilly & Co.*, 1959 Trade Cas. (CCH) ¶ 69,536 at p. 76,152 (D. N.J. 1959) (federal government as a large buyer of pharmaceuticals).

20. Arizona Automobile Dealers Ass'n, C-3497 (Feb. 25, 1994) (press release).

21. California Dental Ass'n, D-9259 (July 25, 1995) (press release: <http://www.ftc.gov/opa/1995/07/cda2.shtm>).

appeals.²² That court ultimately ruled against the Commission, finding that the procompetitive benefits of the rules outweighed their anticompetitive harm,²³ and that the restrictions would prevent advertisements that would mislead consumers, and would induce dentists to provide more complete and understandable pricing information. In 2001, the Commission decided, for various reasons, not to seek further review and dismissed the complaint.

Agreements to restrict advertising can sometimes take variant forms, which may also raise anticompetitive issues. One such variant involves boycotts of publications that publish discount price advertising. In a case of this type, the FTC sued an association of dealers of farm equipment, several of whose members had withheld their advertising from a buying guide until it agreed not to publish advertisements that included prices for new farm equipment.²⁴

In another variant, auto dealers in a city agreed, not to reduce price advertising directly, but rather to impede consumers' ability to make price comparisons by agreeing to restrict their operating hours on weekends, so that comparison shopping became more difficult and price competition became less intense.²⁵

In still another variant, restrictions on price advertising may be imposed, not by a private association, but by a governmental regulatory board that may in practice be dominated by members of the affected industry. The Commission has challenged such board actions when they seem to go beyond the range of discretion contemplated by the state legislature.²⁶ One complaint of this sort was brought against the Texas Board of Chiropractic Examiners.²⁷ Under Texas law, the board was the sole licensing authority for the approximately 1600 chiropractors in the state. The complaint charged the board with hindering consumers in obtaining information about chiropractors' fees, services, and products, thereby making it less likely that there would be vigorous competition within the profession. The board eventually agreed to a consent order against the practices.²⁸ The Commission also issued a similar complaint against the Massachusetts Board of Registration in Optometry.²⁹

2.5 Government action that encourages facilitating practices

As the last example makes clear, facilitating practices can sometimes be imposed by the government. They may be especially troublesome when they have that origin, since actions by the government are durable, not subject to breakdown in the same way as a cartel, and are immune to many forms of legal challenge.

22. California Dental Assn. v. FTC, 526 U.S. 756 (1999).

23. California Dental Ass'n v. F.T.C., 224 F.3d 942 (9th Cir. 2000).

24. Fastline Publications, Inc., C-3819 (May 11, 1998) (consent agreement) (press release: <http://www.ftc.gov/opa/1998/05/fastline.shtm>).

25. See Detroit Auto Dealers Ass'n, 955 F.2d 457 (6th Cir.1992).

26. Under U.S. law, governmental boards are immune from the antitrust laws if they meet the procedural requirements for "state action," but can be treated as private agreements among their members if those requirements are not met, as discussed in the following section of this submission.

27. Texas Board of Chiropractic Examiners, C-3379 (Apr. 29, 1992) (press release).

28. Texas Board of Chiropractic Examiners, 115 F.T.C. 470 (1992).

29. Massachusetts Board of Registration in Optometry, D-9195 (July 2, 1986) (press release); litigated order issued, 110 F.T.C. 549 (1988).

Governmental restraints on competition may serve a valid public purpose, and are generally requested on the basis of that rationale. They can also have anticompetitive effects, however, and for this reason they may be sought by association-oriented lobbying groups.

Facilitating practices may be imposed by a legislature through statute, or by an administrative board through regulations. The practices themselves can take a wide variety of forms. These can include restrictions on advertising, restrictions on services, minimum percentage mark-up for retailers,³⁰ or even authorization for competing firms to agree on prices.³¹

To take one example, a number of states have passed “post and hold” statutes, which provide that firms selling alcoholic beverages must post their prices, and then leave them unchanged for a certain period of time.³² On their face such statutes do not involve price fixing, since they do not authorize any horizontal agreement. They nonetheless establish a facilitating practice, since they make prices more “sticky” and less responsive to competitive circumstances.

Under U.S. law, facilitating practices created through statutes at the level of the state legislature are not usually open to challenge on federal antitrust grounds. Such “state action” is generally thought to be outside the intended scope of the federal antitrust statutes. However, antitrust agencies may, particularly if requested by the legislature, wish to call attention to the competitive consequences of proposed legislation.

An agreement on facilitating practices that would otherwise violate the antitrust laws may not be immune from antitrust scrutiny, despite the role of a subordinate state administrative agency, in two situations.³³ First, if the state agency’s actions were not “clearly authorized” by the state legislature – since the necessary authority must ultimately come from one of the state’s constitutional branches. Second, if the scheme is not “actively supervised” by some part of the state government, to make the conduct truly the state’s own. It is not yet entirely clear at what point a facilitating practice will create “private market power” for this purpose; nor is it entirely clear whether a state regulatory board, numerically dominated by members of the regulated profession, has enough private characteristics to require active supervision.³⁴

3. DOJ Criminal Enforcement

“Facilitating practices” must be distinguished from hard-core cartel behaviour. Cartels have been highlighted in almost all jurisdictions as the most egregious conduct inimical to competition and consumer welfare, and are subject to the most severe sanctions, including criminal prosecution, often with *per se* rules that appropriately account for their unmitigated harmfulness.

3.1 *Reserving the most severe sanctions for hard-core cartels*

Cartels merit special attention from antitrust enforcers because hard-core cartel activity is a well-defined category of collusive conduct among competitors that clearly and unambiguously eliminates

30. 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987).

31. Kentucky Household Goods Carriers Ass’n, D-9309 (June 22, 2005), *aff’d*, 199 Fed. Appx. 410, 2006-2 Trade Cas. (CCH) ¶ 75,384 (6th Cir. 2006).

32. For cases challenging the validity of such statutes, *see, e.g.*, Battapaglia v. New York State Liquor Authority, 745 F.2d 166 (2nd Cir. 1984) (statute upheld); Canterbury Liquors v. Sullivan, 16 F.Supp.2d 41 (D. Mass. 1998) (statute found invalid).

33. *See* California Retail Liquor Dealers Ass’n v. Midcal Aluminum, 445 U.S. 97, 105 (1980).

34. *Cf.* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45 (1985) (explaining the characteristics of government action that ordinarily make supervision unnecessary).

competition without any prospect of offering compensating social benefits. Applying tough penalties is appropriate not just because the conduct is clearly bad, but also because there is no possibility that legitimate conduct can be mistaken for hard-core cartel conduct. Hence, tough penalties will not cause competitors to avoid socially beneficial conduct: over-deterrence is not an issue when it comes to cartels. That is not true for other types of coordinated conduct among competitors, including most facilitating practices.

The Department of Justice has made it clear to all that anti-cartel enforcement is its top priority, relying chiefly on two strategies. First, DOJ, which has sole responsibility for the criminal prosecution of cartels under federal law, has separated criminal from civil enforcement, permitting a large group of attorneys to focus solely on cartels. Second, the Department has declared in numerous publications, speeches, and testimony, that anti-cartel enforcement is the highest priority in an explicit enforcement hierarchy.³⁵

At the same time, DOJ carefully delimits its criminal enforcement to focus only on hard-core violations. The higher burden of proof in criminal cases (requiring proof “beyond a reasonable doubt,” as opposed to the “preponderance of the evidence” standard used in United States civil law) and the narrowness of what criminal enforcement condemns (the fixing of prices, bids, output, and markets, as opposed to conduct subject to the “rule of reason” or monopolization analyses used in civil antitrust law) establish clear, predictable boundaries for business. When criminal cases focus on conduct that has no plausible business justification and that usually occurs in secret, accompanied by pre-emptive cover-ups and misrepresentation, defendants cannot reasonably argue that they failed to grasp the illegality of their actions.³⁶ All of these features – high burdens of proof, well-defined coverage, clear boundaries – allay the potential fears of law-abiding business persons, who can easily determine whether their own conduct will form the basis of a criminal case.

The particularized focus of U.S. criminal prosecution is consistent with the OECD’s recommendation concerning effective action against hard-core cartels. The 1998 recommendation defines a “hard-core cartel” as “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.” This focus is regularly underscored in DOJ speeches and press releases, and is summarized in the Antitrust Division Manual:

In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, *per se* unlawful agreements such as price fixing, bid rigging and horizontal customer and territorial allocations There are a number of situations where, although the conduct may appear to be a *per se* violation of law, criminal investigation or prosecution may not be considered appropriate. These situations may include cases in which: (1) there is confusion in the law; (2) there are truly

35. *E.g.*, R. Hewitt Pate, Ass’t Att’y Gen., U.S. Dep’t of Justice, Securing the Benefits of Global Competition, address before the Tokyo America Center 4-6 (September 10, 2004), at <http://www.usdoj.gov/atr/public/speeches/205389.pdf>; *see also* Thomas O. Barnett, Deputy Ass’t Att’y Gen., U.S. Dep’t of Justice, Antitrust Enforcement Priorities: A Year in Review, address before the Fall Forum of the ABA Section of Antitrust Law 2-3 (November 19, 2004), at <http://www.usdoj.gov/atr/public/speeches/206455.pdf>.

36. Cartels often use extreme measures to conceal their existence. The Division has encountered cover-ups ranging from the creation of bogus trade associations, the use of code names, and sophisticated ruses to keep general counsel in the dark, to hiding incriminating evidence in the attic of a cartel member’s grandparent’s home, wholesale document destruction, and witness tampering after an investigation begins.

novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.³⁷

The decision to make anti-cartel enforcement the highest priority in the DOJ antitrust enforcement hierarchy is also a useful signal to industry. Although protection of competition in the areas of merger and non-merger civil enforcement is important, the Division gives special emphasis to cartel enforcement. This hierarchy also aligns enforcement priorities with our level of certainty about consumer harm: cartels are always harmful to consumers, whereas other types of concerted and unilateral conduct are sometimes harmful but at other times will lead to greater efficiencies that enhance consumer welfare. In merger and non-merger civil enforcement, antitrust enforcers need to account for the possibility of false positives, meaning the assumption of anticompetitive effects where, in fact, none exist or where the potential anticompetitive effects are outweighed by pro-consumer benefits. The Division's enforcement hierarchy helps enforcers to avoid deterring businesses from good, hard competition.

The DOJ usually proceeds with a criminal prosecution only where there is direct evidence of an unlawful agreement to engage in hard-core cartel conduct. In cases where a defendant does not plead guilty, the direct evidence offered most often takes the form of testimony from a cartel participant, who may be a leniency applicant, cooperating witness, or immunized co-conspirator, but can also include video- or audio-tapes or documents providing direct evidence of an unlawful agreement.

It is important to maintain a bright line between criminal activity – naked price-fixing – and other forms of horizontal conduct. Courts are likely to respect the enforcement agency's decision to seek significant deterrent sanctions, including incarceration, in cases where there is no plausible argument that defendants might have had some legitimate objective associated with their conduct, where the conduct is not open or routine in the industry, and where the law and enforcement policy of the agency have left no doubt as to the unlawfulness of the conduct.

3.2 Civil Enforcement Against Facilitating Practices: *U.S. v. Airline Tariff Publishing Co.*

As noted above, the DOJ usually proceeds with criminal prosecutions against hard core cartel activity when direct evidence is available. Under U.S. law, a *per se* illegal price-fixing agreement can also be inferred in the absence of direct evidence, “on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors such as defendants’ use of facilitating practices. Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement.”³⁸

Courts have also discussed “a closely related but analytically distinct type of claim, also based on sec. 1 of the Sherman Act, where the violation lies in the information exchange itself – as opposed to merely using the information exchange as evidence upon which to infer a pricing agreement. This exchange of information is not illegal *per se*, but can be found unlawful under a rule of reason analysis.”³⁹ See *U.S. v. Container Corp.*, 393 U.S. 333 (1969).

37. Antitrust Division Manual, III.C.5.

38. *Todd v. Exxon Corp.*, 275 F.3d 191, 192 (2d. Cir. 2001) (refusing to dismiss a complaint that alleged that 14 oil companies shared information regarding compensation to non-union managerial employees and used that information to set salaries at artificially low levels).

39. *Id.*

The Department of Justice's suit against the Airline Tariff Publishing Company (ATP)⁴⁰ is an example of a case involving horizontal conduct – price fixing and an agreement to engage in facilitating practices – where the Department determined that criminal enforcement was not appropriate. In December 1992, the Department sued eight of the largest U.S. airlines and ATP for price fixing and for operating ATP, their jointly-owned fare exchange system, in a way that facilitated collusion, in violation of §1 of the Sherman Act. ATP was a complex information exchange system among airlines that was widely and openly operated to disseminate fare information through computer reservation systems and travel agents. ATP served as a vehicle for communication and negotiation of unlawful price-fixing agreements by airlines and was operated in “a manner that unnecessarily and unreasonably allowed [the airlines] to coordinate fares.”

Covert information exchanges that serve no purpose other than output limitation are often at the heart of criminal price-fixing conspiracies. ATP, by contrast, provided both a means for the airlines to disseminate fare information to the public and a means for the airlines to engage in essentially a private dialogue on fares. Certain features of ATP “enabled the airline defendants on many occasions to reach overt price-fixing agreements” and “facilitate[d] pervasive coordination of airline fares short of price fixing.” Some of ATP's pernicious features were vestiges of the pervasive regulatory system that had been dismantled when civil aviation was deregulated in the 1980s. In these circumstances the Department determined that civil rather than criminal enforcement was appropriate.⁴¹

The Division's civil complaint targeted two kinds of conduct. First, the defendant airlines had engaged in various combinations and conspiracies with other airline defendants, which included agreements, understandings, and concerted actions to fix prices by increasing fares, eliminating discounted fares, and setting fare restrictions for tickets purchased for domestic air travel. These actions were *per se* violations of §1 the Sherman Act. The defendants used ATP's computerized fare exchange system to (1) exchange proposals and negotiate fare changes, (2) trade fare changes in certain markets in exchange for fare changes in other markets, and (3) exchange mutual assurances concerning the level, scope, and timing of fare changes.

Second, the airline defendants and ATP had conspired and reached an agreement to create, maintain, operate, and participate in the ATP fare exchange system. The defendants designed and operated the system in a way that unnecessarily facilitated coordinated interaction among them so that they could (1) communicate more effectively with one another about future fare increases, restrictions, and elimination of discounted fares, (2) establish links between proposed fare changes in one or more city-pair markets and proposed changes in other city-pair markets, (3) monitor each other's changes, including changes in fares not available for sale, and (4) reduce uncertainty about each other's pricing intentions. The second cause of action challenged the agreement to engage in the facilitating practice – apart from any agreement on price or output – as a violation of §1 of the Sherman Act, under a rule-of-reason analysis.

The ATP case involved “cheap talk” – communication that does not commit firms to a course of action -- such as announcing a future price increase but leaving open the option to rescind or revise it before it takes effect.⁴² If the terms of agreement are complex (*e.g.*, specifying prices in numerous

40. United States v. Airline Tariff Publishing Co., 1994-2 Trade Cas. (CCH) ¶70,687 (D.D.C. Aug. 10, 1994); see <http://www.usdoj.gov/atr/cases/dir23.htm>.

41. U.S. v. Mercury PCS II, L.L.C. (<http://www.usdoj.gov/atr/cases/indx87.htm>) is another example of a civil enforcement action against horizontal conduct – use of coded bids by rivals in a Federal Communications Commission auction of wireless spectrum as part of an agreement not to bid against each other.

42. Joseph Farrell and Matthew Rabin, “Cheap Talk,” 10 *Journal of Economic Perspectives* 103 (Summer 1996).

markets) but there is a common desire to reach agreement, cheap talk can help firms reach a collusive equilibrium. ATP was a joint venture owned by the major airlines. ATP collected fare information from the airlines and distributed it daily to all the airlines and to the major computer reservation systems (CRSs) that serve travel agents. This arrangement was an efficient instrument for cheap talk:

Airlines are charged a fee for each change, so that changes are not absolutely costless, but the fees for any change are very small relative to the revenues involved. Since ATP updates all CRSs once a day, airlines can quickly observe and respond to each other's fares using this system, with (at most) a one day lag. Since any significant price movement can be quickly matched by competitors, the potential benefits from cheating on any collusive price are usually small relative to the advantages of maintaining a high price.⁴³

For example, to eliminate an unwanted discount fare, an airline could tell ATP that the fare would terminate next Tuesday. If the other airlines did the same with their competing discount fares, all the changes would take effect as announced. If some airlines failed to respond, the last date of availability (Last Ticket Date, or LTD) could be moved to a later date to give the laggards more time, or the changes could be withdrawn. Because a proposed fare increase would not take effect until the airline could observe whether it was matched, there was minimal risk that it would lose a sale to a lower-priced rival before a price consensus was reached. Airlines could also use a First Ticket Date (FTD) to signal when they wanted a new fare to take effect, and they could impose "punishment fares" effective immediately, with an LTD signalling an offer to remove it if the offending airline were to change its behaviour.

In more complex (and more typical) examples, airlines had differing pricing strategies, depending on market concentration and hub locations, and the "cheap talk" negotiations occurred simultaneously over numerous markets. One alleged instance, in September 1989, started with a proposal by an airline to eliminate discount one-way fares (known as "junk" fares in the industry) in hundreds of city-pair markets:

Several airlines communicated their agreement to this proposal by also filing to eliminate the fares altogether, but one dissenting airline proposed instead to increase the junk fares by ten dollars each way. One of the airlines supporting the first proposal expressed its dissatisfaction with this counterproposal by briefly lowering the junk fares by ten dollars each way in the markets very important to the dissenting airline, using a [LTD] only a few days away. However, when some of the other airlines began to match the counterproposal to increase fares by ten dollars (instead of eliminate them), the punishing airline withdrew the lower fares immediately (before the [LTD] on the fares) and also filed to increase fares by ten dollars. At that point, another airline proposed yet a third alternative -- to increase the junk fares by twenty dollars each way. Throughout the negotiation process, the airlines continuously altered [FTDs] of the proposed increases, and kept scorecards of which airlines were supporting which proposal, with what [FTD], until they had reached a consensus. Eventually, all the airlines agreed to the third proposal, and the twenty dollar increase went into effect. (One airline estimated that the increase would generate an additional \$7 million/month for that airline alone.)⁴⁴

43. William Gillespie, "Cheap Talk, Price Announcement, and Collusive Coordination," EAG 95-3, Discussion Paper, Economic Analysis Group, Antitrust Division, U.S. Department of Justice (9/25/95). See also Severin Borenstein, "Rapid Price Communication and Coordination: The Airline Tariff Publishing Case (1994)," Chapter 13 in John E. Kwoka, Jr. and Lawrence J. White (eds.), *The Antitrust Revolution: Economics, Competition, and Policy*, 3rd ed. (1999).

44. U.S. v. ATP, United States' Response to Public Comments, April 8, 1993, p. 17, quoted in Gillespie, *op. cit.*, p. 11.

3.3 *Remedies in U.S. v. ATP*

ATP was ultimately resolved by a federal court consent decree. The decree was crafted to ensure that the airline defendants did not continue to use the ATP fare dissemination system or any similar mechanism in a manner that unnecessarily facilitated fare coordination or that enabled them to reach specific price-fixing agreements. It prohibited the airline defendants from disseminating FTDs or using designating mechanisms to signal links between fares, and substantially restricted their use of LTDs. The Final Judgment also prohibited other conduct that would allow the airline defendants to communicate without market risk their pricing intentions or signal competitors that fare actions in different markets were linked. The Final Judgment did not prevent the airline defendants from disseminating their currently available fares through ATP to CRSs for consumer booking and ticketing, from advertising current fare information to consumers, or from offering for sale fares for which travel could only begin in the future, for example, offering fares in the summer that applied to winter travel to warmer locations. Neither did it regulate the independent pricing decisions of an airline, whether or not those prices were a response to, or evoked a response from, other airlines.

EUROPEAN COMMISSION

The OECD secretariat's note of 17 July 2007 has raised the question if and under which circumstances competition law interventions are possible and useful against conduct which in itself does *not* amount to a hard core restriction of competition, while reducing strategic uncertainties among competitors and helping them to more effectively coordinate their behaviour.

The European Commission's contribution will first present two important judgements delivered by the European Court of Justice (ECJ) relevant in this respect (I). These judgements illustrate the EC's approach concerning the above mentioned practices. Thereafter, the contribution will address the main questions raised by the OECD secretariat (II). Third, the paper will briefly describe the relevant parts of the Commission's Guidelines on the Applicability of Articles 81 and 82 EC to horizontal agreements and the Commission's Guidelines on the application of Article 81 (3) EC, as well as the recently adopted "Guidance on data sharing" in the context of the REACH programme (III).

1. European court jurisprudence on information sharing

1.1 *The ECJ's judgement of 23 November 2006 in Case C-238/05 (Asnef-Equifax)*

This very recent judgement further clarifies the circumstances in which competitors may exchange information regarding the creditworthiness of potential borrowers without breaching EC competition law. The ECJ judgment is important as it is one of very few to have dealt with exchanges of non-price information outside hard-core cartels.

The Court's judgment in *Asnef-Equifax* arose out of a dispute before the Spanish courts between Ausbanc, an association representing the interests of users of banking services, and *Asnef-Equifax*, a group of financial organisations. *Asnef-Equifax* runs a *register* through the help of which its members exchange solvency and credit information about their customers in order to evaluate the risks undertaken when engaging in credit or lending activities. The register holds information on the identity and the economic activity of debtors as well as particulars relating to bankruptcy and insolvency. The Spanish competition authority had granted the register an exemption to the Spanish equivalent of Article 81 EC for a five-year period, on the condition that the register was accessible to all relevant institutions on a non-discriminatory basis and that information on the lenders involved was not disclosed. But Ausbanc had successfully claimed before the national courts that the exchange of information regarding the creditworthiness of potential borrowers breached competition law. As a consequence, *Asnef-Equifax* lodged an appeal with the Spanish High Court.

The case was referred by the Spanish High Court to the ECJ for a ruling on whether information exchange of the type in issue breached Article 81 (1) EC and whether such an agreement could be authorised by a national competition authority under Article 81(3) EC if implementation of the agreement could benefit consumers.

The ECJ noted that the primary purpose of the register, and similar ones in other countries, was to reduce the risk of lending by reducing the disparity between the information available to credit institutions and that held by potential borrowers. Therefore in principle such registers were capable of reducing the number of borrowers who default on repayments, and hence improve the functioning of the credit supply

system as a whole. The ECJ thus found that a system for the exchange of information on credit between financial institutions, such as a register of information on customer solvency, does not, in principle, have as its *object* to restrict competition. Rather, the question of a restrictive *effect* must be assessed on the facts and circumstances.

The ECJ ruled that, in order to assess whether such an exchange of information has as its *effect* the restriction of competition, the actual context of the agreement must be taken into account. The compatibility of an information exchange system with Article 81 EC depends on the economic conditions on the relevant markets and on the specific characteristics of the system concerned (such as: its purpose, conditions of access to it, the type of information exchanged, the periodicity of such information and its importance for the fixing of prices, volumes or conditions of services). In the circumstances of the present case the ECJ found that a restriction by effect was *not likely* given that:

- the relevant market or markets are not highly concentrated;
- the system does not permit lenders to be identified; and
- conditions of access and use by financial institutions are not discriminatory, in law or in fact.

In addition, if a restrictive effect is found, the overall positive and negative aspects of the arrangement must be balanced under Article 81(3) EC. The ECJ left it to the national court to determine whether the conditions for an exemption under Article 81(3) EC have been met, but made an important statement on the principle of the balancing exercise. The Court clarified that, for the purpose of the second condition of Article 81(3) (consumer benefit), the possibility that certain credit applicants will be faced with increased interest rates or even be refused credit *cannot* in itself prevent the condition that consumers be allowed a fair share of the benefit resulting from the agreement. It is thus the beneficial nature of the effect on *all* consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers.

1.2 The ECJ's judgements of 28 May 1998 in Cases C-7/95P (John Deere Ltd v Commission) and C-8/95 P (New Holland Ford v Commission) (UK Agricultural Tractor Registration Exchange)

In 1988 the AEA (Agricultural Engineers Association Limited, a trade association open to all manufacturers or importers of agricultural tractors operating in the United Kingdom) notified to the Commission, with a view to obtaining negative clearance, or alternatively an individual exemption¹, an agreement relating to an *information system* based on data held by the UK Department of Transport relating to registrations of agricultural tractors, called the "*UK Agricultural Tractor Registration Exchange*".

The *Commission* first examined the part of the information exchange system which enables each competitor's sales to be identified. It took into account the structure of the market, the type of data supplied, the detailed nature of the information exchanged and the fact that the parties to the agreement regularly met in the AEA committee. At the date of the notification, eight manufacturers took part in the agreement, which at the time of the inquiry held 87 to 88% of the United Kingdom tractor market, the remainder of the market being shared by several small manufacturers.

¹ Under the former antitrust regime such individual exemptions could be requested (former Regulation 17/62; the current Regulation 1/2003 does not offer this possibility any more).

The Commission took the view that the agreement had the effect of restricting competition by increasing transparency on a highly concentrated market and by raising the barriers to entry of non-members to the market. The Commission then evaluated the information exchange system in relation to the distribution of data concerning the sales made by each member's dealers. It concluded that through those data it was possible to identify the sales of the various competitors within each territory where, for a given product and period, the total volume of sales on that territory was less than 10 units. Furthermore, it found that the activity of dealers or parallel importers might be obstructed. The Commission concluded that the *UK Agricultural Tractor Registration Exchange*, in both its original and its amended versions, produced anticompetitive effects and thereby infringed Article 85(1) (now Article 81 (1) EC) in so far as it gives rise to an exchange of information identifying sales of individual competitors, as well as information on dealer sales and imports of own products. The Commission ordered the AEA and the parties to the agreement to put an end to the infringement established. This decision is important because it was the first time the Commission prohibited an information exchange system concerning sufficiently homogeneous products which does not directly concern the prices of those products, but which does not underpin any other anti-competitive arrangement either.

John Deere Limited and *Fiatagri/New Holland Ford*, companies incorporated in the UK, respectively brought an appeal against this decision before the CFI for annulment of the Commission's decision, arguing that the information exchange system at issue is *not* an agreement within the meaning of Article 85(1) EC and that the dissemination of information on the sales of each competitor and the dissemination of information on the sales of each member's dealers do not weaken competition.

The CFI dismissed the appeals holding that the effect of the information exchange system was to reduce, or even remove, the degree of uncertainty as to the foreseeable nature of competitors' conduct and that that consequence was likely to impair substantially the competition which existed between traders. The CFI reached the conclusion that a reduced degree of uncertainty as to the operation of the market restricts undertakings' decision-making autonomy and restricts competition within the meaning of Article 85(1) EC. It took the view that, on a truly competitive market transparency between traders is in principle likely to lead to more competition between suppliers. At the same time, the CFI considered that general use, as between main suppliers of exchanges of precise information at short intervals, on a highly concentrated oligopolistic and transparent market, *likely to impair substantially the competition* which exists between traders. In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all the competitors the market positions and strategies of the various individual competitors.

The ECJ in its judgements of 28 May 1998 confirmed the CFI's ruling. It confirmed that traders are not prevented from adapting themselves intelligently to the existing or anticipated conduct of their competitors, while holding that Article 85 (1) EC strictly precludes any direct or indirect contact between such traders, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question, considering the nature of the products or services offered, the size and number of the undertakings and the volume of the said market. In the present case, the ECJ confirmed that the exchange of information was likely to produce anticompetitive effects.

2. Main conclusions

The observations made under point I illustrate that information sharing practices are probably among the most frequent practices companies apply to reduce strategic uncertainty and more effectively coordinate their conduct. These practices frequently consist in the exchange of market information, which may sometimes be sensitive and, depending on the circumstances of the specific case, may lead to restrictions of competition. The following observations can be made in relation to the issues raised by the OECD paper.

First, EC competition law and jurisprudence stipulates that every economic operator must determine autonomously the policy which it intends to pursue on the common market. (Article 81 EC) is applicable *to conduct that may help firms to reduce strategic uncertainty* and more effectively coordinate their conduct. Such agreements or concerted practices are incompatible with the rules on competition if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted. However, economic operators are not prevented to adapt themselves intelligently to the existing or anticipated conduct of their competitors.

Second, in the Commission's enforcement practice pure facilitating practices such as information sharing (which do not have as their object to restrict or eliminate competition) are *not regarded as "per se" type of infringements*. The ECJ's judgement in *Asnef-Equifax* clearly illustrates this approach. It dismisses the applicant's contention that it can be concluded solely from the existence of a credit information exchange that it might lead to collective anti-competitive conduct. The Court recognised that the essential object of credit information exchange systems is to make available to credit providers relevant information about existing or potential borrowers, in particular concerning the way in which they have previously honoured their debts.

EC law requires thus an examination of the *effects* of information sharing practices. This assessment is not limited to actual effects alone, but must also take account of the potential effects of the agreement or practice in question on competition within the common market. However, as held by the court in both *Asnef/Equifax* and *John Deere Ltd v Commission*, an agreement will, however, fall outside the prohibition in Article 81 EC if it has only an insignificant effect on the market ("*de minimis*").

The compatibility of an information exchange system, such as the register, with the Community competition rules can certainly not be assessed in the abstract. The *factors* which could be used to decide whether an information sharing practice had anti-competitive effects include in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question.

Effects may depend on the economic conditions on the relevant markets and on the specific characteristics of the system concerned, such as, in particular, its purpose and the conditions of access to it and participation in it, as well as the type of information exchanged (for example, public or confidential, aggregated or detailed, historical or current), the periodicity of such information and its importance for the fixing of prices, volumes or conditions of service. Furthermore, if supply on a *market is highly concentrated*, the exchange of certain information may enable undertakings to be aware of the market position and commercial strategy of their competitors, thus distorting competition on the market and increasing the probability of collusion, or even facilitating it. On the other hand, if supply is *fragmented*, the dissemination and exchange of information between competitors may be neutral, or even positive, for the competitive nature of the market. In both of the above-described judgements, *market structure and the nature of competition* were very important criteria in finding whether or not the practices at stake were compatible with EC competition law.

In EC competition law *enforcement* the evaluation of "facilitating practices" takes place mainly in the *context of cases involving hard core infringements*. These practices are therefore generally assessed as part of the overall cartel infringement they form part of. Indeed, in most cases, exchanges of information are used either to make the cartel possible (exchange of planned price increases, exchange of production or sales volumes in order to put in place a market sharing arrangement, exchange of information on the identity of customers in order to put in place a customer sharing arrangement) or to monitor the cartel (information exchanged in order to check the proper implementation of a commonly agreed price increase or production/sales quotas). It concretely means that such exchanges of information will be seen as an infringement of Article 81(1) EC by *object*, along with the other practices that form the cartel.

However, interventions against "*stand alone*" practices of similar nature are also possible (see judgements described under I and II). The two judgements which are discussed above concern cases where a certain type of concerted practice (information sharing) was examined by Member States or the Commission in stand alone cases. In *John Deere Ltd v Commission* the Commission prohibited the information sharing², and the courts confirmed this decision.

Finally, on the issue of *efficiencies*, it is noteworthy that the Court in *Asnef-Equifax* refers to the *balancing* of positive and negative effects of information sharing (although the question whether these negative effects exist in the concrete case was left to the national court). The ECJ ruled that in the event that the register restricted competition, objective economic advantages might be such as to offset the disadvantages. In this context the Court added that the *fair share* for consumers as required in Article 81 (3) EC arising from information sharing practices should be assessed by taking into account the *overall* effect on all consumers in the relevant markets, not the effect on each member of a particular category of consumers. Credit registers as the one under scrutiny are in principle capable of reducing the rate of borrower default and thus of improving the functioning of the supply of credit, and thus produce overall positive effects on consumers. Furthermore, by reducing the significance of the information held by financial institutions regarding their own customers, credit information registers may increase the mobility of consumers and make it easier for new competitors to enter the market.

3. Guidance for market participants

Competition authorities can provide guidance to market participants to help them avoid situations where their conduct might be found to violate competition law when cooperating. To this end, the Commission has issued *Guidelines on the applicability of Article 81 EC to horizontal agreements*³ where it takes account of the fact that horizontal cooperation in the form of agreements of concerted practices, while it may lead to competition problems, can also lead to substantial economic benefit, depending on the specific circumstances. The Guidelines offer an *analytical framework* based on economic criteria which are meant to assist business in assessing the compatibility of individual conduct (amounting to cooperation between companies active on the same market level) with Article 81 EC.

The Guidelines do not cover those types of cooperation which do not amount to a restriction by *object* (such as price fixing or market sharing) since those are prohibited *per se* and not subject to an assessment of the concrete effects. The Guidelines address those agreements and concerted practices the effects of which have to be exercised by the undertakings concerned in order to judge whether they are compatible with Article 81 EC or not. The Guidelines state that the presence of negative effects will depend on the economic context taking into account both the nature of the agreement and the parties' combined market power which determines the capability of the practice to affect overall competition.

Information sharing agreements/practices are not covered as a separate category of cooperation but these situations are inherent in some of the typical forms of cooperation addressed in the Guidelines, such as cooperation on R&D or standardisation. Another type of conduct mentioned in the said Guidelines which could be of relevance in this context is conduct relating to *standardisation* agreements. These agreements can produce effects on three markets. First, the product markets to which the standards relate, second the services for standard setting and third, the market for testing/certification. Agreements, which use standards as a means of a broader restrictive agreement aimed at excluding competitor, infringes Article 81 EC. If this is not the case, the existence of a restriction of competition will depend upon the extent to which the parties remain free to develop alternative standards or products that do not comply with

² Since the case was based on a notification, the Commission could not impose fines.

³ Official Journal of 6 January 2001, C 3/02

the agreed standard. A restriction of competition may occur, where these agreements prevent the parties from developing alternative standards or commercialising products which are not in compliance.

The *Commission's Guidelines on the application of Article 81 (3) EC* explain in detail the different elements which can be invoked as a defence where an infringement of Article 81 EC has been proven.⁴ They also contain explanations on the concept of *ancillary restraints* of competition, which accompany the main activity, which are directly related and necessary to the implementation of the latter. This test applies to all scenarios where the main activity is not restrictive of competition. Unlike Article 81 (3) EC, the application of the ancillary restraint concept does not involve any weighing of pro-competitive and anti-competitive effects. The assessment of ancillary restraints is limited to determining whether, in the specific context of the main non-restrictive activity, a particular restriction is necessary for the implementation of that activity and proportionate to it. If this is the case, the ancillary restriction also falls outside the Article 81 (1) EC. This concept may also be relevant in the context of information sharing.

In addition, the Commission has recently worked with industry associations when developing the REACH⁵ "*Guidance on data sharing*"⁶. Such guidance was deemed necessary as REACH makes comprehensive data exchange between industry players mandatory. For around 30,000 existing chemicals (i.e. chemicals already marketed), the data sharing obligations lead to the co-operation of their manufacturers and importers to the extent they produce the same substance.

A vast mandatory information exchange between, in most cases, competitors may - under certain conditions - raise the inherent risk of collusion and thus of violations of Article 81 EC. Therefore, it is crucial that, next to technical advice on REACH (e.g. pre-registration) the Guidance on Data sharing also spells out clearly the relevant competition problems which may typically arise under REACH, so that registrants can avoid them. From a competition law perspective, it is imperative that undertakings appreciate that the EC competition rules do in fact apply to such co-operation, even if it is provided for by an EC Regulation. The Guidance on Data sharing identifies such instances, i.e. cost sharing for data exchanged calculated on the basis of (individual) production/sales volumes, where the risk that competition rules may be breached is imminent, and provides a set of practical rules helping to avoid such a breach.

⁴ Official Journal of 27 April 2004, C 101/97

⁵ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396, 30 December 2006, p. 1–849.

⁶ See: http://reach.jrc.it/docs/guidance_document/data_sharing_en.pdf

BRAZIL

1. Introduction

This paper will discuss the approach to facilitating practices by the Brazilian antitrust authorities. Anti-cartel enforcement in Brazil is relatively recent and so far the main priority has been to tackle hard-core horizontal practices: price-fixing, market and customer allocation. Nonetheless, facilitating practices may also be sanctioned under the Brazilian Antitrust Law and, although there has been only a few number of cases so far, several important issues have been raised that set the mainframe of what the authorities will be looking for in the future.

Before discussing “facilitating practices”, it is first necessary to have a brief overview of the Brazilian antitrust system. Antitrust law and practice in Brazil is governed primarily by Law No. 8.884, of 1994, as amended in 2000 (the “Law”). There are three antitrust agencies in Brazil -- namely, the Secretariat for Economic Monitoring of the Ministry of Finance, “SEAE”, the Secretariat of Economic Law of the Ministry of Justice, “SDE”, and the Administrative Council for Economic Defence, “CADE”.¹

During the past four years the Brazilian antitrust authorities promoted a hierarchy of antitrust enforcement that places hard-core cartel prosecution as a top priority. From 2003 on, the SDE has been using more aggressive tools to crack cartels, such as signing leniency programs², the introduction of dawn-raids³ and cartel settlements.

With respect to what extent “facilitating practices” may be sanctioned in Brazil, there are no clear rules set in the Brazilian Antitrust Law or by the Brazilian authorities through case law or guidelines. The

¹ SDE is the chief investigative body in matters related to anticompetitive practices and it also issues non-binding opinions related to merger review. SEAE may issue non-binding opinions related to anticompetitive practices and merger review. CADE is the administrative tribunal, composed of seven Commissioners, which makes the final rulings in connection with anticompetitive practices and merger cases. Decisions are taken by majority vote, provided there is a quorum of a minimum of five of the seven Commissioners. The concept of binding judicial precedent is virtually nonexistent in Brazil, meaning that CADE Commissioners are under no obligation to follow the existing case law.

² The Brazilian leniency program was launched in 2000, and the SDE is the antitrust agency with power to negotiate the leniency agreement. Requirements: (i) the applicant is the first to come forward and confesses his participation in the unlawful practice; (ii) the applicant ceases its involvement in the anticompetitive practice; (iii) the applicant was not the leader of the activity being reported; (iv) the applicant agrees to fully cooperate with the investigation; (v) the cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice; (vi) at the time the company comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the cartel. Benefits: Full or partial immunity depending on whether the SDE was previously aware of the illegal conduct at issue. A leniency agreement shelters administratively and criminally the directors and managers of the cooperating firm if those individuals sign the agreement and fulfill the requirements provided in the law.

³ There is a growing number of search warrants served: (i) in 2003, 2004 and 2005, 11 warrants were served and 2 people were temporarily arrested; (ii) in 2006, 19 warrants were served; (iii) and from January to October 2007, 84 warrants were served and 30 people were temporarily arrested.

term “facilitating practices” will be used in this paper to refer to any type of practice that by reducing market transparency and strategic uncertainty, create incentives for tacit collusion and even explicit collusion, and may include (i) information exchanges among competitors, such as discussions within the context of trade associations about planned price increases, capacity, or other future conduct, (ii) more formalised industry wide information sharing systems; and (iii) other practices used to make markets more transparent and easier to monitor, such as standardisation. Differently from other more explicit conduct, facilitating practices may entail efficiencies and therefore need to be viewed from a cost-benefit perspective. Often facilitating practices are instrumental in building cases against cartels in which there is mostly indirect evidence, constituting “plus factors” that end up being crucial to secure a solid investigation and, as the case may be, a well grounded conviction.

With respect to item (i) above, some cases have been reviewed by the Brazilian Antitrust System involving the exchange of information among competitors within the context of trade associations. However, in such cases, the level of information exchanged went far beyond any alleged pro-competitive purpose -- in the majority of the cases, the association took a leading role in organising the cartel and coordinating the exchange of sensitive information -- and thus there was no discussion regarding more subtle information exchange about future conduct.

With respect to industry wide information sharing systems there is one case reviewed by the Brazilian antitrust authorities that is worth special attention. The case involved the Airline Tariff Publishing Company (ATPCO), which maintained a computerised airline price data system used to disseminate past, current and future information on price, fare, route, type of consumer, first and last ticket dates and first and last travel dates to airlines and travel agents. SDE entered into a settlement agreement with ATPCO, which required the company to refrain from certain conduct, including disseminating information concerning planned or contemplated fares.

As there are no clear antitrust guidelines about exchange of information in Brazil nor any kind of comfort letters in business review proceedings, a number of companies aiming to avoid being investigated for participation in illegal “facilitating practices”, have submitted to the authorities agreements with competitors under the merger review procedure (as non-cooperative joint ventures, sharing of distribution channels, etc.).

2. The Legal Framework

The substantive provisions of Brazil’s Antitrust Law appear in Articles 20, 21, and 54. Articles 20 and 21 deal with all types of anticompetitive conduct, other than mergers, while mergers, acquisitions, and other business combinations are addressed in Article 54.

Article 20 contains general language providing that “any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order.” The specified effects are:

- to limit, restrain or in any way injure open competition or free enterprise;
- to control a relevant market of a certain product or service;
- to increase profits on a discretionary basis; and
- to abuse one’s market control.

In turn, Article 21 contains a non-exhaustive list of acts that are considered unlawful if they produce the effects enumerated in Article 20. The listed practices include a range of horizontal and vertical agreements, apart from unilateral conduct, and it is broad enough to include facilitating practices.

Article 54 is the merger provision in the Brazilian Competition Law, which provides that “Any act that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.” This notification requirement, on its face, applies to any “acts,” and thus covers not merely mergers but all agreements: i.e., it is broad enough to allow the notification of cooperation agreements among competitors and, on occasions the Brazilian Antitrust Tribunal formally authorised “facilitating practices systems”.

From the above, it is clear that “facilitating practices” in Brazil could be covered both by the merger and conduct control provisions.

3. Recent Cases Reviewed by the Brazilian Antitrust System

As previously stated, most of cases reviewed by the Brazilian antitrust authorities so far consisted of hard-core cartels in which the companies explicitly agreed upon relevant competition-related variables, such as prices, quantity, and territory allocation. However, there were a few cases reviewed by the Brazilian antitrust authorities involving information exchange in both cartel investigations and merger control proceedings that are described below to illustrate how the Brazilian authorities have analysed the subject.

3.1 Conduct Cases

ATPCO Settlement. In March 2005, CADE approved a 2003 settlement agreement negotiated between SDE and ATPCO. ATPCO maintained a computerised airline price data system used to disseminate past, current and future information on price, fare, route, type of consumer, first and last ticket dates and first and last travel dates to airlines and travel agents. Under the terms of the agreement, which followed the lines of the previous U.S. consent decree on the same matter, ATPCO was required to refrain from certain conduct, including disseminating information concerning planned or contemplated fares, as the three-day notice feature of its system. This feature allowed any airline company to configure a price change notice so that, for an initial three-day period, the change could be viewed only by other airline companies and not by consumers or travel agents. The posting company was thus able to abort the change if competitors failed to follow suit.

The airline cartel case. The ATPCO case described above was initiated in connection with an airline cartel investigation involving the major Brazilian airline companies.⁴ In August 1999, Brazilian newspapers reported that five days after the presidents of Brazil’s four major airlines had met, ticket prices for service on the heavily-travelled Rio de Janeiro- São Paulo route increased simultaneously by 10 per cent. SDE’s investigation concluded that the price move was not merely a case of conscious parallelism. In addition to the meeting of the companies’ executives, evidence revealed that price data were exchanged among the companies through postings on ATPCO. In September 2004, CADE determined that the four airlines had colluded to raise prices and considered as “plus factors”: (i) the use of the ATPCO system by the airline companies; and (ii) the meeting of the presidents in the hotel.

⁴ SDE’s investigation showed that the companies had an efficient electronic tool for coordinating prices and monitoring price increases and market allocation (the “ATPCO” system). At the outset of the investigation, ATPCO offered to terminate the features of its computerised airline tariff information deemed to facilitate collusion among the airline companies.

Pharmaceutical price index report case. In July 2005, CADE terminated proceedings concerning the influence of price index reports published by BrasÍndice (a company that recompiled the information about the pharmaceutical sector) and ABCFARMA (association of pharmaceutical producers) on the prices of medicine. One of SDE's concern was that the mentioned reports led to higher prices to the consumer. Other concern was the possibility that pharmacies could end up charging the maximum price for medicines, facilitating tacit collusion. CADE stated that the pharmaceutical sector has special characteristics, and that the legislation in place required such price disclosure. According to CADE, the publication of maximum resale prices was unlikely to lead to tacit collusion, given that there was a real possibility of discount negotiations between consumers and the pharmacies.

Association of fire extinguisher manufacturers case. In 2004, SDE ordered an association of fire extinguisher manufacturers in Brasilia and its members companies to terminate an agreement whereby the association published an annual statement of "*average variable and fixed costs of production*," and members determined their retail prices by imposing a 30 per cent mark-up on each cost item. Also under investigation in this case was the association's conduct in successfully lobbying the municipal government in Brasilia for an ordinance under which only members of the association members are permitted to sell fire equipment in Brasilia.⁵

3.2 *Merger Cases*

Association of Ethanol Producers case. This case involved the formation of "Bolsa Brasil Álcool", an association of ethanol producers, with the aim of exchanging information in order to facilitate joint selling for foreign markets. The system was presented under the merger regulation and was not approved by the CADE, which in turn discussed whether it was the case of opening proceedings to investigate the possibility of the existence of a cartel.

Ripasa/Suzano/VCP case. The case involves the formation of a consortium between Suzano and Votorantim (VCP), two major Brazilian paper producers, to administer and exploit the output capacity of Ripasa, the third major player in the market for paper in Brazil. SEAE and SDE expressed special concern with the possibility of the joint management of Ripasa could lead to unlawful information exchange between the parties to the consortium or even unlawful transparency with respect to certain strategic decisions, namely capacity. The agencies recommended to CADE that a Chinese Wall should be created inside Ripasa to ensure that Suzano and VCP would not exchange sensitive information, as price, output, costs and strategic planning. Also, they recommended that an independent third party should be the one responsible for directly managing Ripasa. Finally, the agencies proposed the creation of a "Special Regime", granting full access to the Brazilian antitrust authorities to the Ripasa facility without previous notice to the parties. In 2007, CADE approved the joint venture with restrictions, as suggested by SEAE and SDE.

4. **Conclusions**

Facilitating practices have been subject of concern by the Brazilian antitrust authorities on at least three different levels: (i) as a stand-alone unlawful practice, as seen in the ATPCO case; (ii) as a "plus factor" in cartel prosecutions in which there is mostly indirect evidence, as seen in the airline cartel case; and (iii) in the merger review process, as seen in the Ripasa/Suzano/VCP case.

⁵ Administrative Proceedings No. 08012.002097/99-81, <http://www.cade.gov.br/jurisprudencia/arquivosPDF/VotoVogal-PA-1999-08012-002097-Infoglobo-Farina.pdf>.

In each one of those instances, the authorities carefully assessed industry structure and dynamics before ruling on whether facilitating practices should be deemed illegal. In many cases, barring practices that could lead to increased market transparency incurs in higher transaction and monitoring costs. Hence, the authorities' decision should be very thorough in weighting cost and benefits before sanctioning a certain practice.

BIAC

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its roundtable on “Cartels: Approaches to Cartel Investigations.”

The business community shares the concern implicit in the invitation letter that deliberate conduct or practices which cause substantial harm to consumer welfare should not escape the legitimate scrutiny of competition laws. Business entities are often themselves the victims of such anti-competitive practices. The inability of competition law to intervene effectively against restrictive arrangements that damage competition can result in direct harm to the business community at several levels, extending to downstream business purchasers.

BIAC recognises that adopting certain practices short of “hard core” cartel conduct may enable firms effectively to coordinate their conduct in a manner detrimental to competition, customers and consumers, and in particular to raise or fix prices and output, share markets or stifle innovation. These arrangements may not always appear anti-competitive on their face but go beyond the “pure” oligopoly model of non-collusive interdependence. On the other hand, competition agencies should recognise that other forms of horizontal cooperation may stimulate competition and lead to substantial economic benefits.

BIAC therefore supports the efforts of enforcement authorities to ensure that effective competition is maintained, and welcomes proposals for a balanced assessment of horizontal arrangements taking into account both economic benefits and anti-competitive effects.

BIAC welcomes the focus of the present Roundtable discussion on the treatment in competition law of orchestrated arrangements which by one means or another simplify the process of reaching the supra-competitive price or of eliminating uncertainty between the players in an oligopoly market. The fact that this issue and the separate but closely-linked question of the use of circumstantial evidence to prove “agreement” are often conflated has led to some terminological confusion. The line between the two concepts may even be blurred: as stated in the invitation, competition authorities and courts sometimes consider certain of these practices as “plus factors” to prove that firms have entered into an agreement.

In response to the invitation to contribute to the identification of appropriate terminology, for the purposes of the present discussion we would suggest that the term “facilitating *device*” be used (rather than “practice”), if only to avoid any possible confusion with the closely-related notion of “concerted practice” employed in the European Union Treaties and national legislation. When employing the proposed term, it should however be understood that it already involves a value-judgment and implies some mechanism that encourages or promotes a “collusive outcome,” such as anti-competitive coordination of pricing or output, so care should be taken not to attach the label to every form of horizontal industry arrangement that increases transparency including those which are neutral or even entirely beneficial.

A helpful starting point for the discussion is the description of facilitating devices employed in the contribution of the United States to the Roundtable on Oligopoly in May 1999 as: “activities that tend to promote interdependent behaviour among competitors by reducing their uncertainty as to each other’s

future actions, or diminishing their incentives to deviate from a coordinated strategy.”¹ Economic theory assumes that oligopolists recognise their interdependence, a perception which could lead to strategic coordination and the ability to act as a shared monopoly and raise prices above the competitive level. However, as the paper observes, “it is far from inevitable that oligopolists will price supracompetitively.” Facilitating devices tend to be found in markets which are already prone to collusion but in which the market players face some obstacle. Firms may adopt devices which enable them to mitigate or overcome the market uncertainties that complicate collusion (so-called “complicating factors”).² Effective collusion, whether express or tacit, requires firms to identify terms of coordination, detect deviation from those terms and “punish” the deviators, so facilitating devices have to be aimed at achieving those objectives. Facilitating devices may be, but are not necessarily, the subject of an agreement among competitors to adopt the practice in question.

Among the most common forms of industry practice that may be considered potentially to constitute facilitating devices are: advance price announcements with long lead times prior to implementation, base point pricing systems, competitively-sensitive information exchanges and meet-competition or “most favoured customer” clauses.

The assessment of such arrangements, which may take myriad forms, will depend upon the nature of the industry and market circumstances in which they are operated, the nature and specifics of the practice at issue, and the potential effect on the behaviour of the participants.

However, most practices that could be deemed potentially to constitute anti-competitive purposes may also serve pro-competitive ends. It should also be recognised that in a competitive market, transparency between operators is likely to lead to an *intensification* of competition. On the other hand, where a market is already characterised by highly concentrated oligopoly, remaining competition could be further impaired by exchanges at short intervals of precise individual information. Thus, while information exchanges could be used by firms to reduce uncertainty as to their respective future actions and so reduce competition, they may also increase market transparency and enable firms to take their own rational and informed individual decisions to adjust supply to demand or reduce costs. Similarly, advance price announcements could allow competitors to coordinate price increases and lead to a supra-competitive price, but they could also benefit customers by allowing them to stock up before the effective date of a price increase or plan their commercial activity more rationally. It should also be noted that an information exchange or other industry practice could be ancillary to and essential for the operation of a procompetitive and lawful arrangement.

In BIAC’s view, care should be taken to distinguish unilateral conduct from coordinated actions. Independent action by an operator (at least to the extent that the operator does not hold a dominant position) should not be the subject of a prohibition. Facilitating devices may be the subject of an express agreement, the most obvious example being the implementation of a formal industry information exchange with detailed rules. On the other hand, more informal practices may be adopted which could restrict competition. Nevertheless, some element of concerted action between competitors should be a precondition to any enforcement action. As with the treatment under competition laws of parallel behaviour, interdependence should not be equated with agreement. Where all that has occurred is unilateral parallel adoption of a practice, even in an oligopoly, a conservative approach should be adopted to avoid the risk of “false positives.” Attempts by enforcement agencies to deploy economic theory to define the elements that could be used to prove that the adoption and use of a facilitating device was an

¹ OECD, *Oligopoly*, at 199, DAF/CLP(99)25 (Oct. 19, 1999).

² George A. Hay, *Oligopoly, Shared Monopoly and Antitrust Law*, 67 CORNELL L. REV. 439 (1982).

unlawful agreement have had mixed success.³ The mere fact that the adherents to a scheme derive a benefit only if other industry players adopt the conduct should not be sufficient to ground a finding of unlawful collusion. For a finding of agreement, reciprocity ought to be regarded as a necessary but not a sufficient condition.

For similar reasons, BIAC would caution against rendering it unlawful for a single firm unilaterally to make information available publicly to the market place (as by giving information about upcoming price increases). Advance publication of prices by a market leader may allow other firms in the oligopoly to follow a price increase. However, such conduct should be of antitrust concern only if it is part of an agreement or other scheme of collusion. Occurring on its own, the conduct may have a legitimate business reason. In circumstances where the information is shared with customers or made publicly available, it may serve pro-competitive ends. Conversely, where sensitive information is regularly given only to competitors, the evidence may warrant a finding of an agreement or other prohibited form of collusion.

Where a facilitating device is the adjunct of a cartel, it should of course be treated as an integral part of the unlawful activity. Conduct consisting “only” of a facilitating device might legitimately fall within the scrutiny of competition law. In certain jurisdictions, a direct exchange of information, for example, might constitute an infringement of the competition laws in its own right. This could be the case where the information exchange demonstrably reduces or removes the degree of uncertainty among the market players as to the operation of the market in question or their respective intentions so that competition between them is substantially affected or eliminated. However, such cases, even where they might fall under the purview of competition enforcement, should not be equated with hard core cartels; in particular, such conduct might, under a comparative rule of reason examination, be deemed not to constitute a violation, or if it constitutes a technical infringement, it might in appropriate circumstances benefit from the application of an exemption, rule of inapplicability, or prosecutorial discretion.

Given the many forms that industry arrangements may take, and the need for a case-by-case approach, BIAC does not consider it appropriate to enforce against conduct in this area as though they were “per se” violations. On the assumption an industry practice is found to constitute a facilitating device, a careful balancing should then be conducted of the beneficial and negative effects. In judging a business practice, the potentially negative effects should always result from its actual or potential restriction of competition. How this necessary exercise should translate into operation will depend on the purpose, structure and framework of the legislation protecting competition in the particular jurisdiction. Under the EC Treaty, an arrangement that is caught by the terms of Article 81 (1) will be the subject of an analysis under Article 81(3) and benefit if the conditions are fulfilled for a direct exception under Article 81(3). In the United States, apart from the few cases where a “hard core” practice might be considered tantamount to direct price fixing, an analysis under the rule of reason is appropriate before an agreement is found to constitute a violation of Section 1 of the Sherman Act. In Canada, all potential restrictions of competition are assessed under a rule of reason designed to consider potential procompetitive benefits.

A business practice could be neutral or benign in competition terms. In BIAC’s opinion, for a commercial practice to be considered unlawful (other than offenses tantamount to hard core price fixing), actual or reasonably foreseeable negative effects upon competition must be demonstrated. The prohibition should be based on a firm showing that the practice in question will lead to the participants altering their competitive behaviour in a manner that appreciably reduces competition. There should be a clear causal connection between the practice and the non-competitive outcome.

³ See the Antitrust Division Memorandum of 26 May 1978, 874 ANTITRUST AND TRADE REGULATION REPORTER, July 27, 1978, reprinted in the JOURNAL OF REPRINTS, Vol. XIII, n° 2 (1982), and also *DuPont de Nemours v. FTC*, 729 F2d 128 (2nd Cir. 1984).

Positive effects that may outweigh restrictions of competition include better planning of investments and more efficient use of capacity. In other cases, in-depth information exchanges may be necessary to sustain a pro-competitive agreement such as a joint venture for production or the provision of services. Such cost-saving results of information exchanges are likely to benefit consumers in a competitive market. In BIAC's opinion, this "sliding scale" approach, measuring any restriction against the benefits, is the most prudent one. Where the restrictions are far-reaching, the positive effects must be more accentuated.

Further, even if a practice has the potential to facilitate coordinated behaviour, it should not be unlawful if it has a clear and legitimate business purpose and there is no less restrictive way by which it can be achieved.

BIAC would caution against imposing fines or criminal sanctions where a facilitating device is not part of a wider violation. An adverse finding should involve a balancing of restrictions against the benefits. Given the uncertainties inherent in the assessment of most industry practices, punitive sanctions would not be appropriate. Even if they are administrative rather than criminal in nature, the imposition of fines involves a finding of wrongdoing and breach of a clear standard. The most suitable remedy from an enforcement standpoint would be a prohibition or other suitably framed "cease and desist" or "consent" order. The same reasoning applies to the necessity of providing for any award of civil damages.

Clear, concise and comprehensible guidance on the impact on competition law of potential facilitating devices from a regulator can perform a valuable function. Although the full implications of (for example) an information exchange needs to be assessed on a case-by-case basis, outlining the relevant parameters for the assessment of information exchanges will be beneficial to all market players. Such guidance must strike a balance between the need for transparency of regulation and need for correct assessment in each relevant instance. Imposing too-detailed rules of general application prohibiting information exchanges would run the risk of being over-cautious, and hence prohibit exchanges which overall have a cost-saving and pro-competitive effect.

SUMMARY OF DISCUSSION

The Chair opened the roundtable and thanked the participants for the large number of written contributions. He welcomed Professor Hay¹ and asked him for his presentation. Professor Hay stated that he was impressed by the number of submissions that described actual enforcement actions. For many years, the ratio of speeches about facilitating practices compared to actual facilitating practices cases had been very high. Professor Hay went on to explain that parallel conduct - focusing on parallel pricing – could fall in one of four categories:

- The conduct, although parallel, was independent and consistent with competitive action; consumers have not been injured and there was no reason for intervention or for any legal instrument that could be used for intervention.
- The parallel conduct was the result of an explicit agreement which could be established either through direct evidence or circumstantial evidence. Direct evidence could be video tapes, hot documents, or testimony of someone who is present when the agreement was reached. Circumstantial evidence could fall in one of two categories: 1) it can be “detective evidence,” for example when one knows that all the executives were in the same city at the same time, one has telephone logs indicating that there were communications although it is not known whether these communications were among the chief executives. 2) It could be economic evidence which has traditionally been used to distinguish between competitive conduct and parallel and interdependent conduct.
- The conduct could be the result of “oligopolistic interdependence,” or “pure oligopoly.” The conduct was not competitive, prices were likely to be at supracompetitive levels, therefore customers are harmed. But one cannot identify any culpable conduct other than the fact that the prices are high. Each oligopolist was acting rationally given the structure of the industry. For the most part courts in the United States and in other countries have refused to condemn such conduct even if they acknowledge that it can harm consumers, in large part because there is no meaningful relief.
- Conduct was interdependent and non-competitive, and not simply parallel conduct. Prices were likely to be at supracompetitive levels. There was no particular reason to believe that there was any explicit agreement, and no direct evidence pointing to the existence of an explicit agreement. Nevertheless there is something one can use to describe the conduct as constituting an unlawful tacit agreement, an implicit agreement or some other form of unlawful concert of practice.

Professor Hay then explained that the principal questions were whether there was in fact any legal content to the fourth category, whether the concept of an unlawful tacit agreement existed, and whether the law permits condemning firms that engage in what is purely tacit or implicit agreement. If so, the next question was how to distinguish conduct that belonged in the category of an unlawful tacit agreement from the conduct that belongs in the category of pure oligopolistic interdependence. The problem was that economic, circumstantial evidence that could be used to show that certain conduct was not competitive was

¹ Professor George Hay (US) from Cornell University – Law School.

equally consistent with pure oligopolistic interdependence and "tacit collusion." The facilitating practices approach was simply one way to try to get at this problem by trying to identify conduct which is no longer in the realm of pure oligopolistic interdependence. But the most difficult job - at least from an economist's perspective - was to distinguish the facilitating practices situation from the pure oligopolistic interdependence problem.

Professor Hay distinguished three categories of facilitating practices. Beginning with the easiest one,:

- The easiest cases exist when there is an agreement that can be easily proved to implement facilitating practices. For example one can read the container case in the United States as an agreement to exchange information; it was not difficult to prove the existence of that agreement, since it was explicit.
- The second category is where one observes parallel adoption of facilitating practices, but it is very difficult to establish that they were adopted as a result of an agreement. Each of several competitors independently uses facilitating practices; they post their prices for example, but it is very difficult to establish that they agreed to do so either tacitly or explicitly.
- The third - and far more difficult - scenario is where only one of the firms engages in facilitating practices. For example, one of the firms adopts a most favoured nations clause or posts its price in advance, but that is enough to permit the oligopolists to coordinate their actions. Clearly there is no agreement - tacit or explicit - to engage in facilitating practices; but one firm permits the other oligopolists to act in an anticompetitive way. Again the legal leap is to say that that pattern of conduct, where this one firm does something quite deliberately which enables the other firms to coordinate their conduct and harm their consumers constitutes an unlawful agreement.

The Chair thanked for Professor Hay for his presentation. He suggested that the roundtable first focus on describing examples of facilitating practices that competition authorities have encountered. He mentioned the contribution of the United States which detailed a large number of facilitating practices that the U.S. antitrust authorities have come across. He asked the United States for an overview of cases in which various facilitating practices had been investigated.

The representative of the United States described one of the facilitating practices discussed in the U.S. contribution, the use of minimum advertised price programmes (MAP). The FTC examined MAP programmes under a rule of reason standard as the programmes can have both pro-competitive and anticompetitive effects, depending on the particular facts of a case. As for the potential pro-competitive effects, the programmes can enhance competition among upstream manufacturers if the MAP programme reduces free riding across retailers: Consumers might try out a product and obtain information from retailers who incur the costs of providing those services, but consumers might then turn around and buy from a discounting retailer who does not provide the same service and therefore can operate at lower costs. MAP programmes encourage retailers to promote a manufacturer's product and can increase demand and value in the mind of consumers. At the same time, the FTC believed that MAP programmes can have anticompetitive effects if they are essentially a mechanism to facilitate horizontal collusion. The CD MAP case discussed in the U.S. submission illustrates this concern, as well as the concern about horizontal collusion either upstream at the manufacturer level or downstream at the retailer level. These concerns exist in particular when a highly restrictive MAP programme is in effect as was the case in the CD MAP case. The restrictions went far beyond the advertised price for the manufacturer's product, but appeared to be an attempt to limit the ability of retailers to convey any lower price in almost any form beyond simply an advertised price.

The Chair turned to the representative of Denmark. He explained that the Danish contribution discussed a type of facilitating practice which was not covered in any other contribution, namely the use of "category captains" in the retail sector.

The representative of Denmark explained that the question of category management had been raised in the retail food sector where retailers - mainly supermarket chains – appointed one of the main suppliers as category manager for each category of food products (tea, coffee, washing powder, etc.). The category manager would then have access to sales figures as well as information on the supermarket chain promotion plans. With this information and on the basis of his general industry knowledge, the category manager could suggest changes and recommendations to the stock arrangements and marketing plans in order to increase the category turnover. The recommendations may range from issues such as marketing approaches and space managements to recommendations on the pricing of the products in the category and listing or delisting specific products. After that the retailer must make final decisions on what products and which suppliers to choose for the category in question and also at what level to set the price. In the Danish Competition Authority's view, category management entailed both advantages and concerns. For example, the retailer will benefit from the supplier's detailed knowledge of the industry and experience from other retailers. On the other hand, concerns exist because the category manager gets prior and in some cases confidential information on competitive prices as well as on the supermarket chains marketing plans. The primary risk is that he may use this position to foreclose competing brands. In addition, the category manager will obtain a number of additional advantages through his increased market knowledge compared to his rivals. The representative of Denmark explained that these concerns had been identified, but there was uncertainty about how to assess this situation.

The Chair then opened the floor for comments from delegates to find out whether they had cases like the Danish one and whether they had reactions to the Danish presentation. The representative of the United States pointed out that the FTC held hearings in 2001-2002 which included the subject of category management. Extensive testimony was provided at the hearings regarding the potential pro competitive effects as well as the anticompetitive effects. The ultimate conclusion of the report, which was completed after the hearings, was that category management programmes hold the potential for a number of pro competitive benefits for manufacturers and retailers. But abuses can occur and one must be careful to make sure that they do not.

The representative of South Africa explained that South Africa was also investigating a category captaincy case. The case had come up in the cigarette market in which one firm was clearly dominant and paid for the privilege of being the category captain. In the cigarette market, where advertising was not permitted, points of sales arrangements were critical for selling cigarettes. It had been alleged that the practice of category captaincy was an instrument of abuse. The representative of South Africa was not sure about the outcome of the case, but it has become clear from this case that the practice of category captaincy and the practice of firms paying to be category captain was very widespread. Where markets were oligopolistic it seemed very difficult to believe that category captaincy was not a very effective instrument to facilitate collusion, largely because of the information exchanges that accompany the practice.

The representative of South Africa also mentioned that interlocking non-executive directorships were another fairly widespread facilitating practice in his country. The law established an irrefutable presumption of an agreement if parallel conduct is established and interlocking directorships exist. This provision had some positive effects, one being reducing the possibility of collusion. More generally it had widened the range of directors that are used in a number of companies. This was tested in a merger case where the tribunal imposed a condition as a remedy on a financial institution that had placed the same directors on the boards of a number of associated, competing companies. The Appeals Court rejected the condition on the basis that the financial institution involved had a stated practice that allowed its associated

companies to compete with each other even when they were in the same market This seemed questionable to the representative of South Africa.

The representative of Norway followed up on the topic of category captaincy. Last year the competition authority had initiated a somewhat similar case against AC Nielsen and supermarket chains. It appeared that the supermarket chains through Nielsen exchanged historic price information. The competition authority reached an agreement with the chains and AC Nielsen to modify their practices in order to make the information more aggregate and less recent.

The Chair turned to another type of facilitating practice which was discussed in the contribution of Turkey which had a long section on the use of “multiple basing-point pricing systems” in the cement industry. The Chair asked the delegate of Turkey to explain those cases and the facilitating practices they involved.

The representative of Turkey explained that the so-called “multiple basing-point pricing system” was extensively used in the Turkish cement market. The price similarity results from the fact that cement factories sell in their production region at a price that is parallel to the price applied by the nearest, competing cement factory in the adjacent region. In other words, a competitor in a particular region considers the price applied by its competitor in the nearest region and determines its price in light of transportation costs of competitors. On the other hand sometimes higher price levels might occur considering supply/demand balance in these regions and therefore there might be certain differences in these two close regions. In such cases, according to cartel members, dealers in the lower price region should be prevented from making sales to higher price regions. Different types of controls can be used, such as different packaging for different regions and fines equal to the price difference between the purchasing region and the selling region. According to Turkish competition legislation, only active sales prohibitions can be imposed on dealers, but not passive sales prohibitions. Existing systems applied by the cement factories stipulate that goods are delivered to the area where they are purchased without making a distinction between active and passive sales. These practices constitute a hardcore restriction and are prohibited without any further analysis. Such practices are designed to support cartel agreements and to prevent any activity by dealers that could circumvent the cartel agreement.

The Chair next turned to the question on how to delineate merely oligopolistic interdependence from an unlawful agreement. He asked Chinese Taipei to explain its cases in the gasoline sector, an industry many countries have investigated, in particular the way the competition authority was able to delineate legal conduct from unlawful conduct.

The representative of Chinese Taipei explained that one case was still pending at the highest administrative court. He discussed the difficulty the authority faced when trying to find direct evidence of a collusive agreement between two gasoline suppliers. The authority was therefore forced to infer the existence of a collusive agreement from indirect, circumstantial evidence. The authority did observe facilitating practices in the gasoline industry, but unfortunately these practices could be both pro competitive and anticompetitive. Many of the practices could be justified on some kind of business justification. On the other hand, the authority did have some evidence of collusion and relied on some kind of oligopolistic theory in its decision.

The elements taken into account could be classified in the following two categories:

- the first category is the marketing condition and the product characteristics. The gasoline market in Chinese Taipei is a duopoly as there are only two suppliers in Chinese Taipei. Secondly, the product was homogenous, it made no difference for the users to select between different brands of gas. Thirdly, supply and demand were quite inelastic. Fourthly, the authority considered that

the two suppliers have been engaging in something like a repeated game. All this evidence has helped the authority to draw an inference of collusion.

- the second category of evidence was related to facilitating practices. Two types of practices could be relied upon to infer an agreement: First, there were frequent pre-announcements of price re-adjustments; the two suppliers frequently publicised the adjustment through the national newspaper. Usually very quickly the other supplier would follow the price adjustment by the same amount and almost at the same time. Within a two year period the firms had 19 such announcements. The representative of Chinese Taipei thought that pre-announced price adjustments had the effect of stabilising or creating collusive agreements. Second, the franchise agreement included a provision that the supplier would guarantee a wholesaler the lowest available price. In other words, if a gas station finds that the other supplier's price is lower the gas station has the right to terminate the franchise agreement. This provision was very similar to a most favoured nation clause.

The representative of Chinese Taipei further explained that the competition authority was still in the process of finding the right balance in establishing how to distinguish between lawful conduct and the anticompetitive effects. Market condition was an important factor: the more concentrated the market is the more likely conduct would be scrutinised. The second factor was the specificity of the information exchanged, especially information revealed through the media. Because Chinese Taipei is a small country any information revealed in a newspaper would circulate very quickly. So the more specific the information disclosed the more likely the finding of an intention to collude on price. Another factor was the frequency of information exchanges and price signalling. The more frequently this type of price adjustment was observed the more likely it became that the authority would engage in some kind of investigation.

Professor Hay then asked what the result would be under Chinese Taipei law if there was no collusion and the conduct was purely the result of the fact that there were only two gas suppliers and they were following each other.

The representative of Chinese Taipei replied that under their law the cartel members do have to have an agreement, but in this case the authority relied on the evidence described above to establish the existence of an agreement. Over the past two years, the firms adjusted the price simultaneously and by the same amount, and the prices were the same at all gas stations. It was too early to know whether the evidence was strong enough to persuade the court. The representative of Chinese Taipei asked the delegates and Professor Hay for their opinions on how the authority should proceed in this case.

Professor Hay explained that the suggestion that comes to mind is a semantic one, i.e. the distinction between saying that the conduct was the result of collusion or can only be explained as a result of the parties having met in hotel room; or it is too much of a coincidence to be explained even by the oligopolistic structure.

The Chair then turned to the representative of the European Commission, as the Commission's contribution appeared to propose as a general test that conduct can violate competition law if it "may help firms reduce strategic uncertainty and more effectively coordinate their conduct;" and that practices must not "reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted. However, economic operators are not prevented to adapt themselves intelligently to the existing or anticipated conduct of their competitors." The Chair asked the European Commission whether this should be considered a statement of the problem, or a test or solution to the problem.

The representative of the European Commission confirmed that the statement was a general description of the problem and not a solution. The Commission thought that it was very difficult to establish a list of conduct which can be categorised as intelligent adaptation to competitors as opposed to conduct which reduces the strategic uncertainty of the market place and should be considered a restriction of competition. There was a lack of case law in this field and it was very difficult to classify conduct outside a specific context.

The first case mentioned in its contribution is the very recent Court of Justice's *Asnef-Equifax* decision of November 2006. The Court of Justice held that a system for the exchange of information between banks relating to the credit-worthiness of their customers was not likely to restrict competition for several reasons: the market was not highly concentrated; the system did not permit the identification of sensitive information; and the conditions of access to the system were non-discriminatory. The Commission also referred to the UK Agricultural Tractor Registration Exchange case. In this case, the Court had confirmed the Commission's finding of a restrictive practice; the information exchange system identified very sensitive, detailed information about the sales of competitors, including sales of dealers and importers, and it was backed by regular meetings of producers in the Agricultural Engineer Association Committee. What mattered in this case was the very high degree of concentration in the market and the fact that the system was not accessible at all to non-members. The representative of the European Commission pointed out that the high market concentration was an aspect that was very similar to the case just discussed by Chinese Taipei.

The representative of the United Kingdom commented on the difficulty that Chinese Taipei had described. It could be considered whether there are alternative ways of dealing with these kinds of problems which would not require the establishment of an agreement or culpability. In the United Kingdom, the Enterprise Act provides for the possibility of investigating markets and making references to the Competition Commission for market investigations. An investigation can target the structure of the market but also the conduct of the players within the market in order to determine whether the market operates in a competitive way. If it does not, the Competition Commission could propose and ultimately impose solutions that would require the players in the market to alter their conduct. The United Kingdom suggested that this instrument takes some of the sting out of the issue because the investigation does not seek to make anyone culpable and impose penalties; rather it identifies a problem through a proper investigation and seeks a solution.

The Chair followed up on the presentation by the European Commission and raised the question whether financial disclosures, which are required from firms under financial governance rules can conflict with competition law. More and more information must be made available by firms. The Chair asked whether this could be a vehicle through which information about the future prospect of the firms may be disclosed to competitors.

The representative of BIAC first commented briefly on the importance of market structure. He concurred with Professor Hay that if the equilibrium price was at a supracompetitive level as a result of specific market structure, it was not the role of competition enforcement to try to correct the inefficiencies of an oligopolistic market. Otherwise, enforcers abandon the role of a competition law enforcer and take on the role of a market regulator.

The representative of New Zealand explained that the Competition Commission used the term facilitating practices to refer to practices being less than an agreement on price that firms may engage in to make a concentrated market operate more like an oligopoly or a cartel. New Zealand strongly supported submissions from other countries that it is necessary to balance the potential of anticompetitive and pro competitive effects of facilitating practices. Under the Competition Act it is necessary to demonstrate that there is a contract or understanding. In addition the purpose, effect or likely effect of the agreed facilitating

practice must, as a minimum, be to restrain or impede the free action of price. There has been no court precedence on facilitating practices to date. In practice most companies and organisations realise that they have the opportunity to put a case to the Commission for consideration. For some 20 years, the Commission has received between one and three applications per year. Under the Act parties can apply to the Commission for an authorisation of practices that would otherwise lessen competition. The Commission can grant an authorisation if the public benefits of the practice outweigh the associated detriments. The effect of an authorisation is to grant immunity to the authorised practice from the prohibition in the Act.

New Zealand gave two examples of cases involving facilitating practices, one where the Commission did not find a lessening of competition and therefore declined jurisdiction and another where the Commission did find a lessening of competition because the benefits did not outweigh the detriments and declined to grant the authorisation. In the first case, NZ Medical Association (NZMA) applied for an authorisation of an agreement reached between the Minister of Health and the NZMA in respect of general medical practitioner fees for child patient consultations. The proposal required that the divisional fee compliance officer would publish in the press at least at 6 monthly intervals the range of total fees for paediatric consultations charged by the practitioners in the region, and each practitioner would be asked to place notices in their waiting room of their usual total fee. The NZMA would also set up a free monitoring and compliance procedure to carry out the arrangement and to protect customers from overcharging. The Commission determined that the arrangement was unlikely to contravene the Act; the purpose of the arrangement was not anticompetitive; rather the Act but was designed to provide consumer information and to protect consumers against overcharging. The Commission also came to the conclusion that the arrangement would not fix, control or maintain prices, and there was no evidence of an expectation or intention by the NZMA, the Minister of Health or the practitioners that any particular price or price within a range would be charged. The correspondence made clear that each member of the NZMA was required to establish his/her own standard paediatric consultation fee as a matter of independent judgment.

The second example involved the Chemist Guild (CG) of New Zealand. It concerned a recommended price scheme for the majority of pharmacies in NZ. The Commission received a proposal from the CG to approve a product information catalogue including recommended retail prices for pharmaceuticals, health and beauty products. The CG also wanted to issue a part-charges guide; part-charges refer to goods that are partially subsidised by the government so the part-charge is the part that can vary. CG also wanted to issue a retail pricelist for sedatives. In the Act there is a particular provision which provides for an exemption from the per se prohibition in situations if there are 50 or more suppliers of a product. As a result, the recommended price guide issued by the trade association was not a per se offence but had to be considered under a more generic prohibition of the Act. The CG claimed that the arrangement would not have the purpose or likely effect of substantial lessening of competition because the prices were recommendations only and were claimed to be merely for the convenience of members. The CG also argued that chemists were under no obligation to charge the prices and they would not be subject to penalty should they depart from the recommendations. Finally the CG argued that since it had more than 50 members the exemption in the Act applied. The Commission declined to consider the CG's application on the grounds that the claimed benefits of the arrangement could be achieved by other means that would not result in restrictions of competition.

The Chair then invited the representative of Spain to present the 3-stage test Spain applies to facilitating practices. He also called on other delegations to react to this test.

The representative of Spain pointed out that the first step is what could be called the enforceability test because an intervention is only justified when there is serious actual or very likely consumer harm. The second step would be to look at the relation between the facilitating practice and its impact on the market structure. It would be a test quite like the test in the coordinated effects in merger analysis. Finally the

authority would look at the objective or purpose of the facilitating practice because it was aware that many practices can have different purposes. Some practices, for instance price announcements, may help customers to plan their investment.

Professor Hay asked the representative of Spain about the law that gives the competition authority the power to intervene and if the authority could intervene even when a conduct did not violate Article 81.

The representative of Spain explained that the competition authority believed that some cases could be prosecuted under Spain's Article 81-type prohibition because it prohibited practices that reduce the level of uncertainty. In some circumstances there might be a case under Article 1 of Spanish competition law where a practice clearly has no social benefit and all the oligopolists follow the same practice even if it is not possible to prove the existence of an agreement.

The Chair next moved to the practices of exchanges of information. First he turned to the representative of the United Kingdom for an explanation of the OFT's intervention in the independent schools case. The UK's contribution argued that the exchange of information was anticompetitive by object and therefore it was unlawful even without proof of anticompetitive effect. The Chair asked the representative of the United Kingdom whether this was a general standard that is being used or was a particular standard that as used only in this specific case.

The representative of the United Kingdom explained that in the independent schools case the OFT relied on a statement by the Court of First Instance in the European Night Services judgment that a restriction of competition can be considered a restriction by object if it is obvious that the conduct will have harmful effects. In such a case, the Competition Authority did not have to prove actual or likely effects. The question was whether in the particular circumstances of the independent schools case the exchange of information obviously had the effect of restricting competition. The representative of the United Kingdom highlighted that there were a number of features that made this case particularly susceptible for a treatment as an "object" case: firstly the information that was exchanged was confidential; secondly it concerned the schools' future pricing strategies; thirdly it was done on a regular and highly systematic basis, and for many years; and, in addition, prices in that market were set annually and the exchange of information was timed so it would take place during the schools' annual budgeting process for the following academic year. The schools provided each other with updated information throughout that budgeting process so that they were able to adjust their pricing intentions as the process evolved both in terms of establishing what their costs were likely to be in the coming year - the principal cost being staff costs - but also by reference to what other schools intended to charge.

The representative of the United Kingdom explained that as the case was not appealed to the Competition Appeal Tribunal the UK courts had not yet expressed their view on this matter. The UK then asked other delegates to discuss their experiences in similar cases, and in particular asked the delegation of France to describe its experience with the motorway petrol stations case.

The Chair called the attention on the French contribution very interesting in his view for two reasons. First, as mentioned by the UK delegate, it describes several cases in different sectors (motorway petrol stations case, hotels and mobile phone cases). Second, the French contribution presents an excellent synthesis of the economic analysis applied to exchanges of information and oligopolistic collusion. This raises the issue of how to combine legal and economic approaches. He invited the French delegation to elaborate on these aspects

The representative of France clarified in response to the British delegate's point that according to the French standard of proof, what matters is to demonstrate the likely effect of the practice. This standard of proof consists in identifying a qualitative, theoretical economic mechanism likely to affect competition.

Also, it is important to look at the context, the nature of the information that is exchanged and the species of the exchange itself.

The French cases, contrary to the English ones which concern future exchanges, concern past exchanges of information. Thus the exchange of information on past or present data prevents price fight and collusion. On the other hand remains for companies the option to set incitative mechanisms for their sales force with benchmarking for instance, or to reorient outputs towards dynamic markets or more efficient competitors. However, as far as the burden of proof is concerned, the Competition Authority must demonstrate the likely impact of the practice and it is up to the companies to demonstrate efficiency gains. To demonstrate likely impact, the Authority considers the number of players, the oligopolistic structure, the nature and frequency of the information exchanged and if entry barriers do exist. The legal grounds for Competition Authority's intervention are the agreement on exchange of confidential information, itself.

In the fuel case, the situation was however somewhat different as the information was not confidential. The Conseil de la concurrence has checked that this information was actually used by companies to monitor others thus demonstrating the likely impact.

Professor Hay highlighted the advantages of having to prove only likely effects of certain conduct. But if the practice has been in existence for a while, there was a question whether reliance on likely effects was a viable legal strategy or whether a defendant would say: "you cannot just talk about likely effects, you must prove actual effects."

According to the representative of France to prove actual effects would put the standard very high. The Conseil de la concurrence sets already the bar very high, in line with the EC position and the John Deere case, in looking at the environment, nature of the exchange of information *etc.*

The Chair then turned to the delegation of the United States. In most cases discussed in the U.S. contribution the exchange of information was used to infer the existence of a price fixing agreement. But there were two cases, the container case and possibly the 1982 ATP case, where it appeared that the US authority looked at the exchange of information as being itself an antitrust violation. The Chair asked the delegation of the United States if that was the correct interpretation.

The representative of the United States explained that in the *ATP* case DOJ sued 8 major US airlines and the Airline Tariff Publishing Company (ATP), a complex computerised information exchange system among airlines that was widely used throughout the industry to disseminate fare information to computerised reservation systems and travel agents. ATP itself was a joint venture owned by the airlines and its database was updated on a daily basis with fare information from all the airlines. The investigation showed that ATP was in fact used as a device where airlines could signal to each other proposed changes in fares, propose discounts they were considering, including the start date and end date of proposed discounts and fare changes. The case relied on two allegations under Sherman Act Section 1: the first count was a *per se* case arguing that on a number of routes prices and discounts had been fixed and competitors had agreed on certain price they wanted to give for a route. The second count was a rule of reason case alleging an agreement among various airlines to operate ATP as a fare exchange system with the purpose of communicating information about fares and reducing uncertainty about pricing intentions. In short, this was the facilitating practice aspect of the case and called as such in the complaint. The case was settled.

In response to a question by the Chair about why information exchange cases were so rare, the representative of the United States pointed out that the first type of information exchanges that Professor Hay mentioned, *i.e.*, information exchanges in the context of hardcore cartels, were in fact not that rare. At the opposite end of the spectrum one could find information exchanges where trade associations get together and have information exchanges. Most of those are pro competitive and beneficial; trade

associations know very well where to draw the line and what is permissible. In addition, there is plenty of guidance from the agencies on what type of information can be exchanged during their business meetings. That is one reason why there are not many cases like *ATP*.

The Chair then turned to the representative of Brazil, as its contribution referred to a case that was very similar to the case just described by the United States. The Chair asked the Brazilian delegation about the standard of review that had been used in that case.

The representative of Brazil explained that in its case ATP Co. was the company that was hired by their airline companies to run the computer system. This case was initiated in connection with an investigation of the four leading Brazilian airline companies which at that time held almost 100% of the market. In August 1999 there was a meeting among the Presidents of these companies and after this meeting the ticket price for services on heavily travelled Rio de Janeiro to Sao Paulo route increased simultaneously by 10%. At that time the competition authority could not use dawn raids or wire tapping and had to base its analysis on circumstantial evidence. During the investigation it emerged that the ATP system was a system for exchanging data. The ATP system served as a mechanism that helped the companies achieve three important points: converge on the price, detection of deviation and punishment of deviations. The ATP case was settled, but the cartel was convicted based on circumstantial evidence of meetings, the reduction of the discounts and the use of the ATP system.

Professor Hay intervened to comment on a point raised by Spain: its presentation had referred to Article 20 which addresses any act intended to reduce competition. Professor Hay asked Spain whether he understood correctly that this provision did not require the finding of an agreement. The representative of Spain explained that Article 20 could apply to any practice, unilateral or coordinated, that was intended or able to limit, restrain or in anyway injure open competition or free enterprise.

The Chair then asked the delegation of Japan to explain an interesting case discussed in its contribution; the copper clad laminates case was very close to a cartel case, even though it is presented as an information exchange case. The Chair thought that one of the interesting questions about this case was whether the JFTC had used the same standards that one would use for a hardcore cartel case or whether it had a special set of criteria.

The representative of Japan explained that the copper clad laminates case was a price fixing cartel, a typical case of a hardcore cartel. The case provides a standard decision on whether there was concerted action or not. It was not necessary to show explicit agreement and it was sufficient to show tacit agreement in order to prove concerted action.

The representative of Japan then gave a few examples of guidance on information exchange activities provided in the Trade Association Guidelines (TAG). The TAG stipulates that the following types of conduct usually do not have the effect of restraining competition and in principal do not constitute a violation of the Anti Monopoly Act:

- Offering for the purpose of improving consumers' convenience information of such matters as the proper use of such products or services in the field of consumers.
- Collecting and offering general information on matters such as technological trends, management expertise, market environment, administrative trends and social-economic conditions in the field.

The Chair turned to the delegation of Korea: In its contribution, Korea explained that it was trying to find a middle ground between a rule of reason approach and a per se approach. The Chair explained that Article 19.5 of the Korean Competition Law appeared to establish a legal presumption of illegality for

certain information exchanges. The Chair asked the Korean delegation under what circumstances the KFTC could use the statutory presumption of illegality and what firms would have to show to overcome the presumption.

The representative of Korea explained that there are two provisions in the Korean Competition Law that are applied to illegal agreement or concerted action. The first provision is Article 19.1 which requires the direct or indirect evidence to prove the existence of the illegal agreement or concerted action. The second provision is Article 19.5 which stipulates that illegal agreement shall be presumed when two requirements are met: there must be identical behaviour between competitors and circumstantial evidence of anticompetitive conduct; in other words the existence of circumstantial evidence is a requirement for presumption of illegality of an agreement under paragraph 5. For example, in a case concerning price fixing among three manufacturers in 1997 the KFTC presumed the unlawfulness of the agreement under paragraph 5. But the firms tried to overcome this presumption insisting that identical pricing was caused by the increase of the production costs common to all competitors and that prices had been set independently based on each firm's respective decision. The firms' efforts to overturn the KFTC's presumption were not successful. Article 19.5 conforms to the general principle that conscious parallelism does not contravene the competition law. An illegal agreement can be inferred on the basis of conscious parallelism only if accompanied by circumstantial evidence and plus factors.

The Chair then asked the delegation of the Czech Republic for a discussion of the building saving banks case that explored the standards to analyse information exchanges. More specifically, he asked about the analytical approach used by the competition authority to prove that the information exchange was unlawful.

The representative of the Czech Republic explained that the building saving banks case involved a long term implementation of an agreement to exchange highly detailed statistical business data. The agreement covered all building saving banks in the Czech Republic which exchanged 30 different types of information on a monthly basis, including data on the number of new agreements and market shares with a comparison to the preceding month. It was possible to easily track the developments in the market; the information was so detailed and of such quality that no individual bank would have been able to obtain the information without cooperation of its competitors. On the other hand no tangible evidence of price coordination or other coordination of market behaviour was found. But the Czech Competition Act allows the Czech Competition Authority to find unlawful conduct even in the case of potential anticompetitive effects. It is not necessary to show and prove that such effects have taken place. The problems had started in the market two years before the investigation. The problem was that the fee of the building savings banks increased very slowly but steadily for a very long time. The competition authority had tried to find some hardcore agreement, but was not successful; it did find, however, very precise and detailed agreement about the exchange of information. With regard to the quality and exchange of information the Czech Competition Authority decided to act against the agreement to prevent negative impacts on competition and to restore effective competition on the market.

The representative of South Africa commented on the banking case. He asked what competition authorities should think of the practice where the Central Bank changes its lending rate and within hours all other banks make a separate but identical announcement changing their own prime lending and mortgage rates, usually by exactly the same amount. This was primarily a macroeconomic policy question; there was certainly no agreement between the banks because this conduct had existed for a long time. If there is an agreement, it might exist between the Central Bank and the banks that they will follow the Central Bank's macroeconomic policy signals. On one occasion a few years ago the Central Bank had dropped its lending rate and the four major banks announced a decrease in their lending rates - again with separate but identical announcements - that was somewhat smaller than the rate at which the Central Bank had dropped its rate.

The representative of the Czech Republic followed up on this intervention and explained that the Czech case was somehow different. It was possible to receive signals from the Central Bank, from the government, from the Ministry of Finance and increase or decrease the fees. In the Czech case the problem had been that practically after one month without any change from the side of the government or Central bank one of the companies increased its fees and after two more months, when everybody saw that nothing had changed, all banks increased the fees as well.

The Chair then asked the delegation of the United States if the Sherman Act covers the situation that South Africa had described. The representative of the **United States** explained that there is no exemption for the banking sector. Actions by the Fed which is part of the government were shielded from the antitrust laws. But whatever private banks do to react to the Fed obviously could be a problem of they got together and reached an agreement.

The representative of Romania intervened and commented on the role of the banking sector by explaining that the banking system was exempt from the enforcement of competition law to the extent specific legislative acts governed banks. The representative of Romania followed up on the South African intervention and explained that there was no standard situation in all countries and outcomes will depend on whether the private banks follow exactly the behaviour of the Central Bank. In Romania, for example, the National Bank is a net debtor to the system and not a net creditor. Private banks do not get their resources mainly from the Central Bank, but from other sources. A move in the reference rate by the Central Bank was not always followed by the private banks.

The Chair turned to the fourth part of the roundtable discussion. Several contributions referred to scenarios where firms engage in facilitating practices that have not been agreed upon, or have not been "explicitly agreed upon." The assessment of such practices seems to vary among countries. Hungary, for example, stated in its contribution that the unilateral sending of price information by one firm to its competitors would be considered an unlawful, concerted action if the recipients do not protest; Belgium appeared to agree with this result; Denmark said that making prices available unilaterally would not be enough to establish liability under competition law. The Chair gave the floor first to these three countries.

The representative of Hungary explained that the case concerned currency exchange offices in the tourist centre of Budapest. When the investigation started, the firms already had problems with other authorities like the police; criminal investigation was already in place for different crimes they committed. Due to this, the firms had already taken certain "defensive" measures which undermined the competition authority's ability to collect direct evidence. Dawn raids were unsuccessful; the authority could not gather any direct evidence of an agreement either on fixing the exchange rates or the information facilitating such hardcore cartel; witnesses were reluctant to speak. The direct evidence the authority obtained was that one of the parties had on a daily basis circulated the exchange rates it intended to apply. The authority found the faxes relating to such communication and the other parties who had received the information were not able to show that they had actually refused to read this document or protested against sending such information. The competition authority found that while there were several competitors on the market, the correlation between the exchange rates circulated by the sender and those used by the receiving companies was strong. The competition authority had two choices: either to establish that there was a hardcore price fixing cartel which was facilitated by the information cartel, or to establish that there was an information exchange cartel which had certain observable effects on the market. Finally the decision-making body choose the first approach and established that a hardcore price fixing cartel was operating on the market, the functioning of which was facilitated by the behaviour that had been discovered and supported by economic analysis of the price movements on the market.

The representative of Belgium explained that with regard to the unilateral announcement not followed by any protest from the receivers the authority would go one step further. The authority would need to see

whether the market has actually followed and implemented the announcements. That means that at least with regard to unilateral announcements, the standard of proof is the effective impact on the market. In this respect the delegate agreed with France that this was a very difficult standard to meet. This partly explained why there were so few cases. When the authority prepared its submission, it was working on a case that was almost exactly like the Caterpillar example, but instead of an expected alignment of prices the authority observed a significant drop in the market share of the dominant player even before the competitors announced their future prices. This demonstrated there is a thin line between anticompetitive unilateral announcements and pro competitive announcements.

The representative of Denmark explained that the reason for the Danish approach is the Danish Competition Act, Section 6, under which facilitating practices could be declared unlawful. According to this section any agreement between undertakings which has direct or indirect objective for competition shall be prohibited. Hence the law requires some kind of concurrence of wills amongst the participants. Therefore in case of unilateral announcements it would be required that there is some kind of concurrence of wills or that the announcement has manifested itself in a concerted practice. The Danish Competition Authority has not yet dealt with a situation of a company which unilaterally made sensitive information available to its competitors, so it remained to be seen how this issue will be addressed.

The representative of BIAC explained that enforcement against concerted practices that do not involve reciprocity was dangerous territory, particularly when one is talking about information exchanges that are not made privately but publicly. Without reciprocity it is very difficult to identify a motive and prove that the conduct was necessarily anticompetitive. As for the case of Caterpillar, BIAC explained that the type of equipment that Caterpillar sells often involves budgeted line items for companies and one would expect that an advanced price announcement would be very much in the interest of customers. Therefore the agencies should examine effects in part by testing whether customers thought that price announcements were advantageous. BIAC also noted that it had seen a number of countries which suggested that a balancing test should be used; for example, New Zealand had suggested it; in the United States and Canada it is part of the statute that potential countervailing efficiencies can be asserted. BIAC thought that this was particularly important when looking at unilateral actions in price announcements. Finally BIAC noted that in some cases where there are public announcements of price changes, it was like an extra marital affair that does not involve a mistress; it was really only a half handshake at that point and one must look very closely before attaching some ill motive to it.

The Chair pointed out that the contribution of Spain is fairly close to what Belgium had said about unilateral price announcements. It states: "if an undertaking, on its own initiative, performs an action that, if followed by competitors, facilitates coordination; and, without the existence of an actual plan, competitors follow the action in an appropriate way, this might be prosecuted as an 'agreement'." The Chair then asked the delegation of Spain if it had some experience with this approach, if there have been cases, and if the standard was in fact fairly close to what the Belgian delegate explained.

The representative of Spain explained that the Spanish approach was close to the approach discussed by Belgium and France in the sense that in order to reach unilateral announcements with the statutory prohibition against concerted practice one had to show some type of coordinated action. Spain then followed up on a comment made by BIAC and noted that it is important to make some kind of balancing, to differentiate the price announcements in their objectives or in their aims. In some cases they might have different aims like facilitating customers' investment; that would be like an efficiency test. The representative of Spain described the following example: in a market with two different buyers public tenders take place on a regular basis, for example every 3 to 6 months. There is only a big player and one or two players; the conditions of the market are prone to tacit collusion, there are high barriers to entry, etc. After several interactions the bidders might find a focal point, the buyer might not be up to date on auction theory, and supra competitive prices can be observed after several interactions. But then this market

experiences a costs shock. Now the bidders have different alternatives: they can either wait until the next bid and then implement and increase. Or they might consider a public announcement immediately. The representative of Spain explained that in this case the public announcement may have no other purpose than facilitating that focal point.

The Chair turned to Korea which suggested that under its laws the conduct of the dominant firm could be considered unlawful if the firm adopts a pricing strategy that it expects other market participants will follow. The Chair asked the delegation of Korea if it was fairly close to what the other delegates had discussed and if Korea had experience with this part of the law.

The representative of Korea explained that pure oligopolistic interdependence cannot be punished. Therefore when the price leader sets out the price based on its own independent decision, other enterprises may follow his path. But when the price leader can predict the competitors' price plans by using facilitating practices such as advanced exchanges of price information, advanced releases of pricing plans, etc., his pricing behaviour could be considered as unlawful. For example in the case of price cartel by Korean Air and Asian Airplanes (the first and second largest airlines in Korea), the KFTC failed to find any evidence of coordination or communication. It took the position that Korean Air's price increase plan released through the computer reservation system triggered Asian Airline to follow the price increase in the same way and at the same time. Under the same logic companies' pricing actions triggered by an unlawful agreement or facilitating practices can infringe the competition law. Conversely, when the small companies unilaterally follow a price leader their conduct is not considered unlawful.

The Chair last turned to the question of remedies, a topic that had not been covered extensively in most contributions. The Chair first gave the European Commission the floor, as its contribution discussed the REACH program and the guidance on information exchanges the Commission offers. The Chair asked the European Commission to explain the background of this case, the concerns it had, and the advice or guidelines it developed.

The representative of the European Commission explained that REACH stands for Registration Evaluation Authorisation and Restriction of Chemicals. It is a system established by the EU which encompasses a very comprehensive exchange of information between industries in the chemical sector for safety and other reasons. This very comprehensive exchange of information creates a danger that the information exchange might facilitate collusion. The Commission established guidelines on what companies that are involved in this system can do and cannot do in order to not infringe competition rules. These guidelines were drafted by a consortium composed by several representatives of the industry, including the Federation of the European Chemical Industry, under the supervision of the European Commission. The guidelines make very general warnings that competition law fully applies and companies cannot invoke their obligations under REACH as an exemption to these rules. The guidelines include a list of "don'ts" which are hardcore restrictions prohibited per se like price fixing, limiting of production, dividing up customers, etc. The also include recommendations to companies to do only what is required by REACH, as well as a list of information which must not be exchanged under REACH. The guidelines also recommend that whenever possible companies anonymise or neutralise the information they are going to share by using threshold ranges, etc. The guidelines also advise or recommend reducing the frequency of the exchanges, and to exchange information only at the frequency which is necessary to achieve the objectives of the REACH system. In any case if they have to share sensitive information with the competitors precautionary measures should be used like including a trustee in these exchanges. That person might produce aggregate figures, present the figures in a way that can then be shared with other companies, calculate cost location based on individual figures and produce a non confidential version of these figures before showing to others, etc. The representative of the European Commission also noted that although this is a relatively new system, in its very short period of implementation the Commission has not encountered problems.

The Chair turned to Professor Hay to give him the opportunity to comment on what had been discussed.

Professor Hay pointed out that the most interesting aspects of the discussion was that all delegations appeared to recognise the need to "force" conduct they observe into the category of agreement; to some extent this might be artificial and require them to stretch the meaning of the word. Therefore one is attracted to a statute like in Brazil or perhaps models like Section 5 of the Trade Commission Act which can be used to go after unilateral conduct which clearly has the effect of reducing competition. Professor Hay emphasised that if he had to recommend the adoption of such a statute three issues would have to be taken care of:

- An agency probably should not be allowed to succeed by simply showing likely effects. If one goes after unilateral conduct it would probably be better require proof actual effects, recognising the difficulties that this can create.
- One would not want to have a statute that enables an agency to seek criminal penalties or fines.
- Such a statute should exclude a private right of action.

The representative of Brazil explained that although Brazil was a very large country, it had many small economic markets and oligopolistic structures in many sectors. The competition authority had to be concerned about correctly identifying strategies that constituted unlawful practices. In fact, in the ATP case there was a lot of discussion among the commissioners, and the decision was not adopted unanimously. One party alleged that it had price leadership. It was not easy to prove the opposite and it could have been rational for the other firms to follow the leader. The representative of Brazil thought that it is a challenging subject that they have addressed it very carefully. She also noted that it was wonderful to have Professor Hay not only as a speaker at the beginning, but also commenting and taking part in the discussion.

The representative of Chinese Taipei made a point about the gasoline case and noted that the authority knew perfectly well that it was difficult to infer an agreement from circumstantial evidence which can have both pro-competitive and anticompetitive explanations. Some scholars in Chinese Taipei have suggested that the major problem in the gas industry lies in the structure of the market and not firm conduct because the Government had not opened up the market enough to allow competition to increase in the upstream market which is the supply of gasoline. Esso used to be in the market but exited in the 1990s. The representative of Chinese Taipei asked Professor Hay if the authority should be concerned about behaviour that would occur in a small economy like Chinese Taipei, where the market could only afford two competitors, or whether there were any guidelines the authority should follow in analysing this type of market.

Professor Hay replied that there was nothing fundamentally wrong if as a result of the situation in Chinese Taipei the competition authority cannot improve competition. If there was a duopoly in a market for a tangible product where prices were almost certainly public, then the authority may have to live with it and there was nothing wrong with the activity.

The representative of Italy followed up on a comment made by the representative of Norway about the Nielsen case and explained that Nielsen is a major player in the provision of information across all countries. He asked the representative of Norway about how timely the information in the Nielsen case was. The representative of Norway explained that the information was exchanged on a weekly basis and was very detailed all the way down to product lines in specific products in specific packages.

The Chair, before bringing the roundtable to a close, pointed to the advantage of a standard that considered potential anticompetitive effects as well as efficiency benefits. Such a standard could not only simplify the life of the competition authorities, it also could address the question that BIAC had mentioned. This standard would also strike the right balance intellectually. The Chair was not convinced by the argument that some facilitating practices could have a different objective. Perhaps the objective of certain facilitating practices was not to restrict competition, but if they nevertheless created a risk for competition it may be justified for competition authorities to intervene. The Chair agreed with BIAC that efficiency benefits should be taken into consideration. In closing, the Chair thanked Professor Hay for his intervention and the delegates for a stimulating debate.

COMPTE RENDU DE LA DISCUSSION

Le Président ouvre la séance et remercie les participants de leurs nombreuses communications écrites. Après avoir souhaité la bienvenue au professeur Hay¹, il le prie de faire sa présentation. Le professeur Hay se déclare impressionné par le nombre de communications décrivant les actions coercitives engagées dans les faits. Depuis de longues années, le rapport entre le nombre de discours sur les pratiques de nature à faciliter les oligopoles et celui des mesures les facilitant effectivement était très élevé. Puis le professeur Hay explique qu'une conduite parallèle – notamment s'agissant de la fixation des prix – peut entrer dans une des quatre catégories suivantes :

- La conduite, quoique parallèle, est indépendante et compatible avec une démarche concurrentielle ; les consommateurs n'ont pas subi de dommages et il n'y a pas de raison d'intervenir ni de recourir à un instrument juridique en vue d'une intervention.
- La conduite parallèle résulte d'un accord explicite pouvant être attesté par des preuves directes ou circonstanciées. Les preuves directes peuvent consister en des bandes vidéo, des documents confidentiels ou des témoignages de personnes présentes à la conclusion de l'accord. Les preuves circonstanciées peuvent se ranger en deux catégories : 1) les « éléments d'enquête », lorsque, par exemple, quelqu'un sait que tous les dirigeants se trouvaient dans la même ville au même moment, ou détient des relevés téléphoniques indiquant que des appels ont été passés mais sans préciser si ces appels ont eu lieu entre les dirigeants ; 2) les éléments à caractère économique servant habituellement à faire la distinction entre une conduite concurrentielle et une conduite parallèle et dépendante.
- La conduite résulte d'une « interdépendance oligopolistique » ou d'un « pur oligopole ». Elle n'est pas concurrentielle, les prix atteignent probablement un niveau supraconcurrentiel, et les consommateurs sont donc lésés. Mais personne ne peut reprocher à cette conduite autre chose que la pratique de prix élevés. Chaque membre de l'oligopole a agi d'une manière rationnelle en fonction de la structure du secteur. Dans leur majorité, les tribunaux aux États-Unis et dans d'autres pays, même s'ils reconnaissent qu'elle fait du tort aux consommateurs, refusent de condamner une telle conduite essentiellement parce qu'il n'existe pas de voie de recours efficace.
- La conduite n'est pas simplement parallèle, mais aussi interdépendante et non concurrentielle. Les prix atteignent probablement un niveau supraconcurrentiel. Il n'y a aucune raison particulière de soupçonner l'existence d'un accord explicite. Mais on peut invoquer des éléments pour dire que la conduite constitue un accord tacite illégal, un accord implicite ou une autre forme d'entente illégale.

Le professeur Hay explique ensuite que les principales questions sont de savoir s'il existe en fait un fondement juridique à la quatrième catégorie, si la notion d'accord tacite illégal était valable, et si la loi permet de condamner des entreprises qui se prêtent à des accords purement tacites ou implicites. Dans l'affirmative, il s'agit ensuite de savoir comment distinguer une conduite relevant d'un accord tacite illégal et une conduite relevant d'une pure interdépendance oligopolistique. Le problème vient de ce que les

¹ Professeur George Hay (E.U.) de Cornell University – Law School.

preuves économiques circonstancielles pouvant être utilisées pour montrer qu'une conduite donnée n'est pas concurrentielle valent tout autant dans le cas d'une pure interdépendance oligopolistique et d'une « collusion tacite ». Le recours à des pratiques de nature à faciliter les oligopoles est une solution parmi d'autres, dont le but est d'isoler les conduites qui ne relèvent plus d'une pure interdépendance oligopolistique. Mais le plus dur, – du moins aux yeux d'un économiste – est de faire la distinction entre l'application de pratiques de nature à faciliter les oligopoles et une situation de pure interdépendance oligopolistique.

Le professeur Hay distingue trois catégories de pratiques de nature à faciliter les oligopoles , en commençant par les plus évidentes :

- Les cas les plus évidents sont ceux dans lesquels il est facile de prouver qu'un accord a été conclu en vue de l'adoption de pratiques de nature à faciliter les oligopoles. S'agissant de l'affaire des conteneurs aux États-Unis, par exemple, d'aucuns pensent qu'un accord a été passé pour l'échange d'informations ; il n'a pas été difficile de prouver l'existence d'un accord de ce type puisqu'il était explicite.
- Dans la deuxième catégorie, on observe l'adoption parallèle de pratiques de nature à faciliter les oligopoles, mais il s'avère très difficile d'établir qu'elle résulte d'un accord. Chacun des concurrents recourt indépendamment à des pratiques de nature à faciliter les oligopoles ; quand ils affichent leurs prix, par exemple, il est très difficile d'établir qu'ils se sont entendus pour ce faire d'une manière tacite ou explicite.
- Dans la troisième situation – de loin la plus complexe –, une seule entreprise recourt à des pratiques de nature à faciliter les oligopoles. Une des entreprises applique, par exemple, une clause de la nation la plus favorisée ou affiche ses prix à l'avance, mais cela suffit aux autres composantes de l'oligopole pour coordonner leurs actions. Certes, il n'y a pas d'accord – tacite ou implicite – sur l'adoption de pratiques de nature à faciliter les oligopoles, mais une entreprise permet aux autres composantes de l'oligopole d'agir d'une manière anticoncurrentielle. Là encore, l'argument juridique consiste à déceler un accord illégal derrière une conduite par laquelle une entreprise agit délibérément pour permettre à d'autres entreprises de coordonner leurs opérations et de porter préjudice aux consommateurs.

Le Président remercie le professeur Hay de son exposé. Il propose aux participants , pour commencer, de présenter des exemples de pratiques de nature à faciliter les oligopoles constatées par les autorités de la concurrence. Il évoque la communication des États-Unis, qui fait état du grand nombre de pratiques de nature à faciliter les oligopoles observées par les services antitrust américains. Il demande aux États-Unis de faire un tour d'horizon des cas dans lesquels de telles pratiques ont donné lieu à une enquête.

Le représentant des États-Unis décrit une des pratiques de nature à faciliter les oligopoles évoquées dans la communication de son pays, le recours à des dispositifs de prix minimum annoncés . La FTC a analysé ces dispositifs en se fondant sur la règle de raison étant donné que, selon les circonstances, ils peuvent aussi bien favoriser qu'entraver la concurrence. S'agissant de leurs effets bénéfiques sur la concurrence, ils peuvent être observés chez les fabricants en amont lorsque ces dispositifs limitent le parasitisme au niveau des détaillants. Il arrive en effet que des consommateurs essaient un produit et obtiennent des informations auprès de détaillants qui supportent le coût de la fourniture du service, puis qu'ils aillent voir ailleurs et achètent à un détaillant qui vend au rabais, qui n'assure pas le même service et dont les coûts, par conséquent, sont moindres. Ces dispositifs encouragent les détaillants à promouvoir le produit d'un fabricant et peuvent accroître la demande et la valeur de ce produit aux yeux des consommateurs. En même temps, la FTC pense que ces dispositifs peuvent nuire à la concurrence s'ils ont principalement pour objet de faciliter les collusions horizontales. L'exemple présenté dans la

communication des États-Unis concernant les CD. L'affaire des prix minimums des CD est une illustration de ce problème, ainsi que des préoccupations relatives aux collusions horizontales en amont au niveau des fabricants ou en aval au niveau des détaillants. Ces préoccupations sont particulièrement présentes dans le cas d'un dispositif particulièrement restrictif, comme l'était celui des prix minimums des CD. Les restrictions allaient bien au-delà du prix annoncé pour le produit du fabricant, mais il est apparu qu'il s'agissait d'empêcher les détaillants de pratiquer des prix inférieurs sous presque toute forme autre que la simple application du prix annoncé.

Le Président donne ensuite la parole au représentant du Danemark. Il précise que la communication danoise traite d'un type de pratique de nature à faciliter les oligopoles auquel aucune autre communication ne fait allusion, à savoir la désignation de « capitaines de catégorie » dans le commerce de détail.

Le représentant du Danemark explique que la question de la gestion par catégorie s'est posée dans le secteur de l'alimentation de détail, où les commerçants – principalement les chaînes de supermarchés – désignent un fournisseur important comme responsable d'une catégorie donnée de produits alimentaires (thé, café, lessive, etc.). Ce responsable de catégorie a alors accès aux chiffres des ventes ainsi qu'à des informations sur les programmes promotionnels des chaînes de supermarchés. Avec ces informations en mains, et avec ce qu'il connaît du secteur en général, il peut émettre des idées et des recommandations pour changer la structure des stocks et les plans de commercialisation de manière à accroître le chiffre d'affaires dans la catégorie en question. Ses recommandations peuvent porter sur des aspects comme les techniques de commercialisation et la gestion des surfaces, la fixation des prix des produits dans la catégorie, et l'inscription ou le retrait de produits précis au catalogue. Ensuite, le détaillant doit arrêter son choix sur les produits et les fournisseurs de la catégorie en question ainsi que sur le niveau des prix. De l'avis de l'Autorité danoise de la concurrence, la gestion par catégorie présente à la fois des avantages et des inconvénients. Le détaillant profitera, par exemple, de la connaissance approfondie que le fournisseur possède du secteur et de l'expérience des autres détaillants. En revanche, on peut craindre que le responsable de catégorie ne détienne avant tout le monde des informations, de surcroît parfois confidentielles, sur les prix de la concurrence ainsi que sur les plans de commercialisation des chaînes de supermarchés. Le principal risque est qu'il profite de cette position pour s'emparer de marques concurrentes. En outre, sa meilleure connaissance du marché par rapport à ses rivaux donnera au responsable de la catégorie des avantages supplémentaires. Le représentant du Danemark indique que ces problèmes étaient connus, mais que l'on ne savait pas trop quoi penser de cette situation.

Le Président demande ensuite aux délégués de dire s'il existe chez eux des cas semblables à l'exemple danois, en les priant de faire part de leurs réactions éventuelles à l'exposé du Danemark. Le représentant des États-Unis signale que la FTC a tenu des audiences en 2001-02, au cours desquelles la question de la gestion par catégorie avait été abordée. De nombreux témoignages y ont été produits concernant ses possibles effets positifs ou négatifs sur la concurrence. Le rapport préparé à l'issue des audiences aboutissait à la conclusion que les programmes de gestion par catégorie peuvent présenter au plan de la concurrence divers avantages pour les fabricants et les détaillants. Mais des abus peuvent se produire et il faut veiller à les prévenir.

Le représentant de l'Afrique du Sud explique qu'une enquête est également en cours dans son pays à propos d'un cas de gestion par catégorie. L'affaire porte sur le marché des cigarettes, dans lequel une entreprise occupe clairement une position dominante et exerce la responsabilité de la catégorie contre rémunération. Sur ce marché, où toute publicité est interdite, la conclusion d'accords sur les points de vente est capitale. D'aucuns estiment que le fait de prendre une catégorie sous sa responsabilité constitue une forme d'abus. Le représentant de l'Afrique du Sud ne sait pas exactement comment l'affaire se terminera, mais ce cas montre bien qu'il est très courant de désigner un « capitaine de catégorie » et de le rémunérer sur les deniers des entreprises. Dans les situations de marché oligopolistique, il semble extrêmement

difficile de ne pas penser que la gestion par catégorie constitue un moyen très efficace de favoriser la collusion, notamment à cause des échanges d'informations qui vont de pair avec cette pratique.

Le représentant de l'Afrique du Sud indique que le cumul de mandats d'administrateurs sans fonction de direction est une autre pratique de nature à favoriser les oligopoles qui est assez répandue dans son pays. Selon la loi, la conclusion d'un accord est présumée irréfutable dès lors qu'une conduite parallèle a été établie et qu'il existe une imbrication des conseils d'administration. Cette disposition a des effets positifs et limite notamment les risques de collusion. De manière plus générale, elle permet d'élargir l'éventail des administrateurs en poste dans plusieurs entreprises. C'est ce qui est ressorti d'une affaire de fusion dans laquelle le tribunal avait imposé cette condition, à titre de réparation, à un établissement financier qui avait placé les mêmes personnes aux conseils d'administration de plusieurs sociétés associées et concurrentes. La cour d'appel avait rejeté la décision au motif qu'il existait dans l'établissement financier en cause une pratique bien établie qui permettait aux entreprises qui lui étaient associées de se faire concurrence même si elles opéraient sur le même marché. Le représentant de l'Afrique du Sud trouve ce jugement contestable.

Le représentant de la Norvège rebondit sur la question des « capitaines de catégorie ». L'an passé, la Direction de la concurrence a engagé une action plus ou moins similaire contre AC Nielsen et les chaînes de supermarchés. Il est en effet apparu que les chaînes de supermarchés s'échangeaient par l'intermédiaire d'AC Nielsen des informations rétrospectives sur les prix pratiqués. La Direction de la concurrence est parvenue à un accord avec les chaînes et AC Nielsen, qui ont accepté de changer leurs habitudes de manière que les informations soient plus synthétiques et moins récentes.

Le Président en vient à une autre pratique de nature à faciliter les oligopoles évoquée dans la communication de la Turquie, qui comporte un long passage sur l'utilisation de « systèmes de fixation des prix à points de référence multiples » dans le secteur du ciment. Le Président demande au délégué de la Turquie d'expliquer ces systèmes et les pratiques correspondantes de nature à faciliter les oligopoles .

Le représentant de la Turquie explique que ces systèmes sont couramment employés sur le marché du ciment turc. La similarité des prix résulte du fait que les cimenteries pratiquent dans la région où elles produisent des prix comparables aux prix appliqués par la cimenterie concurrente la plus proche située dans la région adjacente. Autrement dit, une entreprise d'une région particulière tient compte du prix appliqué par sa concurrente de la région la plus proche et détermine son prix en fonction des frais de transport des concurrents. Cela étant, il peut arriver que les prix fixés soient plus élevés du fait du jeu de l'offre et de la demande dans ces régions, de sorte que certaines différences peuvent apparaître dans ces deux régions proches. Dans ce cas, selon des membres de l'entente, il convient d'empêcher les négociants de la région qui pratique les prix les plus bas de vendre aux régions où les prix sont plus hauts. Différents moyens de contrôle peuvent être employés, comme l'utilisation de conditionnements différents selon la région de destination ou l'imposition d'une amende égale à la différence de prix entre la région acheteuse et la région vendeuse. Aux termes du droit turc de la concurrence, seules des interdictions de ventes actives peuvent être imposées aux négociants, et non des interdictions de ventes passives. Les systèmes actuellement appliqués par les cimenteries font que les marchandises doivent être livrées dans la région d'achat sans qu'une distinction soit faite entre ventes actives et ventes passives. Ces pratiques constituent une restriction injustifiable et sont interdites sans autre forme d'analyse. Elles ont pour but de faciliter les ententes et d'empêcher les négociants de se livrer à toute activité risquant d'échapper à de tels accords.

Le Président se demande ensuite comment faire la distinction entre une interdépendance simplement oligopolistique et un accord illégal. Il invite le représentant du Taipei chinois à exposer les cas observés chez lui dans le secteur de l'essence, secteur sur lequel beaucoup de pays ont effectué des études, et d'expliquer en particulier comment la direction de la concurrence s'y est prise pour tracer une ligne de démarcation entre les conduites légales et les conduites illégales.

Le représentant du Taipei chinois indique qu'une affaire est encore en instance au tribunal administratif supérieur. Il explique que l'autorité de la concurrence a du mal à établir la preuve directe d'une entente illicite entre deux fournisseurs d'essence. Pour établir l'existence d'une entente illicite, elle doit donc s'en remettre à des preuves indirectes, circonstancielles. Elle observe certes des pratiques de nature à faciliter les oligopoles dans ce secteur, mais ces pratiques peuvent malheureusement être aussi bien favorables que défavorables au jeu de la concurrence. Nombre de ces pratiques ont pu être justifiées par diverses considérations commerciales. Cependant, l'autorité de la concurrence détenait un certain nombre d'éléments de preuve de collusion et avait fondé sa décision sur une réflexion autour de la notion d'oligopole.

Les éléments pris en considération peuvent se ranger dans les deux catégories suivantes :

- La première catégorie inclue les conditions de commercialisation et les caractéristiques du produit. Le marché de l'essence au Taipei chinois est un duopole partagé entre deux fournisseurs. Deuxièmement, le produit est homogène ; pour le consommateur, cela ne fait aucune différence de choisir telle ou telle marque d'essence. Troisièmement, l'offre et la demande sont relativement inélastiques. Quatrièmement, l'autorité de la concurrence considère que les deux fournisseurs se livrent à une opération qui semble être devenue une habitude. Autant d'éléments qui ont conduit l'autorité à soupçonner l'existence d'une collusion.
- Les éléments de preuve appartenant à la seconde catégorie se rapportent aux pratiques de nature à faciliter les oligopoles. Deux types de pratiques permettent de conclure à l'existence d'une entente. Premièrement, les annonces préalables d'une révision des prix sont fréquentes ; il arrive souvent qu'un des deux fournisseurs annonce une révision tarifaire dans la presse nationale. Habituellement, l'autre fournisseur lui emboîte rapidement le pas pour publier un changement de tarif équivalent. En l'espace de deux ans, les fournisseurs ont ainsi fait 19 annonces. De l'avis du représentant du Taipei chinois, les révisions de prix annoncées à l'avance ont pour effet de consolider ou d'engendrer des ententes illicites. Deuxièmement, l'accord de franchise comporte une disposition obligeant le fournisseur à garantir au grossiste le prix le plus bas existant. En d'autres termes, si un pompiste trouve un prix plus bas chez un autre fournisseur, il a le droit de dénoncer l'accord de franchise. Cette disposition est très semblable à une clause de la nation la plus favorisée.

Le représentant du Taipei chinois explique ensuite que l'autorité de la concurrence se demande encore où placer le curseur pour établir une séparation entre les conduites légales et les effets anticoncurrentiels. La situation du marché est un facteur important : plus le marché est concentré, plus les conduites adoptées font l'objet d'une surveillance serrée. Un deuxième facteur réside dans la spécificité des informations échangées, en particulier celles qui sont divulguées par les médias. Le Taipei chinois étant un petit pays, toute information parue dans un journal circule très rapidement. Par conséquent, plus les informations divulguées sont spécifiques et plus on risque de conclure à une intention de collusion sur les prix. Autre facteur, la fréquence des échanges d'informations et des annonces de prix. Plus cette forme de révision des prix est fréquente et plus il y a de chances que l'autorité procède à une enquête.

Le professeur Hay se demande ce qui se passerait aux termes du droit du Taipei chinois si aucune collusion n'était observée et si la conduite résultait purement du fait qu'il n'existe que deux fournisseurs de carburant qui se surveillent l'un l'autre.

Le représentant du Taipei chinois répond que, en vertu de la loi, les membres du cartel doivent avoir conclu une entente mais que, en l'espèce, l'autorité s'est appuyée sur les éléments décrits précédemment pour établir l'existence d'une entente. Au cours des deux années écoulées, les entreprises ont révisé leur prix simultanément et du même montant, et les prix étaient identiques dans toutes les stations d'essence. Il

est trop tôt pour savoir si ces éléments de preuve suffiront à convaincre le tribunal. Le représentant du Taipei chinois a demandé aux délégués et au professeur Hay de s'exprimer sur la façon dont l'autorité devrait procéder dans cette affaire.

Le professeur Hay indique que la suggestion qui lui venait à l'esprit est d'ordre sémantique, toute la question étant de savoir s'il convient de dire que la conduite est le fruit d'une collusion ou d'une réunion des parties dans une chambre d'hôtel ; sinon, il y a là trop de coïncidences pour que l'on puisse l'expliquer même par la présence d'un oligopole.

Le Président s'adresse ensuite au représentant de la Commission européenne, dont la communication posait pour critère général qu'une conduite peut enfreindre la loi sur la concurrence dès lors qu'elle « aide les entreprises à réduire les incertitudes stratégiques et à mieux coordonner leurs actions », et que les pratiques en vigueur ne doivent pas « atténuer ou supprimer l'incertitude sur le fonctionnement du marché en cause au point de restreindre la concurrence entre entreprises. Mais rien n'empêche les agents économiques de s'adapter intelligemment à la conduite existante ou prévisible de leurs concurrents. » Le Président demande à la Commission européenne s'il faut voir dans cette affirmation un énoncé du problème, un critère de décision ou une solution possible.

Le représentant de la Commission européenne confirme que cette déclaration constituait un exposé général du problème et non une solution. Pour la Commission, il est très difficile de dresser une liste de conduites relevant d'une adaptation intelligente à la concurrence par opposition aux conduites qui réduisent les incertitudes stratégiques liées au marché et restreignent manifestement la concurrence. La jurisprudence se révèle insuffisante dans ce domaine et, en dehors d'un contexte précis, il était extrêmement difficile de ranger une conduite dans une catégorie.

Le premier cas mentionné dans la communication est le jugement très récent rendu par la Cour de justice, en novembre 2006, dans l'affaire *Asnef-Equifax*. La Cour de justice a considéré qu'un système d'échange de renseignements entre des banques sur la solvabilité de leurs clients ne risque pas de porter atteinte à la concurrence pour plusieurs raisons : le marché n'est pas très concentré ; le système ne permet pas d'isoler des renseignements sensibles ; et les conditions d'accès au système ne sont pas discriminatoires. D'autre part, la Commission s'est reportée à l'affaire de l'échange d'informations sur l'immatriculation des tracteurs agricoles au Royaume-Uni. Dans cette affaire, la Cour avait conclu comme la Commission à l'existence d'une pratique restrictive ; le système d'échange d'informations faisait apparaître des renseignements très sensibles et détaillés sur les ventes des concurrents, y compris sur leurs ventes à des négociants et des importateurs, à quoi s'ajoutaient des réunions régulières de producteurs au sein de l'Agricultural Engineer Association Committee. Le problème, dans cette affaire, vient de la très forte concentration du marché et du fait que le système n'est pas du tout accessible aux non-membres. Le représentant de la Commission européenne souligne que cette forte concentration du marché fait penser au cas très semblable du Taipei chinois que l'on vient d'évoquer.

Le représentant du Royaume-Uni s'exprime sur la difficulté soulevée par le Taipei chinois. On peut se demander si, face à des problèmes de ce genre, il existe d'autres façons de procéder qui ne consistent pas à vérifier l'existence d'une entente ou à chercher un coupable. Au Royaume-Uni, la Loi sur les entreprises prévoit la possibilité d'enquêter sur les marchés et de saisir la Commission de la concurrence pour la réalisation des enquêtes. On peut axer l'enquête sur la structure du marché, mais aussi sur la conduite des acteurs du marché pour déterminer si le jeu de la concurrence y est préservé. Dans la négative, la Commission peut proposer et imposer en dernier ressort des solutions obligeant les acteurs du marché à modifier leur conduite. Selon le Royaume-Uni, cet instrument apporte en partie une voie de recours dans la mesure où l'enquête n'a pas pour objet de désigner un coupable et d'imposer des sanctions, mais de cerner le problème au moyen d'une analyse sérieuse et de trouver une solution.

Le Président revient sur l'exposé de la Commission européenne et se demande si la communication de données financières, à laquelle les entreprises sont tenues en vertu des règles de bonne gouvernance financière, peut aller à l'encontre du droit de la concurrence. Les entreprises doivent fournir un volume d'informations de plus en plus important. Le Président demande si, par ce canal, les concurrents peuvent être au courant des perspectives telles qu'elles se présentent dans telle ou telle entreprise.

Le représentant du BIAC fait d'abord un bref commentaire sur la structure du marché. Abondant dans le sens du professeur Hay, il affirme que si le prix d'équilibre se trouve à un niveau supraconcurrentiel à cause de la structure particulière du marché, il n'appartient pas à l'autorité de la concurrence d'essayer de remédier aux défaillances d'un marché oligopolistique. Sinon, les services d'application du droit de la concurrence se transforment en autorité de tutelle du marché.

Le représentant de la Nouvelle-Zélande explique que la Commission de la concurrence parle de « pratiques de nature à faciliter les oligopoles » pour désigner les pratiques qui, sans relever d'une entente, sont suivies par des entreprises pour qu'un marché concentré fonctionne davantage comme un oligopole ou un cartel. La Nouvelle-Zélande approuve totalement les pays qui jugent nécessaire d'équilibrer les effets négatifs et positifs des pratiques de nature à faciliter les oligopoles sur la concurrence. En vertu de la Loi de la concurrence, la preuve doit être apportée de l'existence d'un contrat ou d'une entente. En outre, la pratique de nature à faciliter les oligopoles doit avoir pour but et, plus ou moins, pour effet, au minimum, de restreindre ou d'empêcher la liberté d'agir par les prix. Il n'existe pas à ce jour de jurisprudence sur les pratiques de nature à faciliter les oligopoles. Dans les faits, la plupart des entreprises et organismes savent qu'ils peuvent saisir la Commission. Sur une période d'une vingtaine d'années, la Commission a reçu entre une et trois demandes par an. La Loi dispose que les parties peuvent demander à la Commission une autorisation pour des pratiques susceptibles de freiner la concurrence. La Commission peut donner son autorisation si les avantages de la pratique pour le public l'emportent sur ses inconvénients. Cette autorisation a pour effet de soustraire la pratique en cause à l'interdiction prévue par la Loi.

La Nouvelle-Zélande a illustré les pratiques de nature à faciliter les oligopoles par deux exemples : dans un cas, la Commission n'a observé aucune limitation de la concurrence et s'est donc déclarée incompétente ; dans l'autre cas, elle a considéré que le jeu de la concurrence était freiné parce que les avantages de la pratique ne l'emportaient pas sur ses inconvénients, et elle a refusé de donner son autorisation. Dans le premier cas, l'Association des médecins de Nouvelle-Zélande (NZMA) a demandé son autorisation pour un accord passé entre le ministère de la Santé et la NZMA concernant les honoraires de consultation perçus par les généralistes en pédiatrie. Selon la proposition, le service local de réglementation tarifaire devrait publier dans la presse au moins tous les six mois le barème des honoraires totaux pratiqués par les médecins de la région pour des consultations en pédiatrie, et chaque médecin serait tenu d'afficher ses tarifs courants dans sa salle d'attente. En outre, la NZMA mettrait en place un dispositif de surveillance et d'exécution gratuit pour assurer l'application du système et protéger les consommateurs contre les dépassements d'honoraires. La Commission est parvenue à la conclusion que ce dispositif ne se traduirait pas par une fixation, un contrôle ni un blocage des prix, et que rien ne prouvait qu'il était dans l'idée ou dans l'intention de la NZMA, du ministère de la Santé ni des médecins d'appliquer un tarif ou un barème d'honoraires particulier. Il ressortait clairement de la communication qu'il appartiendrait à chaque membre de la NZMA d'établir en toute indépendance ses propres honoraires de consultation en pédiatrie.

Le second exemple concernait l'Association des pharmaciens de Nouvelle-Zélande (Chemist Guild – CG). Il s'agissait d'un système de prix recommandés applicable à la majorité des pharmacies du pays. La Commission avait reçu une proposition dans laquelle la CG lui demandait d'approuver un catalogue de produits contenant des recommandations de prix de vente au détail pour des produits pharmaceutiques, de santé et de beauté. La CG souhaitait en outre publier un guide des articles en partie pris en charge, c'est-à-dire en partie subventionnés par l'État, et pour lesquels les frais facturés peuvent varier. Enfin, la CG voulait publier un tarif des sédatifs vendus au détail. La Loi contient une clause d'exemption particulière

dans le cas d'un produit pour lequel il existe 50 fournisseurs ou plus. En conséquence, la publication d'un guide des prix recommandés par l'association professionnelle ne constituait pas en soi une infraction mais il convenait de la considérer dans le cadre de l'interdiction plus générale établie par la Loi. Aux yeux de la CG, ce dispositif n'avait pas pour but et ne risquait pas d'avoir pour effet de restreindre fortement le jeu de la concurrence parce qu'il consistait uniquement à recommander des prix, pour la seule commodité de ses membres, affirmait-elle. La CG ajoutait que les pharmaciens ne seraient pas obligés d'appliquer ces prix et qu'ils ne subiraient aucune sanction s'ils ne suivaient pas les recommandations. Elle affirmait pour terminer que, puisqu'elle comptait plus de 50 membres, l'exemption prévue dans la Loi s'appliquait. La Commission a refusé d'examiner la demande de la CG au motif que les avantages attendus de ce dispositif pouvaient être obtenus par d'autres moyens n'ayant pas pour résultat de restreindre la concurrence.

Le Président invite ensuite le représentant de l'Espagne à décrire le mécanisme à trois volets que l'Espagne utilise pour vérifier les pratiques de nature à faciliter les oligopoles. Il demande également aux autres délégations de réagir à ce propos.

Le représentant de l'Espagne explique, à propos du premier volet, qu'on peut parler d'un critère d'applicabilité car une intervention se justifie uniquement lorsque le préjudice pour les consommateurs, réel ou redouté, est important. Le deuxième volet consiste à examiner les incidences d'une pratique de nature à faciliter les oligopoles sur la structure du marché. Cette opération se rapproche de la vérification des effets indirects que les analystes effectuent dans le cas d'une fusion. Enfin, l'autorité compétente examine l'objet ou le but de la pratique de nature à faciliter les oligopoles, parce qu'il peut sensiblement varier d'une pratique à l'autre. Certaines pratiques, par exemple les annonces de prix, peuvent aider les clients à planifier leurs investissements.

Le professeur Hay interroge le représentant de l'Espagne sur la loi qui habilite l'autorité de la concurrence à intervenir, et lui demande si elle peut intervenir même en l'absence d'infraction à l'article 81.

Le représentant de l'Espagne explique que l'autorité de la concurrence juge nécessaire d'engager des poursuites dans certains cas au titre des interdictions prévues à l'article 81 et visant notamment les pratiques qui limitent le degré d'incertitude. Dans certaines circonstances il est possible d'invoquer l'article premier de la Loi relative à la concurrence, quand une pratique ne présente manifestement aucun avantage pour la société et qu'elle est suivie par tous les composants de l'oligopole, même si l'on ne peut pas prouver l'existence d'une entente.

Le Président en vient ensuite à la pratique de l'échange d'informations. Il s'adresse d'abord au représentant du Royaume-Uni pour qu'il explique l'intervention de l'OFT dans l'affaire des écoles indépendantes. Selon la communication du Royaume-Uni, l'échange d'informations est anticoncurrentiel par destination et donc illégal même s'il n'a pas d'effets anticoncurrentiels prouvés. Le Président demande au représentant du Royaume-Uni s'il s'agit d'une règle d'application générale ou d'une règle particulière appliquée uniquement dans ce cas précis.

Le représentant du Royaume-Uni explique que, dans l'affaire des écoles indépendantes, l'OFT a repris une déclaration du Tribunal de première instance que l'on trouvait dans le jugement concernant l'entreprise European Night Services, déclaration selon laquelle toute restriction de la concurrence pouvait être considérée comme une restriction par destination s'il apparaît clairement que la conduite aurait des effets dommageables. Dans ce cas, la Direction de la concurrence n'avait pas à prouver l'existence d'effets réels ou possibles. La question était de savoir si, dans le cas particulier des écoles indépendantes, l'échange d'informations avait clairement pour effet de restreindre la concurrence. Le représentant du Royaume-Uni répond que plusieurs facteurs justifient particulièrement que cette affaire soit traitée comme un manquement « par destination » : premièrement, les informations échangées étaient confidentielles ; deuxièmement, elles concernaient les stratégies futures des écoles en matière de prix ; troisièmement, ces

échanges se faisaient d'une manière régulière et mécanique depuis de nombreuses années ; et, enfin, les prix sur ce marché étaient fixés tous les ans et l'échange d'informations était programmé de façon qu'il tombe pendant la préparation du budget des écoles pour l'année scolaire suivante. Les écoles se communiquaient mutuellement des données actualisées pendant tout ce processus de budgétisation pour pouvoir revoir leurs prévisions de prix au fur et à mesure en fonction des coûts anticipés au cours de l'année à venir – principalement les frais de personnel – mais aussi des tarifs que les autres écoles avaient l'intention de pratiquer.

Le représentant du Royaume-Uni explique que, la Cour d'appel de la concurrence n'ayant pas été saisie de l'affaire, les tribunaux britanniques ne se sont pas encore prononcés à son propos. Le Royaume-Uni invite donc les autres délégués à indiquer s'ils connaissaient des cas semblables et demandé notamment à la France de faire part de son expérience concernant les stations-service des autoroutes.

Le Président attire l'attention des participants sur la communication de la France, très intéressante à ses yeux pour deux raisons. Premièrement, comme le délégué du Royaume-Uni l'a signalé, elle traite de plusieurs affaires survenues dans différents secteurs (stations-service des autoroutes, hôtels et téléphonie mobile). Deuxièmement, elle constitue une excellente synthèse de l'analyse économique appliquée aux échanges d'informations et aux collusions oligopolistiques. D'où la question de savoir comment concilier le point de vue juridique et le point de vue économique. Le Président invite la délégation française à développer ces points.

Pour répondre au délégué britannique, le représentant de la France précise que, selon la norme de preuve en vigueur dans son pays, l'important est de démontrer les effets possibles de la pratique. L'application de cette norme consiste à dépister un mécanisme économique qualitatif et théorique risquant d'altérer le jeu de la concurrence. Il convient en outre d'examiner le contexte, la nature des informations échangées et la forme même de l'échange.

Les cas observés en France concernent des échanges d'informations passés, et non futurs comme au Royaume-Uni. L'échange de données rétrospectives ou actuelles empêche ainsi une guerre des prix et une collusion. D'un autre côté, les entreprises conservent la possibilité d'instaurer des mécanismes d'incitation pour leur personnel de vente en définissant des éléments de référence, par exemple, ou de réorienter leur production vers des marchés dynamiques ou vis-à-vis de concurrents plus efficaces. Cependant, s'agissant de la charge de la preuve, l'autorité de la concurrence doit apporter la preuve des retombées à craindre de la pratique et il appartient aux entreprises d'apporter la preuve des gains d'efficacité. Pour prouver qu'il y a des retombées à attendre, l'autorité prend en considération le nombre d'intervenants, la structure oligopolistique, la nature des informations échangées et la fréquence des échanges, ainsi que la présence éventuelle de barrières à l'entrée. Le fondement juridique de l'intervention de l'autorité de la concurrence réside dans l'entente sur l'échange d'informations proprement dite.

Dans le cas des carburants, le tableau est légèrement différent, les informations ne présentant pas de caractère confidentiel. Le Conseil de la concurrence a vérifié que ces informations étaient en fait utilisées par les entreprises pour se surveiller entre elles, ce qui prouve bien le risque de retombées.

Le professeur Hay souligne qu'il vaut mieux n'avoir à prouver que les effets possibles d'une conduite donnée. Mais si la pratique est en vigueur depuis un certain temps, il convient de se demander si, au regard du droit, il est valable d'invoquer l'existence d'effets possibles ou si la partie adverse peut dire pour sa défense : « Vous ne pouvez pas vous contenter des effets possibles ; vous devez apporter la preuve d'effets réels. »

Selon le représentant de la France, demander de prouver les effets réels, c'est mettre la barre très haut. Or le Conseil de la concurrence met déjà la barre très haut, conformément à la position de la CE et à la jurisprudence John Deere, en ce qui concerne l'environnement, la nature des échanges d'information, etc.

Puis le Président s'adresse à la délégation des États-Unis. Dans la plupart des cas évoqués dans la communication des États-Unis, l'échange d'informations sert à déterminer l'existence d'une entente sur les prix. Mais, dans deux cas – l'affaire des conteneurs et l'affaire ATP en 1982, l'autorité américaine a apparemment jugé que l'échange d'informations représentait en soi une infraction à la loi antitrust. Le Président demande à la délégation des États-Unis si cette interprétation est correcte.

Le représentant des États-Unis explique que, dans l'affaire ATP, le ministère de la Justice avait attaqué huit grandes compagnies aériennes américaines et l'Airline Tariff Publishing Company (ATP), plateforme informatisée complexe d'échange d'informations entre les transporteurs abondamment utilisée dans le secteur pour communiquer des données tarifaires aux systèmes informatisés de réservation et aux agents de voyages. L'ATP est une coentreprise dont le capital est détenu par les compagnies aériennes et dont la base de données est quotidiennement mise à jour en fonction des informations tarifaires fournies par les transporteurs. L'enquête a montré que les compagnies aériennes se servaient de l'ATP pour s'informer mutuellement des changements de tarif et des promotions auxquelles elles se préparaient, avec un échéancier précis. L'affaire a fait suite à deux allégations au titre de l'article premier de la Loi Sherman : selon la première, fondée sur la règle *per se*, les prix et les réductions pratiqués sur certaines lignes étaient fixes, et les concurrents s'étaient entendus sur tel prix pour telle ligne. Selon la seconde allégation, fondée sur la règle de raison, plusieurs compagnies aériennes s'étaient entendues pour faire de l'ATP un outil d'échange d'information leur permettant de se tenir au courant de leurs tarifs et de réduire l'incertitude liée à leur politique des prix. En résumé, c'est cet aspect « facilitant » du mécanisme qui était en cause et qui était mis de l'avant, sous cette désignation, dans la plainte présentée. L'affaire a été tranchée.

Au Président qui avait demandé pourquoi les affaires concernant des échanges d'informations étaient aussi rares, le représentant des États-Unis répond que les échanges d'informations de la première catégorie mentionnés par le professeur Hay, c'est-à-dire ceux réalisés dans le cadre d'ententes injustifiables, n'étaient pas aussi rares qu'on pouvait le penser. À l'autre extrémité du spectre des pratiques, on observe des échanges d'informations entre associations. Ces derniers se révèlent pour la plupart favorables à la concurrence et fructueux ; les associations professionnelles savent très bien faire la distinction entre ce qui est permis et ce qui ne l'est pas. En outre, les sources d'information ne manquent pas sur les renseignements qu'elles peuvent s'échanger au cours de leurs réunions professionnelles. C'est une des raisons pour lesquelles on dénombre peu d'affaires comme celle de l'ATP.

Le Président donne ensuite la parole à la représentante du Brésil, dont la communication traite d'un cas très semblable à celui que les États-Unis viennent d'évoquer. Le Président demande à la délégation brésilienne sur quel principe on s'est appuyé pour traiter cette affaire.

La représentante du Brésil explique que l'ATP avait été engagée par les compagnies aériennes de son pays pour gérer le système informatique. Cette affaire fait suite à une enquête réalisée auprès de quatre grands transporteurs brésiliens qui détenaient à l'époque la totalité du marché. En août 1999, les présidents de ces compagnies avaient tenu une réunion au terme de laquelle ces dernières avaient toutes augmenté de 10 % le prix du billet d'avion sur la ligne très fréquentée entre Rio de Janeiro et Sao Paulo. À ce moment-là, il était impossible à l'autorité de la concurrence d'effectuer des descentes dans les locaux ou de mettre les téléphones sur écoute, et elle a dû se contenter de preuves circonstancielles pour analyser la situation. Il est apparu pendant l'enquête que le système de l'ATP servait à l'échange de données. Il aidait les compagnies aériennes sur trois plans : s'entendre sur les prix, dépister les écarts de conduite et sanctionner ces écarts. L'affaire ATP a été tranchée, mais l'entente a été condamnée sur la base de la preuve

circonscrite de la tenue de réunions, de la limitation de la réduction de prix, et de l'utilisation du système de l'ATP.

Le professeur Hay intervient pour commenter un point soulevé par l'Espagne : celle-ci se réfère dans sa communication à l'article 20 qui concerne tout acte visant à entraver la concurrence. Le professeur Hay demande à l'Espagne s'il interprète correctement cette disposition, dont il croit comprendre qu'elle n'oblige pas à établir l'existence d'une entente. Le représentant de l'Espagne explique que l'article 20 s'applique à toute pratique, unilatérale ou concertée, ayant pour but ou étant en mesure de limiter, restreindre ou altérer d'une autre façon la liberté de concurrence ou d'entreprise.

Le Président demande ensuite à la délégation du Japon d'expliquer un cas intéressant évoqué dans sa communication ; avec l'affaire des feuilles de placage de cuivre, on est très près d'un cas d'entente, même si l'on a tenté de faire passer cette pratique pour un échange d'informations. Pour le Président, il convient de se demander, entre autres questions intéressantes, si la JFTC a appliqué les mêmes critères que ceux que l'on emploierait dans un cas d'entente injustifiable ou si elle utilise des critères différents.

Le représentant du Japon explique que dans l'affaire des feuilles de placage de cuivre, on se trouvait devant une entente sur les prix, cas type d'entente injustifiable. La décision à prendre était simple : y avait-il action concertée ou non ? Il n'a pas été nécessaire de prouver qu'un accord explicite avait été conclu et, pour démontrer l'existence d'une action concertée, il a suffi de prouver la présence d'une entente tacite.

Le représentant du Japon présente ensuite quelques exemples de conseils que l'on trouvait, en matière d'échange d'informations, dans le guide des organismes professionnels intitulé *Trade Association Guidelines* (TAG). Il est dit dans le TAG que, de manière générale, les conduites des catégories suivantes n'ont pas pour effet de restreindre la concurrence et que, en principe, elles n'enfreignent pas la Loi antimonopole :

- Dans le souci d'améliorer le confort des consommateurs, fournir des informations sur le bon usage des produits et services de grande consommation, entre autres.
- Recueillir et diffuser des informations générales sur des sujets comme l'évolution de la technologie, les compétences managériales, la situation du marché, les tendances dans le domaine administratif ou la conjoncture sociale et économique dans le secteur.

Le Président s'adresse ensuite à la délégation de la Corée. Dans sa communication, la Corée indique qu'elle essaye de trouver un juste milieu entre l'application de la règle de raison et l'application du principe *per se*. Le Président explique que l'article 19.5 de la Loi relative à la concurrence semble frapper d'une présomption d'illégalité certains échanges d'informations. Le Président demande à la délégation coréenne dans quelles circonstances la KFTC peut invoquer cette présomption d'illégalité et quels éléments les entreprises doivent produire pour que cette présomption soit levée.

Le représentant de la Corée explique que la Loi relative à la concurrence comporte deux dispositions qui s'appliquent aux ententes illégales et aux actions concertées. La première est l'article 19.1, qui exige la production de preuves directes ou indirectes de ces agissements. La seconde disposition est l'article 19.5, selon lequel il y a présomption d'entente illégale lorsque deux conditions sont remplies : un même comportement est observé chez les concurrents, et on possède la preuve circonstancielle d'une conduite anticoncurrentielle. Autrement dit, selon l'alinéa 5, l'existence de preuves circonstancielles est une condition préalable à l'établissement de la présomption d'illégalité d'une entente. Par exemple, en 1997, dans une affaire concernant les prix pratiqués par trois fabricants, la KFTC a déclaré l'entente illégale aux termes de l'alinéa 5. Mais les entreprises intéressées ont tenté de renverser cette décision en faisant valoir que la similitude des prix était due au fait que l'augmentation des coûts de production était commune à tous

les concurrents, et en soulignant que chaque entreprise avait décidé en toute indépendance des prix qu'elle appliquerait. Mais leur tentative a tourné court. L'article 19.5 respecte le principe général selon lequel le parallélisme conscient ne contrevient pas à la Loi de la concurrence. Une accusation d'entente illégale ne peut être justifiée par l'existence d'un parallélisme conscient que si l'on possède des preuves circonstanciées et d'autres éléments aggravants.

Le Président demande alors à la délégation de la République tchèque de fournir des explications, à propos des caisses d'épargne-logement, sur les critères employés pour analyser les échanges d'informations. Plus précisément, il souhaite en savoir plus sur la méthode d'analyse utilisée par l'autorité de la concurrence pour prouver l'illégalité d'un échange d'informations.

Le représentant de la République tchèque explique que, dans le cas des caisses d'épargne-logement, le problème vient de la mise en œuvre sur le long terme d'un accord portant sur l'échange de statistiques commerciales très détaillées. Cet accord liait toutes les caisses d'épargne-logement de la République tchèque qui s'échangeaient chaque mois des informations de 30 types différents, y compris sur l'évolution du nombre d'accords et des parts de marché au cours du mois écoulé. Cela permettait de suivre facilement les mouvements du marché ; les informations étaient tellement détaillées et d'une telle qualité qu'aucun établissement n'aurait pu se les procurer seul sans la coopération de ses concurrents. Mais il a été impossible d'obtenir la preuve matérielle d'une entente sur les prix ou d'une action concertée sur le marché. Toutefois, la Loi de la concurrence permet à l'autorité de la concurrence de conclure à l'existence d'une conduite illégale même en invoquant l'éventualité d'effets anticoncurrentiels. Il n'est pas nécessaire de démontrer ni de prouver la réalité de ces effets. Le problème est apparu sur le marché deux ans avant la tenue de l'enquête : les frais appliqués par les établissements augmentaient insensiblement mais régulièrement depuis très longtemps. L'autorité de la concurrence a cherché à mettre en évidence une entente injustifiable, mais en vain ; en revanche, elle a mis au jour une entente très précise et détaillée portant sur l'échange d'informations. Pour ce qui était de l'aspect qualitatif de l'échange d'informations, l'autorité de la concurrence a décidé de faire barrage à cette entente pour éviter qu'elle ne porte atteinte à la concurrence et pour rétablir l'efficacité de cette dernière sur le marché.

Le représentant de l'Afrique du Sud souhaite s'exprimer sur le cas des établissements bancaires. Il demande ce que les autorités de la concurrence doivent penser de la pratique selon laquelle, dans les heures qui suivent la modification de son taux directeur par la banque centrale, toutes les autres banques annoncent à leur tour et dans des termes identiques qu'elles ont décidé de réviser leurs propres taux de base et taux hypothécaire, généralement dans la même proportion. Cette question relève d'abord de la politique macroéconomique ; de toute évidence, il n'existe aucune entente entre les banques étant donné que cette pratique est très ancienne. Si entente il y a, ce pourrait être entre la banque centrale et les banques qui guettent les signaux donnés par la banque centrale en matière de politique macroéconomique. À une seule occasion, quelques années en arrière, la banque centrale avait baissé son taux directeur, et les quatre principales banques avaient annoncé – là encore dans un deuxième temps mais dans les mêmes termes – une baisse de leurs taux de base, baisse légèrement inférieure à celle décidée par la banque centrale.

Le représentant de la République tchèque rebondit sur cette intervention pour expliquer qu'en République tchèque la situation se présente un peu différemment. Il arrive que la banque centrale, le gouvernement ou le ministère des Finances donne le signal d'une augmentation ou d'une diminution des taux. Le problème qui s'était posé en République tchèque était le suivant : alors que depuis presque un mois le gouvernement ni la banque centrale n'avait donné de signe de changement, un des établissements avait décidé de relever ses taux et, deux mois plus tard, tout le monde voyant que rien ne bougeait, toutes les autres banques avaient elles aussi augmenté leurs taux.

Le Président demande alors à la délégation des États-Unis si la Loi Sherman couvre les situations du genre de celle exposée par l'Afrique du Sud. Le représentant des États-Unis explique que le secteur

bancaire ne bénéficie d'aucune exemption. Les initiatives de la Fed relevant de missions publiques échappent aux lois antitrust. Mais tout ce que les banques privées entreprennent en réaction aux décisions de la Fed peuvent évidemment poser un problème dès lors qu'elles font cause commune et concluent une entente.

Le représentant de la Roumanie intervient pour s'exprimer sur le rôle du secteur bancaire et expliquer que le droit de la concurrence ne s'applique pas au système bancaire dans la mesure où les banques relèvent de textes législatifs spécifiques. Le représentant de la Roumanie revient sur l'intervention de l'Afrique du Sud pour déclarer qu'il n'existe pas de situation type valable pour tous les pays et que les cas de figure diffèrent selon que les banques privées s'alignent ou non rigoureusement sur le comportement de la banque centrale. En Roumanie, par exemple, la Banque nationale a une position débitrice nette dans le système et non une position créditrice. Les banques privées tirent principalement leurs ressources non pas de la banque centrale mais d'autres sources. Les banques privées ne suivent pas toujours la banque centrale lorsqu'elle révisé son taux directeur.

Le Président aborde le quatrième volet du programme de la table ronde. Plusieurs communications évoquent le cas d'entreprises dont les pratiques de nature à faciliter les oligopoles n'ont fait l'objet d'aucun accord ou ne résultaient d'aucun « accord explicite ». Le jugement que l'on porte sur ces pratiques varie visiblement selon les pays. La Hongrie, par exemple, indique dans sa communication que l'envoi unilatéral, par une entreprise, d'informations sur ses prix à ses concurrents serait considéré comme une mesure illégale et concertée en l'absence de protestation de ses destinataires ; la Belgique semble de cet avis ; aux yeux du Danemark, une information unilatérale sur les prix n'est pas suffisante pour établir la culpabilité de l'entreprise au regard du droit de la concurrence. Pour commencer, le Président a donné la parole à ces trois pays.

Le représentant de la Hongrie indique que l'affaire concernait les bureaux de change situés dans le centre touristique de Budapest. Au moment du lancement de l'enquête, ces officines étaient déjà aux prises avec d'autres autorités comme la police ; elles faisaient déjà l'objet d'une enquête pénale pour divers agissements de leur part. Pour cette raison, elles avaient déjà pris certaines mesures « défensives » qui n'ont pas aidé l'autorité de la concurrence à recueillir des preuves directes. Les descentes dans leurs locaux n'ont donné aucun résultat ; l'autorité n'a trouvé aucune preuve directe d'une entente sur les taux de change ni d'informations facilitant l'existence d'une entente injustifiable de ce type ; les témoins hésitaient à parler. La seule preuve directe recueillie par l'autorité tient dans les informations qu'une des parties diffusait quotidiennement sur les taux de change qu'elle comptait appliquer. L'autorité de la concurrence a estimé que les télécopies de ces communications et des échanges avec d'autres parties ne suffisaient pas à établir que les destinataires avaient refusé de lire le document ou protesté contre l'envoi de ces informations. Mais l'autorité a constaté que, si plusieurs officines se faisaient concurrence sur le marché, il existait néanmoins un rapport étroit entre les taux de change annoncés par l'établissement en question et ceux pratiqués par les destinataires de l'information. L'autorité de la concurrence se trouvait devant le choix suivant : soit conclure à l'existence d'une entente injustifiable sur des prix facilitée par la diffusion d'informations, soit conclure à l'existence d'une entente sur l'échange d'informations dont on pouvait observer les effets sur le marché. Au bout du compte, l'autorité a opté pour la première solution et établi qu'il existait sur le marché une entente injustifiable sur des prix, dont le fonctionnement était facilité par la conduite observée et dont l'existence était corroborée par une analyse économique des variations de cours sur le marché.

Le représentant de la Belgique explique que, concernant l'annonce unilatérale qui n'avait été suivie d'aucune protestation des destinataires, l'autorité de la concurrence franchirait un pas de plus. Il lui faudrait vérifier si, dans les faits, le marché a suivi et appliqué les consignes annoncées. Cela signifie que, du moins pour ce qui est des annonces unilatérales, la norme de preuve est l'impact effectif sur le marché. À cet égard, le délégué convient avec le représentant de la France qu'il s'agit d'une norme très difficile à respecter. Cela explique en partie pourquoi il y a si peu d'affaires. Au moment de la préparation de sa

communication, l'autorité de la concurrence s'occupait d'un cas presque identique à l'affaire Caterpillar mais, au lieu de l'alignement des prix qu'elle attendait, elle a observé une forte diminution de la part de marché de l'entreprise dominante même avant que ses concurrents aient annoncé leurs prix futurs. Cela montre que la frontière est mince entre des annonces unilatérales anticoncurrentielles et des annonces concurrentielles.

Le représentant du Danemark indique que l'approche adoptée par son pays repose sur l'article 6 de la Loi relative à la concurrence, en vertu duquel les pratiques de nature à faciliter les oligopoles peuvent être déclarées illégales. Aux termes de cet article, tout accord entre des entreprises qui vise directement ou indirectement à réduire la concurrence est interdit. Par conséquent, en vertu de la loi, il doit exister une certaine volonté commune entre les parties. Dans le cas d'une annonce unilatérale, il faudrait donc qu'il y ait une certaine volonté commune ou que l'annonce se révèle être le fruit d'une action concertée. L'autorité danoise de la concurrence n'a pas encore connu de cas d'entreprise qui transmette unilatéralement des renseignements sensibles à ses concurrents, de sorte qu'elle doit réfléchir à la façon de réagir à une telle situation.

Le représentant du BIAC explique que prendre des mesures coercitives contre des pratiques concertées sans réciprocité, c'est s'aventurer sur un terrain dangereux, surtout lorsqu'il s'agit d'échanges d'informations qui ne sont pas privés mais publics. Sans réciprocité, il est très difficile de trouver un motif prouvant indubitablement l'existence d'une conduite anticoncurrentielle. Concernant l'affaire Caterpillar, le BIAC explique que le genre de matériel vendu par Caterpillar oblige souvent les entreprises qui souhaitent les acheter à définir des lignes budgétaires et qu'il est très concevable qu'une annonce de prix anticipée soit décidée dans l'intérêt de la clientèle. Pour déterminer les effets d'une annonce de prix, l'autorité devrait donc, entre autres choses, examiner si les clients en tirent un avantage. Le BIAC a également entendu plusieurs pays, comme la Nouvelle-Zélande, recommander que l'on effectue une contre-vérification ; aux États-Unis et au Canada, la loi dispose que les éventuels gains d'efficacité compensatoires d'une pratique doivent pouvoir être vérifiés. Pour le BIAC, c'est particulièrement important s'agissant des annonces unilatérales de prix. Pour terminer, le BIAC note que dans certaines affaires où il y a eu une annonce de changement de prix, c'est un peu comme si l'on jugeait une aventure extraconjugale sans amant ni maîtresse ; à ce stade, on n'en est qu'aux conjectures et il convient d'examiner soigneusement les faits observés avant de leur associer de mauvaises intentions.

Le Président souligne que la communication espagnole est très proche des propos tenus par la Belgique au sujet des annonces unilatérales de prix : « Si, de sa propre initiative, une entreprise accomplit un acte qui, imité par ses concurrents, facilite la coordination, et si, sans que rien n'ait été planifié à proprement parler, les concurrents s'alignent sur cette entreprise d'une manière appropriée, des poursuites pourraient être engagées pour 'entente' ». Le Président demande à l'Espagne si elle possède une expérience de cette pratique, si des cas se sont présentés, et si la règle appliquée se rapproche effectivement de celle expliquée par le délégué de la Belgique.

Le représentant de l'Espagne explique que la démarche espagnole est proche de celle exposée par la Belgique et la France dans le sens où, pour se prévaloir de l'interdiction légale des actions concertées à l'encontre d'une annonce unilatérale, il faut pouvoir prouver l'existence d'une certaine coordination des décisions. Puis le délégué revient sur un commentaire du BIAC en notant qu'il importe d'établir un certain équilibre, de différencier les annonces de prix en fonction de leur objet ou de leur finalité. Certaines peuvent avoir un but différent, par exemple celui de faciliter les investissements des clients ; ce serait alors comme un test d'efficacité. Le représentant de l'Espagne prend l'exemple suivant : soit un marché composé de deux acheteurs et sur lequel des appels d'offres publics sont lancés à intervalle régulier, par exemple tous les trois ou six mois. Il n'y a qu'une seule grosse entreprise et un ou deux autres intervenants ; la situation du marché est propice aux collusions tacites, les barrières à l'entrée sont importantes, etc. Après plusieurs interactions, les soumissionnaires peuvent trouver un axe de convergence, l'acheteur peut ne pas

être au fait des règles d'adjudication, ou des prix supraconcurrentiels peuvent être observés. Or ce marché connaît ensuite une explosion des coûts. Les soumissionnaires se trouvent alors devant l'alternative suivante : soit attendre la prochaine offre et surenchérir ; soit envisager une annonce publique immédiatement. Le représentant de l'Espagne explique que, dans ce cas, l'annonce publique aura peut-être pour unique objet de trouver plus facilement cet axe de convergence.

Le Président invite le représentant de la Corée à s'exprimer. Ce dernier a en effet indiqué qu'en vertu des lois de son pays la conduite de l'entreprise dominante peut être jugée illégale si cette dernière adopte une stratégie des prix dont elle espère qu'elle sera suivie par d'autres intervenants du marché. Le Président demande à la délégation coréenne si sa position est plus ou moins proche de celle exposée par les autres délégués et si la Corée a connu des affaires relevant de ce volet de la loi.

Le représentant de la Corée explique que les liens d'interdépendance purement oligopolistique ne peuvent être sanctionnés. Par conséquent, quand l'entreprise dominante fixe le prix en toute indépendance, d'autres entreprises peuvent lui emboîter le pas. Mais quand elle arrive à connaître les intentions de prix de ses concurrents en recourant à des pratiques de nature à faciliter les oligopoles – échanges anticipés d'informations sur les prix, diffusion anticipée des tarifs, etc. –, sa méthode de fixation des prix risque d'être jugée illégale. Ainsi, dans le cas de l'entente sur les prix conclue entre Korean Air et Asiana Airlines (premier et deuxième transporteurs aériens de Corée), la KFTC n'a pas réussi à prouver l'existence d'une action concertée ni de l'échange d'informations. Elle a opté pour la position suivante : la divulgation du projet de hausse des prix de Korean Air sur le système informatisé de réservations a amené Asiana Airlines à décider une hausse équivalente au même moment. Selon la même logique, les décisions prises en matière de prix dans le sillage d'une entente ou de pratiques illégales de nature à faciliter les oligopoles peuvent contrevenir au droit de la concurrence. À l'inverse, lorsqu'une petite entreprise s'aligne unilatéralement sur le prix décidé par un acteur dominant, sa conduite n'est pas jugée illégale.

Pour finir, le Président en vient à la question des sanctions, question peu abordée dans la plupart des communications. Le Président donne la parole à la **Commission européenne**, car sa communication traite du programme REACH et des conseils donnés par la Commission à propos des échanges d'informations. Le Président demande à la Commission européenne de présenter un tour d'horizon de ce dossier, les préoccupations qui étaient les siennes, et les recommandations ou les conseils qu'elle pouvait donner.

Le représentant de la Commission européenne explique que la REACH signifie en français « enregistrement, évaluation, autorisation des produits chimiques ». Ce système mis sur pied par l'UE permet des échanges très étendus d'informations entre les entreprises chimiques à des fins de sécurité ou autres. Ces échanges importants d'informations présentent le risque de favoriser les collusions. La Commission a produit des lignes directrices sur ce que les entreprises parties au système peuvent et ne peuvent pas faire de façon à ne pas contrevenir aux règles de la concurrence. Ces lignes directrices ont été élaborées par un consortium composé de représentants du secteur, dont le Conseil européen des fédérations de l'industrie chimique, sous le contrôle de la Commission. Dans ces lignes directrices, les entreprises sont prévenues en des termes très généraux que le droit de la concurrence s'applique dans son intégralité, et qu'elles ne peuvent invoquer leurs obligations au titre de REACH pour se soustraire à ses règles. Ces lignes directrices énoncent des « interdits », c'est-à-dire des pratiques rigoureusement prohibées comme les ententes sur les prix, la limitation de la production, le partage de la clientèle, etc. Il y est également recommandé aux entreprises de s'en tenir strictement aux prescriptions du programme REACH, et on y trouve une liste des informations qui ne peuvent être échangées dans le cadre de REACH. Par ailleurs, il est recommandé aux entreprises de garantir l'anonymat ou la neutralité des informations qu'elles diffusent, en se servant de fourchettes, etc. Enfin, il leur est conseillé ou recommandé de réduire la fréquence de leurs échanges, et de se limiter à la fréquence nécessaire à la réalisation des objectifs du programme REACH. En tout état de cause, si elles doivent communiquer des données sensibles à leurs concurrents, il leur appartient de prendre toutes les précautions utiles et de nommer par exemple un mandataire qui se chargera

de ces échanges. Cette personne pourra produire des chiffres globaux, les présenter sous une forme qui permette de les communiquer à d'autres entreprises, calculer une zone de coûts sur la base des chiffres obtenus et préparer une version non confidentielle de ces chiffres avant de les transmettre à d'autres, etc. Le représentant de la Commission européenne ajoute que, bien que ce système soit relativement nouveau, la Commission n'a pas rencontré de problème depuis le peu de temps qu'il est en place.

Le Président s'adresse au professeur Hay pour lui demander de s'exprimer sur ce qui vient d'être dit.

Le professeur Hay déclare que l'aspect le plus intéressant de la discussion réside dans le fait que toutes les délégations s'entendent apparemment sur la nécessité de « parvenir à faire rentrer » dans la catégorie des ententes les conduites qu'elles observent, au risque d'aboutir à une classification un peu artificielle et de forcer un peu le sens du terme « entente ». D'où l'intérêt que présentent des lois comme celle du Brésil ou bien des textes de référence tels que l'article 5 de la Trade Commission Act, sur lesquels on peut se fonder pour condamner des conduites unilatérales qui ont clairement pour effet de restreindre la concurrence. Le professeur Hay souligne que, s'il fallait recommander l'adoption de tels textes, il conviendrait de veiller à trois choses :

- Pour aboutir à ses fins, l'autorité ne devrait probablement pas se contenter de démontrer l'existence d'effets possibles. Face à une conduite unilatérale, il serait probablement préférable d'apporter la preuve de ses effets réels, malgré les difficultés que cela peut entraîner.
- Il n'y a pas lieu d'adopter une loi habilitant l'autorité à prononcer des sanctions ou des amendes au pénal.
- La loi adoptée devrait exclure la possibilité d'une action privée.

La représentante du Brésil explique que, malgré sa superficie, le Brésil abrite beaucoup de marchés et de structures oligopolistiques de petites dimensions dans de nombreux secteurs. L'autorité de la concurrence a dû se soucier de recenser soigneusement les stratégies qui constituent des pratiques illégales. Dans le cas de l'ATP, les commissaires se sont livrés à d'âpres discussions, et la décision n'a pas été adoptée à l'unanimité. Une des parties prétendait que c'était elle qui fixait les prix. Il n'était pas facile de prouver le contraire et il était logique que les autres parties s'alignent sur l'entreprise dominante. Pour la représentante du Brésil, il s'agit d'un sujet délicat qui a été traité avec la plus grande attention. D'autre part, elle a beaucoup apprécié que le professeur Hay non seulement prenne la parole au début de la rencontre mais qu'il donne aussi son avis et qu'il participe à la discussion.

Le représentant du Taipei chinois revenu revient l'affaire des stations d'essence pour noter que l'autorité savait parfaitement qu'il était difficile de conclure à l'existence d'une entente sur la base de preuves circonstancielles d'éléments aussi bien favorables que défavorables au jeu de la concurrence. De l'avis de spécialistes du Taipei chinois, le principal problème du secteur des carburants tient à la structure du marché et non à la conduite des entreprises parce que le gouvernement n'a pas ouvert suffisamment le marché pour permettre à la concurrence de s'intensifier en amont, c'est-à-dire entre les fournisseurs d'essence. La compagnie Esso, autrefois sur le marché, en est sortie dans les années 90. Le représentant du Taipei chinois demande au professeur Hay si l'autorité doit s'inquiéter d'une conduite observée dans une petite économie telle que le Taipei chinois, dont le marché ne peut supporter que deux concurrents, ou s'il n'existe pas des lignes directrices que l'autorité devrait suivre pour l'analyse de ce type de marché.

Le professeur Hay répond que, sur le fond, il n'y avait pas lieu de s'inquiéter si, du fait de la situation régnant au Taipei chinois, l'autorité est dans l'impossibilité de développer la concurrence. S'il existe un duopole sur le marché d'un bien matériel dont les prix sont presque à coup sûr publics, l'autorité doit sans doute l'accepter d'autant qu'en l'occurrence l'activité ne présentait rien de répréhensible.

Le représentant de l'Italie revient sur un commentaire du représentant de la Norvège concernant l'affaire Nielsen pour expliquer que Nielsen joue un rôle important en matière d'information dans tous les pays. Il demande au représentant de la Norvège quelle était l'actualité des informations dans l'affaire Nielsen. Le représentant de la Norvège indique que les informations étaient communiquées à un rythme hebdomadaire et qu'elles étaient très détaillées d'un bout à l'autre de la chaîne pour des produits précis avec un conditionnement précis.

Avant de clore la table ronde, le Président souligne l'avantage d'une règle qui tiendrait compte des éventuelles retombées négatives sur la concurrence ainsi que des éventuels gains d'efficacité que peut apporter une conduite. Une règle de cette nature pourrait non seulement simplifier la vie des autorités de la concurrence mais aussi remédier au problème soulevé par le BIAC. Par ailleurs, elle apporterait un certain confort intellectuel. Le Président n'était pas convaincu par l'argument selon lequel certaines pratiques de nature à faciliter les oligopoles pouvaient viser un objectif différent. Il est vrai que certaines de ces pratiques n'ont pas pour objet de restreindre la concurrence mais, si elles présentent malgré tout un risque pour la concurrence, les autorités peuvent être en droit d'intervenir. Le Président convient avec le BIAC qu'il faut tenir compte des gains d'efficacité. En conclusion, le Président remercie le professeur Hay de son intervention et les délégués d'avoir produit un débat stimulant.