

Unclassified

DAF/COMP(2012)17

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

11-Oct-2012

English - Or. English

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

Cancels & replaces the same document of 05 October 2012

UNILATERAL DISCLOSURE OF INFORMATION WITH ANTICOMPETITIVE EFFECTS

JT03328482

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on “Unilateral Disclosure of Information with Anticompetitive Effects (e.g. through press announcements)” held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in February 2012.

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 «Échanges unilatéraux d'informations ayant des effets anticoncurrentiels (par le biais de communiqués de presse, par exemple)» qui s'est tenue en février 2012 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la coopération et l'application de la loi).

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

From the Secretariat background paper and the discussion at the roundtable on unilateral disclosure of information with anticompetitive effects, the following points emerge:

- (1) *Greater transparency in the market is generally efficiency enhancing and, as such, welcome by competition agencies. However, it can also produce anticompetitive effects by facilitating collusion or providing firms with focal points around which to align their behaviour.*

Market transparency is a necessary attribute for the model of perfect competition as it increases efficiency by reducing customers' search costs and allowing suppliers to benchmark their performance with that of their competitors. Markets operate more efficiently when participants convey information about their prices and offerings, allowing customers to choose between competing products and suppliers, thereby increasing competition between sellers.

Knowledge about future price developments, for example, allows customers to plan their purchases accordingly. Similarly, disclosing information about the performance of a company and its future business strategy allows securities markets to operate efficiently by providing current and potential investors with relevant data concerning that company.

However, increased transparency may also have negative effects on the market through either directly facilitating collusion among competitors or, particularly with respect to prices, providing them with focal points, which may be used by firms to align their behaviour. Unilateral announcements can function as signalling devices by which they can indirectly communicate their intentions. Such information disclosure, and the resulting transparency it creates, may also be used by firms to monitor and enforce already existing collusive agreements. The result may have potentially anticompetitive effects on the market.

- (2) *Given the potential pro- and anticompetitive effects of unilateral announcements, competition agencies face the challenge of deciding which are on balance harmful. Whether the anticompetitive effects of unilateral disclosure of information outweigh any efficiency enhancing effects is highly fact specific. Bright line rules are therefore difficult to establish. Nevertheless, certain factors, such as the nature, content and context of the disclosure, allow for general categorizations that may be used as starting points in competitive analysis.*

All delegates recognized the potentially harmful effects that unilateral announcements of elements such as future and current prices may have on competition. However, in dealing with these practices, competition agencies face significant challenges in discerning unilateral communications used for the purposes of facilitating collusion or aligning of behaviour from genuine unilateral practices with potentially pro-competitive effects. The delegates generally agreed that the competitive assessment of such cases should be very fact specific.

Nevertheless, several elements may be used as general indicators as to the competitive effects of unilateral information disclosure. Private disclosure between competitors has generally very few

pro-competitive effects. On the other hand, public disclosure of information to both sellers and buyers is principally viewed as positive, in particular if the information has commitment value, meaning that it can be reliably traded upon. The discussion also highlighted the collusive potential of so-called “cheap talk,” which despite its lack of commitment, might be used to create focal points around which competitors may align their behaviour.

In terms of content, the disclosure of current or future price information carries greater anticompetitive potential than disclosure of past price information. Equally significant, the context in which the information disclosure occurs is essential for the assessment of its potential effects. Disclosure in concentrated, oligopolistic markets with homogenous products carries much greater likelihood of anticompetitive effects than announcements made in markets with a competitive supply structure and with heterogeneous products.

- (3) *It is generally accepted that “private” announcements, which are directed to competitors only, do not have efficiency benefits and can only be motivated by the intention to help rivals to coordinate on a particular collusive price. Conversely, public announcements, which are directed to both rival firms and consumers, may provide significant benefits to customers. This positive effect is generally considered stronger than the collusive effects of the announcements.*

Overall, there was broad agreement that genuinely public disclosure of information should generally be viewed as legal. It was therefore suggested that the creation of a safe harbour for certain public announcements of future price intentions would be viable, provided they have commitment value.

Not every public announcement, however, is necessarily pro-competitive. Public announcements might be harmful to competition if the public communication includes an invitation to collude. Invitations to collude are generally understood as unilateral solicitations to enter into unlawful horizontal price-fixing or market allocation agreements. While private communications can always be construed as invitations to collude, public announcements can also be construed as invitations to collude depending on how the communication is formulated.

This would generally be the case of announcements which: (i) contain not only information which must, as a matter of commercial policy, be conveyed to customers but also information which is not intended for that audience, for example including references to specific competitors; (ii) disclose more information than is strictly necessary for the purpose of the announcement; (iii) make the behaviour announced contingent on what other market players or the industry at large will do; and (iv) include threats (e.g. a price war) in case other market players do not accept the invitation to collude.

- (4) *In pursuing unilateral disclosure of information with anticompetitive effects, competition agencies have generally relied on legal concepts derived from the prosecution of cartels, such as agreement or concerted practice. Some jurisdictions, where these concepts have either been interpreted too narrowly or been altogether absent, have introduced specific provisions dealing with unilateral announcements.*

The roundtable revealed a variety of approaches to unilateral disclosure of information. Generally, concepts derived from the prosecution of cartels can be successfully employed in dealing with these cases.

Some jurisdictions have relied on the concept of “agreement” and looked at whether an agreement can be inferred from evidence suggesting that competitors have not acted

independently. Other jurisdictions, in particular those in the European Union, rely on the concept of ‘concerted practice’, which allow them to deal with practices, which, while anticompetitive, do not amount to an agreement.

Proving that a unilateral disclosure of information constitutes an agreement restricting competition can be difficult, in particular in jurisdictions where the concept of an agreement has been interpreted narrowly. For example, in Australia difficulties in proving the existence of an agreement have led to legislative reforms and to the adoption of a new provision dealing specifically with price signalling and unilateral disclosure of information. In the United States, on the other hand, in light of the challenges with applying Section 1 of the Sherman Act to these practices, the enforcement agencies have relied on the concept of an ‘invitation to collude’ under Section 5 of the FTC Act and Section 2 of the Sherman Act.

Several delegates highlighted the issue of criminal liability for cartel conduct, which may be implicated when cartel law concepts are used to pursue unilateral disclosure of information. However, the consensus among the participants was that criminal sanctions would not be suitable for these types of violations given the potentially beneficial effects of the implicated behaviour.

- (5) *For purpose of establishing a collusive arrangement it is irrelevant whether only one firm unilaterally informs its competitors of its intended market behaviour, or whether all participating firms inform each other of their respective deliberations and intentions.*

Reciprocal disclosure is not a condition for establishing an antitrust infringement. But reciprocity should not be confused with some form of acknowledgment that the information has been received and used by the target(s) of the communication. In other words, it is necessary that the information communicated has some influence on the pricing of competitors.

When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data. Simple acquiescence can be considered as acceptance of the information received. It is for this reason that particularly in the context of private exchanges (e.g. a price announcement made by a competitor during a meeting of the trade association), courts have considered it necessary that participants to the meeting had to publicly distance themselves from the discussion in order to escape liability.

In the context of invitations to collude, competition authorities have also looked at the competitors’ reaction to the invitation and have construed as acceptance of the invitation any specific market conduct which is in line with the offer to collude. For example, reacting to an invitation to raise prices by raising its own prices would be taken as a form of acceptance, unless it can be shown that the price increase was contemplated before the invitation was extended. Similarly, not reacting to the perceived invitation with a clear statement taking distance from it could be taken as a sign that the target of the invitation has the intention to accept it.

- (6) *Companies are often required to disclose various types of information about their business and performance. Given these obligations and the general efficiency enhancing effects of greater transparency, businesses would welcome competition agencies providing guidance on the legality of information disclosure in various contexts. While per se type prohibitions may not be suitable in this area, the use of safe harbours could be considered.*

In many jurisdictions information disclosure is mandated by laws or sector regulations. This is the case of securities rules and regulations, under which public companies are required to regularly disclose vast amounts of corporate and financial information. In addition to complying with regulatory requirements, private and public firms are strongly encouraged to provide additional information to stakeholders and potential investors. This is particularly the case after the announcement of quarterly results, when executives are often subject to detailed questions by financial analysts seeking to determine the future outlook of the company. Unilateral communication of company information therefore happens both regularly and legitimately, and to a large extent produces the beneficial effects of transparency described above. Nevertheless, these forms of communication might expose the company to antitrust liability in the light of the risk of collusion that they may create.

As the context of the communication is so determinative of its legitimacy, *per se* rules are less helpful in this respect. Despite this need for case-by-case analysis, given the large amounts of legitimate, and in some cases required, information that firms disclose to the general public, it would be useful for enforcers to provide guidelines and safe harbours that would allow companies to steer clear of infringing competition laws. In principle, these guidelines should take into account the modern demand on firms to provide information to the public and investors as well as the specific conditions of each industry.

SYNTHÈSE

Par le Secrétariat

Il ressort du document de référence du Secrétariat et des débats de la table ronde sur les communications unilatérales ayant des effets anticoncurrentiels que :

- (1) *D'une manière générale, le renforcement de la transparence du marché favorise les gains d'efficacité et, à ce titre, est bien vu des autorités de la concurrence. Pour autant, il peut également être à l'origine d'effets anticoncurrentiels en favorisant les collusions ou en fournissant aux entreprises des points de convergence sur lesquels leurs concurrents peuvent s'aligner.*

La transparence du marché est une condition nécessaire du modèle de concurrence parfaite dans la mesure où elle favorise l'efficacité en réduisant les coûts de recherche des consommateurs et permet aux fournisseurs de comparer leur performance avec celle de leurs concurrents. Les marchés fonctionnent mieux lorsque les intervenants communiquent des informations sur leurs prix et leur offre, donnant ainsi la possibilité aux consommateurs de choisir entre des produits et des fournisseurs concurrents, intensifiant par là même la concurrence entre les vendeurs.

La connaissance de l'évolution future des prix, par exemple, permet aux consommateurs de planifier leurs achats en conséquence. De même, la publication d'informations sur les résultats d'une entreprise et sur sa future stratégie commerciale concourt à l'efficacité des marchés financiers en fournissant aux investisseurs effectifs ou potentiels des informations pertinentes sur cette entreprise.

Cependant, l'amélioration de la transparence peut également avoir des incidences négatives sur le marché, soit directement, en facilitant les collusions entre concurrents, soit, notamment pour ce qui concerne les prix, en fournissant aux entreprises des points de convergence sur lesquels elles peuvent s'aligner. Les communications unilatérales peuvent servir aux entreprises à donner des indications sur leurs intentions. Ces communications, et la transparence qui en résulte, peuvent également être utilisées pour surveiller et faire appliquer des accords d'entente déjà existants. Elles sont donc susceptibles d'avoir des effets anticoncurrentiels sur le marché.

- (2) *Compte tenu des effets potentiellement favorables ou défavorables à la concurrence des communications unilatérales, les autorités de la concurrence ont la lourde tâche de distinguer les cas où les effets préjudiciables l'emportent. Déterminer si les effets anticoncurrentiels d'une communication unilatérale sont supérieurs aux gains d'efficacité qu'elle apporte relève d'une analyse au cas par cas. Il est donc difficile de tracer une frontière claire entre les deux. Cependant, à partir de certains éléments, comme la nature, le contenu et le contexte de la communication, il est possible de répartir les communications unilatérales en grandes catégories qui serviront de base à l'analyse de leurs effets sur la concurrence.*

Les délégués s'accordent à reconnaître les effets potentiellement préjudiciables pour la concurrence de la divulgation unilatérale de certaines informations comme les prix actuels ou futurs. Cependant, il est particulièrement difficile pour les autorités de la concurrence qui se

penchent sur ces pratiques de discerner les communications unilatérales visant à favoriser les collusions ou à aligner les comportements, des véritables pratiques unilatérales recélant des effets potentiellement favorables à la concurrence. La majorité des délégués estiment que cette distinction doit s'opérer au cas par cas.

Certains éléments donnent toutefois des indications générales sur les effets des communications unilatérales sur la concurrence. Ainsi, les communications privées entre concurrents ont généralement très peu d'effets positifs sur la concurrence. En revanche, la diffusion publique d'informations destinées tant aux vendeurs qu'aux acheteurs est d'une manière générale considérée comme favorable à la concurrence, notamment si ces informations ont valeur d'engagement, ce qui signifie qu'elles peuvent être valablement utilisées dans les transactions. Les débats ont également porté sur les libres propos (*cheap talk*) contenus dans les communications, qui, bien qu'ils n'engagent pas leur auteur, peuvent contribuer à établir des points de convergence sur lesquels les concurrents peuvent aligner leurs comportements.

En termes de contenu, la publication d'information sur les prix actuels ou futurs recèle un potentiel anticoncurrentiel supérieur à la publication d'information sur les prix antérieurs. De même, le contexte dans lequel la publication des informations intervient est déterminant dans l'évaluation de ses effets éventuels. Les risques de répercussions anticoncurrentielles est ainsi supérieur sur les marchés concentrés, oligopolistiques et dotés de produits homogènes que sur les marchés où la structure de l'offre est concurrentielle et les produits hétérogènes.

- (3) *Il est généralement admis que les communications privées destinées aux seuls concurrents ont peu de chance d'être justifiées par des gains d'efficience et ne peuvent être motivées que par l'intention d'aider les concurrents à coordonner leurs actions sur un prix collusoire donné. À l'inverse, les annonces publiques qui sont adressées à la fois aux concurrents et aux consommateurs peuvent être largement bénéfiques aux clients. Il est généralement estimé que cet effet favorable l'emporte sur les effets collusoires.*

Dans l'ensemble, un consensus s'est dégagé sur le fait que, lorsque les communications sont strictement publiques, elles doivent être généralement considérées comme légales. Dans ce contexte, la faisabilité de la création d'une zone de sécurité pour certains communiqués publics portant sur les prix projetés a été évoquée, sous réserve que ces annonces aient valeur d'engagement.

Toutes les annonces publiques ne sont toutefois pas nécessairement favorables à la concurrence. Elles peuvent porter atteinte à la concurrence dès lors qu'elles invitent à la collusion. Ces invitations sont généralement comprises comme des sollicitations unilatérales à conclure des accords horizontaux illicites de fixation des prix ou de répartition de marché. Si les communications privées laissent peu de place au doute, les annonces publiques, quant à elles, peuvent être considérées comme des invitations à la collusion en fonction de la façon dont elles sont formulées.

C'est généralement le cas lorsque les annonces : (i) comportent non seulement des informations devant être diffusées aux clients dans le cadre de la politique commerciale, mais aussi des informations qui ne sont pas destinées à ce public, comme des références à des concurrents particuliers ; (ii) divulguent davantage d'informations que celles qui sont strictement nécessaires pour les besoins de l'annonce ; (iii) lient le comportement annoncé à l'action des autres acteurs du marché ou du secteur dans son ensemble ; et (iv) prévoient des menaces (comme une guerre des prix) si les autres intervenants du marché n'acceptent pas l'invitation à la collusion.

- (4) *Dans leur lutte contre les communications unilatérales ayant des effets anticoncurrentiels, les autorités de la concurrence s'appuient généralement sur des notions juridiques tirées du droit des ententes, comme la notion d'« accord » ou de « pratique concertée ». Dans certains pays, où ces notions sont interprétées de façon trop restrictive ou n'existent pas, des dispositions ad hoc ont été adoptées.*

La table ronde révèle la diversité des approches dans le traitement des communications unilatérales. D'une manière générale, les concepts juridiques issus du droit des ententes sont employés avec succès en l'espèce.

Certains pays s'appuient sur la notion d'« accord » pour tenter de déterminer si à partir de certains éléments, il est possible de déduire que les concurrents n'ont pas agi de façon indépendante et de conclure à l'existence d'un accord. D'autres, notamment dans l'Union européenne, utilisent la notion de « pratique concertée », ce qui leur permet d'examiner des pratiques qui, tout en étant anticoncurrentielles, ne constituent pas un accord.

Il peut être difficile de démontrer que les communications unilatérales constituent un accord préjudiciable à la concurrence, notamment dans les pays où la notion d'accord revêt une acception très étroite. Par exemple, en Australie, les difficultés à attester de l'existence d'un accord ont conduit à une modification de la loi et à l'adoption d'une nouvelle disposition spécifique sur les indications de prix et les communications unilatérales. En revanche, aux États-Unis, au vu de la difficulté à appliquer l'article 1 du Sherman Act à ces pratiques, les autorités de la concurrence se sont appuyées sur le concept d'« invitation à la collusion » au titre de l'article 5 de la loi instituant la Federal Trade Commission (FTC) et de l'article 2 du Sherman Act.

Plusieurs délégués font observer que les entreprises peuvent encourir les sanctions pénales applicables aux comportements d'ententes lorsque des concepts issus du droit des ententes sont utilisés dans l'examen des communications unilatérales. Les participants s'accordent toutefois sur le fait que les sanctions pénales ne sont pas adaptées à ce type d'infraction compte tenu des effets potentiellement bénéfiques de ces annonces.

- (5) *Pour établir l'existence d'une entente, il importe peu de déterminer si une seule entreprise informe unilatéralement ses concurrents du comportement qu'elle entend adopter sur le marché ou si toutes les entreprises concernées s'informent mutuellement de leurs réflexions et intentions respectives.*

La communication réciproque n'est pas nécessaire pour établir une infraction au droit de la concurrence. Mais il convient de distinguer réciprocity et toute forme de reconnaissance du fait que l'information a été reçue et utilisée par le ou les destinataire(s) de la communication. En d'autres termes, il est nécessaire que les informations transmises aient une certaine influence sur la politique tarifaire des concurrents.

Lorsqu'une entreprise reçoit des données stratégiques d'un concurrent (que ce soit lors d'une réunion ou par courrier postal ou électronique), elle sera supposée avoir accepté ces informations et avoir adapté son comportement sur le marché en conséquence, à moins qu'elle n'ait fait savoir sans équivoque qu'elle ne souhaitait pas recevoir de telles données. Un simple acquiescement peut être considéré comme une acceptation des informations reçues. C'est pour cette raison que, notamment en cas d'échanges privés (par exemple lorsqu'une annonce sur les prix est faite par un concurrent durant une réunion de l'association professionnelle), les tribunaux ont jugé qu'il était nécessaire que les participants à la réunion prennent publiquement leurs distances avec ces déclarations afin de ne pas engager leur responsabilité.

Pour ce qui concerne les invitations à la collusion, les autorités de la concurrence se sont également penchées sur la réaction des concurrents à l'invitation et ont estimé que ces derniers acceptaient l'invitation dès lors qu'ils adoptaient un comportement sur le marché cohérent avec l'offre de collusion. Par exemple, augmenter ses prix après y avoir été invité serait considéré comme une forme d'acceptation, sauf si l'on peut démontrer que cette augmentation était déjà envisagée avant l'invitation. De la même manière, si le destinataire de ce que les autorités considèrent comme une invitation ne prend pas ses distances de façon non équivoque avec cette invitation, son attitude peut être interprétée comme une indication de son intention de l'accepter.

- (6) *Les entreprises ont souvent l'obligation de publier différents types d'informations sur leur activité et leurs résultats. Compte tenu de ces obligations et des gains d'efficacité généralement induits par une transparence accrue, les entreprises apprécieraient que les autorités de la concurrence fournissent des orientations sur la légalité de la communication d'informations dans différents contextes. Les interdictions systématiques ne semblent pas pertinentes en l'espèce, mais le recours à des zones de sécurité pourrait être envisagé.*

Dans de nombreux pays, la publication d'informations est obligatoire en vertu de la loi ou de règlements sectoriels. Ainsi, en vertu des règles et réglementations financières, les entreprises cotées sont tenues de publier régulièrement de nombreuses informations institutionnelles et financières. Outre ces obligations légales, les entreprises, cotées ou non, sont fortement incitées à fournir des informations supplémentaires aux actionnaires et aux investisseurs potentiels. C'est notamment le cas lors de la publication des résultats trimestriels, à l'issue de laquelle les analystes financiers posent des questions précises aux dirigeants d'une entreprise dont ils essaient de déterminer les perspectives. La communication unilatérale d'informations sur l'entreprise intervient donc de façon à la fois régulière et légitime, et, dans une large mesure, cette transparence produit les effets bénéfiques décrits précédemment. Pour autant, ces formes de communication peuvent engager la responsabilité de l'entreprise au titre du droit de la concurrence du fait des risques de collusion qu'elles peuvent créer.

La légitimité des communications étant déterminée par le contexte dans lequel elles interviennent, les interdictions systématiques sont peu utiles en l'espèce. L'analyse au cas par cas est nécessaire, même si, compte tenu de l'ampleur des informations légitimes, voire obligatoires, publiées par les entreprises à destination du grand public, il serait utile que les autorités donnent des orientations et créent des zones de sécurité, évitant ainsi aux entreprises d'enfreindre le droit de la concurrence. Ces orientations devraient principalement tenir compte des exigences qui pèsent désormais sur les entreprises en matière d'information du public et des investisseurs, ainsi que des conditions propres à chaque secteur d'activité.

BACKGROUND PAPER

*By the Secretariat**

1. Introduction

Explicit collusion, resulting from "naked" cartels to fix prices, allocation of customers or rig bids is almost universally condemned as unlawful. Conversely, conduct resulting purely from oligopolistic interdependence (tacit collusion) is generally not seen as a violation of competition law. It is also undisputed, however, that between explicit and tacit collusion there are situations in which firms engage in a range of practices that may help them to reduce strategic uncertainty and align their conduct more effectively. There are various strategies that firms can put in place to this purpose. These include artificially increasing market transparency by exchanging information with competitors or setting up more formalized industry-wide information sharing systems, as well as engaging in unilateral communications to the market (e.g. via press releases or other media) about future strategies, such as planned price increases, capacity, output limitations or other future conduct. In doing so, firms offer focal points on which competitors can align themselves, which can result in higher prices and harm for social welfare.

The Competition Committee has already examined the complexity of enforcing competition rules in oligopoly markets¹ and how competition authorities have dealt with facilitating practices.² The Committee also has focused its attention on those business practices which facilitate collusion by increasing market transparency. In October 2007, the Working Party No. 3 held a roundtable on anti-competitive practices within trade and business associations,³ which included a discussion of associational information exchange programs. In October 2010, the Competition Committee specifically addressed the issue of how competition authorities assess direct and/or indirect exchange of information between competitors under antitrust rules. It reviewed in particular the pro- and anti-competitive effects of transparency and the main factors which authorities take into account when determining if an exchange of information has anti-competitive effects or not.⁴

The purpose of this paper is to build on previous OECD work, and review policy and enforcement questions related to purely unilateral communications by firms directed either to competitors or to the public at large. There can be considerable uncertainty surrounding the issue of whether/when competition law should intervene against unilateral disclosures of information (as opposed to reciprocal exchanges of information). There is little guidance from enforcement authorities and courts and the economic literature is at times equivocal. Making a distinction between purely unilateral conduct, such as unilateral communications (or signalling) which falls outside of the reach of competition laws, and co-ordinated

* This paper was prepared by Antonio Capobianco, with the research assistance of Anna Pisarkiewicz.

¹ See OECD, 1999.

² See OECD, 2007(a); and OECD, 2006(a), para 15.

³ See OECD, 2007(b). See also an revised version of the background paper of this roundtable circulated in preparation of the Latin American Competition Forum session on Competition Issues in Trade Associations (Session I), which took place on 13-14 September 2011 (Colombia).

⁴ See OECD, 2010.

conduct which could in principle fall within these laws, can be a difficult task for competition enforcers. While explicit collusion is viewed by most competition authorities as one of the most serious violation of competition law, tacit collusion or conscious parallel behaviour are on the contrary not considered as illegal despite the fact that the outcome can be the same as in explicit collusion cases: prices jointly rise to the supra-competitive levels and possibly to the monopoly level. This raises an enforcement dilemma on how to deal with those practices which do not amount to explicit collusion but favour tacit collusion.

The present paper is organised around three main parts. The first part offers an overview of the economics of collusion and the role of transparency in establishing effective collusive agreements. This will also include an overview of the literature on “cheap talk” and on the differences between private and public exchanges. The paper then discusses the legal constraints facing enforcement authorities when dealing with unilateral actions, such as unilateral disclosures of information. It will discuss how authorities have used the concept of agreement to address these practice, or how they have to look beyond the notion of formal agreements to address other forms of concerted actions between competitors with anti-competitive effects. The last part of the paper focuses on the factors and criteria that competition authorities should take into consideration when assessing if a unilateral disclosure of information may have anti-competitive effects.

A number of points emerge from this paper. These include:

- Unilateral price announcements can be a practice facilitating collusion and can be prohibited as anti-competitive if, as a result of this practice, competitors can reach some type of formal or informal understanding to reduce competition on their future conduct;
- The pro or anti-competitive effects of unilateral announcements depend on the specific circumstances in which they occur; in particular, the risk of anti-competitive effects is higher in concentrated markets with homogeneous products;
- Private announcements (i.e. between competitors only) of future conduct are generally viewed as having an anti-competitive purpose and can hardly be justified by pro-competitive efficiency reasons;
- Public announcements (i.e. to customers as well as to competitors) of future conduct can in theory be used to facilitate collusion, but are generally viewed as pro-competitive as they generate a wide range of benefits, including providing better information to customers who can make better informed choices.

2. An overview of the economic theory on collusion and the role of transparency

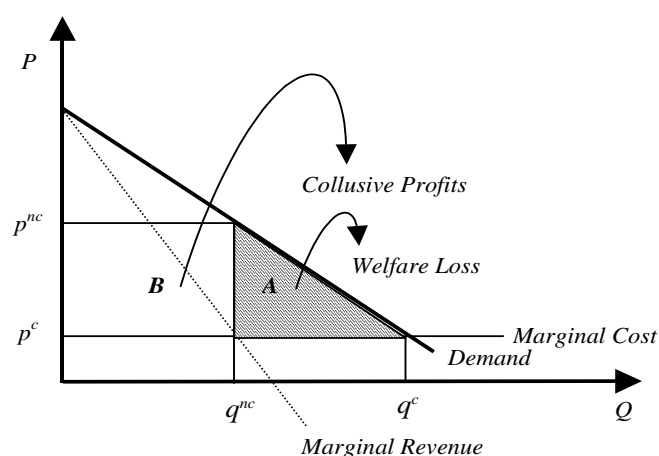
This first part of the paper reviews the main economic literature associated with the competition analysis of information disclosures. After a review of the general theory of collusion, this section reviews the factors which generally lead to a stable collusive outcome, focusing particularly on transparency as an important factor⁵ to establish a collusive agreement, monitor its enforcement and punish possible deviations from it. It will then review the efficiency enhancing effects of public disclosures (as opposed to the collusion enhancing effects of private disclosures) and the literature on ‘cheap talk’ as a possible way for competitors to establish focal points for price collusion.

⁵ Particularly in concentrated markets with homogeneous products, transparency is a major factor (but not the only one) which allows firms to raise the general level of price to a level which approximates the monopoly price by enjoying the benefits of the market structure and staying clear from explicit forms of co-ordination.

2.1 The notion of collusion as a market outcome

In the economic literature,⁶ the term ‘collusion’ refers to any form of co-ordination or agreement among competing firms with the objective of raising prices (or lowering output) to a level which is higher than the non-collusive equilibrium.⁷ In other words, collusion is a joint profit maximization strategy put in place by competing firms in order to achieve monopoly prices and profits jointly, rather than competing independently. Firms can collude on different competitive variables. In most cases, co-ordination involves keeping prices above the competitive level. In other markets, however, collusion may aim at limiting production or the amount of new capacity brought to the market. Firms may also co-ordinate by dividing the market, for instance by geographic area or other customer characteristics, or by allocating contracts in bidding markets.

The diagram below shows the effect of collusion on social welfare.⁸



In a perfectly competitive market (i.e. a market with an infinite number of firms, homogeneous products and perfect information) prices will be set at marginal cost. The competitive equilibrium will then be at q^c and firms will not make any economic profits. If firms succeed in cartelizing the market, they will be able to move the equilibrium from q^c to the non-competitive equilibrium and quantity q^{nc} will be available at the cartel price of p^{nc} (i.e. where marginal costs equal marginal revenues). In the new cartelized outcome, the net social welfare will fall (shaded area A). At the same time, the cartelist's profit will increase (non-shaded area B).

Differently from the legal approach, which is more focused on the *means* and the *form* used by competitors to collude,⁹ the economic theory focuses on *market outcomes*, i.e. the impact of business

⁶ For further details, see Stigler, 1964; Tirole, 2002; Carlton and Perloff, 1999; Scherer and Ross, 1990; Bishop and Walker, 2010; Philips, 1995; Ivaldi, Jullien, Rey, Seabright and Tirole, 2003; Creatini, 2002; and the extensive literature cited in these texts.

⁷ Generally, economists would identify this level with as Bertrand equilibrium price, if firms compete on prices; or the Cournot equilibrium quantity, if firms compete on output.

⁸ For the simplicity's sake we have assumed that the collusive outcome equals to monopoly and that absent collusion the market would be perfectly competitive. Collusion, however, can lead to prices higher than the competitive price, but not necessarily as high as the monopoly price.

practices on prices and output. Hence, regardless of whether collusion is achieved by way of a formal cartel between competing firms (explicit collusion) or by a tacit interdependence between the members of a tight oligopoly, economists consider that the economic effect of collusion is the same: a higher level of price to the detriment of social welfare. As we will discuss later in this paper this raises an important policy questions on if and when competition law should be concerned with collusion, and particularly with situation of tacit interdependence.

2.2 *Factors which favour collusive outcomes – an overview*

To reach and maintain over time a collusive equilibrium it is necessary that the colluding parties are in a position (i) to agree on a “common policy”; (ii) to monitor whether the other firms are adopting this common policy; and (iii) to enforce it. In other words, rivals must be in a position to reach a common understanding to restrict competition, they need to have an incentive not to depart from the agreed common policy and, if they do, the other must be in a position to punish the deviation. Without these three conditions firmly in place, a collusive equilibrium is not possible.¹⁰

Various factors may facilitate rivals reaching collusive outcomes and maintaining them over time.¹¹ Some of these factors refer to the structure of the market or to the characteristics of the products at stake; other relate more to the functioning of market and to its competitive dynamics.¹² Not all of these factors, however, are necessary t for collusion to be possible in a given market.¹³

⁹ E.g. agreements to fix price or quantities. See, for example, the US Sherman Act, 15 U.S.C. § 1 according to which “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” Similarly, Article 101 TFEU lists (although in a non-exhaustive manner) what are generally considered the most common ways in which competition can be restricted. In particular, it prohibits “*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection.*”

¹⁰ See Stigler, 1964; Tirole, 1988; Carlton and Perloff, 1990; Scherer and Ross, 1990; Ayres, 1987.

¹¹ For a general discussion of these factors see Levenstein and Suslow, 2006. The authors also point to other factors which make cartels stable, such as the cartel internal organisation and its ability to learn about the market and its dynamics, or factors related to social pressure more generally.

¹² See for example, the Horizontal Merger Guidelines of the US department of Justice and of the Federal Trade Commission (available on the website of the two agencies); the European Commission’s Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings (OJ 2004 C 31/5–18); or the Merger Assessment Guidelines of the Competition Commission (CC) and the Office of Fair Trading (OFT) in the United Kingdom (available on the web sites of the two agencies).

¹³ It must be noted that the analysis of these factors does not provide evidence of actual collusion on the market but it only provides an analytical framework to analyze if the market conditions are conducive to a collusive outcome. An extensive review of the main factors which facilitate collusion is included in the OECD, 1999.

- Collusion is more likely to occur in concentrated markets given the positive correlation between the number of firms in the market and the degree of competition: the fewer the firms in the market, the easier it is for them to collude successfully.¹⁴
- Collusion is easier to reach, monitor and sustain over time if the products concerned are homogeneous. It is also easier to co-ordinate on a price for a single, homogeneous product, than on hundreds of prices in a market with many differentiated products. In the latter situation, co-ordination and monitoring of deviations is much more difficult as rivals are not in a position to know whether price differences are due to cheating or to differences in the products concerned.
- Collusion is easier if incumbents are shielded from competition by new entrants. If barriers to entry/expansion are high or if there are no substitute products, collusion is more likely to occur and firms more likely to join a conspiracy. Entry of new suppliers attracted by the high profits of cartel members is a fundamental factor that jeopardizes the stability of the cartel itself.
- The number and the strength of the outsiders to the collusive understanding is also an important factor to assess whether collusion is a likely market outcome. Collusive prices are not sustainable if buyers can successfully resist the price increase by diverting their demand to alternative supply sources.¹⁵
- It is also easier to co-ordinate firms' commercial strategies in markets in which conditions (i.e. the demand and supply functions) are relatively stable. In a market with volatile demand or frequent entry by new firms, collusion may not be sustainable.
- A collusive equilibrium is only possible if the same firms regularly meet and interact in the market place. Only in this case are firms capable of adapting their respective strategies by acting and reacting to those of their competitors.
- If firms meet in more than one market (so-called *multi-market contacts*), it is more likely that punishment mechanisms will be credible and effective. Deviations in one market may trigger punishment in all markets, with greater losses for the cheater. Intuitively, collusion is also more likely if firms are similar.¹⁶
- Asymmetries in size or cost structures, which are likely to result in differences in market shares, can prevent firms from correctly allocating the reduction in output required to obtain the expected collusive price increase.¹⁷

¹⁴ The evidentiary value of structural evidence, however, is limited. There are examples of highly concentrated industries selling homogeneous products which are 'benign' in terms of competition and where one experiences fierce rivalry. Conversely, cartels are known to have existed and prospered for many years in industries with numerous competitors and differentiated products. See OECD, 2006(a), at para 15.

¹⁵ If the cartel is facing a concentrated structure of demand, it is likely that the buyers can leverage their bargaining power to stimulate price competition between the participants in the cartel (i.e. providing incentives for cheating) and between the cartel members and residual competitors. See Snyder, 1996.

¹⁶ There are economic studies which support this intuition and conclude that if there are significant differences in the size, market share and cost structure of the colluding firms, the collusive strategy is unlikely to be sustained over time. See Compte, Jenny and Rey, 2002; Kühn and Motta, 1999.

¹⁷ On the impact on the likelihood of collusion of production capacities and capacity utilization rates, see Philips, 1995, Chapter 9.

2.3 *The role of market transparency as a relevant factor for collusive or competitive outcomes*¹⁸

Market transparency is an important factor which affects the likelihood of competitive or collusive outcomes. A market's degree of transparency can be loosely defined as the speed with which leading firms can reliably inform themselves of rivals' actions.¹⁹ The economic literature has historically placed transparency and access to information at the centre of the competition process and of the economic benefits that it generates. The economic thinking on market transparency and its relevance for antitrust purposes is twofold. In 1776 Adam Smith warned us about the possible consequences of competitors' communications on competition.²⁰ However, in order for the invisible hand to produce benefits for society as a whole it is necessary for independent actors to plan and conduct their economic activity according to price signals. Therefore, market transparency, can either facilitate collusion or competition, depending on the circumstances:²¹

- On the one hand, market transparency should be encouraged; after all, the model of perfect competition presumes the availability of perfect information about demand and supply in any given market. Increased knowledge of market conditions mostly benefits consumers, who can choose between competing products with a better understanding of the product characteristics; customers can also compare terms and conditions of the various offerings and freely choose the most suitable one for their needs. Enhanced transparency benefits consumers by lowering search costs.²² On the supply-side, the knowledge of the market and its key features (e.g., characteristics of demand, available production capacity, investment plans, etc.) facilitates the development of efficient and effective commercial strategies by market players. New entrants or fringe players may benefit from this information and enter the market more effectively and compete more fiercely against incumbents.
- Increased transparency, on the other hand, is one of the factors required to reach a collusive understanding and make sure that it is sustainable over time. Transparency generally contributes to the ease of reaching an "agreement", and decreases incentives to cheat by reducing the time before cheating is detected. In order to reach terms of co-ordination, to monitor compliance with such terms and to effectively punish deviations, companies need to acquire detailed knowledge of competitors' pricing and/or output strategies. The artificial removal of the uncertainty about competitors' actions, which is at the basis of the competitive process, can in itself eliminate the normal competitive rivalry.²³ This is particularly the case in highly concentrated markets where increased transparency enables companies to better predict or anticipate the conduct of their competitors and thus align themselves to it.

¹⁸ For a general discussion of pro and anti-competitive effects of information exchange see OECD, 2010 and Capobianco, 2004.

¹⁹ See OECD, 1999.

²⁰ In *The Wealth of Nation* of 1776, Adam Smith observed: "*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*" (Vol. I, Bk. I, Ch. 10 (1776).

²¹ See OECD, 2010. See also Mollgaard and Overgaard, 2001; Philips, 1988.

²² See OECD, 2001.

²³ See, Court of Justice of the European Union in case C-8/08, *T-Mobile*, of 4 June 2009, para 33.

2.3.1 *Public transparency and private transparency*

It follows from the previous discussion that when assessing the relevance of transparency for collusion a distinction should be made between *public* transparency and *private* transparency. Public transparency (i.e. when the information is disclosed to all market players, including consumers) has the potential to intensify competition, while private transparency (i.e. the information is only disclosed to suppliers) is likely to restrict it.²⁴ An information exchange is genuinely public if it makes the exchanged data equally accessible to suppliers and customers at no cost.²⁵ The assumption is that information disclosed publicly may be used to decrease the likelihood of a collusive outcome to the extent that competitors unaffiliated to the exchange, potential entrants, buyers and end customers are able to constrain any potential restrictive effect on competition.

The reason the distinction between public market transparency and private market transparency should have a bearing on defining a sound policy is that the economic literature associates with public disclosures a number of pro-competitive effects which are not associated with private communications.²⁶ First and foremost, increased transparency and better knowledge of market conditions benefit consumers. In 1961, Stigler emphasised the importance of search costs for consumers.²⁷ Buyers need to identify sellers and their prices, while customers need to search for knowledge on the quality of goods. The more information is available on the market (i.e. on the products and services and their suppliers), the better placed consumers are to choose between competing products, as they will have a greater understanding of the product characteristics. Consumers can knowledgeably compare terms and conditions of the various offerings and freely choose the most suitable one for their needs.²⁸ The positive effects of price advertising are generally considered outweighing in magnitude the collusive effects of the announcements.²⁹

In these circumstances, enhanced market transparency through disclosure to the public can benefit consumers by lowering consumers' search costs.³⁰ Reinforcing the conclusion of traditional economics, behavioural economics have shown that better informed consumers can be instrumental in developing vigorous competition between suppliers.³¹ This stream of literature has also shown that information asymmetries and absence of information may not only distort consumer behaviour but may also adversely

²⁴ See Kühn and Vives, 1995.

²⁵ Collins and Bennett argue that "Public information that is repackaged with additional functionality that, for example, allows a more detailed interrogation of the data and then is sold on to firms would not be considered public under this definition. Neither would information that is placed on a website that is inaccessible to the general public or hidden away from public view" (Bennett and Collins, 2010).

²⁶ See Motta, 2004. Benefits on the supply side of market transparency will not be discussed here as they are common to both public and private communications. For a more in-depth review of the pro-competitive effects of transparency for suppliers see OECD, 2010.

²⁷ See Stigler, 1961.

²⁸ Greater transparency may increase customers' switching. However, the effects of this are ambiguous. Bjorkroth, for example, argued that increased consumer switching increases the profits from deviating (reducing the incentive to co-ordinate), but also increases the ability to punish the deviator (increasing the incentive to co-ordinate). See Bjorkroth, 2010. See also Farrell and Klemperer, 2006; Bos, Peeters and Pot, 2010.

²⁹ For a review of the empirical and theoretical literature on price advertising, see Fumagalli and Motta, 1999.

³⁰ For a discussion on the links between increased transparency to the benefit of consumers and switching costs, and their effects on competition, see the discussion on retail banking in OECD, 2006(b).

³¹ For a further discussion on this, see Bennett, Fingleton, Fletcher, Hurley and Ruck, 2010.

impact competition and competitive outcomes.³² In these circumstances, increased transparency may improve social welfare.³³ From a more empirical and pragmatic perspective, if the intention of unilateral announcements is to provide focal pricing points for competitors, private communications are significantly less costly and more effective than public announcements.³⁴ Moreover, public announcements are by definition visible. As such, they increase the risk of detection by competition enforcers, and facilitate the evidence gathering exercise should these practices be investigated at a later stage.

2.3.2 How valuable is “cheap talk”?

If transparency is an important factor to assess whether collusion is a likely market outcome, then there is a question surrounding which kind of information disclosures contribute to artificially increasing the degree of transparency and therefore to establishing a risk of collusion. One factor that the literature points out is that communications between firms may have little value in facilitating co-ordination if disclosed information is not *credible* and *verifiable*. If it is meant to offer a focal point for co-ordination, the disclosing party will have the incentive to reveal the information which will likely move the focal point the closest to its own optimum equilibrium. Similarly, if the disclosure is to ensure the monitoring of an existing collusive arrangement, incentives to lie on possible departures from that arrangement will be high. A rational rival will therefore discount any information not compatible with the incentives of the disclosing firm, and the information will become meaningless: this is the so called “cheap talk” critique.³⁵

Economists, however, have reached different conclusions on the question of how much “cheap talk” can contribute to reaching collusive outcomes. Despite the fact that when talk is cheap there are no incentives to tell the truth, some economists suggest that communications between firms, even if not verifiable, can lead players to Nash equilibria.³⁶ In particular, they argue that “cheap talk” can assist in a meeting of minds and allow firms to reach an understanding on acceptable collusive strategies.³⁷ It is necessary however that the information disclosed is *self-committing*. Only then players should be able to co-ordinate on a stable Nash equilibrium.³⁸ Others scholars have suggested that cheap talk can assist in creating and sustaining those personal relationships which play an important role in sustaining collusion

³² See Klemperer, 1995, according to which high switching cost allow firms to maintain higher prices and earn higher profits.

³³ Bennett and Collins have, however, emphasise the importance that access to the information must be accompanied by the ability of the consumer to assess it and to act upon it. In this respect, some have warned of the effects on consumer choices and consequently on social welfare of firms’ strategies to “overflow” consumers with information on products and services, the only purpose being to complicate the assessment of the information and therefore making consumer choice more difficult. See Bennett and Collins, 2010; see also, Ellison and Ellison, 2009; Gabaix and Laibson, 2006.

³⁴ Public announcements have a smaller risk of under-enforcement (see Bennett and Collins, 2010). For this reason, their effects on competition should be analysed on a case-by-case basis. As for private exchanges, while they should not be viewed as presumptively anti-competitive in all circumstances, most competition authorities are very cautious and looked at very closely to assess if there is any benefit/efficiency that can justify them under the competition rules.

³⁵ See Baliga and Morris, 2002; Bennett and Collins, 2010.

³⁶ A Nash equilibrium is a strategic selection such that no firm can gain by altering its strategy, given the existing strategies of its rivals. Thus, a Nash equilibrium represents the best response by each firm to the given strategies of others. See Nash, 1951; see also Fudenberg and Tirole, 1989; Shapiro, 1989; Neumann and Morgenstern, 1980.

³⁷ See Farrell, 1987; Overgaard and Møllgaard, 2007.

³⁸ See Farrell, 1988.

and overcoming the problems of trust.³⁹ Others have shown that cheap talks can matter in a variety of economic interactions involving private information: cheap talk can matter in bargaining⁴⁰ or in political contexts.⁴¹ Finally, even “cheap talk” which is not immediately verifiable may be of some concern as announced plans can often be verified later or revoked, whereas wrong announcements can be punished, which in long-term commercial relationships may be enough to create credibility.⁴²

The Airline Tariff Publishing Company case in the US

An example of an enforcement action based on cheap talk as a means to provide anti-competitive focal points is the US Airline Tariff Publishing Company case (ATP). In December 1992, the US Department of Justice (DOJ) sued eight of the largest U.S. airlines and the Airline Tariff Publishing Company (ATP) for price fixing and for operating ATP in a way that facilitated collusion, in violation of Section 1 of the Sherman Act.⁴³ ATP collected fare information from the airlines and disseminated it on a daily basis to all airlines and to the major computer reservation systems that served travel agents.

According to the DOJ, ATP thus allowed air carriers to respond quickly to each others’ prices and made the deterrence more imminent which in itself facilitated collusion. ATP provided both a means for the airlines to disseminate fare information to the public and a means for them to engage in essentially a private dialogue on fares. The defendants designed and operated ATP’s computerized fare exchange system in a way that unnecessarily facilitated co-ordinated interaction among them so that they could

- communicate more effectively with one another about future fare increases, restrictions, and elimination of discounted fares,
- establish links between proposed fare changes in one or more city-pair markets and proposed changes in other city-pair markets,
- monitor each other’s changes, including changes in fares not available for sale, and
- reduce uncertainty about each other’s pricing intentions.

The ATP case involved a typical example of “cheap talk”: carriers communicated price information but did not commit to a course of action: they could announce a future price increase but left open the option to rescind or revise it before it took effect. If the terms of agreement are complex (e.g., specifying prices in numerous markets) but there is a common desire to reach agreement, cheap talk can help firms reach a collusive equilibrium. ATP collected fare information from the airlines and distributed it daily to all the airlines and to the major computer reservation systems that serve travel agents. This arrangement was an efficient instrument for cheap talk.⁴⁴

The case was resolved with a consent decree crafted to ensure that the airlines did not continue to use any fare dissemination system in a manner that unnecessarily facilitated price co-ordination or that enabled them to reach specific price-fixing agreements.

³⁹ See Farrell and Rabin, 1996.

⁴⁰ See Farrell and Gibson, 1989; Mathews and Postlewait, 1989.

⁴¹ See Austen-Smith, 1990; Austen-Smith, 1993; Matthews, 1989.

⁴² See Nitsche and von Hinten-Reed, 2004; Bigoniy, Fridolfsson, Le Coq and G Spagnolo, 2010.

⁴³ United States v. Airline Tariff Publishing Co., 1994-2 Trade Cas. (CCH) ¶70,687 (D.D.C. Aug. 10, 1994). For more details on the case, see US submission to the OECD Report on *Oligopoly*, 1999, Paris.

⁴⁴ See also Borenstein, 1999.

Empirical evidence on the role of informal communications in supporting collusion is also ambiguous. First, most cartel cases involve a significant amount of communication between participants; face to face communications are those which seem to work best and are used to create trust.⁴⁵ Empirical studies have also concluded that pre-play communication facilitates collusion, and particularly that the mere knowledge that one will be informed about the other players' actions can substantially enhance the likelihood of co-ordination when there is also a signal about intended play. Otherwise there are no effects.⁴⁶ In contrast, the experimental literature on non-binding price signalling shows that although price signalling often increases transaction prices, this increase is very often temporary and the equilibrium behaviour may be unaffected by these non-binding price signals.⁴⁷ More permanent price increases due to price signalling seem to be more likely when sellers compete in multiple markets.⁴⁸ Similarly, the impact of cheap talk seems to depend on the signalling language available to sellers: very restrictive language (e.g. one price proposal per period) is unlikely to have a lasting effect on prices, while multiple-round signalling structures can generate persistently higher prices.⁴⁹

3. The role of communication in establishing an anti-competitive agreement or concerted practice

So far, we have seen how the term 'collusion' refers to any form of co-ordination or agreement among competing firms on a market, with the objective of raising prices (or lowering output) to a level which is higher than the non-collusive equilibrium. This second part of the paper explores the approach of economics and law to explicit and tacit collusion, and the policy implications of enforcing cartel rules.⁵⁰ In particular, it discusses how the traditional concepts of 'agreement' and 'concerted practices' have been used by competition enforcers to address situations where collusion between rival firms is facilitated by business practices aimed at increasing market transparency without the need for competitors to enter into explicit agreements.

3.1 *Explicit and tacit collusion*

The most direct way to achieve a collusive outcome is for the firms to interact directly and agree on the optimal level of price or output. Any form of direct contact between firms is defined as *explicit* (or sometimes *overt*) *collusion*.⁵¹ Collusion, however, may not necessarily involve an explicit understanding

⁴⁵ See Levenstein and Suslow, 2006(b); Potters, 2005.

⁴⁶ See Charness and Grosskopf, 2004.

⁴⁷ See Cason, 1995; Holt and Davis, 1990.

⁴⁸ See Caslon and Davis, 1995.

⁴⁹ See Harstad, Martin and Normann, 1997. This is the position that was taken by the US Department of Justice in the ATP case, discussed further in this paper, which involved "cheap talk" such as announcing a future price increase but leaving open the option to rescind or revise it before it took effect. The Department argued that if the terms of agreement are complex but there is a common desire to reach agreement, cheap talk can help firms reach a collusive equilibrium. See US submissions in OECD, 2007(b). See also Farrell and Rabin, 1996.

⁵⁰ This paper will not discuss how collusion can be addressed through other competition provision. In particular through merger control provisions which prohibit mergers which can lead to co-ordinated effects post transaction. Similarly, it will not discuss the use of the concept of joint or collective dominance under unilateral conduct rules against business practices similar to those discussed in this paper.

⁵¹ The fact that the firms have direct interactions does not necessarily imply that explicit collusion is easier to reach and to sustain over time. On the contrary, the likelihood of reaching an explicit as well as a tacit collusive agreement strictly depends on the structural and behavioural factors that discussed above. What really matters over time is the incentive of each firm to cheat on any agreed term and the ability of the

between firms. In oligopolistic markets, firms tend to be interdependent in their pricing and output decisions so that the actions of each firm impact on, and result in, a counter response from the other firms. In such circumstances, oligopolistic firms may take their rivals' actions into account and co-ordinate their actions as if they were a cartel, but without an explicit agreement. Such co-ordinated behaviour is referred to as *tacit* (or sometimes *implicit*) *collusion*, *oligopolistic interdependency* or *non-cooperative oligopoly*.⁵²

Specific features of explicit collusion

As opposed to tacit collusion, explicit collusion makes the reaching of a collusive outcome more efficient, at least in the initial phase of the cooperation. Through explicit collusion the colluding firms may co-ordinate on a price level which is higher than the price level that they could have achieved under tacit co-ordination. Explicit collusion can also help structuring the cooperation in such a way as to simulate some of the required conditions for the sustainability of collusion. In particular, if the market is not inherently transparent, firms can improve transparency by setting up an institutionalized exchange of information.⁵³ Finally, explicit collusion may facilitate co-ordination among a larger number of firms than under tacit collusion. Explicit cartels are also more easily detectable (as they leave trails which can be used as evidence against the members) and are clearly caught by antitrust rules, which expose their members to severe monetary and (in some jurisdictions) criminal sanctions. For these reasons, firms normally only turn to an explicit cartel if the market structure cannot sustain a tacitly collusive equilibrium.

In contrast to explicit collusion, in a tacitly collusive context, the non-competitive outcome is achieved by each participant deciding on its own profit maximizing strategy independently of its competitors. This occurs when the market is extremely concentrated, stable, homogeneous and transparent. Under these conditions, the pricing and output actions of each firm have a significant impact upon those of rivals, and after a period of repeated actions/reactions, firms become conscious that their respective strategic choices are interdependent.

No profit-maximising firm wants to make zero profits forever and each firm knows that it could earn supra-competitive profits by collectively charging a non-competitive price. The indefinitely repeated interaction makes the threat of punishment credible so that each firm knows that any deviation from the non-competitive equilibrium would trigger a price war pushing prices towards the competitive equilibrium. Therefore, such oligopolistic interaction renders individual strategies conducive to an equilibrium at non-competitive prices/output rational, without actually communicating or agreeing explicitly. This form of conscious parallel behaviour generally has the same economic outcome as a cartel that fixes prices or restricts output, without however the need to enter into an explicit agreement.

In reality, however, there can be a considerable gap between the intention to co-operate and the ability to do so successfully. It can be difficult to reach mutually acceptable terms of co-operation, and to ensure that firms do not deviate from them. In order to increase the chances for successful collusion, and in particular to improve abilities to detect and punish cheating, co-operating firms may employ what are known as "facilitating practices".

other firms to detect and punish any such deviation. The need for *all* of these conditions to be met applies equally to tacitly collusive understandings *and* to explicit agreements.

⁵² For a general overview on the theory of tacit collusion see Tirole, 2002; Carlton and Perloff, 1999; Scherer and Ross, 1990; Bishop and Walker, 2010; Philips, 1995.

⁵³ For a discussion on information sharing arrangements in the context of trade associations see OECD, 2007.

3.2 *Competition and oligopolistic interdependence – the policy dilemma*

The previous discussion on explicit and tacit collusion shows how, under certain market conditions (i.e. markets with few sellers and homogenous products), supra-competitive price strategies may be the normal outcome of rational economic behaviour of each firm on the market. It is for this reason that tacit collusion or conscious parallelism falls outside the reach of competition laws on cartels. However, from a policy perspective, such a tacitly collusive outcome may not be desirable as it confers on firms the ability to significantly suppress output or raise prices to the detriment of consumers. This is the so-called *oligopoly problem*, which has generated a large debate on whether competition policy should be concerned with tacit collusion or not.⁵⁴ Cartel rules generally are not designed to tackle individual and rational market strategies of a single firm, even if the overall result of similar individual strategies has an equivalent outcome to a cartel.

Between explicit collusion (which should always be regarded as illegal under competition rules) and mere conscious parallelism (which should fall outside the reach of competition law as it does not entail any form of co-ordination between competitors), there is a grey area of business behaviour which goes beyond conscious parallelism but at the same time does not involve an express agreement between competitors. This is a situation which may arise particularly in oligopolistic markets where competitors are able to co-ordinate on prices and increase the likelihood of a tacitly collusive outcome by engaging in activities (so called “facilitating practices” or signalling) which make co-ordination easier (e.g. because they facilitate communications) and more effective (e.g. because they facilitate detection of cheating and administration of punishment of deviations).⁵⁵

Facilitating Practices – Definition and examples

According to the OECD, 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 co-ordinate their conduct more effectively.*”⁵⁶

Competition authorities have investigated a broad range of conducts as facilitating practices. One of the most commonly cited examples of facilitating practices or signaling devices⁵⁷ include direct or indirect communications between competitors, which may take the form of information exchanges between competitors⁵⁸, public speeches or announcements (such as media dissemination of price information or advance price announcements).

Other types of facilitating practices include pricing systems that facilitate collusive outcomes, such as most favored customer clauses, alignment clauses, English clauses, resale price maintenance clauses, uniform delivery pricing methods and multiple basing point pricing systems.⁵⁹ Facilitating practices can also include vertical arrangements that may facilitate co-ordination among suppliers, such as certain minimum advertised price programs and interlocking directorates, which can facilitate co-ordination among competitors. Product standardisation and benchmarking are also often considered as facilitating practices.

⁵⁴ For a general overview of the policy implication of the ‘oligopoly problem’, see Hovenkamp, 1994, Chapter 4; Turner, 1962; Posner, 1969; Posner, 1976. See also Hay, 1999.

⁵⁵ See Kovacic, 1993; Page, 2009; Arquit, 1993; Hay, 2008; Blechman, 1979; Ayres, 1987.

⁵⁶ See OECD, 2007(a).

⁵⁷ See generally Areeda and Hovenkamp, 2003; Hay, 1982.

⁵⁸ See OECD, 2010; Capobianco, 2004.

⁵⁹ For a general review of these pricing practices see Capobianco, 2007.

Leaving aside structural regulatory solutions to the oligopoly problem,⁶⁰ which would imply an intervention affecting the structure of the market to favour a more competitive market outcome, competition policy makers have devised different ways of addressing the oligopoly problem. They have expanded the traditional notions of ‘agreement’ and ‘concerted practice’ to tackle these practices which facilitate a non-collusive equilibrium in markets where pure oligopolistic interdependence would not be feasible or because it would be insufficient to yield monopoly profits. Moreover, in many countries, competition authorities have used *ex ante* merger control rules to prevent structural changes which could favour co-ordinated effects⁶¹ or *ex post* unilateral conduct rules which try to address the oligopolistic interdependence under the notion of joint or collective dominance.

The question, however, remains of whether behavioural rules prohibiting anti-competitive agreements and concerted practices are suited to address situations leading to oligopolistic interdependence and under which circumstances cartel rules are designed to pursue practices which facilitate collusion absent evidence of actual conspiracy between the firms. These intermediary situations between explicit and tacit collusion are becoming more and more frequent in sophisticated economies, where old fashioned “agreements” are increasingly replaced by more discrete, looser forms of co-ordination and informal understandings between firms. Such forms of interaction between competitors may still have anti-competitive effects and might require scrutiny under competition rules.

The main challenge for competition enforcers, however, is to distinguish between lawful conduct that is the result of oligopolistic interdependence and certain additional conduct that can be characterized as unlawful facilitating practices. Unfortunately, there is no bright line test to make this distinction. Most conduct characterized as facilitating practice can have pro and anti-competitive effects, depending on the circumstances in which it occurs. Given such ambiguous nature, a careful examination of a specific practice, its anti-competitive effects and efficiencies, as well as its objective or purpose, will usually be necessary to determine whether a given practice can be considered unlawful.⁶² In exceptional cases, on the other hand, the circumstances may support a presumption that certain practices are anti-competitive so that a competition authority can condemn such practices under an abbreviated analysis without proof of actual anti-competitive effects. These practices are considered to restrict competition *per se* or by object.

The rest of the paper will discuss when unilateral disclosures of information can raise concerns under competition laws.

3.3 Unilateral disclosures of information and cartel agreements

3.3.1 Unilateral disclosures as an ancillary practice to a main illegal agreement

Unilateral disclosures are less problematic when competitors chose to use them as part of a wider anti-competitive agreement, for example by fixing prices or sharing customers. The disclosure is then just an ancillary mechanism used to support the enforcement and monitoring of the main anti-competitive agreement.⁶³

⁶⁰ The oligopoly problem is fundamentally a structural problem which requires structural solutions which could be pursued by sector regulator. See Turner, 1962.

⁶¹ Merger control is a partial answer to this policy dilemma and is used to prevent mergers which affect the market structure to the point where they are likely to lead to tacit collusion in the future (so-called *co-ordinated effects* of mergers). See discussion in Capobianco, 2007.

⁶² See OECD, 2008.

⁶³ See also the discussion below on price leadership.

The analysis of this situation is relatively straightforward and competition authorities would assess it as part of the main anti-competitive agreement. If a price fixing agreement can be successfully established, competition authorities would assess the possible restrictive effects of unilateral disclosures in the broader context of the cartel or the agreement to which they are ancillary.⁶⁴

3.3.2 *Agreements to disclose information*

Competitors can also agree on an industry-wide practice of rivals' unilaterally disclosing sensitive information, such as an agreement to announce list prices. One should distinguish between the case where rivals agree to adhere to terms announced and the case where they simply agree to disclose the information without an obligation to abide by the particular terms of dealing disclosed. The legality of these two different practices depends on whether the facilitating practice consists of an agreement to adhere to particular terms of dealing or an agreement to share information. While both types of agreement may facilitate price co-ordination, an agreement on terms of dealing should be viewed with greater suspicion.

An agreement that facilitates price co-ordination by fixing rivals' terms of dealing is likely to be held illegal *per se*.⁶⁵ In the United States, for example, the Supreme Court in *Sugar Institute*⁶⁶ found that an agreement among rivals to adhere to publicly announced prices was illegal. The agreement to abide by particular terms of dealing was the decisive factor in the Court's judgement. Similarly in *Catalano*,⁶⁷ the Court condemned an agreement not to offer secret discounts which amounted to an agreement by each firm to adhere to announced list prices. Similar reasoning would apply to agreements to adopt other facilitating practices, such as resale price maintenance or basing point or delivered pricing, that enhance price transparency by restricting terms of dealing.⁶⁸

The assessment of an horizontal agreement to adopt a practice of simply disclosing information, without an agreement to adhere to a common commercial policy, would depend on case-by-case analysis of the pro- and anti-competitive effects of the increased transparency. Competition authorities and courts' assessment of such effects normally depends on the nature of the information exchanged, the type of disclosure, and the effects of the practice, given the characteristics of the market.⁶⁹

3.3.3 *Unilateral disclosures as evidence of an illegal agreement*

Unilateral announcements could also be seen as an indirect evidence of a secret illegal agreement. The argument for the latter would be that firms would not voluntarily share confidential information unless they had already agreed to restrict competition between them.

Competition law enforcement officials always strive to obtain direct evidence of agreement in prosecuting cartel cases, but sometimes such direct evidence is not available. Circumstantial evidence is employed in cartel cases in all countries. There are two general types of circumstantial evidence: communication evidence and economic evidence. Of the two, communication evidence is considered to be the most important. Communication evidence is evidence that cartel operators met or otherwise communicated, but it does not describe the substance of their communications. It includes, for example,

⁶⁴ See OECD, 2010; Bennett and Collins, 2010; Capobianco, 2004; Kühn and Vives, 1995.

⁶⁵ See Page, 2010; Lande and Marvel, 2000.

⁶⁶ *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936).

⁶⁷ *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

⁶⁸ See Page, 2010.

⁶⁹ For an extensive review of these factors, see OECD, 2010; see also Capobianco 2004.

records of telephone conversations among suspected cartel participants, of their travel to a common destination and notes or records of meetings in which they participated. Communication evidence can be highly probative of an agreement many of the circumstantial cases included communication evidence; in some the evidence was compelling.⁷⁰

3.4 *Unilateral disclosure of information outside a cartel agreement*

More complex is the situation where rivals adopt parallel facilitating practices, such as individual disclosures of information, for anti-competitive purposes without entering into an agreement. To address this issue, some jurisdictions have relied on the concept of “agreement” and looked at whether an agreement could be inferred from evidence suggesting that competitors have not acted independently. Other jurisdictions have relied on the concept of “concerted practice”.

3.4.1 *The notion of agreement and concerted practice in the EU*

Article 101 of the Treaty on the Functioning of the European Union (the ‘TFEU’) prohibits “*all agreements [...] and concerted practices [...] which have as their object or effect the prevention, restriction or distortion of competition within the internal market [...]*.” The Treaty, however, does not provide a definition of an agreement or a concerted practice. This is left to the case law of the European courts and to the enforcement practice of the European Commission.

The notion of ‘agreement’ within the meaning of Article 101 TFEU has been construed very broadly. According to the General Court, “[...] *an agreement [...] must be founded upon the direct or indirect finding of the existence of the subjective element that characterizes the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties’ intention to behave on the market in accordance with the terms of that agreement is expressed.*”⁷¹ Two elements are therefore central to the notion of agreement: (i) the existence of a concurrence of wills between at least two parties and (ii) the implicit or explicit manifestation of such concurrence. The existence of a common will (or a commitment) and its manifestation are therefore essential.

Article 101 TFEU distinguishes “agreements” from “concerted practices” and the reason for that is to provide the European Commission with a legal category which could be sufficiently flexible to embrace all multilateral conducts which restrict competition, even in the absence of a formal agreement or commitment.⁷² If competition authorities could only enforce competition rules against agreements, the effectiveness of the enforcement policy could be significantly hampered as the increasing difficulties in finding sufficient evidence to show that firms have actually entered into an agreement would seriously limit the number of cases which could be successfully investigated and prosecuted by the authority. This would be the case for companies interacting in oligopolistic and concentrated markets, where market conditions and the repeated interaction between the existing few players may lead to collusive outcomes.

⁷⁰ See contributions to the OECD 2006(a).

⁷¹ Case T-41/96, *Bayer AG v Commission*, [2000] ECR II-3383, para 173.

⁷² It must be noted that the notion of agreement and that of concerted practice are not mutually exclusive. Certain conduct may well likely be an agreement but it may just as easily end up being investigated and prohibited as a concerted practice. This may be the case where the Commission does not have sufficient evidence to show that the parties have entered into a restrictive agreement, but it has sufficient evidence showing that there is parallel conduct which restricts competition and which cannot be explained in any other way than by a collusive understanding. In practice, most cartels are investigated as agreements and concerted practices at the same time, as they exhibit features of both.

In these cases, competition authorities may have difficulties demonstrating the existence of an agreement and may therefore find it easier to presume illegal collusion, in the form of a concerted practice, from parallel conduct.

Australia – Agreement and price signalling amendments

The Australian experience shows that the difficulties in establishing that firms have actually entered into an “agreement” may result in a serious impediment to efficient enforcement of cartel rules.

In November 2011, the Australian Parliament passed amendments to the Competition and Consumer Act 2010 (CCA) (previously known as the Trade Practices Act 1974) targeting what has been termed “price signaling”. The amendments are designed to address, at least in part, the fact that potentially anti-competitive information exchanges may not be caught by the cartel provisions in the CCA. This is because the cartel provisions require the existence of a “contract, arrangement or understanding” and the Australian courts have held that in order to meet that requirement it is necessary to have evidence of a “meeting of the minds” and a commitment or obligation of some kind.

The new provisions, which come into force on 6 June 2012, target the public and private disclosure of pricing and related information. The amendments include a *per se* prohibition of private disclosure of pricing information to one or more competitors; and a prohibition on other disclosures of pricing information (including public disclosures) which depends on whether it can be established that such practices have substantially lessened competition in a market. The new provisions also include a number of exceptions for certain legitimate disclosures, for example the disclosure of pricing information to a related corporate body or a disclosure required under the continuous disclosure obligations in the Corporations Act 2001.

The new prohibitions carry only civil sanctions (unlike the cartel provisions which carry both civil and criminal sanctions). The remedies available include pecuniary penalties which can be up to the greater of AUD10 million, 10% of a business’s annual turnover or three times the benefit gained. The new provisions, however, will only apply to classes of goods and services prescribed by regulation. Under regulations currently proposed by the Australian government, the provisions will initially only apply to the banking sector.

The first important pronouncement on what constitutes a “concerted practice” under the European competition rules dates back to the early seventies when the Court of Justice of the European Union (“ECJ”) reviewed on appeal the Commission’s decision in the *ICI* case (more commonly known as the *Dyestuffs* case).⁷³ The Court, endorsing on appeal the Commission’s approach, offered for the first time a comprehensive definition of concerted practice: “[...] a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. By its very nature, a concerted practice does not have all the elements of a contract but may *inter alia* arise out of co-ordination, which becomes apparent from the behaviour of the participants.”⁷⁴

The notion of concerted practice was further refined in the *Sugar* case, where the ECJ rejected the argument that a concerted practice requires “*the working out of an actual plan*” and confirmed that, under European competition law, companies have the right to adapt intelligently their market strategy to the conduct of their competitors.⁷⁵ In the *Polypropylene* case, the ECJ held that “*a concerted practice implies,*

⁷³ OJ 1969 L 195/11.

⁷⁴ Case 48/69, *ICI v Commission*, [1972] ECR 619, paras 64 and 65. See also Joined Cases C-89/85 and others, *Wood Pulp*, [1993] ECR 1307, paragraph 63, and more recently Case C-8/08, *T-Mobile Netherlands*, paragraph 26.

⁷⁵ Joint cases 40-48, 50, 54-56, 111, 113 and 114/73, *Suiker Unie v Commission*, [1975] ECR 1663.

beside undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two."⁷⁶ The Court then established that if the Commission has shown satisfactorily that concertation has taken place the market behaviour can be presumed, reversing the burden of proof onto the parties. Finally, according to the Court, a concerted practice falls under Article 101 TFEU even in the absence of anti-competitive effects on the market, as long as it has an anti-competitive object.

Based on the Court case-law, there are three constituent elements of a concerted practice:

- (i) it requires a direct or indirect interaction between competitors which is likely to affect their independence of judgment;⁷⁷
- (ii) it requires some form of manifested consensus to replace competition with forms of collusion between the participants; and⁷⁸
- (iii) co-ordination must result in common conduct on the market and a relationship of cause and effect between the two (so-called *causality link*).⁷⁹

In the 2010 Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements⁸⁰ the European Commission applied this test to unilateral disclosures of information and concluded that "[a] situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice. Such disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour."⁸¹

⁷⁶ Case C-49/92P, *Commission v Anic Partecipazioni*, [1999] ECR I-4125, para 118.

⁷⁷ In *Züchner* (Case 172/80, *Züchner v Bayerische Vereinsbank*, [1981] ECR 2021) the Court confirmed that, in order to have a concerted practice, it is not necessary that there has been contact, but a simple 'exchange of information' is sufficient for this purpose (see para 12).

⁷⁸ What matters is that, through direct or indirect contacts, firms deliberately influence the conduct of other firms by disclosing to each other their respective course of conduct. Such disclosure is bound to affect the market behaviour of the participants, as it eliminates in advance the uncertainty about the future conduct of the others, which is the essence of competitive rivalry and of secret competition. See Alese, 1999; Black, 2003.

⁷⁹ Case C-49/92P, *Commission v Anic Partecipazioni*, [1999] ECR I-4125, para 118 et seq. However, the threshold for establishing that co-ordination has resulted in a market conduct is fairly low under the current case law. It is sufficient for the Commission to establish that companies, which have participated in concerting arrangements (i.e. have entered into direct or indirect contacts with competitors), have remained active on the market. When this is the case, it is presumed that their market conduct has been affected by such contacts.

⁸⁰ OJ 2011 C 11/01.

⁸¹ At para 62.

3.4.2 *The notion of agreement in the US and the standard of proof*

In the United States, courts do not draw any fine distinction between the concepts of “*contract, combination in the form of a trust or otherwise, or conspiracy*”, which are listed in Section 1 of the Sherman Act. In practice these are all different terms to indicate an agreement.⁸² According to long-standing case-law of the Supreme Court under the Sherman Act, an agreement need not be ‘explicit’,⁸³ ‘express’,⁸⁴ or ‘formal’,⁸⁵ so long as two factors can be established: the firms have (i) “*a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement*”⁸⁶ and (ii) “*a conscious commitment to a common scheme.*”⁸⁷

This very broad definition, which in principle is able to cover also situations of mere parallelism of conduct, did not prove helpful in providing clear guidance on how to distinguish legitimate parallel behaviour from concerted actions to restrict competition. In practice, however, courts have not focused too much on the notion of ‘commitment’, which requires some form of express assurance that each competitor will adhere to the common design or understanding, and focused more on whether an agreement can be inferred from evidence suggesting that the defendant did not act independently. The Supreme Court in *Matsushita* held that a plaintiff seeking damages for a violation of Section 1 of the Sherman Act must present evidence “*that tends to exclude the possibility that the alleged conspirators acted independently*”.⁸⁸ In other cases, the courts required evidence that “*tend[s] to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism*”.⁸⁹

Another way courts express this standard is by requiring the plaintiff to produce evidence amounting to a ‘plus factor’.⁹⁰ In other words, plaintiff is required to show that there was something else or something more than conscious parallelism or oligopolistic interdependence to meet the standard under Section 1.⁹¹ The courts have given little guidance on what sort of evidence must be submitted by the plaintiff to prove that the parallel conduct is actually the result of a conspiracy and not just a mere parallel conduct. Following the Supreme Court judgment in *Twombly*,⁹² however, courts have begun to consider as a key

⁸² See Posner, 2001; Areeda and Hovenkamp, 2001; Handler, 1953.

⁸³ *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142–3 (1966).

⁸⁴ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948) (noting that “[i]t is enough that a concert of action is contemplated and that the defendants conformed to the arrangement”).

⁸⁵ *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809–10 (1946) (adding that evidence of a violation ‘may be found in a course of dealings or other circumstances as well as in any exchange of words’). The Supreme Court has also stated that an agreement need not involve ‘letters, agreements, or other testimonials to a conspiracy’. *Norfolk Monument Co. v. Woodlawn Mem’l Gardens, Inc.*, 394 U.S. 700, 703–4 (1969).

⁸⁶ *Interstate Circuit Inc v United States*, 306 US 208, 810 (1939); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809–10 (1946), at 810.

⁸⁷ *Monsanto Co. v. Spray- Rite Serv. Corp.*, 465 U.S. 752, 768 (1984); *In re Flat Glass*, 385 F.3d at 357.

⁸⁸ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

⁸⁹ *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 571 n.35 (11th Cir. 1998).

⁹⁰ See, e.g., *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1032–4 (8th Cir. 2000) (holding that the plaintiff ‘has the burden to present evidence of consciously paralleled pricing supplemented with one or more plus factors’). On the “plus factors” see discussion further below.

⁹¹ Kovacic, 1993; Snider and Scher, 2008.

⁹² *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007).

element for establishing an agreement whether the parties have communicated to each other their intentions to act in a certain way and their reliance on each other to do the same.⁹³

3.4.3 Communication as a “plus factor”

The standard set by the courts in the US and in the EU appears to be rather circular in its logic: to prove unlawful collusion from parallel behaviour, one has to show that parallel behaviour can only be the result of unlawful collusion. It is clear, however, that enforcers cannot simply rely on evidence of parallel behaviour to prove a concerted action in violation of competition rules. The legal and economic problem with such evidence is that parallel behaviour could have causes other than collusion. In oligopoly settings, parallel price movements for example could arise simply through independent rational behaviour. To convince courts that parallel behaviour has arisen through some sort of agreement rather than mere oligopolistic interdependence, competition authorities must usually demonstrate that something more has occurred. Parallel conduct is therefore a necessary, but not a sufficient, condition.⁹⁴

Conscious parallelism is not anti-competitive

Courts have generally embraced the economic conclusion that tacit collusion should not be considered anti-competitive. In the United States, for example, in *Brooke Group*, the Supreme Court characterized “tacit collusion,” which it equated with conscious parallelism and “oligopolistic price co-ordination,” as “not itself unlawful.”⁹⁵ Similarly, in *Twombly*, the Court held that parallel conduct is “consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”⁹⁶ The Court of Justice of the European Union reached similar conclusions. Already in *Dyestuffs*, the Court clearly held that “parallel behaviour may not itself be identified with a concerted practice.”⁹⁷ In *Wood Pulp*, the Court confirmed that “[...] although Article 85 [now 101] of the Treaty prohibits any form of collusion which distorts competition, it does not deprive the economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitor”.⁹⁸ The Court added that if the parallel conduct can be explained by plausible reasons other than concertation, the parallelism cannot be regarded as illegal, because it is the lawful market outcome of tacit collusion.

⁹³ See Page, 2009; Page, 2007; Black, 2005; Page, 2010.

⁹⁴ See Van Gerven and Navarro Varona, 1994.

⁹⁵ *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). See also JTC Petroleum, 190 F.3d at 780 (also equating tacit collusion with oligopolistic interdependence, and observing that no court has held it to be illegal under § 1 of the Sherman Act.

⁹⁶ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1555, 1564 (2007).

⁹⁷ See Case 48/69, *ICI v Commission*, [1972] ECR 619, para 65. The judgment, however, left doubts as to whether under certain conditions tacit collusion could nevertheless amount to a concerted practice. In paragraphs 66 and 67 the Court said that parallel behaviour “may however amount to strong evidence of such a [concerted] practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. This is especially the case if the parallel conduct is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers.”

⁹⁸ Joint Cases C-89/85, C-104/85, C-114/85, C-116 and 117/85, C-125-129/85, *Ahlström Osakeyhtiö and others v Commission*, [1993] ECR I-1307, para 71. For commentaries see Jones, 1993; Van Gerven and Navarro Varona, 1994; Raffaelli, 1996; Pardolesi, 1994.

Courts have indeed made clear that something more than conscious parallelism is required (the so-called *plus factors* or *parallelism plus*), although they have not clearly defined what this “something more” should be. These *plus factors* include *inter alia*:⁹⁹

- Evidence that the market in question is not conducive to tacit collusion and lawful parallelism of conduct (i.e. tacit collusion is not a likely outcome of market interaction).¹⁰⁰
- Evidence that there are no other exogenous factors which could justify the parallelism (e.g. increases in input prices for all suppliers, increase in inflation, exchange rate fluctuations, increase in property prices, etc.).¹⁰¹
- Evidence of direct or indirect contacts or communications between firms which have influenced the market conduct of the firms.¹⁰²
- Evidence that the firms are acting “*against their own interest*”, i.e. that a firm would not have engaged in the parallel conduct if it had been acting unilaterally pursuing its own interests.¹⁰³

Two types of evidence seem to be playing a particularly important role: economic evidence¹⁰⁴ and evidence of communications between competitors. The importance of communications to establish a violation of competition law is emphasised clearly by the Court of Justice of the European Union in *Suiker Unie*. The Court stressed that economic operators’ strategic decisions must be taken in total independence from competitors which “*strictly precludes any direct or indirect contact between such competitors, 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.*”¹⁰⁵

Although the requirement of independence does not deprive economic operators of the right to adapt intelligently their strategy to that of other market players, it does however strictly preclude any *direct or indirect contact* between competitors, whose object or effect is either to influence the conduct on the

⁹⁹ Kovacic, 1993, identifies as plus factors in this broader sense “[e]xistence of a rational motive for defendants to behave collectively,” “[a]ctions contrary to the defendant’s self-interest unless pursued as part of a collective plan,” “[m]arket phenomena that cannot be explained rationally except as the product of concerted action,” “[d]efendant’s record of past collusion-related antitrust violations,” “[e]vidence of inter-firm meetings and other forms of direct communications among alleged conspirators,” “[d]efendant’s use of facilitating practices,” “[i]ndustry structure characteristics that complicate or facilitate the avoidance of competition,” and “[i]ndustry performance factors that suggest or rebut an inference of horizontal collaboration.”

¹⁰⁰ See discussion of these factors in the first part of this paper.

¹⁰¹ See Motta, 2004.

¹⁰² See the detailed discussion above on the constituent factors of a concerted practice under the case law of the European courts.

¹⁰³ This is a concept employed by U.S. courts in recent years. It assumes that an action against one’s self interest is one that would otherwise be against the self interest of the actor in the absence of an agreement. Concrete cases where U.S. courts have applied this criteria are described in OECD, 2006(a), at para 51 *et seq.*

¹⁰⁴ On the use of economic evidence to prove a cartel, see OECD, 2006(a). Economic evidence is particularly important in markets where the concentrated structure of the supply and the intrinsic transparency of pricing policies of each participant can sufficiently explain the parallelism.

¹⁰⁵ Joint cases 40-48, 50, 54-56, 111, 113 and 114/73, *Suiker Unie v Commission*, [1975] ECR 1663, para 174.

market of an actual or potential competitor or to disclose to such a competitor the future course of conduct, which they themselves have decided to adopt or contemplate adopting on the market. Therefore, any interaction between competitors which is likely to affect the independence of their decision-making is likely to be viewed as evidence of an anti-competitive agreement or concerted practice.

4. Should any form of communication amongst rivals be suspicious?

Not all communication between rivals, however, should be treated as suspicious. On the contrary, most forms of communications are benign.¹⁰⁶ Prices after all are meant to be communicated and the simple disclosure of price information cannot be considered as anti-competitive as such. In order to assess if direct or indirect communications between competitors should be viewed as anti-competitive, competition enforcers should follow a structured approach whereby they should first assess the market structure and whether the product characteristics are such that there is a risk of collusion should transparency increase. If the answer to this preliminary question is positive, the analysis should then move to the types and the nature of the information which is communicated and to the characteristics of the dissemination.

4.1 Market structure and product characteristics

The structure of the market and the nature of the product in question *ceteris paribus* are key elements in the analysis of whether collusion is likely to occur in a given market. If a market is highly concentrated or there are only a few large firms on the supply side, collusion will be more likely. The costs of organizing a sustainable collusion will be low, it will be easier to find terms of co-ordination and to monitor compliance. Punishment mechanisms will be more effective since cheating firms will be exposed to much higher losses. In contrast, in fragmented markets, firms will have greater incentives to deviate from any collusive understanding in order to try and gain market shares over their competitors and monitoring such deviations will be much more difficult. Such incentives to deviate will jeopardize the stability of a cartel.¹⁰⁷ A collusive agreement is also easier to reach, monitor and enforce over time if it concerns products which are homogeneous. If products characteristics differ in attributes such as quality and durability, it becomes difficult for firms to detect whether variations in sales are due to changing buyer preferences or cheating strategies by firms in the form of secret price cuts.¹⁰⁸

In an oligopolistic market with homogeneous products, direct or indirect communications between competitors are a key factor that facilitates collusion. In particular, communication (i) facilitates the reaching of a common understanding on the terms of co-ordination; (ii) helps monitoring whether the terms of co-ordination are being followed; and (iii) improves the ability or reduces the cost of punishing deviations from the terms of co-ordination.

Reaching terms of co-ordination on prices or volumes may not be easy, particularly when a number of different collusive equilibria are possible. Communication between competitors artificially increases

¹⁰⁶ For a discussion on pro and anti-competitive effects of competitors' communications see OECD, 2010 and Capobianco 2004.

¹⁰⁷ The evidentiary value of the market structure, however, is imperfect. There are examples of highly concentrated industries which are very competitive and where one experiences fierce rivalry. Conversely, cartels are known to have existed and prospered for many years in industries with numerous competitors and differentiated products. See, OECD, 2006(a).

¹⁰⁸ Economists, however, also note that under certain circumstances the differentiated nature of the products may also facilitate collusion. In case of differentiated products, deviations are in fact less profitable because the cheating firm cannot expect to gain large market shares from such strategy, unless it is prepared to cut prices significantly. In such circumstances, therefore, product differentiation makes collusion more likely.

market transparency and thus is one of the facilitating factors for collusion.¹⁰⁹ Information disclosures can facilitate this exercise as they offer firms points of co-ordination or focal points.¹¹⁰ In this way, communications can help firms co-ordinate their behaviour even in the absence of an explicit anti-competitive agreement.

Artificially increased transparency allows firms to monitor adherence to the collusive arrangement, and provides better information on when and how to punish firms when they deviate.¹¹¹ For collusion to be sustainable it is necessary that firms can detect deviations from the collusive equilibrium. The sharing of information may therefore support the internal stability of the collusive arrangement through greater precision in punishments of deviations. Firms will be in a better position to identify which firm has deviated and on what product if they have access to precise and individualised information on their competitors. Artificially increased transparency also allows existing firms to better identify entry opportunities for new firms and to co-ordinate a response. This increases the external stability of the collusive understanding.

4.2 *Private and public announcements*

The first part of this paper looked at the differences between *public* and *private* transparency. This distinction has important implications for competition policy which are discussed in this section.

4.2.1 *Private communications to competitors are unlikely to have efficiency justifications*

It is generally accepted that “private” announcements, which are directed to competitors only, should be forbidden as they don’t have any efficiency justification and can only be motivated by the intention to help rivals to co-ordinate on a particular collusive price, and avoid costly periods of price wars and price instability.¹¹² Conversely, public announcements, which are directed to both rival firms and consumers, are widespread¹¹³ and may provide significant benefits to customers as they allow them to “shop around” for the best offer.¹¹⁴ This positive effect is generally considered stronger than the collusive effects of the announcements. For this reason, many conclude that competition enforcers should be stricter in reviewing private announcements than public announcements.¹¹⁵

¹⁰⁹ See Albaek, Mollgaard and Overgaard, 1997.

¹¹⁰ See Levenstein and Suslow, 2006.

¹¹¹ See Genesove and Mullin, 2001.

¹¹² See Kühn, 2001; Motta, 2007; Bennett and Collins, 2010.

¹¹³ For example, manufacturers of electronic goods regularly announce the future prices of their new products. Retailers may announce the prices of products that will be placed in forthcoming sales.

¹¹⁴ See discussion in the first part of this paper.

¹¹⁵ To would be the case, for example, of a competitor sending a fax or an email to rivals where it announces its intention to set a certain price in the future.

Unilateral announcement of future price and the Wood Pulp ECJ judgement

A generally more lenient approach towards public announcement has also been endorsed by courts. In Europe, for example, the Court of Justice found in *Wood Pulp* that if the communication of prices between competitors arises from announcements to the public they “[...] constitute in themselves market behaviour which does not lessen each undertaking’s uncertainty as to the future attitude of its competitors. At the time when each undertaking engages in such behaviour, it cannot be sure of the future conduct of the others.”¹¹⁶

According to the Court, therefore, advanced price announcements are not illegal as such if these communications are addressed to the public (and not to competitors)¹¹⁷ and do not have as their declared purpose the co-ordination of competitors’ market conduct. The Court noted that, in order to have a concerted practice, it is necessary that the uncertainty as to the future conduct of the competitors is eliminated or lessened, which is not the case when each competitor remains free to determine its own future conduct independently.

Beyond the statement reported above, the circumstances of the Wood Pulp case offer some indications as to when price signaling could be found illegal under EC competition law:¹¹⁸

- There was a clear business justification for the advance price announcements;
- The announcements were public;
- There was no commitment to follow the announced price.

4.2.2 Public announcements with possible anti-competitive effects

Not every public announcement, however, is necessarily pro-competitive. To generate efficiencies, announcements of future intentions must concern *effective* price changes, i.e. they should carry a commitment value *vis-à-vis* consumers.¹¹⁹ Only this type of public dissemination of future intentions notifies customers of changes before they take place and allows them to plan their responses in advance.¹²⁰

¹¹⁶ Joint Cases C-89/85, C-104/85, C-114/85, C-116 and 117/85, C-125-129/85, *Ahlström Osakeyhtiö and others v Commission*, [1993] ECR I-1307, para 64. The conclusion in *WoodPulp* reversed an older judgement in the *Dyestuffs* case found that advanced price announcements were illegal, as a form of undue communication between competitors with the sole effect of eliminating uncertainty as to each competitors’ future conduct (Case 48/69, *ICI v Commission*, [1972] ECR 619).

¹¹⁷ A different assessment applies to private price communications (i.e. communications addressed only to competitors and not to the customers), which have as their only purpose “*eliminating in advance uncertainty about the future conduct of its competitors*” (see Case T-7/89, *SA Hercules Chemicals NV v Commission*, [1991] ECR II-1711, para 259).

¹¹⁸ See van Gerven and Varona, 1994.

¹¹⁹ See discussion on cheap talk in the first part of this paper.

¹²⁰ See, for example, footnote 4 of the EU Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements (OJ 2011, C 11/01), which explains the notion of ‘intended future prices’: “*In specific situations where companies are fully committed to sell in the future at the prices that they have previously announced to the public (that is to say, they cannot revise them), such public announcements of future individualised prices or quantities would not be considered as intentions, and hence would normally not be found to restrict competition by object. This could occur, for example, because of the repeated interactions and the specific type of relationship companies may have with their customers, for instance since it is essential that the customers know future prices in advance or because they can already take advanced orders at these prices. This is because in these situations the information exchange would be a more costly means for reaching a collusive outcome in the market than exchanging information on future*

Otherwise, uncommitted announcements might be a tool to avoid costly experimentation with the market and reach collusive outcomes more effectively and faster. A firm might announce that it will increase its price to a certain level at a specific date in the future, but then revert to the current price if other firms do not follow suit with similar announcements of price changes. This way, firms might arrive at a commonly agreed price without incurring the risk of losing market shares or triggering price wars during the period of adjustment to the new prices.

Public announcements - EU Guidelines on horizontal agreements

This approach was endorsed by the European Commission in its Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements¹²¹ which state: “Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1). However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other’s public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of co-ordination.”

4.2.3 *Invitations to collude through price sharing*

Another instance where public announcements might be harmful to competition is where the public communication includes an invitation to collude. Invitations to collude are generally understood as unilateral solicitations to enter into unlawful horizontal price-fixing or market allocation agreements.¹²² While this is rather uncontroversial for private communications, which can always be construed as invitations to collude, public announcements can also be construed as invitations to collude depending on how the communication is formulated.

This would generally be the case of announcements which:

- (i) contain not only information which must, as a matter of commercial policy, be conveyed to customers but also information which is not intended for that audience, for example including references to specific competitors;
- (ii) disclose more information than strictly necessary for the purpose of the announcement;
- (iii) make the announced behaviour contingent on what other market players or the industry at large will do; and
- (iv) include threats (e.g. a price war) in case other market players do not accept the invitation to collude.

intentions, and would be more likely to be done for pro-competitive reasons. However, this does not imply that in general price commitment towards customers is necessarily pro-competitive. On the contrary, it could limit the possibility of deviating from a collusive outcome and hence render it more stable.”

¹²¹ OJ 2011, C 11/01, at para 62.

¹²² The classic example of such a practice is the 1983 call of the American Airlines president to the president of competing carrier Braniff Airlines: “I think it’s dumb as hell [...] to sit here and pound the **** out of each other and neither one of us making a **** dime. [...] Raise your goddamn fares twenty percent. I’ll raise mine the next morning.” (US v. American Airlines, 743 F.2d 1114)

Competition authorities have also looked at the competitors' reaction to the invitation and have construed as acceptance of the invitation any specific market conduct which is in line with the offer to collude. For example, reacting to an invitation to raise prices by raising its own prices would be taken as a form of acceptance, unless it can be shown that the price increase was contemplated before the invitation was extended. Similarly, not reacting to the perceived invitation with a clear statement taking distance from it could be taken as a sign that the target of the invitation has the intention to accept it.

US Federal Trade Commission recent practice on invitations to collude¹²³

Two recent cases in the US clearly illustrate the meaning of invitation to collude.

In *Valassis Communications*,¹²⁴ the FTC challenged the announcement made by Valassis president and chief executive officer, in a public call with analysts, detailing its strategy to increase prices. In order to regain market shares lost in the previous years to its competitor News America, Valassis decided to communicate to News America an offer to cease competing for News America customers, provided that the latter ceased competing for Valassis customers. If accepted, both firms could raise prices within their respective protected customer bases and end their price war. Valassis proposed that prices be restored by both firms to the pre-price war levels and described how business with shared customers and outstanding bids to News America's customers would be handled. Valassis would monitor News America's response, looking for "concrete evidence" of reciprocity in "short order." If News America continued to compete for Valassis customers and market share, then the price war would resume. To resolve these allegations, Valassis entered into a consent order with the FTC that prohibits unilateral communications, both public and private, concerning the company's willingness to refrain from competing with rivals or to co-ordinate pricing with them.

The FTC case against *U-Haul*¹²⁵ involved both private and public communications. According to the complaint, U-Haul's CEO instructed U-Haul's regional managers and dealers to reach out privately to their counterparts at Budget (U-Haul's closest competitors in the market for consumer truck rental) to exhort them to match U-Haul's higher rates. A year later, U-Haul's CEO allegedly instructed managers to raise their rates, anticipating that "Budget will come up." But Budget did not immediately follow. Then, during a conference call with stock analysts, in response to a question about U-Haul's pricing strategies, U-Haul's CEO explained that U-Haul was trying to "show price leadership" for the good of the entire industry. He said that U-Haul was attempting to indicate to competitors that they should not "throw the money away," and that they should "[p]rice at cost at least." The CEO then indicated that he had instructed U-Haul managers to wait a while longer for Budget to respond and that he was optimistic that Budget would respond by raising prices. He also added that Budget need not match the U-Haul prices exactly, but could lag behind by 3–5%.

4.3 Disclosures of future intentions

The subject matter of the communication is also relevant in establishing whether the unilateral communication is likely to facilitate collusion. Not all information can have a meaningful impact on the likelihood of price co-ordination. *Historical* information, for example, has generally lost its value as a competitive asset that can affect future conduct of the companies involved; therefore, their exchange is generally not considered harmful.¹²⁶

¹²³ Both cases were brought by the Federal Trade Commission the Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition" (15 U.S.C. § 45).

¹²⁴ *Valassis Communications*, 2006, FTC File No 051 0008.

¹²⁵ *Matter of U-Haul Int'l, Inc and AMERCO*, 2010, FTC File No 081-0157.

¹²⁶ Information about past behavior, however, may allow rivals to detect and, therefore, deter deviations.

Competition enforcers are usually concerned with communications regarding *future* strategies, including prices, sales, and capacities trends.¹²⁷ This information is particularly sensitive and should remain within the corporate knowledge of each competitor. The disclosure of future pricing intentions directly to competitors (private communications) is probably the most useful information in enabling rivals to reach a focal point, and hence is viewed as the most harmful by competition authorities.¹²⁸ Information regarding future behaviour can be particularly useful when there are several possible equilibria and rivals need to communicate to focus on just one of them, and to establish a focal point.¹²⁹

Since its earlier judgements (mostly concerning exchanges in the context of trade associations), the US Supreme Court has focussed on communications which included “*suggestions as to both future prices and production*”.¹³⁰ The Court held that the exchange of this type of information intended to reduce production and raise prices.¹³¹ The Court also focused its attention on the private nature of the information sharing schemes.¹³² Public exchanges of information, on the contrary, can be beneficial for competition if the information is disseminated in the widest possible way (*i.e.*, the information is available not only to the association’s members, but also to their customers) and in aggregated form, even if the exchange calls for detailed information on individual sales, prices and monthly information on production and new orders.¹³³ The US Antitrust Guidelines for Collaborations among Competitors¹³⁴ endorse this approach and consider that the competitive concerns with information sharing depend, among other things, on whether the information disseminated concerns current operating and future business plans, which is more likely to raise concerns than the sharing of historical information.

¹²⁷ See country contributions to the OECD, 2010.

¹²⁸ See for example, EU Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements (OJ 2011, C 11/01), para 66.

¹²⁹ See Kühn, April 2001; Møllgaard and Overgaard, 2006.

¹³⁰ See *American Column and Lumber Co v. US*, 257 US 377 (1921, at 398-99).

¹³¹ The judgment was criticised for not having taken into account the pro-competitive effects of the exchange of information. Justice Brandeis and Justice Holmes dissented and saw no evidence of any serious attempt to limit production, and found that there was simply a reporting of “market facts”. The dissenting judges concluded that not allowing the exchange of information could lead to the elimination of competition in the wood industry.

¹³² See *US v. American Linseed Oil Co*, 262 US 371 (1923), where the Court struck down another associational information exchange programme concerning price lists, price variations and the names and addresses of buyers who received special prices.

¹³³ See *Maple Flooring Manufacturers Association v. US*, 268 US 563 (1925).

¹³⁴ Available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

EU – Information exchange and restrictions by object

The European Commission has also taken a firm stand against the dissemination of information concerning the future conduct regarding price or quantities.¹³⁵

“[...]”

73. *Exchanging information on companies’ individualised intentions concerning future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices [...]. Moreover, it is less likely that information exchanges concerning future intentions are made for pro-competitive reasons than exchanges of actual data.*

74. *Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object. In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities. Information exchanges that constitute cartels not only infringe Article 101(1), but, in addition, are very unlikely to fulfill the conditions of Article 101(3).”*

According to the Guidelines, unilateral announcements of individualised future price intentions will be considered a restriction “by object” of EU competition law if the announcement is private (i.e. is made only to competitors). For public announcements of intended individualised prices the Commission will review possible efficiency arguments that the parties can bring under Article 101(3) TFEU.¹³⁶

4.4 Collusive price leadership

The fact that the unilateral (price) disclosures are made by a price leader is another element that has been identified as a factor in the assessment of whether unilateral disclosures should be considered an illegal facilitating practice.

The literature identifies three types of leadership:¹³⁷

- a) *Dominant firm price leadership*: in this situation, a large (dominant)¹³⁸ firm sets its price first and smaller firms simply take this price in determining their profit maximizing levels of production. In this case, the price determined by the monopoly firm is not the outcome of a strategy to circumvent competition but rather the inevitable consequence of the market structure. The acceptance by the industry of a price leader and the decision to follow the price leadership of a dominant firm generally falls outside the reach of competition laws.
- b) *Barometric price leadership*: this situation may arise where some firms are better informed than others. Less informed firms may then delay their decisions until a better informed firm moves.

¹³⁵ See EU Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements (OJ 2011, C 11/01).

¹³⁶ See EU Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements (OJ 2011, C 11/01), footnote 5.

¹³⁷ See Stigler, 1947; Bain, 1960; Cooper, 1997; Deneckere and Kovenock, 1992.

¹³⁸ Similar conclusions could be reached for a large incumbent firm, which is not dominant but has an information advantage over its rivals.

Thus, providing a signal about market conditions, the leader acts as a “barometer”. In this scenario, where there is no monopolist, the price leader is frequently (but not necessarily) the largest firm. Barometric leadership is generally competitive given that as for the most part the price leader cannot impose the rest of the industry to accept its price. Prices would eventually be set at the same level at which they would have been set by the competitive forces.

- c) *Collusive price leadership*: this type of price leadership allows firms to replace explicit collusion (which is illegal) with a system of public (pre-) announcements to co-ordinate on a collusive outcome. The first to study collusive price leadership was Markham in 1951,¹³⁹ and he identified a number of market features as prerequisite to effective price leadership:
- (i) Few and sufficiently large number of rival firms in the market;¹⁴⁰
 - (ii) High entry barriers, which ensure that the price set by the price leader remains close to the oligopolistic price;
 - (iii) The goods produces are homogeneous, or at least each producer must view the output of all the other firms as closely substitutable;
 - (iv) A sufficiently rigid demand curve to ensure that the gains from adopting a price leadership are not eroded or eliminated by competing products;
 - (v) Symmetry in the cost curves of the individual firms so that a particular price allows all firms to operate at a satisfactory rate of output.

Subsequent studies on collusive price leadership concluded that asymmetric information can contribute to collusive leadership, leaving however open the question as to whether price leadership may still facilitate collusion in the absence of asymmetric information.¹⁴¹ More recent literature emphasizes the fact that collusive leadership may enhance the sustainability and thus the efficiency of collusion.¹⁴² In particular, it concludes that (i) price leadership is a more effective collusive device when firms compete in prices rather than in quantities; (ii) when firms differ in their costs then the leader is likely to be the less efficient firm; and finally, (iii) regardless of whether firms compete in prices or quantities, in order to facilitate collusion the firm acting as a follower in a given period should get a higher market share and earn a higher profit in that period.

These theoretical conclusions are supported by empirical evidence which indicate how price leadership is present in many cartel cases. For example, in the EU decision on the vitamin case, the parties “agreed that one producer should first ‘announce’ the increase, either in a trade journal or in direct communication with major customers. Once the price increase was announced by one cartel member, the others would generally follow suit.”¹⁴³ Similar evidence was also found in recent cartel cases in industries,

¹³⁹ Markham, 1951.

¹⁴⁰ If there are several small firms with no dominant firm, they are likely to engage in promiscuous price cutting and, at least on downwards price adjustments, take the role of price leader.

¹⁴¹ Rotemberg and Saloner, 1990.

¹⁴² Mouraviev and Rey, 2011.

¹⁴³ See the European Commission Decision, *Vitamins*, OJ 2003 L 6/1, para 203.

such as sorbates, high pressure laminates, rubber chemicals, graphite electrodes, polyester staple and organic peroxides.¹⁴⁴

4.5 *Reciprocal disclosure is not a condition for establishing an infringement*

The discussion above clearly indicates that for purpose of establishing a tacitly collusive arrangement it is irrelevant whether only one firm unilaterally informs its competitors of its intended market behaviour, or whether all participating firms inform each other of their respective deliberations and intentions.

In the *Cement* case,¹⁴⁵ the General Court of the European Union established that the simple fact that a company is the passive recipient of information on the future conduct of a competitor (i.e. because it participated in meetings where such information was disclosed) is sufficient to establish participation in the illegal conduct. The Court noted that the fact that the recipient of the information did not disclose its own strategy was not a sufficient defence when that company had arranged the meeting and did not object when informed of the competitor's strategy. The Court inferred that the information was disclosed to reduce uncertainty as to the future competitive strategies of the participants and to enable them to align their respective strategies in an anti-competitive way.

The European Commission has established that, for example, the mere attendance at a meeting where a company discloses its pricing plans to its competitors is likely to be caught by Article 101 TFEU, even in the absence of an explicit agreement to raise prices.¹⁴⁶ When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.

But reciprocity should not be confused with some form of acknowledgment that the information has been received and used by the target(s) of the communication. In other words, it is necessary that the information communicated has some influence on the pricing of competitors.¹⁴⁷ Simple acquiescence can be considered as acceptance of the information received. It is for this reason that particularly in the context of private exchanges (e.g. a price announcement made by a competitor during a meeting of the trade association), courts have considered necessary that participants to the meeting had to publicly distance themselves from the discussion in order to escape liability.¹⁴⁸ The fact that communication has influenced the behaviour of the intended recipient can be inferred from the market conduct of the latter.¹⁴⁹ Should

¹⁴⁴ Marshall, Marx, Raiff, 2008. Other evidence can be found in Mouraviev and Rey, 2011. In this latter paper, the authors found evidence of collusive price leadership in 16 of 49 cartel decisions adopted by the European Commission between 2001 and 2010.

¹⁴⁵ Joined Cases T-25/95, *Cimenteries CBR and Others v Commission*, [2000] ECR II-491: “[...] the concept of concerted practice does in fact imply the existence of reciprocal contacts [...]. That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it.” (para 1849).

¹⁴⁶ See EU Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements (OJ 2011, C 11/01), para 62.

¹⁴⁷ For more information on country perspective on the role of reciprocity in finding an infringement of competition rules, see the contributions of Denmark, Hungary, Netherlands and Spain to the OECD, 2008.

¹⁴⁸ See, for example, the EU case law in T-141/89, *Tréfileurope v Commission*, [1995] ECR II-791, para 85. See also Case T-311/94, *BPB de Eendracht NV v Commission*, [1998] II-1129, para 203; Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission*, not yet reported, para 87.

¹⁴⁹ The contribution of Canada to OECD, 2010, states: “[...] a situation in which one party unilaterally makes information available to other competitors, such as information about intended price increases or other

price move to the announced level, and absent other justifications for the price increase, a competition authority could legitimately infer the existence of a concerted action.¹⁵⁰

5. Conclusions

Competition authorities are faced with complex issues when enforcing cartel rules in oligopoly markets, where it is often difficult to distinguish legitimate business behaviour from illegal collusive practices. In market, with few sellers and homogenous products, supra-competitive prices may be the normal outcome of rational economic behaviour of each firm on the market. This conscious parallelism, although its outcome may be the same as that of a cartel, falls outside the reach of competition laws on cartels.

This paper reviewed unilateral announcements by firms as one of the “facilitating practices” that firms can put in place to achieve stable collusive outcome without entering into an explicit cartel arrangement. These are practices, typically in an oligopolistic market, which fall short of an explicit, “hardcore” cartel agreement, but reduce uncertainty in the market and help rivals coordinate their conduct more effectively. Competition authorities are confronted with two issues in particular: (i) how unilateral disclosures of information can be reconciled with the notion of anti-competitive agreement; and (ii) how to distinguish legitimate business practices, such as announcing prices to the market, from practices which offer focal points to rivals and facilitate collusion.

In most competition regimes, unilateral price announcements can be condemned as unlawful only if it can be shown that as a result of the practice firms have reached some type of formal or informal agreement on their future conduct. In some countries this may require an expansive interpretation of the concept of “agreement”. In other countries the use of the notion of “concerted practice” has allowed competition authorities to pursue more discrete, looser forms of co-ordination and informal understandings between firms which cannot be reconciled with the notion of an agreement. To find an infringement of competition rules it not necessary that the announcements are reciprocal, but to satisfy the necessary legal standard it must be shown that the recipients or addressees of a unilateral announcement did not protest and that the announcement resulted in actual anti-competitive effects.

Distinguishing between a lawful business practice and an unlawful facilitating practice can be particularly challenging, as there is no bright line test to make this distinction. Most facilitating practices, depending on the circumstances, can have pro- as well as anti-competitive effects. For example, practices like unilateral price disclosures can restrict competition when the information disclosed concerns future prices or strategic conduct. However, market transparency due to these disclosures can also be efficiency enhancing as it provides more and better information to customers, who can make a more informed choice between competing products and suppliers.

From the analysis in this paper, competition authorities can draw a number of lessons concerning their enforcement policy *vis-à-vis* unilateral announcements:

- The potential for unilateral announcement to have anti-competitive effects is much higher in concentrated markets with homogeneous products, where increased transparency is an important

future competitive conduct, may be sufficient to infer the existence of an agreement contrary to the Act. For the purpose of determining whether an agreement exists, it does not matter whether information is made available only to competitors or to the marketplace generally, although the Bureau will typically view private exchanges with greater suspicion.”

¹⁵⁰

See for example the contributions of the Netherlands to OECD, 2008.

factor which facilitates reaching of tacitly collusive agreements, their monitoring and their enforcement.

- Private announcements (i.e. to competitors only) of future prices cannot have any legitimate business justification, but only help rivals to co-ordinate on the right collusive equilibrium. Since customers do not have access to such information, it involves little commitment, and it is hard to see the “efficiency defence” for this type of practice.
- Public announcements (i.e. to customers as well as competitors) of future prices that permit customers to trade on these (so they involve commitment) are in most cases efficiencies enhancing and should not be viewed as anti-competitive.
- Uncommitted public announcements or public announcements which involve some form of invitation to collude should be carefully reviewed by competition authorities to assess whether they have anti-competitive effects on the market.

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*Par le Secrétariat**

1. Introduction

La collusion explicite – qui consiste à ce que les membres d’une entente « injustifiée » s’accordent sur les prix, la répartition de clientèle ou la manipulation d’appels d’offres – est presque unanimement condamnée et considérée comme illicite. À l’inverse, les comportements qui résultent exclusivement d’une interdépendance oligopolistique (collusion tacite) ne passent généralement pas pour une infraction au droit de la concurrence. Toutefois, de l’avis général, il existe, à la frontière entre collusion explicite et implicite, des cas dans lesquels les entreprises se livrent à un éventail de pratiques susceptibles de les aider à réduire l’incertitude stratégique et à aligner plus efficacement leurs comportements. Les sociétés disposent à cet effet de diverses stratégies, notamment le renforcement artificiel de la transparence de marché par l’échange d’informations avec les concurrents, la mise en place de systèmes plus formalisés de partage d’informations à l’échelle sectorielle, ou encore, par le biais de communiqués de presse ou d’autres moyens, la communication unilatérale au marché des stratégies futures, telles que les projets d’augmentation des prix, les stratégies en matière de capacités ou toute autre action future. Les sociétés fournissent ainsi des points de convergence sur lesquels leurs concurrents peuvent s’aligner, avec le risque de provoquer une hausse des prix et de porter préjudice au bien-être social.

Le Comité de la concurrence s’est déjà intéressé au caractère complexe de la mise en œuvre des règles de concurrence sur des marchés oligopolistiques¹ et à la manière dont les autorités de la concurrence ont abordé les pratiques de facilitation². Plus récemment, le Comité s’est également intéressé aux pratiques qui facilitent la collusion en renforçant la transparence du marché. En octobre 2007, lors d’une table ronde sur les pratiques anticoncurrentielles qui ont cours dans le cadre d’associations professionnelles et d’entreprises³, le Groupe de travail n° 3 a discuté des programmes d’échange d’informations qui s’inscrivent dans le cadre d’associations. Plus récemment, en octobre 2010, le Comité de la concurrence s’est particulièrement concentré sur la manière dont les autorités de la concurrence évaluent les échanges d’informations directs et/ou indirects entre concurrents dans le cadre du droit de la concurrence. Il a plus particulièrement examiné les effets pro concurrentiels et anticoncurrentiels de la transparence et les principaux facteurs que les autorités prennent en considération lorsqu’elles déterminent si un échange d’informations a des effets anticoncurrentiels⁴.

En s’appuyant sur les précédents travaux de l’OCDE, le présent document a pour objectif d’examiner les questions de politique de concurrence et de mise en œuvre liées aux communications purement unilatérales diffusées par les sociétés directement à leurs concurrents ou au grand public. Pour les acteurs du droit de la concurrence, décider d’intervenir ou non, et décider quand intervenir contre les divulgations

* Le présent document a été préparé par Antonio Capobianco avec l’aide d’Anna Pisarkiewicz pour les recherches.

¹ Voir OCDE, 1999.

² Voir OCDE, 2007(a) ; et OCDE, 2006(a), paragraphe 15.

³ Voir OCDE, 2007(b). Voir également une version révisée du document de référence de cette table ronde, diffusé en amont de la session du Forum de la concurrence d’Amérique latine sur les Problèmes de concurrence dans le cadre d’associations professionnelles (Session I), qui s’est tenu les 13 et 14 septembre 2011 (Colombie).

⁴ Voir OCDE, 2010.

unilatérales (et non réciproques) d'informations sont des questions qui peuvent soulever des incertitudes considérables. Les autorités chargées d'appliquer le droit et les tribunaux ne donnent que peu d'indications à cet égard et les publications économiques sont parfois équivoques. Les autorités chargées d'appliquer le droit de la concurrence peuvent avoir du mal à faire une distinction entre un comportement purement unilatéral, d'une part, comme les communications unilatérales (le fait d'adresser des signaux) – un comportement qui n'entre pas dans le champ du droit de la concurrence – et, d'autre part, les comportements coordonnés qui peuvent, en principe, en relever. Bien que la collusion explicite soit considérée par la plupart des autorités de la concurrence comme l'infraction la plus grave au droit de la concurrence, la collusion tacite ou les comportements parallèles délibérés ne sont en revanche pas jugés illicites bien qu'ils puissent avoir les mêmes effets qu'une collusion explicite : hausse conjointe des prix au-delà de l'équilibre supra-concurrentiel, voire à un niveau monopolistique. Un dilemme se pose donc en matière d'application pour savoir comment traiter les pratiques qui ne relèvent pas d'une collusion explicite mais qui favorisent la collusion tacite.

Ce document s'articule autour de trois grands axes. La première partie décrit les mécanismes économiques à l'œuvre dans les cas de collusion et le rôle de la transparence dans la mise en place d'accords d'entente effectifs. Elle comporte aussi un aperçu des publications sur le « *cheap talk* » et sur les différences entre les échanges privés et publics. La deuxième partie traite ensuite des contraintes juridiques auxquelles sont confrontées les autorités chargées de l'application du droit de la concurrence dans les cas de pratiques unilatérales telles que les divulgations unilatérales d'informations. Elle étudie la manière dont les autorités ont employé le concept d'accord pour s'atteler à ces pratiques, ou la manière dont elles doivent dépasser la notion d'accord formel pour traiter d'autres formes d'actions concertées entre concurrents ayant des effets anticoncurrentiels. La dernière partie du document se concentre sur les facteurs et critères dont les autorités de la concurrence doivent tenir compte lorsqu'elles évaluent si une divulgation unilatérale d'informations peut avoir des effets anticoncurrentiels.

Plusieurs constats ressortent de ce document, notamment :

- les annonces de prix unilatérales peuvent faciliter la collusion et être interdites au motif qu'elles sont anticoncurrentielles si elles permettent aux concurrents de s'entendre de manière formelle ou informelle afin de réduire la concurrence sur leur comportement futur ;
- les effets favorables et préjudiciables à la concurrence que peuvent avoir les annonces unilatérales dépendent des circonstances particulières dans lesquelles ces dernières surviennent ; le risque de répercussions anticoncurrentielles est notamment accru sur les marchés concentrés dotés de produits homogènes ;
- les annonces privées (c'est-à-dire entre seuls concurrents) sur les comportements futurs sont généralement considérées comme ayant un but anticoncurrentiel et peuvent difficilement être justifiées par une quelconque efficacité favorable à la concurrence ;
- les annonces publiques (c'est-à-dire destinées aux consommateurs aussi bien qu'aux concurrents) concernant les comportements futurs peuvent en théorie être employées pour faciliter la collusion, mais elles sont généralement jugées favorables à la concurrence car elles apportent de nombreux avantages, comme celui de mieux informer les consommateurs, lesquels peuvent alors effectuer des choix plus éclairés.

2. Aperçu de la théorie économique sur la collusion et le rôle de la transparence

Cette première partie s'intéresse aux principales publications économiques en rapport avec l'analyse concurrentielle des divulgations d'informations. Après avoir passé en revue la théorie générale de la

collusion, nous étudierons les facteurs qui entraînent généralement une collusion stable, en abordant tout particulièrement le rôle majeur que peut jouer la transparence⁵ pour déterminer l'existence d'une entente, surveiller son application et sanctionner les éventuelles déviations. Nous verrons par la suite que les divulgations publiques peuvent être favorables à l'efficacité tandis que les divulgations privées renforcent la collusion, puis nous étudierons les publications sur l'éventuel recours au « *cheap talk* » par les concurrents pour établir des points de convergence et ainsi s'entendre sur les prix.

2.1 *La collusion définie par les conséquences sur le marché*

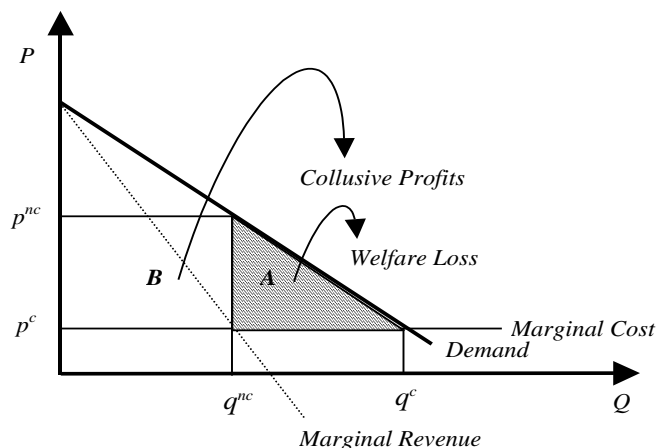
Dans les publications économiques⁶, le terme « collusion » se réfère à toute forme de coordination ou d'accord entre sociétés concurrentes, dans le but de relever les prix (ou de diminuer la production) à un niveau supérieur à l'équilibre non collusif⁷. En d'autres termes, la collusion est une stratégie conjointe de maximisation des profits mise en place par des sociétés concurrentes dans le but d'atteindre conjointement des prix et bénéfices monopolistiques plutôt que de se concurrencer en toute indépendance. Les entreprises peuvent s'entendre sur diverses variables concurrentielles. Dans la plupart des cas, la coordination implique de maintenir les prix au-dessus du niveau d'équilibre concurrentiel mais, sur d'autres marchés, la collusion peut avoir pour but de limiter la production ou le volume de nouvelles capacités introduites sur le marché. Les sociétés peuvent aussi se coordonner en se répartissant le marché, que ce soit par zone géographique ou selon d'autres critères de clientèle, ou encore en se répartissant les contrats sur des marchés soumis à des appels d'offres.

⁵ La transparence est un facteur déterminant (mais pas le seul) permettant aux entreprises de relever le niveau général des prix à un degré proche des prix monopolistiques en tirant parti de la structure du marché et sans se livrer à toute forme explicite de coordination. Cela est tout particulièrement vrai sur les marchés concentrés dotés de produits homogènes.

⁶ Pour de plus amples détails, voir Stigler, 1964 ; Tirole, 2002 ; Carlton et Perloff, 1999 ; Scherer et Ross, 1990 ; Bishop et Walker, 2010 ; Philips, 1995 ; Ivaldi, Jullien, Rey, Seabright et Tirole, 2003 ; Creatini, 2002 ; et les nombreuses publications citées dans ces écrits.

⁷ De manière générale, les économistes identifieraient ce niveau au prix d'équilibre de Bertrand si les sociétés sont en concurrence sur les prix, ou à la quantité d'équilibre de Cournot si elles sont en concurrence sur la production.

Le diagramme ci-dessous illustre les effets de la collusion sur le bien-être social⁸.



Sur un marché en concurrence parfaite (c'est-à-dire un marché comptant un nombre infini de sociétés, des produits homogènes et une information parfaite), les prix sont établis au coût marginal. L'équilibre concurrentiel est alors q^c et les entreprises ne font aucun bénéfice économique. Si les entreprises parviennent à s'entendre sur le marché, elles pourront faire basculer l'équilibre q^c vers un équilibre non concurrentiel, offrant une quantité q^{nc} au prix d'entente p^{nc} (auquel cas les coûts marginaux sont égaux aux revenus marginaux). Dans la nouvelle situation d'entente ainsi créée, le bien-être social net s'effrite (la partie hachurée A). Parallèlement, le bénéfice des membres de l'entente augmente (la partie B non hachurée).

Contrairement à l'approche juridique, qui se concentre davantage sur les *moyens* employés par les concurrents pour s'entendre et la *forme* que prennent ces collusions⁹, la théorie économique met l'accent

⁸ Pour des raisons de simplicité, nous sommes partis de l'hypothèse selon laquelle l'effet collusoire était assimilable à un monopole et qu'en l'absence de collusion, le marché serait parfaitement concurrentiel. Cependant, la collusion peut hisser les prix au-delà de l'équilibre concurrentiel, sans nécessairement leur faire atteindre un niveau monopolistique.

⁹ Comme les accords destinés à fixer des prix ou des quantités. Voir par exemple la loi américaine Sherman Act, 15 U.S.C. § 1, selon laquelle « Tout contrat, groupement sous la forme de *trust* ou autre, ou entente délictueuse restreignant les échanges ou le commerce entre les différents États ou avec des nations étrangères, est déclaré illégal. » De la même manière, l'article 101 du traité sur le fonctionnement de l'Union européenne énonce (sans être exhaustif) les types de restriction de la concurrence généralement considérés comme les plus courants. Il interdit plus précisément « tous accords entre entreprises, toutes décisions d'associations d'entreprises et toutes pratiques concertées, qui sont susceptibles d'affecter le commerce entre États membres et qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché intérieur, et notamment ceux qui consistent à : (a) fixer de façon directe ou indirecte les prix d'achat ou de vente ou d'autres conditions de transaction ; (b) limiter ou contrôler la production, les débouchés, le développement technique ou les investissements ; (c) répartir les marchés ou les sources d'approvisionnement ; (d) appliquer, à l'égard de partenaires commerciaux, des conditions inégales à des prestations équivalentes en leur infligeant de ce fait un désavantage dans la concurrence ; (e) subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien. »

sur les *conséquences pour le marché*, à savoir l'impact des pratiques d'entreprises sur les prix et la production. Ainsi, que la collusion résulte d'une entente formelle entre des sociétés concurrentes (collusion explicite) ou d'une interdépendance tacite entre les membres d'un oligopole restreint, les économistes jugent l'effet économique identique : hausse du niveau des prix au détriment du bien-être social. Comme nous le verrons, cela soulève des questions importantes en matière de politique : le droit de la concurrence doit-il s'occuper des collusions – notamment dans les situations d'interdépendance tacite –, et à quel moment ?

2.2 *Aperçu des facteurs favorisant les collusions*

Afin d'atteindre et de maintenir un équilibre collusoire dans le temps, il est nécessaire que les membres de l'entente soient en mesure (i) de s'accorder sur une « politique commune » ; (ii) de surveiller si les autres sociétés adoptent cette politique ; et (iii) de la faire appliquer. En d'autres termes, trois conditions sont nécessaires : les concurrents doivent être en mesure de s'entendre afin de restreindre la concurrence, être suffisamment motivés pour ne pas dévier de la politique commune convenue et, en cas de déviation, ils doivent être en mesure de sanctionner ce comportement¹⁰. Un équilibre collusoire ne peut pas avoir lieu si ces trois conditions ne sont pas complètement satisfaites.

Divers facteurs peuvent aider des sociétés rivales à parvenir à un équilibre collusoire et à le maintenir au fil du temps¹¹. Certains sont propres à la structure du marché ou aux caractéristiques des produits concernés, tandis que d'autres se rapportent davantage au fonctionnement du marché et à la dynamique concurrentielle qui l'anime¹². Tous ces facteurs ne doivent toutefois pas forcément être réunis pour rendre une collusion probable sur un marché donné¹³ :

- Une collusion est plus susceptible de se produire sur des marchés concentrés car il existe une corrélation positive entre le nombre de sociétés exerçant sur le marché et le degré de concurrence. Moins les sociétés sont nombreuses sur un marché, plus il leur est aisé de parvenir à s'entendre¹⁴.

¹⁰ Voir Stigler, 1964 ; Tirole, 1988 ; Carlton et Perloff, 1990 ; Scherer et Ross, 1990 ; Ayres, 1987.

¹¹ Pour une discussion générale de ces facteurs, voir Levenstein et Suslow, 2006. Les auteurs évoquent également d'autres facteurs de stabilité des ententes, notamment leur organisation interne et leur capacité à s'informer du marché et des dynamiques qui l'animent, ou encore des facteurs liés plus généralement à la pression sociale.

¹² Voir par exemple les Lignes directrices sur les fusions horizontales (*Horizontal Merger Guidelines*) du ministère américain de la Justice et de la Federal Trade Commission (disponibles sur le site Internet de chaque autorité) ; les Lignes directrices sur l'appréciation des concentrations horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises de la Commission européenne (JO 2004 C 31/5–18) ; ou les Lignes directrices d'évaluation des fusions (*Merger Assessment Guidelines*) de la Commission de la concurrence (CC) et de l'Office of Fair Trading (OFT) britanniques (disponibles sur le site Internet de chaque autorité).

¹³ Il convient de noter que l'analyse de ces facteurs ne prouve pas de collusion effective sur le marché. Elle se contente de fournir un cadre analytique destiné à évaluer si les conditions de marché sont propices à la collusion. Une étude détaillée des principaux facteurs facilitant la collusion figure dans OCDE, 1999.

¹⁴ La valeur de preuve que l'on peut prêter aux éléments structurels est cependant limitée. Il existe des exemples de secteurs très concentrés vendant des produits homogènes, qui forment un paysage concurrentiel peu exigeant et au sein desquels la concurrence n'en est pas moins féroce. Inversement, on sait que des ententes ont existé et prospéré pendant de nombreuses années dans des secteurs où étaient présents de nombreux concurrents et où les produits étaient différenciés. Voir OCDE, 2006(a), paragraphe 15.

- Il est plus aisé de parvenir à une collusion, de la surveiller et de la faire perdurer si les produits concernés sont homogènes. Il est également plus facile de se coordonner sur un prix unique applicable à un seul produit homogène plutôt que sur des centaines de prix sur un marché qui présente de nombreux produits différenciés. Dans un marché doté de produits différenciés, la coordination et la surveillance des déviations sont bien plus délicates car les concurrents ne peuvent pas savoir si les écarts de prix sont dus à une tricherie ou à des différences dans les produits concernés.
- La collusion est plus aisée si les sociétés en place sont préservées de la concurrence de nouveaux entrants. Si les barrières à l'entrée / à l'expansion sont élevées ou s'il n'existe aucun produit de substitution, une collusion sera plus susceptible de se produire et les sociétés se trouveront en situation d'entente délictueuse. L'arrivée de nouveaux fournisseurs attirés par les bénéfices élevés des membres de l'entente est un facteur fondamental susceptible d'ébranler la stabilité même de l'entente.
- Le nombre et la vigueur des intervenants étrangers à l'entente est également un facteur important à prendre en considération pour évaluer le risque de collusion sur le marché. Les prix collusoires ne peuvent perdurer si les acheteurs parviennent à échapper à l'augmentation de prix en détournant leur demande vers d'autres sources¹⁵.
- Il est également plus facile de coordonner les stratégies commerciales des entreprises sur des marchés aux conditions (d'offre et de demande) relativement stables. Sur un marché où la demande est volatile ou sur lequel l'arrivée de nouveaux acteurs est fréquente, il peut être impossible de maintenir une collusion.
- Il n'est possible d'atteindre un équilibre collusoire que si les mêmes entreprises se rencontrent et interagissent régulièrement sur le marché. C'est seulement à cette condition que les entreprises sont en mesure d'adapter leurs stratégies respectives en réaction à celles des concurrents.
- Si les entreprises se rencontrent sur plus d'un marché (ce que l'on appelle des *contacts multi-marchés*), il est plus probable que les mécanismes de sanction soient crédibles et efficaces. Des déviations sur un marché peuvent entraîner des sanctions sur l'ensemble des marchés et infliger des pertes plus importantes au tricheur. On conçoit aussi intuitivement que la collusion soit d'autant plus probable que les sociétés sont similaires¹⁶.
- Des asymétries de taille ou de structure de coûts, très susceptibles d'induire des différences de part de marché, peuvent empêcher les sociétés de se répartir correctement la réduction de production requise pour obtenir l'augmentation de prix collusoire escomptée¹⁷.

¹⁵ Si l'entente est confrontée à une demande concentrée, il est probable que les acheteurs puissent user de leur pouvoir de négociation pour stimuler la concurrence sur les prix entre les membres de l'entente (c'est-à-dire inciter à la triche) et entre ces derniers et les autres concurrents. Voir Snyder, 1996.

¹⁶ Des études économiques corroborent cette intuition et concluent qu'en cas de différences marquées en termes de taille, de part de marché et de structure de coûts des membres d'une entente, la stratégie collusoire est peu susceptible de perdurer. Voir Compte, Jenny et Rey, 2002 ; Kühn et Motta, 1999.

¹⁷ Pour une étude de l'impact des capacités de production et des taux d'utilisation des capacités sur la probabilité de collusion, voir Philips, 1995, chapitre 9.

2.3 *Le rôle de la transparence du marché dans les équilibres collusoires ou concurrentiels*¹⁸

La transparence du marché joue un rôle important dans la probabilité de collusion ou d'équilibre concurrentiel sur le marché. Le degré de transparence d'un marché peut être sommairement défini comme la vitesse à laquelle les chefs de file peuvent s'informer de manière fiable des mesures prises par leurs concurrents¹⁹. Les ouvrages économiques placent traditionnellement la transparence et l'accès à l'information au centre du processus concurrentiel et des avantages économiques qui en résultent. La théorie économique sur la transparence du marché et son utilité du point de vue de la lutte contre les pratiques anticoncurrentielles comporte deux volets. En 1776, Adam Smith nous mettait en garde contre les conséquences éventuelles pour la concurrence des communications entre concurrents²⁰. Cela étant, pour que la main invisible ait des effets bénéfiques pour la collectivité dans son ensemble, il est nécessaire que des intervenants indépendants puissent prévoir et mener à bien leur activité économique en se fiant à des signaux de prix. La transparence de marché est donc un facteur susceptible de favoriser la collusion ou la concurrence, selon les circonstances²¹ :

- D'une part, l'amélioration de la transparence du marché est apparemment un facteur à encourager ; après tout, le modèle idéal de concurrence parfaite suppose qu'une information parfaite sur le marché du côté de la demande et du côté de l'offre est disponible. Une meilleure connaissance des conditions du marché est un avantage avant tout pour les consommateurs, qui peuvent faire un choix entre des produits concurrents en s'appuyant sur une meilleure compréhension des caractéristiques de ces derniers ; ils peuvent en outre comparer les conditions des diverses offres et choisir librement celle qui répond le mieux à leurs besoins. La grande transparence bénéficie aux consommateurs en réduisant les coûts de recherche²². Du côté de l'offre, la connaissance du marché et de ses caractéristiques essentielles (comme les caractéristiques de la demande, les capacités de production disponibles, les projets d'investissement, etc.) facilite la mise au point de stratégies commerciales efficaces et efficaces par les intervenants du marché. Les nouveaux entrants ou les intervenants marginaux peuvent mettre à profit ces informations pour s'implanter plus efficacement sur le marché et y livrer une concurrence plus féroce aux intervenants en place.
- D'autre part, la grande transparence est l'un des facteurs requis pour former une entente et s'assurer qu'elle puisse perdurer. D'une manière générale, la transparence contribue à faciliter la réalisation d'un « accord », et à diminuer la tentation de tricher en réduisant le délai nécessaire à la découverte de la tricherie. Afin de parvenir à s'entendre sur les modalités de la coordination, d'en contrôler le respect et de sanctionner efficacement les comportements déviants, les entreprises doivent avoir une connaissance précise des stratégies de détermination des prix et/ou de production de leurs concurrents. L'élimination artificielle de l'incertitude entourant les actions des concurrents, alors que cette incertitude est à la base du processus concurrentiel, peut en soi faire disparaître la rivalité normale entre concurrents²³. Cela est particulièrement vrai sur les

¹⁸ Pour une discussion générale des effets pro concurrentiels et anticoncurrentiels des échanges d'informations, voir OCDE, 2010 et Capobianco, 2004.

¹⁹ Voir OCDE, 1999.

²⁰ Dans *La Richesse des Nations* (1776), Adam Smith observait que : « *il est rare que des gens du même métier se trouvent réunis, fût-ce pour quelque partie de plaisir ou pour se distraire, sans que la conversation finisse par quelque conspiration contre le public, ou par quelque machination pour faire hausser les prix.* » [Traduction française de Germain Garnier, 1881] (Tome I, Livre I, Ch. 10 (1776)).

²¹ Voir OCDE, 2010. Voir également Mollgaard et Overgaard, 2001 ; Philips, 1988.

²² Voir OCDE, 2001.

²³ Voir Cour de Justice de l'Union européenne, affaire C-8/08, *T-Mobile*, du 4 juin 2009, paragraphe 33.

marchés fortement concentrés sur lesquels la grande transparence permet aux entreprises de mieux prévoir ou anticiper les actions de leurs concurrents et donc de s'aligner sur elles.

2.3.1 *La transparence de marché publique et privée*

À la lumière de ce qui précède, il apparaît qu'une distinction soit nécessaire entre la transparence de marché *publique* et *privée* pour évaluer le rôle de la transparence dans la collusion. La transparence publique (à savoir lorsque l'information est divulguée à l'ensemble des intervenants du marché, y compris aux consommateurs) peut renforcer la concurrence, tandis que la transparence privée (à savoir lorsque l'information n'est divulguée qu'aux seuls fournisseurs) aura probablement pour effet de la restreindre²⁴. Un échange d'informations est réellement public s'il rend les données échangées accessibles à tous les fournisseurs et clients dans des conditions identiques et gratuitement²⁵. L'hypothèse est que les informations divulguées à l'ensemble du public peuvent être employées pour limiter la probabilité de collusion, dès lors que les concurrents sans lien avec l'intervenant, les entrants potentiels, les acheteurs et les consommateurs finaux sont à même de limiter tout effet restrictif sur la concurrence.

Les ouvrages économiques prêtent un certain nombre d'effets proconcurrentiels aux divulgations publiques mais non aux divulgations privées, c'est pourquoi il convient de distinguer entre la transparence de marché publique et privée pour définir une politique de la concurrence pertinente²⁶. Avant tout, une grande transparence et une meilleure connaissance des conditions de marché sont bénéfiques aux consommateurs. En 1961, Stigler a mis en évidence l'importance des coûts de recherche pour les consommateurs²⁷. Les acheteurs doivent connaître les vendeurs et leurs prix, les consommateurs doivent se documenter sur la qualité des produits. Plus il y a d'informations disponibles sur le marché, autrement dit, sur les produits et services et ceux qui les fournissent, plus les consommateurs sont en mesure de faire un choix entre produits concurrents et plus ils sont informés sur les caractéristiques des produits. Les consommateurs peuvent comparer, en parfaite connaissance de cause, les conditions des différentes offres et choisir librement celle qui répond le mieux à leurs besoins²⁸. On considère généralement que les effets bénéfiques de la divulgation d'informations sur les prix sont supérieurs aux effets collusoires des annonces²⁹.

²⁴ Voir Kühn et Vives, 1995.

²⁵ Selon Collins et Bennett, « Les informations publiques retraitées – en y ajoutant de nouvelles fonctionnalités qui permettent, par exemple, de consulter les données de manière plus détaillée – puis revendues à des sociétés, ne seraient pas jugées publiques dans le cadre de cette définition, pas plus que les informations publiées sur un site Internet inaccessible au grand public ou sans visibilité publique. » (Bennett et Collins, 2010).

²⁶ Voir Motta, 2004. Les avantages que procure la transparence publique du côté de l'offre ne seront pas étudiés ici car ils sont communs aux annonces publiques et privées. Pour une étude plus approfondie des effets proconcurrentiels de la transparence pour les fournisseurs, voir OCDE, 2010.

²⁷ Voir Stigler, 1961.

²⁸ Une grande transparence peut accroître le transfert des consommateurs, mais les effets de ce phénomène sont ambivalents. Bjorkroth a par exemple fait valoir qu'un transfert accru des consommateurs augmentait l'avantage que l'intervenant tire d'une déviation (ce qui réduit l'incitation à coordonner), mais qu'elle augmentait également la capacité à sanctionner l'intervenant qui s'est écarté de l'entente (ce qui accroît la tentation de coordonner). Voir Bjorkroth, 2010. Voir aussi Farrell et Klemperer, 2006 ; Bos, Peeters et Pot, 2010.

²⁹ Pour une étude des publications empiriques et théoriques sur les annonces de prix, voir Fumagalli et Motta, 1999.

Dans ces circonstances, l'amélioration de la transparence du marché par le biais d'annonces au grand public peut être bénéfique aux consommateurs, puisqu'elle réduit leurs coûts de recherche³⁰. Corroborant les conclusions de l'économie traditionnelle, l'économie comportementale a montré que des consommateurs mieux informés peuvent jouer un rôle important dans l'instauration d'une vive concurrence entre les fournisseurs³¹. Elle a également montré que les asymétries informationnelles et l'absence d'informations peuvent non seulement fausser le comportement des consommateurs mais aussi brider la concurrence et l'équilibre concurrentiel³². Dans ces circonstances, une grande transparence peut accroître le bien-être social³³. D'un point de vue plus empirique et pragmatique, si les annonces unilatérales ont pour but de fournir des points de convergence aux concurrents en matière de prix, les communications privées sont largement moins coûteuses et plus efficaces que des annonces publiques³⁴. De plus, ces dernières sont par définition visibles et accroissent donc le risque d'être décelées par les autorités chargées d'appliquer le droit de la concurrence et rendent la réunion de preuves plus aisée en cas d'enquête ultérieure sur ces pratiques.

2.3.2 De l'intérêt du « *cheap talk* »

Si la transparence joue un rôle important pour évaluer la probabilité de collusion sur le marché, les théories s'affrontent sur les types d'annonce qui contribuent à augmenter artificiellement le degré de transparence, et donc à faire peser un risque de collusion. Un facteur important, que soulignent les études, est le fait que les communications entre entreprises ne peuvent guère servir à faciliter la coordination si elles ne sont pas *crédibles* et *vérifiables*. Si les informations communiquées ont pour but de fournir un point de convergence pour la coordination, l'annonceur sera tenté de divulguer les informations susceptibles d'amener le point de convergence au plus près de son propre optimum. De la même manière, si l'annonce a pour but de surveiller l'application d'une entente existante, la tentation de mentir sur les déviations à cette entente sera grande. Un concurrent rationnel se gardera dès lors de divulguer toute information incompatible avec les incitations de l'annonceur, rendant l'information inutile – c'est ce que l'on appelle le « *cheap talk* », une pratique critiquée³⁵.

³⁰ Pour une étude des liens entre une transparence accrue bénéfique aux consommateurs et les coûts de transfert, et leurs effets sur la concurrence, voir la section relative à la banque de réseau dans OCDE, 2006(b).

³¹ Pour une analyse plus approfondie de cette question, voir Bennett, Fingleton, Fletcher, Hurley et Ruck, 2010.

³² Voir Klemperer, 1995, selon lequel l'application de coûts de transfert élevés permet aux entreprises de maintenir des prix plus élevés et de réaliser des bénéfices plus importants.

³³ Bennett et Collins ont cependant souligné combien il était important qu'outre l'accès à l'information, le consommateur ait la possibilité d'évaluer cette information et d'agir en conséquence. À cet égard, certains chercheurs ont mis en garde contre les effets que peuvent avoir, sur les choix des consommateurs et par conséquent sur le bien-être social, les stratégies des entreprises visant à submerger leurs clients d'informations sur leurs produits et services, à la seule fin de rendre plus complexe l'évaluation des informations et, partant, plus difficile le choix des consommateurs. Voir Bennett et Collins, 2010 ; voir également Ellison et Ellison, 2009 ; Gabaix et Laibson, 2006.

³⁴ La loi risque moins d'être sous-appliquée en ce qui concerne les annonces publiques (voir Bennett et Collins, 2010). C'est pourquoi il convient d'analyser leurs effets sur la concurrence au cas par cas. Pour ce qui est des échanges d'informations privés, s'ils ne doivent pas être présumés anticoncurrentiels en tout état de cause, la plupart des autorités de la concurrence les abordent avec une grande circonspection et les examinent de très près pour apprécier les avantages / efficacités éventuels qui peuvent les justifier en application des règles de concurrence.

³⁵ Voir Baliga et Morris, 2002 ; Bennett et Collins, 2010.

Les conclusions des économistes divergent toutefois sur la mesure dans laquelle le « *cheap talk* » peut contribuer à établir un équilibre collusoire. Bien que cette pratique n'incite nullement à dire la vérité, certains économistes estiment que les communications entre entreprises, même si elles ne sont pas vérifiables, peuvent amener les intervenants à des équilibres de Nash³⁶. En particulier, ils font valoir que le « *cheap talk* » peut contribuer à une convergence de vues et permettre aux entreprises de parvenir à un accord sur des stratégies collusoires acceptables³⁷. Il est toutefois nécessaire que les informations divulguées engagent leur émetteur. Ce n'est qu'à cette condition que les intervenants seraient en mesure de se coordonner en se maintenant sur un équilibre de Nash³⁸. D'autres chercheurs ont laissé entendre que le « *cheap talk* » pouvait aider à créer et à entretenir les relations personnelles qui jouent un rôle important pour faire perdurer une collusion et surmonter les problèmes de confiance³⁹. D'autres encore ont montré que les « *cheap talks* » pouvaient jouer un rôle dans diverses interactions économiques impliquant des informations privées : dans des négociations⁴⁰, des contextes politiques...⁴¹ Enfin, même le « *cheap talk* » qui n'est pas immédiatement vérifiable peut être un objet de préoccupation dans la mesure où les projets annoncés peuvent souvent être vérifiés ultérieurement ou annulés alors que les annonces erronées peuvent être sanctionnées, ce qui peut suffire, dans le cadre de relations commerciales à long terme, à rendre les annonces crédibles⁴².

³⁶ Un équilibre de Nash est un choix de stratégies tel qu'aucune entreprise ne puisse tirer parti d'un changement de stratégie étant donné les stratégies existantes de ses rivales. Par conséquent, un équilibre de Nash constitue la meilleure réaction possible de chaque entreprise aux stratégies employées par les autres. Voir Nash, 1951 ; voir également Fudenberg et Tirole, 1989 ; Shapiro, 1989 ; Neumann et Morgenstern, 1980.

³⁷ Voir Farrell, 1987 ; Overgaard et Møllgaard, 2007.

³⁸ Voir Farrell, 1988.

³⁹ Voir Farrell et Rabin, 1996.

⁴⁰ Voir Farrell et Gibson, 1989 ; Mathews et Postlewait, 1989.

⁴¹ Voir Austen-Smith, 1990 ; Austen-Smith, 1993 ; Matthews, 1989.

⁴² Voir Nitsche et von Hinten-Reed, 2004 ; Bigoniy, Fridolfsson, Le Coq et G Spagnolo, 2010.

L'affaire Airline Tariff Publishing aux États-Unis

L'affaire Airline Tariff Publishing (ATP) aux États-Unis illustre une mesure d'application prise pour recours au « *cheap talk* » dans le but de fournir des points de convergence anticoncurrentiels. En décembre 1992, le ministère américain de la Justice (DoJ) a poursuivi huit des plus grandes compagnies aériennes américaines ainsi qu'Airline Tariff Publishing Company (ATP) pour entente sur les prix et pour avoir exploité ATP de manière à faciliter la collusion, en infraction à la Section 1 du Sherman Act⁴³. ATP réunissait des informations sur les tarifs auprès des compagnies aériennes et les diffusait quotidiennement à l'ensemble des compagnies ainsi qu'aux principaux systèmes informatiques de réservation utilisés par les agences de voyage.

Selon le ministère, ATP permettait aux transporteurs de réagir rapidement aux prix pratiqués de part et d'autre, renforçant la dissuasion, ce qui en soi favorisait la collusion. ATP fournissait aux compagnies aériennes à la fois un moyen de diffuser les informations sur les tarifs auprès du public et de mener un dialogue finalement privé sur les tarifs. Les défenseurs avaient conçu et exploitaient le système informatique d'échange de tarifs d'ATP d'une manière qui facilitait inutilement les interactions coordonnées entre les compagnies aériennes, de sorte que ces dernières pouvaient

- se communiquer plus efficacement les futures augmentations de prix, les restrictions et la suppression des rabais,
- établir des liens entre les modifications de tarifs proposées pour une ou plusieurs liaisons interurbaines et les modifications de tarifs proposées pour d'autres liaisons interurbaines,
- contrôler les changements apportés par les autres compagnies, y compris les modifications de tarifs non disponibles à la vente et
- réduire l'incertitude quant aux intentions de prix de chacune.

L'affaire ATP comportait un exemple classique de « *cheap talk* » : les compagnies aériennes communiquaient des informations sur les prix sans s'engager sur une ligne de conduite – ainsi, elles pouvaient annoncer une hausse tarifaire à venir tout en conservant la possibilité de ne pas l'appliquer ou de la modifier avant son entrée en vigueur. Si les termes de l'accord sont complexes (comme lorsque les prix sont détaillés pour de nombreux marchés) mais que tous les intervenants désirent s'entendre, le « *cheap talk* » peut aider les entreprises à parvenir à un équilibre collusoire. ATP réunissait des informations sur les tarifs auprès des compagnies aériennes et les diffusait quotidiennement à l'ensemble des compagnies ainsi qu'aux principaux systèmes informatiques de réservation utilisés par les agences de voyage. Ces dispositions permettaient de se livrer au « *cheap talk* » de manière efficace⁴⁴.

L'affaire a été réglée par un jugement d'expédient, élaboré pour s'assurer que les compagnies aériennes cessent d'employer un système de diffusion des tarifs d'une manière qui facilite inutilement la coordination des prix ou qui leur permette de s'entendre sur certains prix.

Les preuves empiriques sur la contribution des communications informelles à la collusion sont elles aussi ambiguës. Tout d'abord, la plupart des affaires d'entente comportent des échanges d'informations significatifs entre participants ; les échanges en face-à-face sont ceux qui semblent les plus efficaces et sont employés pour instaurer un climat de confiance⁴⁵. Les études empiriques ont également conclu que les communications d'intentions facilitent la collusion. En particulier, le simple fait de savoir que l'on sera

⁴³ États-Unis contre Airline Tariff Publishing Co., 1994-2 Trade Cas. (CCH) ¶70 687 (D.D.C. 10 août 1994). Pour de plus amples détails sur l'affaire, veuillez vous reporter à la note des États-Unis sur le Rapport de l'OCDE intitulé *Oligopoly*, 1999, Paris.

⁴⁴ Voir aussi Borenstein, 1999.

⁴⁵ Voir Levenstein et Suslow, 2006(b) ; Potters, 2005.

informé des mesures prises par les autres intervenants peut augmenter sensiblement la probabilité de coordination, à condition qu'il existe par ailleurs un signal annonciateur des mesures envisagées⁴⁶. En revanche, selon les publications empiriques sur les signaux de prix non contraignants, bien que les signaux de prix accroissent souvent le prix des transactions, cette hausse est très souvent temporaire et cette pratique peut ne pas perturber l'équilibre⁴⁷. Il semble plus probable que des signaux de prix engendrent des hausses de prix plus permanentes lorsque les vendeurs se trouvent en concurrence sur plusieurs marchés⁴⁸. De la même manière, l'impact du « *cheap talk* » semble dépendre des possibilités dont disposent les vendeurs pour adresser des signaux : une communication très restrictive (une proposition de prix par période, par exemple) aura peu de risques d'avoir un effet durable sur les prix, tandis que des structures donnant des signaux répétés peuvent engendrer une hausse durable des prix⁴⁹.

3. Le rôle de la communication dans l'établissement d'un accord anticoncurrentiel ou d'une pratique concertée

Jusqu'à présent, nous avons vu que le terme de « collusion » se réfère à toute forme de coordination ou d'accord entre sociétés concurrentes sur un marché, dans le but de relever les prix (ou de diminuer la production) à un niveau supérieur à l'équilibre non collusoire. Cette deuxième partie aborde les collusions explicite et tacite à la lumière des théories économiques et du droit et présente les conséquences, pour la politique de la concurrence, de l'application des règles relatives aux ententes⁵⁰. Elle examinera en particulier la manière dont les concepts traditionnels d'« accord » et de « pratiques concertées » ont été employés par les autorités chargées de l'application du droit de la concurrence pour régler des cas dans lesquels la collusion entre concurrents est facilitée par des pratiques d'entreprises destinées à accroître la transparence du marché sans que les concurrents aient à conclure d'accords explicites.

3.1 Collusion explicite et collusion tacite

C'est en interagissant directement et en trouvant un accord sur le niveau optimal du prix ou de la production que les entreprises peuvent créer un équilibre collusoire le plus directement possible. Toute forme de contact direct entre les entreprises est appelée *collusion explicite* (ou *collusion ouverte*)⁵¹. La

⁴⁶ Voir Charness et Grosskopf, 2004.

⁴⁷ Voir Cason, 1995 ; Holt et Davis, 1990.

⁴⁸ Voir Caslon et Davis, 1995.

⁴⁹ Voir Harstad, Martin et Normann, 1997. C'est la position qu'a adoptée le ministère américain de la Justice dans l'affaire ATP analysée plus en détail dans le présent document. Cette affaire comportait un « *cheap talk* », à savoir l'annonce d'une augmentation des prix à venir, s'accompagnant toutefois de la possibilité de l'annuler ou de la modifier avant son entrée en vigueur. Selon le ministère, si les termes de l'accord sont complexes mais que tous les intervenants désirent trouver un terrain d'entente, le « *cheap talk* » peut aider les entreprises à parvenir à un équilibre collusoire. Voir les notes des États-Unis dans OCDE, 2007(b). Voir aussi Farrell et Rabin, 1996.

⁵⁰ Ce document n'examinera pas comment aborder les affaires de collusion à l'aide d'autres dispositions du droit de la concurrence, comme notamment les dispositions de contrôle des fusions, en vertu desquelles les fusions pouvant entraîner des effets coordonnés à l'issue de la transaction sont interdites. Il n'abordera pas non plus le recours au concept de position dominante conjointe ou collective – en vertu des règles de conduite unilatérale – contre des pratiques d'entreprises similaires à celles évoquées dans ce document.

⁵¹ Le fait que les entreprises interagissent directement n'implique pas nécessairement qu'il soit plus aisé de mettre en place et de maintenir une collusion explicite. Au contraire, la probabilité de former une collusion explicite aussi bien que tacite dépend strictement des facteurs structurels et comportementaux évoqués plus haut. Au fil du temps, l'important est la tentation qu'a chaque entreprise de tricher sur un élément de l'accord et la capacité des autres entreprises à déceler et à sanctionner une telle déviation. *Toutes* ces conditions doivent être réunies *aussi bien* pour les collusions tacites *que* pour les accords explicites.

collusion n'implique cependant pas nécessairement un accord explicite entre les entreprises. Sur les marchés oligopolistiques, les entreprises tendent à dépendre les unes des autres dans leurs décisions tarifaires ou en matière de production. Ainsi, les mesures de chacune d'entre elles entraînent une réaction de la part des autres et ont une incidence sur cette réaction. Dans de telles circonstances, les entreprises oligopolistiques peuvent tenir compte des mesures prises par leurs rivales et coordonner leurs actions comme si elles formaient une entente, sans toutefois avoir passé d'accord explicite. Ce comportement coordonné est appelé *collusion tacite* (ou parfois *implicite*), *interdépendance oligopolistique* ou *oligopole non coopératif*⁵².

Particularités des collusions explicites

Contrairement aux collusions tacites, les collusions explicites permettent d'atteindre plus efficacement un équilibre collusoire, du moins lors de la phase initiale de coopération. Elles permettent aux membres de l'entente de se coordonner sur un niveau de prix supérieur à celui qu'ils auraient atteint avec une coordination tacite. La collusion explicite peut également aider à structurer la coopération de façon à simuler certaines des conditions nécessaires pour la faire perdurer. En particulier, si le marché manque naturellement de transparence, les entreprises peuvent l'accroître en mettant en place un échange d'informations institutionnalisé⁵³. Enfin, une collusion explicite peut faciliter la coordination entre un plus grand nombre d'entreprises que son homologue tacite. Les ententes explicites sont également plus faciles à déceler (puisqu'elles laissent des traces pouvant servir de preuve à l'encontre des membres) et tombent clairement sous le coup du droit de la concurrence, lequel expose leurs membres à de sévères sanctions pécuniaires et (dans certains pays) criminelles. À la lumière de ces éléments, les entreprises ne se livrent donc à une entente explicite que si la structure du marché ne permet pas de maintenir un équilibre collusoire tacite.

Contrairement à la collusion explicite, la collusion tacite entraîne un équilibre non concurrentiel du fait que chaque membre décide de sa propre stratégie d'optimisation du bénéfice indépendamment de ses concurrents. Cela se produit lorsque le marché est extrêmement concentré, stable, homogène et transparent. Dans ces conditions, les décisions tarifaires et de production de chaque entreprise ont une incidence notable sur celles des concurrents et, après une période d'actions / réactions en chaîne, les entreprises prennent conscience que leurs choix stratégiques respectifs sont interdépendants.

Aucune entreprise ayant pour but d'optimiser ses bénéfices ne souhaite générer un bénéfice nul indéfiniment et chaque entreprise sait qu'elle pourrait dégager des bénéfices supérieurs à ce que permet l'équilibre concurrentiel en appliquant des prix non concurrentiels dans un cadre collectif. Les interactions répétées à l'infini rendent la menace de sanction crédible. Ainsi, chaque entreprise sait que toute déviation de l'équilibre non concurrentiel déclencherait une guerre des prix qui rapprocherait ces derniers de l'équilibre concurrentiel. Par conséquent, ces interactions oligopolistiques rendent les stratégies individuelles propices à former un équilibre non concurrentiel sur le front tarifaire ou de la production, sans communication ou accord explicite. Cette forme de comportement parallèle délibéré a généralement le même effet économique qu'une entente sur les prix ou de restriction de la production, sans qu'il soit toutefois nécessaire de former un accord explicite.

En réalité, cependant, il est possible d'avoir l'intention de coopérer, sans en avoir pour autant la capacité. Il peut être difficile de s'entendre sur des conditions de coopération acceptables par toutes les parties et de s'assurer que les entreprises n'y dérogent pas. Afin d'accroître les chances de réussite d'une

⁵² Pour un aperçu général de la théorie des collusions tacites, voir Tirole, 2002 ; Carlton et Perloff, 1999 ; Scherer et Ross, 1990 ; Bishop et Walker, 2010 ; Philips, 1995.

⁵³ Pour une analyse des accords d'échange d'informations dans le contexte des associations professionnelles, voir OCDE, 2007.

collusion, et notamment pour améliorer leur capacité à déceler et sanctionner la tricherie, les membres de l'entente peuvent avoir recours à ce que l'on appelle des « pratiques de facilitation ».

3.2 *Concurrence et interdépendance oligopolistique – le dilemme de la politique de la concurrence*

Le point précédent, qui traite de la collusion explicite et tacite, montre comment, dans certaines conditions de marché (sur des marchés comptant peu de vendeurs et des produits homogènes), un comportement économique rationnel de la part de chaque intervenant peut entraîner des stratégies tarifaires supra-concurrentielles de manière naturelle. C'est la raison pour laquelle la collusion tacite ou les comportements parallèles délibérés n'entrent pas dans le champ d'application de la législation sur les ententes. Cependant, du point de vue de la politique de la concurrence, une telle collusion tacite peut être indésirable car elle permet aux entreprises de réduire significativement la production ou de relever les prix au détriment des consommateurs. C'est ce que l'on appelle le *problème des oligopoles*, un sujet qui a alimenté un vaste débat sur la question de savoir si la politique de la concurrence doit s'inquiéter des collusions tacites⁵⁴. Les dispositions légales régissant les ententes ne sont généralement pas conçues pour s'occuper des stratégies de marché individuelles et rationnelles d'une seule et unique entreprise, même si un ensemble de stratégies individuelles similaires a globalement des effets équivalents à ceux d'une entente.

À la frontière entre la collusion explicite (qui doit toujours être considérée comme illicite au regard du droit de la concurrence) et le simple parallélisme délibéré (qui ne doit pas entrer dans le champ du droit de la concurrence car il n'implique aucune forme de coordination entre les concurrents), il existe une zone floue dans laquelle les comportements des entreprises vont au-delà du parallélisme délibéré, sans toutefois impliquer d'entente expresse entre les concurrents. Cette situation peut se produire notamment sur les marchés oligopolistiques au sein desquels les concurrents peuvent se coordonner sur les prix et accroître la probabilité de collusion tacite en se livrant à des activités (baptisées « pratiques de facilitation », ou signaux) qui rendent la coordination plus aisée (en facilitant la communication par exemple) et plus efficace (en facilitant la détection des tricheries et l'imposition de sanctions en cas de déviation)⁵⁵.

⁵⁴ Pour un aperçu général des implications du « problème des oligopoles » pour la politique de la concurrence, voir Hovenkamp, 1994, Chapitre 4 ; Turner, 1962 ; Posner, 1969 ; Posner, 1976. Voir aussi Hay, 1999.

⁵⁵ Voir Kovacic, 1993 ; Page, 2009 ; Arquit, 1993 ; Hay, 2008 ; Blechman, 1979 ; Ayres, 1987.

Définitions et exemples de pratiques de facilitation

Selon l'OCDE, le concept de pratiques de facilitation désigne le « *comportement d'entreprises, généralement dans un marché oligopolistique, qui ne constitue pas une entente explicite « injustifiable », et qui aide les concurrents à éliminer l'incertitude stratégique et à coordonner leurs comportements plus efficacement.*⁵⁶ »

Les autorités en charge de la concurrence ont enquêté sur un vaste éventail de comportements pouvant être qualifiés de pratiques de facilitation. Certains des exemples de pratiques de facilitation ou de mécanismes de signaux les plus fréquemment cités⁵⁷ sont notamment les communications directes ou indirectes entre concurrents – comme les échanges d'informations entre concurrents⁵⁸ –, les allocutions publiques ou encore les annonces – comme les diffusions d'informations sur les prix par voie médiatique ou les annonces anticipées de prix.

Les systèmes tarifaires favorisant les collusions comptent également parmi les pratiques de facilitation. Ce sont notamment les clauses du client le plus favorisé, les clauses d'alignement, les clauses dites « anglaises », les clauses de prix de vente imposé minimum, les méthodes de tarification uniforme quelle que soit la zone desservie et les systèmes de tarification par centre de distribution⁵⁹. Les pratiques de facilitation peuvent également comprendre des ententes verticales susceptibles de faciliter la coordination entre fournisseurs, comme certains programmes de prix minimums annoncés et les cumuls de mandats d'administrateurs, lesquels peuvent faciliter la coordination entre concurrents. La normalisation des produits et les méthodes d'étalonnage sont aussi souvent considérées comme des pratiques de facilitation.

Abstraction faite des solutions réglementaires structurelles au problème des oligopoles⁶⁰, dans le cadre desquelles une intervention réglementaire modifierait la structure du marché et favoriserait un renforcement de la concurrence, les autorités chargées du droit de la concurrence ont trouvé des moyens de répondre au problème des oligopoles en étendant les notions classiques d'« accord » et de « pratique concertée » afin de s'attaquer aux pratiques qui facilitent l'émergence d'un équilibre non collusoire sur les marchés où une interdépendance oligopolistique pure ne serait pas réalisable ou serait insuffisante pour générer une rente de monopole. Dans bien des pays, les autorités de la concurrence ont employé des règles de contrôle des fusions *ex ante* afin d'empêcher des changements structurels qui favoriseraient des effets coordonnés⁶¹, ou des règles relatives aux conduites unilatérales *ex post* ayant pour but de s'attaquer à l'interdépendance oligopolistique à l'aide du concept de position dominante conjointe ou collective.

Il reste toutefois à savoir si les règles comportementales interdisant les accords anticoncurrentiels et les pratiques concertées sont appropriées pour régler des situations entraînant une interdépendance oligopolistique, ainsi que dans quelles circonstances le droit des ententes est un moyen approprié de poursuivre les pratiques qui facilitent la collusion en l'absence de preuve d'entente illicite effective entre les entreprises. Ces situations intermédiaires, à la frontière entre collusion explicite et collusion tacite, deviennent de plus en plus courantes dans les économies complexes, où les « accords » classiques laissent

⁵⁶ Voir OCDE, 2007(a).

⁵⁷ Voir de manière générale Areeda et Hovenkamp, 2003 ; Hay, 1982.

⁵⁸ Voir OCDE, 2010 ; Capobianco, 2004.

⁵⁹ Pour un aperçu général de ces pratiques tarifaires, voir Capobianco, 2007.

⁶⁰ Le problème des oligopoles est fondamentalement structurel et requiert donc des solutions de même nature pouvant être apportées par les autorités chargées de la réglementation sectorielle. Voir Turner, 1962.

⁶¹ Le contrôle des fusions est un début de réponse à ce dilemme en matière de politique de la concurrence. Il est employé pour éviter les fusions affectant la structure du marché de telle manière qu'elles seraient susceptibles d'entraîner une collusion tacite à l'avenir (ce que l'on appelle les *effets coordonnés* des fusions). Voir l'analyse dans Capobianco, 2007.

de plus en plus la place à des formes plus discrètes et plus souples de coordination et d'entente informelle entre les firmes. Ces types d'interaction entre concurrents peuvent toutefois eux aussi avoir des effets anticoncurrentiels et requérir une analyse à la lumière du droit de la concurrence.

Le principal enjeu, pour les autorités chargées d'appliquer le droit de la concurrence, est toutefois de faire une distinction entre un comportement licite résultant d'une interdépendance oligopolistique et certains autres comportements pouvant être qualifiés de pratiques illicites de facilitation. Malheureusement, il n'existe aucun test permettant de tracer une frontière claire entre les deux. La plupart des comportements qualifiés de pratique de facilitation peuvent avoir des effets à la fois pro concurrentiels et anticoncurrentiels, selon les circonstances dans lesquelles ils sont adoptés. Étant donné cette ambivalence, il sera généralement nécessaire d'étudier soigneusement une pratique donnée, ses effets anticoncurrentiels et ses gains d'efficacité, ainsi que son objectif ou son but, afin de déterminer si elle peut être jugée illicite⁶². Dans des cas exceptionnels, il est cependant possible que les circonstances fassent peser une présomption d'anticoncurrentialité sur certaines pratiques, ce qui permet à une autorité de la concurrence de les condamner à l'issue d'une analyse abrégée, sans avoir à apporter la preuve d'effets anticoncurrentiels effectifs. Ces pratiques sont jugées restreindre la concurrence en soi ou par objet.

La suite du document étudiera les cas dans lesquels les divulgations unilatérales d'informations peuvent soulever des inquiétudes au regard du droit de la concurrence.

3.3 Divulgations unilatérales d'informations et ententes illicites

3.3.1 Les divulgations unilatérales, pratiques accessoires d'une entente illicite plus vaste

Les divulgations unilatérales d'informations sont moins problématique lorsque les concurrents s'en servent dans le cadre d'un accord anticoncurrentiel plus vaste impliquant par exemple de s'entendre sur les prix ou de se répartir la clientèle. La divulgation est alors un mécanisme accessoire destiné à aider la mise en application et la surveillance de l'accord anticoncurrentiel principal⁶³.

L'analyse de cette situation est relativement aisée et les autorités de la concurrence l'évalueraient dans le cadre de l'accord anticoncurrentiel principal. Si une entente sur les prix peut être établie, les autorités de la concurrence examinent les effets restrictifs potentiels des divulgations unilatérales dans le contexte plus général de l'entente ou de l'accord dont elles sont dérivées⁶⁴.

3.3.2 Accords de divulgation d'informations

Les concurrents peuvent également convenir, sur l'ensemble d'un secteur, de divulguer chacun unilatéralement des informations sensibles, comme les prix catalogue. Il convient de faire une distinction entre les cas où les entreprises rivales acceptent d'adhérer aux conditions annoncées et les cas dans lesquels elles s'accordent simplement pour divulguer l'information, sans obligation de se conformer aux conditions commerciales divulguées. Le caractère licite de ces deux pratiques dépend de la nature de la pratique de facilitation : accord d'adhésion à des conditions commerciales données ou accord de partage d'informations. Ces deux pratiques peuvent faciliter la coordination des prix, mais un accord sur les conditions commerciales doit éveiller une plus grande suspicion.

⁶² Voir OCDE, 2008.

⁶³ Voir aussi l'analyse de la détermination des prix ci-dessous.

⁶⁴ Voir OCDE, 2010 ; Bennett et Collins, 2010 ; Capobianco, 2004 ; Kühn et Vives, 1995.

Un accord qui facilite la coordination des prix en fixant les conditions commerciales des entreprises concurrentes est très susceptible d'être jugé illicite en soi⁶⁵. Aux États-Unis, par exemple, la Cour suprême a statué, dans l'affaire *Sugar Institute*⁶⁶, qu'un accord passé entre entreprises rivales dans le but de se conformer à des prix annoncés publiquement était illégal. L'engagement de se conformer à des conditions commerciales données a été le facteur décisif dans le jugement de la Cour. De manière similaire, dans l'affaire *Catalano*⁶⁷, la Cour a condamné un accord par lequel les intervenants s'engageaient à ne pas offrir de réductions secrètes, ce qui revenait à un accord par lequel chaque entreprise décidait de se conformer aux prix catalogue annoncés. Un raisonnement similaire s'appliquerait aux accords visant à adopter d'autres pratiques de facilitation, comme les prix de vente imposés minimums, la tarification uniforme quelle que soit la zone déservie ou la tarification par centre de distribution, autant de pratiques qui accroissent la transparence des prix en restreignant les conditions commerciales⁶⁸.

Pour évaluer un accord horizontal ayant pour but de simplement divulguer des informations sans engagement à se conformer à une politique commerciale commune, il convient d'effectuer une analyse au cas par cas des effets proconcurrentiels et anticoncurrentiels du renforcement de la transparence. Les autorités de la concurrence et les tribunaux jugent généralement ces effets selon la nature des informations échangées, le type de divulgation et l'impact qu'a cette pratique au vu des caractéristiques du marché⁶⁹.

3.3.3 *Les divulgations unilatérales, preuves d'un accord illicite*

Les annonces unilatérales pourraient également être considérées comme des preuves indirectes d'un accord illicite secret. L'argument serait alors que les entreprises ne partageraient pas volontairement d'informations confidentielles si elles n'étaient pas déjà convenues de restreindre la concurrence entre elles.

Les autorités chargées d'appliquer le droit de la concurrence s'efforcent toujours d'obtenir des preuves directes d'accord dans les affaires d'entente, sans qu'il soit toujours possible d'en trouver. Tous les pays utilisent des preuves indirectes dans les affaires d'entente. Il existe deux catégories générales de preuves indirectes : celles fondées sur une communication et celles de nature économique. Des deux, les preuves fondées sur une communication sont considérées comme les plus importantes. Les preuves fondées sur une communication attestent que les membres d'une entente se sont rencontrés ou ont communiqué entre eux d'une autre manière, mais ne décrivent pas la teneur des propos. Il peut s'agir par exemple d'enregistrements de conversations téléphoniques entre des membres présumés d'une entente, d'un déplacement qu'ils ont effectué vers une destination commune, de notes ou de comptes rendus de réunions auxquelles ils ont participé. De tels indices peuvent receler une très forte valeur probante de l'existence d'un accord. De nombreuses affaires comportant des preuves indirectes incluaient des preuves fondées sur une communication ; dans certains cas, ces indices étaient confondants⁷⁰.

3.4 *Divulgations unilatérales d'informations sans accord d'entente*

Les situations dans lesquelles les concurrents adoptent des pratiques de facilitation parallèles – comme des divulgations individuelles d'informations – à des fins anticoncurrentielles sans pour autant

⁶⁵ Voir Page, 2010 ; Lande et Marvel, 2000.

⁶⁶ *Sugar Inst., Inc. contre États-Unis*, 297 U.S. 553 (1936).

⁶⁷ *Catalano, Inc. contre Target Sales, Inc.*, 446 U.S. 643 (1980).

⁶⁸ Voir Page, 2010.

⁶⁹ Pour une étude détaillée de ces facteurs, voir OCDE, 2010 ; voir également Capobianco 2004.

⁷⁰ Voir les notes à OCDE, 2006(a).

passer d'accord à cet effet sont plus complexes. Pour résoudre ce problème, certains pays se sont reposés sur le concept d'« accord ». Ils ont alors regardé si les preuves suggérant que les concurrents n'ont pas agi indépendamment dénotaient l'existence d'un accord. D'autres ont utilisé le concept de « pratique concertée ».

3.4.1 *Le concept d'accord et de pratique concertée dans l'UE*

L'article 101 du traité sur le fonctionnement de l'Union européenne (« TFUE ») interdit « *tous accords [...] et toutes pratiques concertées [...] qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché intérieur [...]*. » Le traité ne définit toutefois pas les concepts d'accord et de pratique concertée. Cette tâche revient à la jurisprudence des tribunaux européens et aux usages en matière d'application du droit de la Commission européenne.

La notion d'« accord » au sens de l'article 101 du TFUE recouvre une acception très large. Selon le Tribunal de première instance, « *[...] un accord [...] doit reposer sur la constatation directe ou indirecte de l'élément subjectif qui caractérise la notion même d'accord, c'est-à-dire d'une concordance de volontés entre opérateurs économiques sur la mise en pratique d'une politique, de la recherche d'un objectif ou de l'adoption d'un comportement déterminé sur le marché, abstraction faite de la manière dont est exprimée la volonté des parties de se comporter sur le marché conformément aux termes dudit accord*⁷¹. » La notion d'accord s'articule donc autour de deux éléments centraux : (i) l'existence d'une concordance de volontés entre deux parties au moins et (ii) la manifestation implicite ou explicite de cette concordance. L'existence d'une volonté commune (ou d'un engagement) et sa manifestation sont donc des éléments essentiels.

L'article 101 TFUE opère une distinction entre accords et « pratiques concertées ». Il vise ainsi à fournir à la Commission européenne une catégorie juridique qui pourrait être suffisamment souple pour regrouper tous les comportements multilatéraux qui restreignent la concurrence, même en l'absence d'accord ou d'engagement formel⁷². Si les autorités de la concurrence n'avaient la possibilité de faire appliquer le droit de la concurrence qu'en cas d'accords, l'efficacité de la politique d'application du droit s'en trouverait fortement limitée. En effet, les difficultés croissantes à trouver des preuves suffisantes pour démontrer que les entreprises ont effectivement conclu un accord restreindraient sérieusement le nombre d'affaires sur lesquelles l'autorité serait en mesure de mener à bien une enquête et d'entreprendre des poursuites. Ce serait le cas pour lorsque les firmes interagissent sur des marchés oligopolistiques et concentrés, où les conditions de marché et l'interaction répétée entre les quelques intervenants existants peuvent entraîner des collusions. Dans ces cas, les autorités de la concurrence peuvent rencontrer des difficultés à démontrer l'existence d'un accord et peuvent donc trouver plus aisé de présumer une collusion illicite, sous la forme de pratique concertée, à partir d'un comportement parallèle.

⁷¹ Affaire T-41/96, *Bayer AG contre Commission des Communautés européennes*, Recueil [2000] II-3383, paragraphe 173.

⁷² Il convient de noter que la notion d'accord n'est pas exclusive de celle de pratique concertée, et vice versa. Certains comportements, bien qu'ils puissent selon toute vraisemblance relever d'un accord, peuvent tout aussi simplement faire l'objet d'une enquête et être interdits en tant que pratique concertée. Cela peut être le cas lorsque la Commission ne dispose pas de preuves suffisantes pour démontrer que les parties ont conclu un accord restrictif mais que les preuves suffisent à démontrer l'existence d'un comportement parallèle qui restreint la concurrence et qui ne peut être expliqué autrement que par une entente illicite. En pratique, la plupart des ententes font l'objet d'une enquête à la fois en tant qu'accords et en tant que pratiques concertées car elles présentent des caractéristiques propres à chacune de ces catégories.

Australie – Modification de la législation en matière d'accords et de signaux de prix

L'expérience australienne montre à quel point l'application efficace des règles d'entente peut être sérieusement entravée par la difficulté à établir l'existence d'un « accord » entre entreprises.

En novembre 2011, le Parlement australien a voté des modifications de la loi sur la consommation et la concurrence de 2010 (*Competition and Consumer Act 2010* – ou CCA, auparavant appelé *Trade Practices Act 1974*), destinées à cibler une pratique baptisée « signaux de prix » (*price signalling*). L'objectif de ces modifications est, au moins en partie, de pallier le fait que les dispositions prévues par le CCA en matière d'entente ne couvrent pas toujours tous les échanges d'informations pouvant avoir des effets anticoncurrentiels. En effet, ces dispositions requièrent l'existence de quelque « contrat, accord ou convention ». De plus, dans leurs décisions, les tribunaux australiens exigent, afin de satisfaire à cette exigence, la preuve d'une « convergence de vues » et d'une forme d'engagement ou d'obligation.

Les nouvelles dispositions, qui entreront en vigueur le 6 juin 2012, ciblent la divulgation publique et privée d'informations sur les prix et de renseignements connexes. Les modifications prévoient, entre autres, d'interdire, en tant que telle, la divulgation privée d'informations sur les prix à un ou plusieurs concurrents ; d'autres types de divulgation d'informations sur les prix (dont les divulgations publiques) doivent également être interdites, sous réserve qu'il soit possible d'établir que ces pratiques ont considérablement érodé la concurrence sur un marché. Les nouvelles dispositions prévoient par ailleurs un certain nombre d'exceptions pour certaines divulgations légitimes telles que la divulgation d'informations sur les prix à une entité liée ou une communication nécessaire au regard des obligations de divulgation continue des informations prévues par la loi de 2001 sur les entreprises (*Corporations Act*).

Les nouvelles interdictions ne seront assorties que de sanctions civiles (contrairement aux dispositions relatives aux ententes, qui prévoient à la fois des sanctions civiles et pénales). Les mesures correctives disponibles comprennent des amendes pouvant aller jusqu'au plus élevé des montants suivants : 10 millions AUD, 10 % du chiffre d'affaires annuel d'une entreprise ou trois fois le bénéfice enregistré. Les nouvelles dispositions ne s'appliqueront toutefois qu'aux catégories de biens et services prévues par la réglementation, à savoir, selon les propositions de réglementation actuelles du gouvernement australien, au seul secteur bancaire pour l'instant.

La première décision importante sur ce qui constitue une pratique concertée en vertu du droit de la concurrence européen date du début des années 1970, lorsque la Cour de Justice de l'Union européenne (« CJUE ») a examiné en appel la décision de la Commission dans l'affaire *ICI* (plus connue sous le nom d'affaire *Dyestuffs*)⁷³. La Cour, confirmant en appel l'approche de la Commission, a pour la première fois proposé une définition exhaustive de la notion de pratique concertée : « [...] *une forme de coordination entre entreprises qui, sans avoir été poussée jusqu'à la réalisation d'une convention proprement dite, substitue sciemment une coopération pratique entre elles aux risques de la concurrence. Que par sa nature même, la pratique concertée ne réunit donc pas tous les éléments d'un accord, mais peut notamment résulter d'une coordination qui s'extériorise par le comportement des participants*⁷⁴. »

La notion de pratique concertée a été encore affinée dans l'affaire du *Sucre*, dans laquelle la CJUE a rejeté l'argument selon lequel une pratique concertée nécessite « l'élaboration d'un véritable « plan » » et a confirmé que, en vertu du droit de la concurrence européen, les entreprises ont le droit d'adapter intelligemment leur stratégie de marché au comportement de leurs concurrents⁷⁵. Dans l'affaire

⁷³ JO 1969 L 195/11.

⁷⁴ Affaire 48/69, *ICI contre Commission des Communautés européennes*, Recueil [1972] 619, paragraphes 64 et 65. Voir également les affaires jointes C-89/85 et autres, *Wood Pulp*, Recueil [1993] 1307, paragraphe 63, et, plus récemment, l'affaire C-8/08, *T-Mobile Netherlands*, paragraphe 26.

⁷⁵ Affaires jointes 40-48, 50, 54-56, 111, 113 et 114/73, *Suiker Unie contre Commission des Communautés européennes*, Recueil [1975] 1663.

Polypropylène, la CJUE a statué que « la notion de pratique concertée implique, outre la concertation entre les entreprises, un comportement sur le marché faisant suite à cette concertation et un lien de cause à effet entre ces deux éléments ⁷⁶. » La Cour a ensuite établi que, dès lors qu'une concertation avait été démontrée de manière satisfaisante par la Commission, le comportement de marché pouvait être présumé, ce qui transférait la charge de la preuve aux parties. Enfin, selon la Cour, une pratique concertée relève de l'article 101 TFUE, même en l'absence d'effets anticoncurrentiels sur le marché, dès lors qu'elle a un objet anticoncurrentiel.

La jurisprudence de la Cour énonce trois composantes pour définir une pratique concertée :

- (i) elle requiert, entre concurrents, une interaction directe ou indirecte susceptible d'affecter l'indépendance de leur jugement⁷⁷ ;
- (ii) elle requiert qu'un certain consensus se manifeste pour remplacer la concurrence par une forme de collusion entre les intervenants⁷⁸ ; et
- (iii) la coordination doit entraîner une ligne de conduite commune sur le marché et une relation de cause à effet entre les deux (ce que l'on appelle le *lien de causalité*)⁷⁹.

Dans les Lignes directrices sur l'applicabilité de l'article 101 du traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale de 2010⁸⁰, la Commission européenne a appliqué ce test aux divulgations unilatérales d'informations et a conclu qu'« [une] situation dans laquelle une seule entreprise divulgue des informations stratégiques à son/ses concurrent(s) qui les accepte(nt) peut également constituer une pratique concertée. De telles divulgations pourraient par exemple se produire dans le cadre de contacts par courrier postal ou électronique, par téléphone ou au cours de réunions, etc. Il est sans importance qu'une seule entreprise informe ses concurrents unilatéralement du comportement qu'elle entend adopter sur le marché ou que toutes les entreprises concernées se communiquent mutuellement leurs considérations et leurs intentions. Lorsqu'une seule entreprise divulgue à ses concurrents des informations stratégiques sur sa future politique commerciale, le degré d'incertitude sur le fonctionnement à venir du marché en cause est atténué pour tous les concurrents impliqués, ce qui accroît le risque de restreindre la concurrence et de voir apparaître des comportements collusoires⁸¹. »

⁷⁶ Affaire C-49/92P, *Commission des Communautés européennes contre Anic Partecipazioni*, Recueil [1999] I-4125, paragraphe 118.

⁷⁷ Dans *Züchner* (affaire 172/80, *Züchner contre Bayerische Vereinsbank*, Recueil [1981] 2021), la Cour a confirmé qu'une pratique concertée ne nécessitait pas forcément de contact, mais un simple « échange d'informations » (voir paragraphe 12).

⁷⁸ L'important est que, par le biais de contacts directs ou indirects, les entreprises influencent délibérément le comportement d'autres entreprises se dévoilant leur ligne de conduite. Ces divulgations affectent nécessairement le comportement des intervenants sur le marché puisqu'elles éliminent à l'avance l'incertitude qui entoure le comportement futur des autres, incertitude qui est l'essence même de la rivalité concurrentielle et de la concurrence secrète. Voir Alesse, 1999 ; Black, 2003.

⁷⁹ Affaire C-49/92P, *Commission des Communautés européennes contre Anic Partecipazioni*, Recueil [1999] I-4125, paragraphes 118 et suivants. Néanmoins, le seuil à partir duquel il est établi que la coordination a entraîné un comportement sur le marché est relativement faible dans la jurisprudence actuelle. Il suffit à la Commission d'établir que les sociétés ayant pris part à des accords de concertation (à savoir qui sont entrées en contact direct ou indirect avec des concurrents) sont restées actives sur le marché. Dans ce cas, il est présumé que leur comportement sur le marché a été affecté par ces contacts.

⁸⁰ JO 2011 C 11/01.

⁸¹ Paragraphe 62.

3.4.2 La notion d'accord aux États-Unis et les règles en matière de preuves

Aux États-Unis, les tribunaux n'opèrent pas de distinction précise entre les concepts énoncés à la Section 1 du Sherman Act : « *contrat, groupement sous la forme de « trust » ou autre, ou entente délictueuse* ». En pratique, toutes ces expressions désignent un accord⁸². D'après une longue jurisprudence de la Cour suprême en rapport avec le Sherman Act, un accord ne doit pas nécessairement être « explicite »⁸³, « exprès »⁸⁴ ou « formel »⁸⁵ tant que deux paramètres peuvent être établis : les entreprises affichent (i) « *un but commun, un dessein et une convention communs ou une convergence de vues dans le cadre d'un accord illicite* »⁸⁶ et (ii) « *un engagement délibéré dans un système commun* »⁸⁷. »

Cette définition très vaste, qui peut en principe couvrir toutes les situations de simple comportement parallèle, n'a pas aidé à clarifier comment distinguer les comportements parallèles légitimes des actions concertées destinées à restreindre la concurrence. En pratique, toutefois, les tribunaux ne se sont pas trop attardés sur la notion d'« engagement », qui requiert une certaine forme d'assurance expresse que chaque concurrent respecte la convention ou le dessein commun(e). Ils se sont davantage attachés à savoir si des preuves suggérant que le défendeur n'avait pas agi en toute indépendance pouvaient déterminer l'existence d'un accord. La Cour suprême de Matsushita a statué qu'un plaignant réclamant des dommages et intérêts pour une infraction à la Section 1 du Sherman Act doit fournir des preuves « *qui tendent à écarter la possibilité que les membres présumés de l'entente illicite ont agi en toute indépendance* »⁸⁸. Dans d'autres cas, les tribunaux ont demandé des preuves qui « *tendent à écarter la possibilité que les défendeurs se soient simplement engagés dans un parallélisme délibéré licite* »⁸⁹.

Les tribunaux traduisent cette norme d'une autre manière encore : le plaignant doit apporter des preuves d'un « facteur supplétif » (*plus factor*)⁹⁰. En d'autres termes, le plaignant doit démontrer l'existence de quelque chose d'autre ou de quelque chose de plus qu'un simple parallélisme délibéré ou qu'une simple interdépendance oligopolistique afin de satisfaire aux exigences de la Section 1⁹¹. Les tribunaux n'ont donné que peu d'indications sur la nature des preuves à apporter par les plaignants pour

⁸² Voir Posner, 2001 ; Areeda et Hovenkamp, 2001 ; Handler, 1953.

⁸³ États-Unis contre Gen. Motors Corp., 384 U.S. 127, 142–3 (1966).

⁸⁴ États-Unis contre Paramount Pictures, Inc., 334 U.S. 131, 142 (1948) (précisant « *[qu']il est suffisant qu'une action concertée soit envisagée et que les défendeurs se soient conformés à l'accord* »).

⁸⁵ Am. Tobacco Co. contre États-Unis, 328 U.S. 781, 809–10 (1946) (ajoutant que la preuve d'une infraction « peut être établie dans une ligne de conduite ou dans d'autres circonstances ainsi que dans tout échange de propos »). La Cour suprême a également stipulé qu'un accord n'impliquait pas nécessairement de « lettre, accord ou autre élément attestant une entente illicite ». Norfolk Monument Co. contre Woodlawn Mem'l Gardens, Inc., 394 U.S. 700, 703–4 (1969).

⁸⁶ Interstate Circuit Inc contre États-Unis, 306 US 208, 810 (1939) ; Am. Tobacco Co. contre États-Unis, 328 U.S. 781, 809–10 (1946), p. 810.

⁸⁷ Monsanto Co. contre Spray- Rite Serv. Corp., 465 U.S. 752, 768 (1984) ; dans l'affaire Flat Glass, 385 F.3d, p. 357.

⁸⁸ Matsushita Elec. Indus. Co. contre Zenith Radio Corp., 475 U.S. 574, 588 (1986).

⁸⁹ Ville de Tuscaloosa contre Harcros Chems., Inc., 158 F.3d 548, 571 n°35 (11^e Cir. 1998).

⁹⁰ Voir, par exemple, Blomkest Fertilizer, Inc. contre Potash Corp. of Sask., 203 F.3d 1028, 1032–4 (8^e Cir. 2000) (statuant qu'il « incombe au plaignant d'apporter la preuve d'un parallélisme tarifaire délibéré, et d'accompagner cette preuve d'un ou de plusieurs facteurs supplétifs »). Pour une analyse des « facteurs supplétifs », voir ci-dessous.

⁹¹ Kovacic, 1993 ; Snider et Scher, 2008.

établir que le comportement parallèle découle d'une entente illicite et n'est pas un simple parallélisme. Après le jugement de la Cour suprême dans l'affaire *Twombly*⁹², toutefois, la question de savoir si les parties s'étaient communiqué leur intention d'agir d'une certaine manière et comptaient sur un comportement similaire de la part des autres est devenue un élément clé aux yeux des tribunaux⁹³.

3.4.3 La communication, un « facteur supplétif »

La norme établie par les tribunaux américains et de l'Union européenne semble participer d'une logique circulaire : pour prouver qu'un comportement parallèle est une entente illicite, il faut démontrer que le comportement parallèle ne peut avoir été causé que par une entente illicite. Il apparaît toutefois clairement que les autorités chargées d'appliquer le droit ne peuvent se reposer sur la seule preuve d'un comportement parallèle pour prouver une action concertée enfreignant le droit de la concurrence. Cette preuve soulève un problème juridique et économique dû au fait qu'un comportement parallèle peut avoir d'autres causes que la collusion. Dans un contexte oligopolistique, les mouvements de prix parallèles peuvent par exemple résulter d'un simple comportement rationnel indépendant. Afin de convaincre les tribunaux que le comportement parallèle résulte d'un quelconque accord plutôt que d'une simple interdépendance oligopolistique, les autorités de la concurrence doivent généralement démontrer un élément supplémentaire. Le comportement parallèle est donc une condition nécessaire, mais non suffisante⁹⁴.

Le parallélisme délibéré n'est pas anticoncurrentiel

Les tribunaux adhèrent généralement au constat économique qu'une collusion tacite ne doit pas être jugée anticoncurrentielle. Aux États-Unis, par exemple, dans l'affaire *Brooke Group*, la Cour suprême a qualifié la « collusion tacite », qu'elle a assimilée au parallélisme délibéré et à la « coordination tarifaire oligopolistique », jugeant qu'elle n'était « pas illicite en soi »⁹⁵. De la même manière, dans l'affaire *Twombly*, la Cour a statué que le comportement parallèle « présentait les caractéristiques d'une entente illicite, mais pouvait tout aussi bien correspondre à une vaste ligne stratégique rationnelle et concurrentielle motivée unilatéralement par une perception commune du marché »⁹⁶. Les conclusions de la Cour de Justice de l'Union européenne sont proches. Dès l'affaire *Dyestuffs*, la Cour a statué qu'un « parallélisme de comportement ne peut être à lui seul identifié à une pratique concertée »⁹⁷. Dans l'affaire *Wood Pulp*, elle a confirmé que « si l'article 85 [désormais 101] du traité interdit toute forme de collusion de nature à fausser le jeu de la concurrence, il n'exclut pas le droit des opérateurs économiques de s'adapter intelligemment au comportement constaté ou à escompter de leurs concurrents »⁹⁸. La Cour a ajouté que si le parallélisme de comportement peut être expliqué par d'autres raisons plausibles que la concertation, le parallélisme ne pouvait être jugé illicite car il est la résultante licite sur le marché d'une collusion tacite.

⁹² Bell Atl. Corp. contre *Twombly*, 127 S. Ct. 1555, 1564 (2007).

⁹³ Voir Page, 2009 ; Page, 2007 ; Black, 2005 ; Page, 2010.

⁹⁴ Voir Van Gerven et Navarro Varona, 1994.

⁹⁵ *Brooke Group, Ltd. contre Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). Voir aussi *JTC Petroleum*, 190 F.3d p. 780 (affaire dans laquelle la collusion tacite est également ramenée à une interdépendance oligopolistique, la décision notant qu'aucun tribunal n'a jugé cette pratique illégale en vertu de l'article 1 du Sherman Act.)

⁹⁶ *Bell Atl. Corp. contre Twombly*, 127 S. Ct. 1555, 1564 (2007).

⁹⁷ Voir l'affaire 48/69, *ICI contre Commission des Communautés européennes*, Recueil [1972] 619, paragraphe 65. Le jugement n'a toutefois pas totalement écarté la possibilité que, dans certaines conditions, la collusion tacite puisse correspondre à une pratique concertée. Dans les paragraphes 66 et 67, la Cour a déclaré que le parallélisme de comportement « est cependant susceptible de constituer un indice sérieux [de pratique concertée], lorsqu'il aboutit à des conditions de concurrence qui ne correspondent pas aux

Les tribunaux ont en effet clairement indiqué qu'il fallait quelque chose de plus qu'un simple parallélisme délibéré (ce que l'on appelle les *facteurs supplétifs*, ou le *parallélisme suppléé*), bien qu'ils n'aient pas précisément défini ce que cette « chose » supplémentaire devait être. Ces *facteurs supplétifs* sont, entre autres⁹⁹ :

- la preuve que le marché en question n'est pas propice à la collusion tacite et au parallélisme de comportement licite (c'est-à-dire que l'interaction sur le marché n'est pas susceptible d'entraîner une collusion tacite)¹⁰⁰ ;
- la preuve qu'il n'existe aucun facteur exogène pouvant justifier le parallélisme (comme l'augmentation des prix des intrants pour tous les fournisseurs, la hausse de l'inflation, les fluctuations des taux de change, le renchérissement de l'immobilier, etc.)¹⁰¹ ;
- la preuve de contacts ou de communications directs ou indirects entre entreprises, qui ont influencé le comportement de ces dernières sur le marché¹⁰² ;
- la preuve que les entreprises agissent « à l'encontre de leur propre intérêt », c'est-à-dire qu'une entreprise n'aurait pas adopté le comportement parallèle si elle avait agi unilatéralement, dans son propre intérêt¹⁰³.

Deux types de preuve semblent jouer un rôle particulièrement important : la preuve économique¹⁰⁴ et la preuve d'une communication entre les concurrents. L'importance de la communication pour établir

conditions normales du marché, compte tenu de la nature des produits, de l'importance et du nombre des entreprises et du volume dudit marché. Que tel est notamment le cas lorsque le comportement parallèle est susceptible de permettre aux intéressés la recherche d'un équilibre des prix à un niveau différent de celui qui aurait résulté de la concurrence, et la cristallisation de situations acquises au détriment de la liberté effective de circulation des produits dans le marché commun et du libre choix par les consommateurs de leurs fournisseurs. »

⁹⁸ Affaires jointes C-89/85, C-104/85, C-114/85, C-116 et 117/85, C-125-129/85, *Ahlström Osakeyhtiö et autres contre Commission des Communautés européennes*, Recueil [1993] I-1307, paragraphe 71. Pour des commentaires, voir Jones, 1993 ; Van Gerven et Navarro Varona, 1994 ; Raffaelli, 1996 ; Pardolesi, 1994.

⁹⁹ Kovacic, 1993, identifie comme facteurs supplétifs, dans cette acception générale, « l'existence d'un motif rationnel pour les défenseurs d'agir collectivement », « les actions contraires à l'intérêt personnel du défendeur si ce n'est dans le cadre d'un projet collectif », « les phénomènes de marché ne pouvant être expliqués de manière rationnelle autrement que comme résultant d'une action concertée », « les infractions passées du défendeur au droit de la concurrence par des pratiques collusoires », « les preuves d'entrevues entre entreprises et d'autres formes de communication directe entre les membres présumés d'une entente illicite », « l'emploi par le défendeur de pratiques de facilitation », « les caractéristiques structurelles du secteur qui compliquent ou facilitent le contournement de la concurrence » et « les facteurs de performance du secteur laissant entrevoir ou écartant la détermination d'une collaboration horizontale ».

¹⁰⁰ Voir l'analyse de ces facteurs en première partie.

¹⁰¹ Voir Motta, 2004.

¹⁰² Voir l'analyse détaillée ci-dessous des facteurs constituant une pratique concertée au regard de la jurisprudence des tribunaux européens.

¹⁰³ Il s'agit d'un concept employé ces dernières années par les tribunaux américains. Il repose sur l'hypothèse qu'une action allant à l'encontre de son propre intérêt est une action qui serait par ailleurs contraire à l'intérêt propre de l'acteur en l'absence d'accord. Le document OCDE, 2006(a) décrit, aux paragraphes 51 et suivants, des affaires concrètes dans lesquelles les tribunaux américains ont appliqué ce critère.

l'infraction au droit de la concurrence est clairement soulignée par la Cour de Justice de l'Union européenne dans l'affaire *Suiker Unie*. La Cour a souligné que les décisions stratégiques des opérateurs économiques doivent être prises en totale indépendance des concurrents, ce qui « *s'oppose rigoureusement à toute prise de contact directe ou indirecte entre de tels opérateurs, ayant pour objet ou pour effet, soit d'influencer le comportement sur le marché d'un concurrent actuel ou potentiel, soit de dévoiler à un tel concurrent le comportement que l'on est décidé à, ou que l'on envisage de, tenir soi-même sur le marché*¹⁰⁵ ».

Bien que l'exigence d'indépendance ne prive pas les opérateurs économiques du droit d'adapter intelligemment leur stratégie à celle d'autres acteurs du marché, elle s'oppose rigoureusement à toute *prise de contact directe ou indirecte* entre concurrents, ayant pour objet ou pour effet, soit d'influencer le comportement sur le marché d'un concurrent actuel ou potentiel, soit de dévoiler à un tel concurrent le comportement que l'on est décidé à, ou que l'on envisage de, tenir soi-même sur le marché. Par conséquent, toute interaction entre concurrents susceptible d'affecter l'indépendance de leur prise de décision sera probablement considérée comme une preuve d'accord anticoncurrentiel ou de pratique concertée.

4. Toute forme de communication entre concurrents doit-elle être considérée suspecte ?

Toutes les communications entre concurrents ne doivent toutefois pas être considérées comme suspectes. Au contraire, la plupart des formes de communication ne posent aucun problème¹⁰⁶. Après tout, les prix sont bien destinés à être communiqués et la simple divulgation d'informations sur les prix ne saurait être considérée comme anticoncurrentielle en soi. Afin d'évaluer si des communications directes ou indirectes entre concurrents doivent être considérées comme anticoncurrentielles, les autorités chargées d'appliquer le droit de la concurrence doivent suivre une approche structurée qui consiste tout d'abord à évaluer la structure du marché et les caractéristiques du produit afin de déterminer si un accroissement de la transparence est susceptible d'entraîner une collusion. Dans l'affirmative, l'analyse doit ensuite porter sur le type et la nature des informations communiquées et sur les caractéristiques de la diffusion.

4.1 Structure de marché et caractéristiques du produit

La structure du marché et la nature du produit concerné, toutes choses égales par ailleurs, sont des éléments déterminants de l'analyse qui permettra d'estimer si une collusion est probable sur un marché donné. Si un marché est très concentré ou s'il n'existe que quelques grandes entreprises du côté de l'offre, le risque de collusion est plus élevé. Les coûts engendrés par l'organisation d'une collusion durable seront faibles ; il est alors plus facile de décider des conditions d'une coordination et de s'assurer que ces conditions sont bel et bien respectées par chaque participant ; les mécanismes de sanction sont plus efficaces car les entreprises qui trichent seront exposées à des pertes nettement supérieures. En revanche, sur des marchés fragmentés, les entreprises sont davantage incitées à s'écarter d'une entente pour tenter de gagner des parts de marché sur leurs concurrents et le contrôle de ces comportements déviants est bien plus

¹⁰⁴ Au sujet du recours aux preuves économiques pour démontrer une entente, voir OCDE, 2006(a). La preuve économique est particulièrement importante sur les marchés dans lesquels la concentration de l'offre et la transparence intrinsèque de la politique tarifaire de chaque intervenant peuvent suffire à expliquer le parallélisme.

¹⁰⁵ Affaires jointes 40-48, 50, 54-56, 111, 113 et 114/73, *Suiker Unie contre Commission des Communautés européennes*, Recueil [1975] 1663, paragraphe 174.

¹⁰⁶ Pour une analyse des effets proconcurrentiels et anticoncurrentiels des communications entre concurrents, voir OCDE, 2010 et Capobianco, 2004.

difficile. Ces incitations à dévier de l'accord remettent en cause la stabilité d'une entente¹⁰⁷. Il est également plus aisé de parvenir à une collusion, de la surveiller et de la faire perdurer si les produits concernés sont homogènes. Si les caractéristiques des produits diffèrent en termes de qualité et de durée de vie, par exemple, il peut être difficile pour des entreprises de détecter si les fluctuations des ventes sont dues à un changement de préférence de la part des acheteurs ou à des stratégies dans le cadre desquelles des entreprises trichent en réduisant secrètement leurs prix¹⁰⁸.

Dans un marché oligopolistique doté de produits homogènes, les communications directes ou indirectes entre concurrents sont l'un des facteurs clés qui facilitent la collusion. La communication permet en particulier (i) de s'entendre plus facilement sur les modalités de la coordination, (ii) de vérifier que ces modalités sont bien respectées et (iii) d'être plus à même de sanctionner tout comportement s'écartant des modalités de la coordination ou de réduire le coût de la sanction.

Il n'est pas toujours facile de s'entendre sur les modalités d'une action coordonnée sur les prix ou les volumes, notamment lorsque divers équilibres collusoires sont possibles. La communication entre concurrents renforce artificiellement la transparence du marché, ce qui en fait l'un des facteurs facilitant la collusion¹⁰⁹. Les divulgations d'informations peuvent faciliter cette pratique en offrant aux entreprises des points de coordination ou de convergence¹¹⁰. Les communications peuvent ainsi permettre aux entreprises de coordonner leur action même en l'absence d'accord anticoncurrentiel explicite.

L'amélioration artificielle de la transparence permet aux entreprises de contrôler que les participants respectent l'accord et de mieux savoir quand et comment sanctionner les entreprises déviantes¹¹¹. Pour que la collusion soit viable, il est indispensable que les entreprises puissent détecter les comportements s'écartant de l'équilibre collusoire. L'échange d'informations peut donc étayer la stabilité interne de l'accord collusoire car les entreprises disposent de plus de précisions leur permettant de sanctionner les comportements déviants. Si elles ont accès à des informations précises et individualisées sur leurs concurrents, les entreprises sont davantage en mesure de savoir quelle entreprise a dévié de la ligne de conduite commune et pour quel produit. L'amélioration artificielle de la transparence permet en outre aux entreprises en place de mieux connaître les possibilités qu'ont les nouveaux entrants de pénétrer sur le marché et de réagir de manière coordonnée, ce qui renforce la stabilité de l'accord collusoire.

4.2 *Annonces publiques et privées*

La première partie de ce document a précisé les différences entre transparence *publique* et *privée*. En matière de politique de la concurrence, cette distinction a d'importantes implications qui seront traitées dans la section suivante.

¹⁰⁷ La valeur de preuve qu'à la structure de marché est cependant imparfaite. Il existe des exemples de secteurs très concentrés qui sont extrêmement concurrentiels et qui se caractérisent par une concurrence féroce. Inversement, on sait que des ententes ont existé et prospéré pendant de nombreuses années dans des secteurs où étaient présents de nombreux concurrents et où les produits étaient différenciés. Voir OCDE, 2006(a).

¹⁰⁸ Cela étant, les économistes font aussi remarquer que, dans certaines circonstances, la nature différenciée des produits peut aussi faciliter une collusion. Dans le cas de produits différenciés, les comportements déviants sont en fait moins rentables car l'entreprise qui triche ne peut espérer acquérir d'importantes parts de marché au moyen de cette stratégie, sauf si elle est prête à réduire considérablement ses prix. Dans de telles circonstances, la différenciation des produits rend donc une collusion plus probable.

¹⁰⁹ Voir Albaek, Mollgaard et Overgaard, 1997.

¹¹⁰ Voir Levenstein et Suslow, 2006.

¹¹¹ Voir Genesove et Mullin, 2001.

4.2.1 *Les communications privées aux concurrents ont peu de chances d'être justifiées par des gains d'efficience*

La conviction générale est que les annonces « privées », adressées aux seuls concurrents, doivent être interdites car elles ne sont pas justifiées par des gains d'efficience et ne peuvent être motivées que par l'intention d'aider les concurrents à coordonner leurs actions sur un prix collusoire donné, et à éviter des périodes coûteuses de guerre des prix et d'instabilité tarifaire¹¹². À l'inverse, les annonces publiques, qui sont adressées à la fois aux concurrents et aux consommateurs, sont monnaie courante¹¹³ et peuvent être largement bénéfiques aux clients puisqu'elles leur permettent de « faire le tour » des fournisseurs pour trouver la meilleure offre¹¹⁴. Cet effet favorable est généralement jugé l'emporter sur les effets collusoires des annonces. C'est pourquoi l'opinion selon laquelle les autorités chargées d'appliquer le droit de la concurrence doivent se montrer plus strictes à l'égard des annonces privées que publiques est largement répandue¹¹⁵.

L'annonce unilatérale d'un prix futur et le jugement de la CEJ dans l'affaire Wood Pulp

La plus grande souplesse généralement montrée à l'égard des annonces publiques a également trouvé écho dans les décisions des tribunaux. En Europe, par exemple, la Cour européenne de Justice a statué, dans l'affaire *Wood Pulp*, que si les communications de prix entre concurrents résultent d'annonces publiques, « [...] elles constituent par elles-mêmes une action sur le marché qui n'est pas de nature à réduire les incertitudes de chaque entreprise sur les attitudes qu'adopteront ses concurrents. Au moment où chaque entreprise y procède, elle n'a, en effet, aucune assurance quant au comportement qui sera suivi par les autres¹¹⁶. »

Selon la Cour, les annonces de prix anticipées ne sont donc pas illicites en soi tant qu'elles sont adressées au public (et non aux concurrents)¹¹⁷ et qu'elles n'ont pas pour motif avoué de coordonner le comportement des concurrents sur le marché. La Cour a noté que, pour qu'il y ait pratique concertée, il était nécessaire que l'incertitude quant au futur comportement des concurrents soit éliminée ou réduite, ce qui n'est pas le cas lorsque chaque concurrent demeure libre de décider en toute indépendance de l'attitude qu'il adoptera à l'avenir.

Au-delà de la déclaration reprise ci-dessus, les circonstances de l'affaire *Wood Pulp* éclairent quelque peu les cas dans lesquels les signaux de prix peuvent être jugés illicites en vertu du droit communautaire de la concurrence¹¹⁸ :

- les annonces de prix anticipées étaient clairement justifiées par des considérations commerciales ;
- les annonces étaient publiques ;

il n'existait aucun engagement à se conformer au prix annoncé.

¹¹² Voir Kühn, 2001 ; Motta, 2007 ; Bennett et Collins, 2010.

¹¹³ À titre d'exemple, les fabricants de biens électroniques annoncent régulièrement les prix auxquels seront vendus leurs nouveaux produits. Les détaillants peuvent annoncer le prix des produits sur lesquels porteront les promotions à venir.

¹¹⁴ Voir l'analyse en première partie.

¹¹⁵ Ce serait le cas, par exemple, si une entreprise envoyait une télécopie ou un message électronique à ses concurrents en y annonçant son intention de fixer un prix donné à l'avenir.

¹¹⁶ Affaires jointes C-89/85, C-104/85, C-114/85, C-116 et 117/85, C-125-129/85, *Ahlström Osakeyhtiö et autres contre Commission des Communautés européennes*, Recueil [1993] I-1307, paragraphe 64. La conclusion de l'affaire *Wood Pulp* est revenue sur un jugement plus ancien, celui de l'affaire *Dyestuffs*, dans lequel il avait été déterminé que les annonces de prix anticipées étaient illicites au motif qu'il

4.2.2 Annonces publiques susceptibles d'avoir des effets anticoncurrentiels

Toute annonce publique n'est toutefois pas nécessairement favorable à la concurrence. Afin de générer des gains d'efficacité, les annonces d'intentions futures doivent porter sur des modifications de prix *effectives*, c'est-à-dire qu'elles doivent avoir valeur d'engagement envers les consommateurs¹¹⁹. Seul ce type de diffusion publique des intentions informe les consommateurs des changements avant qu'ils ne se produisent et leur permettent de prévoir leur réaction à l'avance¹²⁰. Les annonces sans engagement, quant à elles, peuvent être un moyen d'éviter une expérience coûteuse sur le marché et de générer un équilibre collusoire plus efficacement et plus rapidement. Une entreprise peut annoncer l'augmentation de son prix à un certain niveau et à une date future donnée, mais ensuite revenir au prix actuel si les autres entreprises ne lui ont pas emboîté le pas en annonçant des modifications de prix similaires. Les entreprises peuvent ainsi aboutir à un prix communément admis sans risquer de perdre des parts de marché ou de déclencher des guerres de prix durant la période d'ajustement aux nouveaux prix.

s'agissait de communications indues entre des concurrents avec pour seul effet d'éliminer l'incertitude quant au comportement de chaque concurrent à l'avenir (affaire 48/69, ICI contre Commission des Communautés européennes, Recueil [1972] 619).

¹¹⁷ Les communications privées sur les prix (à savoir les communications adressées aux seuls concurrents et non pas aux clients) sont jugées différemment, leur seul objectif étant « *d'éliminer par avance l'incertitude relative au comportement futur de ses concurrents* » (voir l'affaire T-7/89, SA Hercules Chemicals NV contre Commission des Communautés européennes, Recueil [1991] II-1711, paragraphe 259).

¹¹⁸ Voir van Gerven et Varona, 1994.

¹¹⁹ Voir l'analyse sur le « *cheap talk* » en première partie.

¹²⁰ Voir, par exemple, la note 4 des Lignes directrices sur l'applicabilité de l'article 101 du traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (TFUE) (JO 2011, C 11/01), qui explique la notion de « *futurs prix envisagés* » : « *Dans les cas spécifiques où les entreprises s'engagent pleinement à pratiquer à l'avenir les prix annoncés précédemment au grand public (prix qu'elles ne peuvent donc pas revoir), de telles annonces publiques de prix ou de quantités individuels futurs ne seraient pas considérées comme des intentions et ne seraient donc normalement pas considérées comme restreignant le jeu de la concurrence par objet. Tel pourrait être le cas, par exemple, en raison des interactions répétées et du type particulier de relations que les entreprises pourraient avoir avec leurs clients, par exemple parce qu'il est essentiel que ces derniers connaissent les prix futurs à l'avance ou parce qu'ils peuvent déjà passer des précommandes à ces prix. En effet, en pareil cas, l'échange d'informations représenterait un moyen plus onéreux de parvenir à une collusion sur le marché qu'un échange d'informations sur des intentions futures et serait davantage susceptible d'avoir une finalité favorable à la concurrence. Cela ne signifie toutefois pas qu'un engagement en matière de prix à l'égard de clients soit nécessairement de nature à favoriser la concurrence. Il peut, au contraire, avoir pour effet de limiter la possibilité de s'écarter de pratiques collusoires et en renforcer ainsi la stabilité.* »

Annonces publiques – Lignes directrices de l'UE sur les accords horizontaux

Cette approche a également été celle de la Commission européenne dans ses Lignes directrices sur l'applicabilité de l'article 101 du traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (TFUE)¹²¹, lequel énonce ce qui suit : « *Lorsqu'une entreprise fait une annonce unilatérale revêtant un caractère réellement public, par exemple dans un quotidien, cette annonce ne constitue généralement pas une pratique concertée au sens de l'article 101, paragraphe 1. Toutefois, en fonction des faits sous-tendant l'affaire en cause, la possibilité de constater une pratique concertée ne peut être exclue, par exemple lorsqu'une telle annonce a été suivie d'annonces publiques d'autres concurrents, en particulier parce que des réponses stratégiques apportées par des concurrents à d'autres annonces publiques (qui peuvent par exemple impliquer des réajustements de leurs propres annonces antérieures en fonction des annonces des concurrents) pourraient s'avérer constituer une stratégie visant à s'entendre sur les modalités de la coordination.* »

4.2.3 Invitations à la collusion par le partage des prix

Les annonces publiques peuvent également porter atteinte à la concurrence lorsque la communication publique invite à la collusion. Ces invitations sont généralement comprises comme des sollicitations unilatérales à conclure des accords horizontaux illicites de fixation des prix ou de répartition de marché¹²². Si les communications privées laissent peu de place à la controverse car elles peuvent toujours être considérées comme des invitations à la collusion, les annonces publiques, quant à elles, peuvent également être considérées comme des invitations à la collusion en fonction de la manière dont les propos sont formulés.

C'est généralement le cas lorsque les annonces :

1. (i) comportent non seulement des informations devant être transmises aux consommateurs dans le cadre de la politique commerciale, mais aussi des informations qui ne sont pas destinées à ce public, comme des références à des concurrents particuliers ;
2. (ii) divulguent davantage d'informations que celles qui sont strictement nécessaires pour les besoins de l'annonce ;
3. (iii) prévoient que le comportement annoncé dépendra de l'action des autres acteurs du marché ou du secteur dans son ensemble ; et
4. (iv) prévoient des menaces (comme une guerre des prix) si les autres intervenants du marché n'acceptent pas l'invitation à la collusion.

Les autorités de la concurrence se sont également penchées sur la réaction des concurrents à l'invitation et ont estimé que ces derniers acceptaient l'invitation dès lors qu'ils adoptaient un comportement sur le marché cohérent avec l'offre de collusion. Par exemple, augmenter ses prix après y avoir été invité serait considéré comme une forme d'acceptation, sauf si l'on peut démontrer que cette augmentation était déjà envisagée avant l'invitation. De la même manière, si la cible d'une invitation

¹²¹ JO 2011, C 11/01, paragraphe 62.

¹²² L'exemple classique de ce type de pratique est l'appel passé en 1983 par le président d'American Airlines à son homologue de Braniff Airlines, une compagnie aérienne concurrente : « Pour moi, c'est complètement idiot [...] de continuer comme ça à se faire une **** de guerre. Pendant ce temps, aucun d'entre nous ne gagne un kopeck. [...] Augmentez vos foutus tarifs de 20 %. J'augmenterai les miens le lendemain matin. (États-Unis contre American Airlines, 743 F.2d 1114)

perçue ne déclare pas, sans équivoque, se dissocier de cette invitation, son attitude peut être perçue comme un signe selon lequel elle a l'intention de l'accepter.

Pratique récente de la Commission fédérale américaine du commerce en matière d'invitations à la collusion¹²³

Deux affaires récentes survenues aux États-Unis illustrent clairement ce que l'on entend par invitation à la collusion.

Dans l'affaire *Valassis Communications*¹²⁴, la Commission fédérale américaine du commerce (FTC) a mis en cause l'annonce faite par le PDG de Valassis lors d'une conférence téléphonique publique avec des analystes, dans laquelle il a détaillé sa stratégie d'augmentation des prix. Afin de reconquérir les parts de marché que la société avait perdues lors des années précédentes au bénéfice de son concurrent News America, Valassis avait décidé de transmettre à News America une proposition aux termes de laquelle Valassis s'engageait à ne plus tenter d'attirer les clients de News America si cette dernière faisait de même avec les clients de Valassis. Si cette proposition était acceptée, les deux sociétés pouvaient augmenter les prix pratiqués pour leurs clientèles respectives, désormais protégées, et mettre un terme à leur guerre des prix. Valassis avait proposé que les niveaux de prix observés avant la guerre des prix soient rétablis par les deux sociétés et avait décrit la manière dont seraient gérés les clients partagés ainsi que les offres en cours aux clients de News America. Valassis allait surveiller la réaction de News America en recherchant des « preuves concrètes » de réciprocité « sur-le-champ ». Si News America continuait d'essayer d'attirer les clients de Valassis et de grignoter des parts de marché, la guerre des prix reprendrait. Afin de faire face à ces allégations, Valassis a signé un jugement d'expédient avec la FTC interdisant les communications unilatérales, à la fois publiques et privées, exprimant la volonté de la société de ne pas jouer le jeu de la concurrence avec ses rivaux ou de coordonner ses prix avec les leurs.

L'affaire FTC contre *U-Haul*¹²⁵ comportait à la fois des communications privées et publiques. Selon les termes de la plainte déposée, le président de U-Haul avait demandé aux concessionnaires et responsables régionaux de la société de contacter leurs homologues de la société Budget (le principal concurrent de U-Haul sur le marché de la location de véhicules utilitaires grand public) de manière privée afin de les exhorter à suivre la hausse des tarifs de U-Haul. Un an plus tard, le président de U-Haul aurait demandé aux responsables d'augmenter les tarifs en prévision d'une « augmentation de la part de Budget ». Mais cette le rival n'a pas suivi le mouvement sur-le-champ. par la suite, lors d'une conférence téléphonique avec des analystes boursiers, le président de U-Haul a répondu à une question sur la stratégie tarifaire de la société en expliquant que U-Haul tentait d'« orienter la détermination des prix » pour le bien du secteur dans son ensemble. Il a déclaré que U-Haul tentait de faire comprendre à ses concurrents qu'ils ne devaient pas jeter l'argent par les fenêtres et qu'ils devaient « appliquer des tarifs couvrant au moins les coûts ». Le président a ensuite indiqué qu'il avait demandé aux responsables de U-Haul d'attendre encore un peu la réaction de Budget et qu'il s'attendait à une augmentation des prix de leur part. Il a également ajouté que Budget ne devait pas nécessairement calquer précisément les prix de U-Haul, et qu'un écart de 3 à 5 % restait acceptable.

4.3 Divulgence d'intentions futures

La teneur même de la communication est également déterminante pour établir si une communication unilatérale est susceptible de faciliter la collusion. Toutes les informations n'ont pas nécessairement un impact considérable sur la probabilité de coordination des prix. Les informations *rétrospectives*, par exemple, ont généralement perdu de leur valeur en tant qu'actif précieux sur le plan concurrentiel

¹²³ Les deux affaires ont été portées devant la Commission fédérale américaine du commerce en vertu de la Section 5 du Federal Trade Commission Act (loi fédérale américaine du commerce), qui interdit les « méthodes de concurrence inéquitables » (15 U.S.C. § 45).

¹²⁴ Valassis Communications, 2006, dossier FTC n° 051 0008.

¹²⁵ Cas U-Haul Int'l, Inc et AMERCO, 2010, dossier FTC n° 081-0157.

permettant d'influer sur l'action future des entreprises concernées ; par conséquent, leur échange n'est généralement pas considéré comme préjudiciable¹²⁶.

Les autorités chargées d'appliquer le droit de la concurrence s'inquiètent généralement des communications concernant les stratégies *futures*, notamment sur l'évolution des prix, des ventes et des capacités¹²⁷. Ces informations sont particulièrement sensibles et doivent rester dans le champ des connaissances de chaque concurrent. La divulgation directe des intentions de prix aux concurrents (communication privée) est sans doute l'information la plus utile pour que des entreprises rivales parviennent à un point de convergence et cette pratique est donc considérée comme la plus préjudiciable par les autorités de la concurrence¹²⁸. Les informations relatives aux comportements futurs peuvent être particulièrement utiles lorsque plusieurs équilibres sont possibles et que les concurrents doivent communiquer afin de cibler l'un de ces équilibres et d'établir un point de convergence¹²⁹.

Depuis ses premiers jugements (portant pour la plupart sur des échanges dans le cadre d'associations professionnelles), la Cour suprême américaine s'est concentrée sur les communications comportant « *des suggestions à la fois sur les prix et la production à venir* »¹³⁰. La Cour estimait que l'échange de ce type d'information avait pour but de réduire la production et d'augmenter les prix¹³¹. Elle a aussi concentré son attention sur le caractère privé du mécanisme de partage d'informations¹³². Les échanges d'informations publics, en revanche, peuvent être favorables à la concurrence si les informations sont diffusées le plus largement possible (autrement dit, si les informations sont accessibles non seulement aux membres de l'association, mais aussi à leurs clients) et sous une forme agrégée, même si les échanges nécessitent des informations détaillées sur chaque vente, prix, information mensuelle sur la production et les nouvelles commandes¹³³. Les Lignes directrices américaines sur la collaboration entre concurrents¹³⁴ valident cette approche et considèrent que le partage des informations est préoccupant si, entre autres, l'information diffusée porte sur les activités actuelles et les projets futurs, auquel cas elle sera plus susceptible de soulever des inquiétudes que si elle portait sur des informations rétrospectives.

¹²⁶ Les informations relatives à un comportement passé, en revanche, peuvent permettre à des concurrents de déceler, et donc de dissuader des déviations.

¹²⁷ Voir les notes des pays dans OCDE, 2010.

¹²⁸ Voir, par exemple, les Lignes directrices de l'UE sur l'applicabilité de l'article 101 du traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (TFUE) (JO 2011, C 11/01), paragraphe 66.

¹²⁹ Voir Kühn, avril 2001 ; Møllgaard et Overgaard, 2006.

¹³⁰ Voir l'affaire *American Column and Lumber Co contre États-Unis*, 257 US 377 (1921), points 398-99.

¹³¹ Ce jugement a été critiqué pour ne pas avoir pris en compte l'impact favorable sur la concurrence des échanges d'informations. Les juges Brandeis et Holmes ont contesté la décision, n'ayant pas constaté de preuves d'une quelconque tentative sérieuse de limiter la production et ayant estimé qu'il ne s'agissait que d'une simple communication de « *market facts* » [informations sur le marché]. Les juges ayant contesté la décision ont conclu que l'interdiction de l'échange d'informations pouvait se solder par une élimination de la concurrence dans l'industrie du bois.

¹³² Voir l'affaire *États-Unis contre American Linseed Oil Co*, 262 US 371 (1923), dans laquelle la Cour s'est prononcée contre un autre programme d'échange d'informations dans le cadre d'une association ; ce programme concernait des prix catalogue, des fluctuations de prix et les noms et adresses des acheteurs bénéficiant de tarifs spéciaux.

¹³³ Voir l'affaire *Maple Flooring Manufacturers Association contre États-Unis*, 268 US 563 (1925).

¹³⁴ Disponible à l'adresse <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

UE - Échange d'informations et restrictions par objet

La Commission européenne a elle aussi adopté une position stricte envers la diffusion d'informations sur le comportement futur en matière de prix ou de quantités¹³⁵.

« [...] »

73. *Les échanges d'informations relatives aux actions envisagées par les différentes entreprises concernant les prix ou les quantités sont particulièrement susceptibles de déboucher sur une collusion. Le fait de s'informer mutuellement de leurs intentions respectives à cet égard peut permettre aux concurrents de s'entendre sur un niveau de prix commun plus élevé, sans courir le risque de perdre des parts de marché ni de déclencher une guerre des prix durant la période d'adaptation aux nouveaux prix [...]. En outre, il est moins probable que les échanges d'informations concernant des actions envisagées aient une finalité favorable à la concurrence, que les échanges de données actuelles.*

74. *Il convient par conséquent de considérer les échanges, entre concurrents de données individualisées concernant les futurs prix ou quantités envisagés comme constituant une restriction de la concurrence par objet. En outre, les échanges privés, entre concurrents, de leurs intentions individuelles concernant les futurs prix et quantités seraient normalement considérés et sanctionnés comme des ententes, car ils ont généralement pour objet de fixer des prix ou des quantités. Les échanges d'informations qui constituent des ententes n'enfreignent pas seulement l'article 101, paragraphe 1, mais il est en outre très peu probable qu'ils remplissent les conditions de l'article 103, paragraphe 3. »*

Selon les Lignes directrices, les annonces unilatérales d'intentions individuelles concernant les prix futurs seront considérées comme une restriction « par objet » du droit européen de la concurrence si l'annonce est privée (donc adressée uniquement aux concurrents). Dans le cas d'annonces publiques d'intentions de prix individualisées, la Commission examine les éventuels arguments de gains d'efficacité que les parties peuvent apporter à l'article 101, paragraphe 3 du TFUE¹³⁶.

4.4 Fixation de prix collusoire

Le fait que les divulgations unilatérales (de prix) soient faites par une entreprise déterminant les prix est également l'un des éléments jugés utiles pour évaluer si une divulgation unilatérale doit être considérée comme une pratique de facilitation illicite.

Les ouvrages distinguent trois types de détermination des prix¹³⁷ :

- a) *Détermination des prix par une firme dominante* : dans cette situation, une grande entreprise (dominante)¹³⁸ fixe son prix en premier lieu et les entreprises de moindre envergure se servent simplement de ce prix pour calculer les niveaux de production leur permettant de maximiser leur bénéfice. Dans ce cas, le prix déterminé par la firme en position de monopole ne découle pas d'une stratégie destinée à contourner la concurrence ; il est plutôt la conséquence inévitable

¹³⁵ Voir les Lignes directrices sur l'applicabilité de l'article 101 du traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (TFUE) (JO 2011, C 11/01).

¹³⁶ Voir les Lignes directrices sur l'applicabilité de l'article 101 du traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (TFUE) (JO 2011, C 11/01), note de bas de page 5.

¹³⁷ Voir Stigler, 1947 ; Bain, 1960 ; Cooper, 1997 ; Deneckere et Kovenock, 1992.

¹³⁸ Les mêmes conclusions pourraient être tirées dans le cas d'une grande entreprise existante qui, sans être en position dominante, dispose d'un avantage informationnel par rapport à ses rivaux.

de la structure de marché. Le droit de la concurrence ne couvre généralement pas les cas où le secteur accepte qu'une firme détermine les prix et décide de suivre les prix fixés par une firme dominante.

- b) *Détermination des prix par une firme barométrique* : cette situation peut survenir lorsque certaines entreprises sont mieux informées que d'autres. Les entreprises moins bien informées peuvent retarder leur décision jusqu'à ce qu'une firme mieux informée agisse. En donnant un signal sur les conditions du marché, l'entreprise qui joue un rôle directeur en matière de fixation des prix agit tel un « baromètre ». Dans ce scénario, lorsqu'il n'existe pas d'entreprise en situation de monopole, la firme qui détermine les prix est souvent (mais pas nécessairement) la plus grande. La détermination des prix par une firme barométrique est généralement une forme d'ascendant concurrentiel puisque, globalement, l'entreprise qui détermine les prix ne peut imposer au reste du secteur d'imiter son prix ; les prix ainsi déterminés seraient finalement au même niveau que celui auquel aboutirait le jeu de la concurrence.
- c) *Fixation de prix collusoire* : ce type de fixation de prix permet aux firmes de remplacer la collusion explicite (qui est illicite) par un système d'annonces ou de pré-annonces publiques destinées à se coordonner pour aboutir à une collusion. Le premier à avoir étudié la fixation de prix collusoire a été Markham en 1951¹³⁹. Ce dernier a décelé un certain nombre de paramètres de marché nécessaires à l'émergence d'une détermination effective des prix :
- (i) des concurrents peu et suffisamment nombreux sur le marché¹⁴⁰ ;
 - (ii) de fortes barrières à l'entrée garantissant que le prix fixé par la firme déterminant les prix reste proche du prix oligopolistique ;
 - (iii) des produits homogènes, ou du moins tous suffisamment substituables aux yeux de chaque producteur ;
 - (iv) une courbe de la demande suffisamment rigide pour que les gains générés par l'imitation d'une firme déterminant les prix ne soient pas érodés ou entièrement gommés par des produits concurrents ;
 - (v) des courbes de coûts symétriques d'une entreprise à l'autre, afin qu'un prix donné permette à toutes les firmes d'exercer leur activité à un taux de production satisfaisant.

Des études ultérieures sur la fixation de prix collusoire ont montré que les informations asymétriques peuvent contribuer à une détermination collusoire, sans toutefois trancher sur la question de savoir si cet effet se retrouve en l'absence d'asymétrie informationnelle¹⁴¹. Une publication plus récente souligne le fait que la détermination collusoire peut renforcer la pérennité – et donc l'efficacité – de la collusion¹⁴². Elle conclut notamment que (i) la détermination des prix par une firme jouant un rôle directeur est un instrument collusoire plus efficace lorsque les entreprises se concurrencent sur les prix plutôt que sur les quantités ; (ii) lorsque les coûts supportés par les entreprises varient, la firme directrice sera probablement

¹³⁹ Markham, 1951.

¹⁴⁰ S'il existe plusieurs petites entreprises sans firme dominante, les entreprises présentes ont de fortes chances de procéder à de légères réductions de prix et ainsi jouer un rôle directeur en matière de fixation des prix, du moins lors d'ajustements à la baisse.

¹⁴¹ Rotemberg et Saloner, 1990.

¹⁴² Mouraviev et Rey, 2011.

la moins efficace ; et, enfin, (iii) afin de faciliter la collusion, la firme qui suit l'entreprise directrice sur une période donnée doit augmenter sa part de marché et son bénéfice sur cette période, quelle que soit la variable sur laquelle les entreprises se concurrencent (prix ou quantités).

Ces conclusions théoriques sont corroborées par des preuves empiriques attestant que, dans de nombreuses affaires d'entente, une entreprise directrice détermine les prix. À titre d'exemple, dans une décision de l'UE sur l'affaire des vitamines, les parties « *convenaient normalement que l'un des producteurs « annoncerait » l'augmentation en premier, soit dans une revue professionnelle soit par une communication directe aux principaux clients. Une fois l'augmentation de prix annoncée par l'un des membres du cartel, les autres avaient coutume de suivre*¹⁴³. » Mais des preuves similaires ont été décelées dans des affaires d'entente récentes dans des domaines tels que les sorbates, les stratifiés haute pression, les produits chimiques pour le traitement du caoutchouc, les électrodes en graphite, les fibres discontinues de polyester et les peroxydes organiques¹⁴⁴.

4.5 *La divulgation réciproque n'est pas nécessaire pour établir une infraction*

L'analyse qui précède indique de manière évidente que, pour établir l'existence d'un accord collusoire ta¹⁴⁵ cite, il importe peu qu'une seule entreprise informe ses concurrents unilatéralement de ses intentions sur le marché ou que tous les acteurs s'informent mutuellement de leurs délibérations et intentions respectives.

Dans l'affaire *Ciment*,¹⁴⁶ le Tribunal de première instance des Communautés européennes a établi que le simple fait qu'une société reçoive de manière passive des informations sur le comportement futur d'un concurrent (parce qu'elle a pris part à des réunions au cours desquelles ces informations ont été dévoilées) suffit à établir sa participation au comportement illicite. Selon le Tribunal, le fait que l'entreprise destinataire de l'information n'ait pas divulgué sa propre stratégie ne constituait pas un argument de défense suffisant étant donné que l'entreprise en question avait organisé la réunion et n'avait pas soulevé d'objections lorsqu'elle avait été informée de la stratégie de son concurrent. Le Tribunal a déterminé que les informations avaient été divulguées afin de réduire l'incertitude quant aux stratégies concurrentielles futures des participants et de permettre à ces derniers d'aligner leurs stratégies respectives dans un esprit contraire à la concurrence.

La Commission européenne a établi que, par exemple, le simple fait d'assister à une réunion durant laquelle une entreprise dévoile à ses concurrents ses intentions en matière de fixation des prix pourrait relever de l'article 101 TFUE, même en l'absence d'accord explicite sur une augmentation des prix¹⁴⁷. Lorsqu'une entreprise reçoit des données stratégiques d'un concurrent (que ce soit lors d'une réunion ou par courrier postal ou électronique), elle sera supposée avoir accepté ces informations et avoir adapté son

¹⁴³ Voir la décision de la Commission européenne dans l'affaire *Vitamines*, JO 2003 L 6/1, paragraphe 203.

¹⁴⁴ Marshall, Marx, Raiff, 2008. D'autres éléments probants figurent dans Mouraviev et Rey, 2011. Dans cette dernière publication, les auteurs ont établi la présence de détermination des prix collusoire dans 16 des 49 décisions prises par la Commission européenne dans des affaires d'entente entre 2001 et 2010.

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¹⁴⁶ Affaires jointes T-25/95, *Cimenteries CBR et autres contre Commission des Communautés européennes*, Recueil [2000] II-491 : « [...] la notion de pratique concertée suppose effectivement l'existence de contacts [...] caractérisés par la réciprocité. Cette condition est toutefois satisfaite lorsque la divulgation, par un concurrent à un autre, de ses intentions ou de son comportement futur sur le marché a été sollicitée ou, à tout le moins, acceptée par le second. » (paragraphe 1849).

¹⁴⁷ Voir les Lignes directrices sur l'applicabilité de l'article 101 du traité sur le fonctionnement de l'Union européenne aux accords de coopération horizontale (TFUE) (JO 2011, C 11/01), paragraphe 62.

comportement sur le marché en conséquence, à moins qu'elle n'ait répondu par une déclaration claire qu'elle ne souhaitait pas recevoir de telles données.

Mais il convient de distinguer réciprocité et toute forme de reconnaissance du fait que l'information a été reçue et utilisée par le ou les destinataire(s) de la communication. En d'autres termes, il est nécessaire que les informations transmises aient une certaine influence sur la politique tarifaire des concurrents¹⁴⁸. Un simple acquiescement peut être considéré comme une acceptation des informations reçues. C'est pour cette raison que, notamment en cas d'échanges privés (par exemple lorsqu'une annonce sur les prix est faite par un concurrent durant une réunion de l'association professionnelle), les tribunaux ont jugé qu'il était nécessaire que les participants à la réunion se distancent publiquement de la discussion afin d'échapper à toute responsabilité¹⁴⁹. L'influence que la communication a eu sur le comportement de ses destinataires peut être déduite du comportement de ces derniers sur le marché¹⁵⁰. Si les prix augmentent au niveau annoncé, en l'absence d'autre justification de cette hausse, une autorité de la concurrence peut légitimement en déduire qu'il y a eu action concertée¹⁵¹.

5. Conclusions

Les autorités de la concurrence sont confrontées à des problèmes complexes pour faire appliquer les règles sur les ententes dans des marchés oligopolistiques. Sur ces derniers, il peut être difficile de distinguer les comportements professionnels légitimes des pratiques collusoires illicites. Lorsqu'il existe peu de vendeurs et des produits homogènes sur un marché, il est possible que les prix atteignent des niveaux supra-concurrentiels de manière naturelle, du fait d'un comportement économique rationnel de la part de chaque intervenant du marché. Ce parallélisme délibéré ne tombe pas dans le champ d'application des règles de la concurrence relatives aux ententes, bien que ses effets puissent être similaires à ceux d'une entente.

Le présent document a examiné les annonces unilatérales faites par des entreprises comme l'une des « pratiques de facilitation » pouvant être mises en place par les firmes pour générer une collusion stable sans conclure d'accord d'entente explicite. Ce sont là des pratiques que l'on observe généralement sur les marchés oligopolistiques et qui, sans être des accords d'entente explicites « injustifiables », réduisent l'incertitude sur le marché et aident les concurrents à coordonner plus efficacement leur comportement. Les autorités de la concurrence sont confrontées à deux problèmes en particulier : (i) comment rapprocher les divulgations unilatérales d'informations de la notion d'accord anticoncurrentiel ; et (ii) comment distinguer les pratiques professionnelles légitimes (comme l'annonce de prix au marché) des pratiques fournissant des points de convergence aux concurrents et facilitant la collusion.

¹⁴⁸ Pour de plus amples informations sur la perspective de certains pays sur le rôle de la réciprocité dans l'établissement d'une infraction aux règles de la concurrence, voir les notes du Danemark, de la Hongrie, des Pays-Bas et de l'Espagne dans OCDE, 2008.

¹⁴⁹ Voir par exemple la jurisprudence de l'UE dans T-141/89, *Tréfileurope contre Commission des Communautés européennes*, Recueil [1995] II-791, paragraphe 85. Voir également l'affaire T-311/94, *BPB de Eendracht NV contre Commission des Communautés européennes*, Recueil [1998] II-1129, paragraphe 203 ; l'affaire T-168/01, *GlaxoSmithKline Services Unlimited contre Commission des Communautés européennes*, paragraphe 87.

¹⁵⁰ La note du Canada dans OCDE, 2010 indique : « [...] une situation dans laquelle une partie transmet unilatéralement des informations à des concurrents, comme des informations sur les augmentations de prix envisagées ou autres comportements concurrentiels futurs, peut suffire à déterminer l'existence d'un accord contraire à la loi. Pour déterminer s'il existe un accord, peu importe que les informations soient mises à la seule disposition des concurrents ou diffusées au marché en général, bien que le Bureau fasse généralement preuve d'une plus grande suspicion à l'égard des échanges privés. »

¹⁵¹ Voir par exemple les notes des Pays-Bas dans OCDE, 2008.

Dans la plupart des régimes de concurrence, les annonces de prix unilatérales ne peuvent être condamnées comme illicites que s'il est possible de démontrer que cette pratique a entraîné, pour les entreprises, une certaine forme d'accord formel ou informel sur leur comportement futur. Dans certains pays, cela peut nécessiter une interprétation vaste du concept d'« accord ». Dans d'autres pays, le recours à la notion de « pratique concertée » a permis aux autorités de la concurrence de poursuivre des formes plus discrètes et plus souples de coordination et de conventions informelles entre les firmes, qui ne peuvent être rapprochées de la notion d'accord. Afin d'établir une infraction au droit de la concurrence, il n'est pas nécessaire que les annonces soient réciproques. Cependant, la loi exige de démontrer que les récipiendaires ou les destinataires d'une annonce unilatérale n'ont pas protesté et que l'annonce a effectivement porté préjudice à la concurrence.

Il peut être particulièrement délicat de distinguer une pratique professionnelle licite d'une pratique de facilitation illicite et il n'existe aucun test permettant de tracer une frontière claire entre les deux. La plupart des pratiques de facilitation peuvent avoir des effets à la fois favorables et préjudiciables sur la concurrence, selon les circonstances. Par exemple, les pratiques telles que les divulgations de prix unilatérales peuvent restreindre la concurrence lorsque les informations fournies portent sur les prix ou les comportements stratégiques futurs. En revanche, la transparence de marché que procure ces divulgations peut aussi générer des gains d'efficacité car elle améliore l'information dont disposent les consommateurs et permet à ces derniers d'opérer des choix plus éclairés entre des produits et des fournisseurs concurrents.

L'analyse menée dans le présent document permet aux autorités de la concurrence de tirer un certain nombre de leçons sur la manière d'appliquer le droit de la concurrence dans le cas d'annonces unilatérales :

- Les annonces unilatérales ont bien plus de risques d'avoir des effets anticoncurrentiels sur des marchés concentrés dotés de produits homogènes, sur lesquels un accroissement de la transparence est un facteur important qui facilite la formation d'accords d'entente tacite, leur surveillance et leur application.
- Les annonces privées (destinées aux seuls concurrents) concernant les prix futurs ne sauraient avoir de justification professionnelle légitime. Elles ne font qu'aider des firmes concurrentes à se coordonner sur le bon équilibre collusoire. Les consommateurs n'ayant pas accès à ces informations, elles n'impliquent qu'un engagement modeste et il est difficile de défendre ces pratiques au nom des gains d'efficacité.
- Les annonces publiques (destinées à la fois aux consommateurs et aux concurrents) concernant les prix futurs, lorsqu'elles permettent aux consommateurs d'agir en conséquence (car elles impliquent un engagement) apportent dans la plupart des cas des gains d'efficacité et ne doivent pas être considérées comme anticoncurrentielles.
- Les annonces publiques sans engagement ou les annonces publiques comportant une forme d'invitation à la collusion doivent être examinées avec soin par les autorités de la concurrence afin de déterminer si elles sont préjudiciables à la concurrence sur le marché.

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AUSTRALIA

1. Introduction

Facilitating practices refers to conduct by businesses which helps competitors to reduce or eliminate strategic uncertainty and coordinate their conduct more effectively, but do not constitute an explicit cartel agreement. Unilateral disclosures of information can be a form of facilitating practice.

Information disclosures (or exchanges) are a common form of facilitating practice. The disclosure of pricing information between competitors increases transparency between those businesses and changes the incentive for those businesses to compete and may facilitate coordination of prices.

The disclosure or exchange of information can have pro-competitive or anti-competitive effects, depending on the circumstances in which it occurs. Australian businesses are subject to a range of regulatory obligations to disclose information, including continuous disclosure obligations for publicly listed corporations under Australian corporate law. In some specific cases, regulatory obligations can extend to current price information – in the State of Western Australia, petrol retailers are required by law to specify, and adhere to, petrol prices for the next day.

Ordinarily, information disclosure plays a vital role in any economy and should be encouraged. Suppliers communicate to their current and potential customers for a variety of reasons including to inform customers, to advertise their market positioning and to improve brand awareness in competitive markets. Conversely, in some cases, the disclosure of information between competitors clearly has the potential to diminish competition. For example, by knowing what price a competitor is going to move to, the ‘receiving party’ does not need to offer its best price to attract customers.

The effectiveness of an information disclosure to facilitate coordination can be impacted by the nature of the disclosure. For example, the private disclosure of pricing information between competitors is likely to have little to no redeeming qualities, whereas there may be legitimate reasons for communication of information publicly. That is not to say that all public information disclosures will be deemed to be legitimate. For example, the Australian Competition and Consumer Commission (ACCC) has previously expressed concern regarding the public signalling of future interest rate pricing decisions by Australian banks. In October 2010, the then Chairman of the ACCC indicated that price signalling by major banks in Australia was of concern as, in his view, it provided businesses who sought to raise their own interest rates with an amount of comfort that their competitors will not undercut them.

The fact that information disclosures can be both pro-competitive and anti-competitive means that adequately addressing anti-competitive disclosures under competition law is invariably difficult. In attempting to address such disclosures, care must be taken to ensure that the appropriate balance is struck between prohibiting those disclosures which are most clearly anti-competitive while allowing the pro-competitive or benign disclosures to continue.

2. Information disclosures and the Competition and Consumer Act 2010

Australia has put in place a strong competition policy framework, which is underpinned by the *Competition and Consumer Act 2010* (the Act). The objective of the Act is to enhance the welfare of Australians through promotion of competition and fair trading and the provision of consumer protection.¹

¹ Section 2.

In particular, Part IV of the Act promotes competition by prohibiting certain types of anti-competitive conduct.

The Act adopts a rules-based rather than a principles-based approach to legislative drafting.² That is, in contrast to the approaches to competition law in some other OECD countries, the Act attempts to define all forms of conduct prohibited with a great deal of specificity, rather than setting out general principles.

Under Part IV of the Act, collusive behaviour in which competitors make or give effect to a ‘contract, arrangement or understanding’ which contains an exclusionary provision³ or has the purpose, effect or likely effect of substantially lessening competition is prohibited by section 45. In addition, under sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the Act it is an offence and a *per se* contravention to make or give effect to a contract, arrangement or understanding for explicit cartel conduct such as price fixing, bid rigging, reducing outputs and allocating territories.

These provisions clearly capture anti-competitive conduct which involves one competitor attempting to induce another into collusive conduct. However numerous judicial decisions imply that the above mentioned competition provisions of the Act may not effectively address facilitating practices, such as information disclosures or exchanges, where these occur outside of a contract, arrangement or understanding. As the words ‘arrangement’ and ‘understanding’ are not defined in the Act, it has been left to the Australian courts to interpret their meaning.

The Australian courts have held that proving a contract, arrangement or understanding will generally require direct evidence of a communication; a ‘meeting of the minds’ between parties; and an actual commitment (albeit moral, not legal) by at least one party to act in a certain way.⁴ Specifically, the interpretation of the word ‘arrangement’ and of the word ‘understanding’ appears to require the clear assumption by colluding parties of a ‘commitment’ or ‘obligation’ as to their conduct in the market.

The cases indicate that at least one party must ‘assume an obligation’ or give an ‘assurance’ or ‘undertaking’ that it will act in a certain way before the collusive conduct will be held to be a breach of the Act. A mere expectation that as a matter of fact a party will act in a certain way is not enough, even if it has been engendered by that party.⁵ In addition, if a party is motivated to act in a particular way for fear of repercussions if it does not do so, the courts have held that this does not mean that an arrangement or understanding exists.⁶

In recent years there has been considerable debate in Australia in relation to whether the current judicial interpretation of ‘understanding’ is adequate to capture anti-competitive conduct. The Part IV provisions of the Act have generally been effective in dealing with cases of explicit collusion and cartel behaviour because the criteria were clearly met via the direct evidence provided. However, they do not appear to have been effective in capturing collusive behaviour cases involving the disclosure or exchange of information where anti-competitive outcomes have been reached by competitor coordination; that is information exchanges between competitors which, when combined with a rational response based on their

² For commentary see: [Ross, ‘Some Outside Observations on Overly Restrictive Agreements and the Souths Rugby Case’ \(2004\) 12\(1\) *Competition and Consumer Law Journal* 83.](#)

³ Section 4D.

⁴ See for example, *Trade Practices Commission v Email & Ors* [1980] FCA 86; (1980) 43 FLR 383, *Apco Service Stations v Australian Competition and Consumer Commission* [2005] FCAFC 161 and *ACCC v Leahy Petroleum Pty Ltd* [2007] FCA 794.

⁵ *ACCC v CC (NSW) Pty Ltd (No 8)* [1999] FCA 954 at [141].

⁶ *ACCC v Rural Press Ltd* [2001] FCA 116.

underlying incentives, leads to circumstances in which supra-competitive prices can be created and maintained.

Australia's general approach of rules-based competition law, combined with the outcomes of numerous judicial decisions, has led to a relatively unique situation in Australia whereby it was considered that facilitating practices could not be effectively targeted under the existing laws.

Therefore, in response to concerns that the Act does not adequately address the issue of facilitating practices and following extensive consultation (over several years) the Government has recently legislated to prohibit anti-competitive price signalling and information disclosures under the Act.

3. Overview of Australia's new anti-competitive price signalling and information disclosure legislation

In December 2010, as part of its Competitive and Sustainable Banking System Package,⁷ the Government announced its intention to address anti-competitive price signalling and information disclosures by way of amendments to the Act. Following this, stakeholder consultation was undertaken on draft legislation, with final legislation being agreed to by both Houses of Australian Parliament and given Royal Assent in December 2011. The new legislation will take effect as of 6 June 2012.

The legislation inserts a new division into Part IV of the Act (Division 1A – Anti-competitive disclosure of pricing and other information) and consists of two new core prohibitions which aim to address the issue of anti-competitive price signalling and information disclosures:

- The outright (or *per se*) prohibition of private disclosures of pricing information (the *per se* prohibition); and
- The prohibition of the disclosure of pricing and other information if the disclosure is made for the purpose of substantially lessening competition (the SLC prohibition).

For the purpose of the prohibitions, a disclosure is defined as a unilateral communication; no degree of reciprocity or mutuality is required for there to be a disclosure. In addition, the term 'disclosure' is intended to convey that the conduct is active, not passive or accidental.

Consistent with other Part IV provisions of the Act, a contravention of the new prohibitions will lead to civil penalties of up to \$10 million, 10 per cent of a business's annual turnover or three times the benefit of the conduct — whichever is higher.

3.1 The *per se* prohibition

As indicated above, the *per se* prohibition prohibits outright the private disclosure of pricing information (i.e. information that relates to a price for, or a discount, allowance, rebate or credit in relation to goods or services to which the prohibitions relate to) between competitors. This prohibition requires no proof as to the purpose or effect of the conduct.

This prohibition is targeted toward the information disclosures that are the most clearly anti-competitive. As indicated previously, private disclosures of price information between competitors are only likely to occur in circumstances where one or other of the competitors is seeking to facilitate prices

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See: http://www.treasury.gov.au/banking/content/banking_announcement.asp

above the competitive level. Such disclosures give rise to an increased probability of such an outcome occurring.

The new legislation defines what constitutes a private disclosure. In particular, a disclosure is only private if the disclosure was made to one or more competitors or potential competitors of the business in that market to which the disclosure relates, and not to anyone else. Generally speaking, if a business makes a disclosure of information to a competitor, but also at the same time to one or more non-competitors it is not intended to be subject to the *per se* prohibition.

The legislation includes anti-avoidance provisions, recognising that a business may seek to circumvent the application of the *per se* prohibition. If for example a business uses an intermediary to pass on pricing information to a competitor, the disclosure will be taken to have been made by the business and subject to the *per se* prohibition.

This prohibition also only applies to private disclosures that are not in the ordinary course of business. While this is not explicitly defined, the concept of ‘ordinary course of business’ is a familiar concept under the Act and is found elsewhere in relation to the merger and acquisition provisions. The onus will be on the ACCC to disprove that the disclosure was in the ordinary course of business.

The new legislation also provides for a number of exceptions from the *per se* prohibition. In particular, specific exceptions are provided for private disclosures which are likely to occur for a legitimate business purpose, such as those in relation to joint venture activities or in relation to a merger. Disclosures which are excepted from the *per se* prohibition are still subject to the SLC prohibition. The evidentiary burden will be on the business to prove that their conduct falls within one of the exceptions.

3.2 The SLC prohibition

The SLC prohibition will prohibit a wide range of disclosures if the purpose of the disclosure is to substantially lessen competition in the market to which the disclosure relates. In particular, the prohibition is designed so that:

- It targets a broader range of information than the pricing information captured by the *per se* prohibition, including supply capacity and any aspect of commercial strategy of the business .
- It targets both private and public disclosures of information.
- A business’s purpose may be inferred from surrounding circumstances.

The inclusion of a competition test is consistent with the general framework of the Act as it is the basis for various other prohibitions in Part IV of the Act. The competition test in this case is whether the disclosure has had the ‘purpose’ of substantially lessening competition. It is recognised that commercial conduct frequently has more than one purpose. Conduct that has the purpose of substantially lessening competition will only be caught if that purpose was a substantial purpose behind the conduct engaged in.⁸ Ultimately, the Courts will decide whether the conduct in question, if it has multiple purposes, was engaged in for a substantial purpose of substantially lessening competition.

Some may consider that the requirement to prove ‘purpose’ is quite an onerous task. However, given that it is widely recognised that disclosures of information can be made for a wide range of purposes such a high burden was considered to be appropriate. In addition, to ensure that it is made clear that there is no

⁸ Section 4F.

necessity for a ‘smoking gun’ document to establish that a firm has the requisite purpose, the provision explicitly provides that the courts can infer the existence of purpose from the conduct of the business or of any other person or from other relevant circumstance.

The new prohibition includes a list of non-exhaustive factors that the courts may take into consideration when determining whether the business had the requisite purpose of substantially lessening competition. In particular, the factors are:

- Whether the disclosure was a private disclosure to competitors in relation to that market;
- The degree of specificity of the information;
- Whether the information relates to past, current or future activities;
- How readily available the information is to the public; and
- Whether the disclosure is part of a pattern of similar disclosures by the business.

Of particular interest to this discussion topic are the first and fourth factors in the list. While the new prohibitions are capable of capturing public disclosures of information, it is generally recognised that a private disclosure to a competitor may be more likely to have an anti-competitive purpose than a disclosure in public. Similarly, it can be said that disclosures of information already in the public domain may be less likely to have been made for an anti-competitive purpose in contrast to commercially sensitive, confidential information.

While some other anti-competitive conduct prohibitions in the Act include a test which examines whether certain conduct has the purpose and/or effect or likely effect of substantially lessening competition, it was concluded that the inclusion of the effects limb of the competition test was not warranted at this time. In the case of any disclosures, and perhaps more notably public disclosures, an effects test may cause undue uncertainty for businesses in determining whether a particular disclosure would breach the new prohibitions. This is because, at the time of the disclosure, it may be difficult to determine the likely response of competitors as it is largely beyond the control of the business disclosing the information.

In addition, in so far as the test was based on whether a public communication had the effect or likely effect of substantially lessening competition, the prohibition may have required a causal relationship between the relevant conduct and the effect. This may have placed the ACCC and the courts in a difficult position in terms of determining that the conduct had the requisite anti-competitive effect.

In addition to the specific exceptions that are provided for the *per se* prohibition, a number of exceptions are provided for both of the prohibitions. The exceptions include for disclosures with are authorised by or under another law, disclosures between related bodies corporate, disclosures made in relation to conduct that has already received immunity from the anti-competitive conduct prohibitions of the Act, disclosures made for the purpose of complying with Australia’s corporate law continuous disclosure requirements and accidental disclosures.

3.3 Immunity arrangements

Importantly, the new legislation also provides for mechanisms for parties to seek immunity from the prohibitions. If a business wishes to continue to engage in conduct in contravention of the new

prohibitions, and can demonstrate that doing so provides a net public benefit, it can seek authorisation from the ACCC.

In addition, where parties which to continue to engage in conduct in breach of the *per se* prohibition, it can use the notification process to seek immunity from the ACCC. Notification allows parties to obtain immunity through the lodgement of a notification of the proposed conduct to the ACCC. The ACCC then have 14 days to assess the notice, before the immunity commences. The immunity will not commence if the ACCC issues a notice prior to the end of the 14 day period. Businesses who receive immunity from the *per se* prohibition through the notification process will also receive immunity from the SLC prohibition. Notification is a more cost effective and timely process, relative to authorisation and is more suitable for one-off disclosures which are likely to have a clear public benefit.

3.4 Sector specific application

The new prohibitions will only apply to classes of goods and services that are prescribed by regulations for the purpose of the prohibitions and their application will be limited to the banking sector in the first instance.

The regulation making power allows for the extension of the laws to other sectors in the future and ensures that the new prohibitions are targeted towards sectors where conduct of concern has been identified, minimising the risk of unintended consequences in other sectors.

4. Conclusion

Anti-competitive information disclosures can help businesses better coordinate their conduct and result in prices above the competitive level. Such disclosures are often made unilaterally and fall short of any kind of explicit contract or agreement. A number of judicial decisions suggest that such disclosures have not, until recently, been capable of capture under Australia's competition laws. To address this concern, Australia has recently legislated to explicitly prohibit anti-competitive price signalling and information disclosures, including publicly disclosures.

While the new laws prohibiting anti-competitive price signalling and information disclosures are yet to be tested, they provide clear guidance to business as to the types of information disclosures that are and are not appropriate. They prohibit those disclosures which are most clearly anti-competitive while allowing those which are either competitively benign or pro-competitive to continue.

While the *per se* prohibition requires no proof of the purpose or effect of the disclosure, there is a recognition that under certain, limited circumstances, such disclosures may have a valid reason. Such disclosures will not be prohibited if they are in the ordinary course of business. Also, a number of other specific exceptions are provided to ensure that legitimate conduct can continue.

The SLC prohibition requires the ACCC to prove, in the courts, that the disclosure was made for the purpose of substantially lessening competition. While some may consider this to be quite an onerous task, given that it is widely recognised that disclosures of information can be made for a wide range of purposes such a high burden of proof is appropriate.

Finally, the availability of immunity arrangements allow those businesses who would like to make a disclosure that is likely to breach the prohibitions to apply to the ACCC for immunity on the grounds that the disclosure will provide a net public benefit.

BELGIUM

1. The legal standard for review

Our competition law does not require the establishment of an ‘agreement’ or ‘contract’ in order to find an infringement. Art. 2 of the Belgian competition act prohibits concerted practices that restrict competition in terms that in the relevant part identical to the text of art. 101(1) TFEU. It is moreover the expressed wish of Parliament that the Belgian competition act be interpreted in accordance with the case of the EU Courts and the decision practice of the EU Commission.

Concerted practices that fall short of an agreement can therefore be captured and sanctioned.

Whether a concerted practice constitutes an infringement by object or by effect depends on the nature of the alleged infringement.

A unilateral announcement of a future price by one competitor that is adopted by competitors is e.g., in case there is no element of ‘agreement’, likely to be qualified as a concerted practice in respect of an infringement by object. The EU case law has e.g. decided that some forms of collusion can be considered to be harmful for a good functioning of the markets and competition by their very nature.¹ If the unilateral announcement does not lead to a pattern of behaviour that would, in case of an agreement, not be qualified as an infringement by object, the concerted practice is also likely to be assessed as an infringement by effect.

The efficiencies of increased transparency will be assessed in the light of the specific characteristics of the affected markets.

2. Types of announcements

We have not yet dealt with a case on ‘cheap talk’. We foresee primarily problems to prove that indeed was cheap talk.

The Authority has in the past, in the light of the pricing behaviour of its members, sanctioned a website instrument of a professional association on pricing models as a horizontal price fixing arrangement. We may therefore assume that price information on future prices that are followed by market behaviour conforming with the announced intention of competitor will be assessed as invitation to a concerted practice, c.q. concerted practice. We do not think that a more explicit form of acceptance will be required. But defendants may be able to prove that their behaviour was not a consequence of the information they received (or may perhaps be able to establish that they did not receive the information).

We have not yet dealt with the distinction between private and public communications.

¹ TPI, 9 juillet 2009, aff. T. 450/05, *Automobiles Peugeot c. Commission*, Rec. 2009, p. II-2533, pt. 44 et CJCE, 20 novembre 2008, *Beef Industry Development Society Ltd*, aff. C-209/07, pt 17.

3. Enforcement related issues

If there is only a unilateral communication that has had no identifiable impact on the behaviour of competitors, it will be difficult to qualify the behaviour as an infringement of art. 2 of the Belgian competition act (the prohibition of restrictive agreements, concerted practices or decision of associations of undertakings). And in the absence of a dominant position it may be difficult to establish any infringement of the rules of competition. Much will therefore depend on the behaviour of competitors. But the fact they took the information into account does, even if it can be proven, not necessarily point to an infringement. It may also be the case that it inspires a more competitive reaction.

It is possible. A series of unilateral announcement by different competitors may sometimes even constitute evidence of an agreement. But unless the announcements are concerned with hardcore restrictions, the qualification is likely to depend on the effect the announcements have had on the market.

4. Policy guidance

The answer to both questions is still negative. Reference is usually made to EU Commission policy.

CHILE

1. Legal provisions

According to the provisions of the Chilean Competition Act (“Act” or “DL 211”), in order to find an infringement of the law’s provisions for a unilateral disclosure of sensitive information, there is no need to prove an explicit “agreement” among competitors.

Unilateral disclosure of sensitive information having anticompetitive effects may be framed as a tacit agreement or a concerted practice, as an invitation to collude, or as a unilateral conduct having anticompetitive effects.

Different sections of the Act allow for these different framings.

Regarding ‘unilateral conduct having anticompetitive effects’, the broad provision of Article 3 section 1, expresses: “*Whoever executes or enters into any act, ... **individually**, which hinders, restricts or impedes free competition, or which tends to produce such effects, shall be penalized with the measures indicated in Article 26 hereof, notwithstanding any preventive, corrective or restrictive measures that could be ordered in each case, with regard to said acts, ...*”. The provision has been traditionally construed as requiring market power.

As to the framings of ‘tacit agreement’ or ‘concerted practice’, Article 3 section 2 a), expresses: “Among others, the following shall be considered as acts, agreements or conventions that hinder, restrict or impede free competition, or which tend to produce said effects: a) Express or **tacit agreements between competitors**, or **concerted practices** between them, which confer to them market power and which consist of fixing sale prices, purchase prices, or other commercial terms and conditions, restricting output, allocating territories or market quotas, excluding competitors, or affecting the results of tender processes (bid rigging).”

Finally, regarding ‘invitations to collude’, even though such behavior is not considered by the provisions of the Act, it could be argued that punishing attempts or failures of committing an unlawful conduct is a criminal law principle applicable to administrative law infringements such as violations to the Competition Act.¹

No matter what framework is chosen for analyzing unilateral disclosure of information, in Chile, in order to be punishable, the potential effects of the conduct –whether its own or those risen by the concurrence of a hypothetical subsequent reaction of a competitor– should be proven and assessed.

¹ The Competition Tribunal (“TDLC”) gave grounds in favor of arguing that attempts or failures of committing an unlawful agreement are punishable. Analyzing a conduct consisting in using an agreement with regards to a specific target as a *test case* in order to further extend the anticompetitive agreement to other targets, the TDLC held: “...*it is not proven that coordinated actions have actually taken place or were attempted*...”. TDLC, October 19th, 2011, Ruling N° 113/2011, Rc. 48°.

2. Enforcement practices

Since the enactment of Law N°20.361/2009 which reinforced effectiveness of investigations in cartel behavior (introducing leniency, wiretapping and raids powers), FNE's² efforts in enforcement have been oriented towards high impact cartel cases with direct evidence. Unilateral behavior has been identified as part of the evidence grounding FNE's complaints in some cases but the FNE has not assessed these unilateral conducts in isolation, but as a component of coordinated behavior among competitors. However, before these legal amendments were enacted, concerted practices and tacit collusion were used as theories of the case when proofs were limited to circumstantial evidence. In the final section of this contribution cases illustrating both periods are summarized.

3. Policy guidance

In 2011, in order to clarify core concepts and promote compliance with competition law in the field of trade associations (TAs), the FNE issued an advocacy document on competition law and TAs.³ The document conveyed the FNE's vision in matters of competition law concerning collaboration between competitors, recommendations on commercial practices formulated by TAs, formal aspects and content regarding TAs meetings, boycott infringements, criteria and conditions for TAs membership, essential services offered by TAs to members and non-members, self-regulation by TAs, standards setting, advertising, standard contracts and general marketing conditions. For each of these issues, the document provides specific recommendations to guide TAs and their members.

Though the document covers primarily information exchanges among competitors participating in a TA, those criteria are useful for guidance for competitors when deciding unilaterally to disclose information. For instance, the document explains that the following is considered competitive sensitive information: information concerning pricing policy (current or future prices), costs structures, outcome volumes (current or future), expansion and investment plans, imports policy, information regarding market shares, clientele lists, discounts policy, payment conditions, marketing strategies, and design and content of bid for tenders. Companies should be careful when disclosing such information.

4. Cases

4.1 *Complaint for cartel case in the poultry industry (2011)*

In a complaint for cartel conduct in the poultry industry submitted by the FNE in 2011, one of the facts considered by the FNE was a press interview of one of the defendants' CEO. In this interview, this CEO expressed: *"Fighting against Super Pollo [one of its competitors]... what for? It is better to coexist. As the idiom says, if you cannot beat your powerful enemy, join him. We have a strong trade association along with Ariztía and Agrosuper [its competitors] through which we have been able to reach agreements*

² FNE is the acronym for Fiscalía Nacional Económica, the Competition Agency in Chile in charge -in the enforcement field- of investigating, prosecuting and litigating competition law cases before the TDLC and other tribunals.

³ A preliminary draft was presented for public comment and consultation and preceded by a study conducted by a university research center specialized in regulation and competition, who reviewed the practice of case law by antitrust authorities in Chile over a 35 year period, including also foreign literature. During the consultation period, the FNE received comments and observations from approximately 30 TAs, including business associations and professional associations, and simultaneously held work meetings with the most important TAs in the country.

regarding which part of the market belongs to each one. We will not jeopardize our reputation for a 1% more".⁴

However, as explained above, this unilateral act was not used in isolation, but as part of a set of evidence that also include information gathered during a search in companies' premises such as e-mails between competitors, among others. All the above is supporting a cartel accusation.

4.2 *Private health insurance (ISAPRES) case (2007)*

In 2005, the FNE submitted charges against the major private health insurance companies (ISAPRES), accusing them of colluding to reduce the coverage of their marketed health plans, harming their affiliates. As a matter of fact, until May 2002 plans offering 100-80 coverage (i.e. 100% coverage in hospitalizations and 80% in ambulatory services) represented 96.7% of Isapres' sold plans. In 2004, after a serial of constant reductions by each defendant Isapre, 100-80 coverage plans reduced to only 7.5% of the sold plans whereas 90-70 plans reached 90.6% of the total. These changes in the available plans in the market translated, additionally, in increases in Isapres' benefits that had no other justification.

The accusation was dismissed in a divided ruling, by the TDLC and by the Supreme Court. However, it is worth noting that the TDLC analyzed different factors that could be indicating a collusive agreement, notably the frequent interaction among competitors and high degrees of transparency of information on competitors.⁵

Various opportunities for interactions among competitors within their trade association were identified, going beyond the regular meetings of the association (e.g. technical committees, meetings of the companies' chairmen meetings, etc.). In addition, the TDLC identified that employees of the marketing branches of companies had easy access to the information of health insurance plans marketed by competitors.

The above mentioned interactions, in addition to public information provided by the Regulator as well as the constant reciprocal monitoring among the companies translated into high degrees of transparency in the market.

The aforementioned factors (interactions among competitors and transparency) supported the thesis of parallelism. However, the TDLC held that proving parallelism was not enough to establish a collusive agreement. The lack of plus factors led the TDLC to discard the accusation.

⁴ Translated from an interview in "El Mercurio", "Revista del Campo" supplement, April 16th, 2007; quoted by the FNE's complaint for cartel conduct in the poultry industry, available at: <http://www.tdlc.cl/DocumentosMultiples/Requerimiento%20FNE%2030%2011%202011.pdf> ¶ 40.

⁵ TDLC, Ruling No 57/2007, Rc. 69 and ff.

GERMANY

1. Introduction

Unilateral disclosure of information with anticompetitive effects is a topic which is of interest not only to economic and legal scholars, but also to anti-cartel enforcers. Competition authorities all around the world have found themselves confronted with situations where companies disclose information on business strategies and have had to assess this conduct under their respective competition law regimes.

In their assessment of unilateral disclosure, competition authorities face a variety of constellations which can be considered to fall into “grey areas”. Companies use a full range of practices from quietly observing but not communicating with competitors to interacting by way of express agreements. In between, companies may also communicate unilaterally on different levels with different target groups. For example, the CEO of a company may mention changes in capacity in a speech at a trade association meeting attended by competitors. Or he might give a press statement on future pricing policy directed at consumers. Acting in a more subtle way, coordinating their conduct by the unilateral disclosure of information may be one of the courses taken by companies in order to avoid the scrutiny of the authorities. Competition authorities have to assess the quality of such communications and determine whether the behavior might be relevant under competition law, e.g. because it is mirrored by competitors or even leads to parallel conduct with the same aim as an agreement.

This paper will focus on the unilateral disclosure of information with potential anticompetitive effects, such as press announcements. It will not cover the express exchange of information as already discussed at the last roundtable on “Information Exchange between Competitors under Competition Law”¹ nor will it deal with market information systems.

The paper will survey the benefits and risks that unilateral disclosure may have for competition (2.). It will then turn to the legislative framework in which the Bundeskartellamt assesses such conduct (3.) and give an overview of practical experiences (4.) before concluding (5.).

2. Benefits and risks for competition

Before turning to the legal provisions which may apply to unilateral disclosure of information with anticompetitive effects, it is important to remember the economic implications of such conduct.

Though competition lawyers might instinctively regard many forms of information disclosure as a threat to competition, it should be kept in mind that a certain level of transparency is necessary or beneficial for a competitive outcome. Consumers take advantage of their access to information to make informed choices and to purchase those products that best satisfy their preferences or needs. As companies adapt to consumers’ choices, this will indirectly lead to an efficient allocation of resources.

Information disclosure between competitors may help to avoid the over-supply or under-provision of goods to consumers by contributing to an efficient allocation of resources. Furthermore, information

¹ See Germany’s contribution to the 2010 October Roundtable, OECD Doc. [DAF/COMP/WD\(2010\)106](#).

sharing can assist in solving problems of information asymmetries on certain markets: for example, shared information about past credit default can improve the functioning of the credit supply market by providing incentives for consumers to limit their risk exposure.² These are only some examples of the beneficial effects of a certain level of transparency.

On the other hand, information disclosure leading to more transparency may assist firms in reaching tacit collusion.³ In the economic literature three main reasons for the harmfulness of disclosure of information have been identified:⁴ i) Information sharing can help firms to reach a *focal point* of coordination, ii) it can increase the *internal stability* of coordination and iii) it may also promote the *external stability* of coordination. In practical terms: A focal point for tacit coordination can be achieved by the transfer of information about pricing intentions, as such knowledge can assist firms in reaching a tacit understanding without direct communication.⁵ Internal stability of coordination can be increased when information disclosure facilitates the monitoring of firms' actual conduct. Thereby the probability or targeting of punishment for deviation from the collusive outcome is increased. External stability of coordination can be enhanced when information sharing allows for the detection of and coordinated reaction to new market entries. These effects may also materialize due to indirect information disclosure organized through third parties.⁶

The effects of unilateral disclosure will always depend on the nature of the information disclosed, the way in which this is done and the competitive situation on the market concerned.⁷ *Public* information disclosure, which also reaches consumers, may have a greater potential to be pro-competitive than information disclosed *privately* to competitors. Further, *aggregate* information about the market may suffice to reach more efficient market outcomes, while the disclosure of *individualized* information may have a greater potential to sustain a collusive outcome.⁸ Information on *homogeneous* products may be more likely to lead to collusion than on *heterogeneous* products. Details on *production capacities* can suffice in some markets to give competitors a clear message and indication of future behavior. A decisive element for the assessment of unilateral disclosure is therefore whether the diffusion of information may lead to or *facilitate coordination* between competitors in view of the *specific circumstances at hand*.

² Communication from the Commission “Guidelines on the applicability of Article 101 Treaty on the Functioning of the European Union to horizontal co-operation agreements” (OJ 14.01.2011, C 11/1), para. 57.

³ In this context tacit collusion shall refer to an anticompetitive behavior by companies. The economic notion of collusion refers directly to the market outcome. Collusion, whether reached by an explicit agreement or via implicit coordination, leads to higher prices (lower output) than the competitive, non-collusive market outcome.

⁴ See for example Bennett and Collins, “The law and economics of information sharing: the good, the bad and the ugly”, ECJ 2010, p. 320.

⁵ Although this has been criticized as “cheap talk” (costless and non-binding communication), even “cheap talk” has been shown to assist in reaching a collusive outcome. See Bennett and Collins, p. 323 f. Charness and Grosskopf, “Cheap talk, information and coordination – experimental evidence”, (September 27, 2001). Available at SSRN: <http://ssrn.com/abstract=292861>, p. 1.

⁶ See for example Bennett and Collins.

⁷ Kühn, “Fighting collusion” in Economic Policy, 2001, p. 180 ff.

⁸ Kühn, *ibid*.

3. Legal provisions/ legal standard of review

Disclosure of information (be it unilateral or in the form of an exchange) may be subject to assessment under the German Act against Restraints of Competition (ARC)⁹ or Art. 101 TFEU as it reduces the strategic uncertainty on the market and could in principle constitute or lead to a concerted practice. The German ARC introduced the extension of the prohibition of cartels to cover concerted practices with the second amendment of the ARC in 1974.¹⁰ The current provision of the prohibition on cartels in Section 1 ARC mirrors the wording of Art. 101 TFEU. It states that “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, shall be prohibited.”

Guidance for the German practice may therefore also be sought in the “Guidelines on the applicability of Article 101 Treaty on the Functioning of the European Union to horizontal co-operation agreements”¹¹ (hereinafter “Guidelines”) and in the case law of the European Court of Justice. Concerted practices in the meaning of Art. 101 TFEU are understood to be “a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition”.¹²

The Guidelines intend to provide an analytical framework for the most common types of horizontal co-operation agreements, including “General principles on the competitive assessment of information exchange”.¹³ According to these principles, the unilateral disclosure of information via, for example, mail, e-mail, phone calls, meetings etc. can amount to a concerted practice under certain conditions. In particular the guidelines stipulate clear obligations for competitors receiving competitively sensitive information in any seemingly unilateral way to take a distance or even object. Otherwise the Commission might consider their silence as agreement.¹⁴ On that basis undertakings can be considered as colluding by just mirroring the unilateral disclosure of one undertaking, and even more so if such announcements involve an invitation to collude. However, given that Article 101 (1) TFEU as well as Section 1 ARC only relate to situations with at least *two* players, the guidelines consequently confirm that where a company makes a unilateral announcement that is also *genuinely public*, for example through a newspaper, this *generally will not constitute a concerted practice* within the meaning of Article 101 (1) TFEU.¹⁵

4. Case practice

In practice it is very difficult to assess cases relating to the unilateral disclosure of information. Not only does the relevance of the information depend on the nature of the market and the competitive situation on the market as well as the undertakings involved. Also the requirements of proof that such conduct led to some sort of collusion or concerted practice with competitors are particularly difficult to fulfill. Finally it

⁹ An English version of the ARC is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/110120_GWB_7_Novelle_E.pdf.

¹⁰ The second amendment of the ARC entered into force in 1973, BGBl. I 1974, p. 869.

¹¹ Communication from the Commission “Guidelines on the applicability of Article 101 Treaty on the Functioning of the European Union to horizontal co-operation agreements” (Horizontal Guidelines) (OJ 14.01.2011, C 11/1).

¹² ECJ 1972, ICI v. Commission, ECR 619, para. 64.

¹³ Horizontal Guidelines, para. 55.

¹⁴ Horizontal Guidelines, para 62. For meetings or situations with clearly anti-competitive object this is commonly accepted, see Kühn, “Fighting collusion”, p.1181, with references to European case law.

¹⁵ Horizontal Guidelines, para 63.

would also have to be analyzed whether the conduct might be exempted under Section 2 of the ARC, Art. 101 (3) TFEU.

In the past, whenever the Bundeskartellamt as the competent federal competition authority in Germany has received complaints or hints about illegal anticompetitive behavior by means of unilateral disclosure of information, it has analyzed the situation on a case by case basis. However, in recent years the indications for anticompetitive conduct were never clear enough to open a formal investigation.

5. Conclusion

The discussion within the framework of the OECD on the requirements for assuming that seemingly unilateral conduct has led to a bilateral or multilateral concerted practice (as described by the Guidelines of the European Union and maybe other authorities) will provide a welcome opportunity to further clarify the standards of assessment in such cases.

ISRAEL

1. Preview

This contribution paper discusses the issue of unilateral disclosure of information with anticompetitive effects (e.g. through press announcements) under Israeli Law. The first section outlines the statutory framework. The second section illustrates the main factors relevant to the assessment of unilateral disclosure of information.

As the Israel Antitrust Authority's ("IAA") official position on the matter of unilateral disclosure of information through press announcements is still being considered, this contribution should only be regarded as a preliminary analysis of said matter.

In the last few years we have witnessed an increase in media reports over the Israeli business world. The printed, digital and broadcasted press covers economic issues, which are used, amongst other things, to present economic and business information of various types.

The publication of economic and business information is of great value, as it gives the investors the tools to make better informed investment decisions,¹ assists consumers with the acquisition of goods and services,² and generally supports the public and the business sector's ability to plan ahead and take more informed actions.

However, from time to time there are statements and announcements in the media regarding business issues that may have an anticompetitive effect. Reports which contain information pertaining to future plans or which contain trade secrets which would otherwise be hidden from the public, may be regarded as such.

One problematic issue pertaining to the publication of information which may have anticompetitive effects immediately comes to mind: whereas disclosure of such information in the course of a private conversation could be condemned as a breach of the Law, publication of the same information in the general media will seldom lead to legal enforcement.

2. The statutory framework

The Israeli Restrictive Trade Practices Law, 5748-1988 ("the Law") sets the statutory framework for competition regulation in Israel. The chapter relevant to the issue of unilateral disclosure of information is the one dealing with restrictive arrangements. Unilateral disclosure of information may be unlawful if it was found to constitute a restrictive arrangement under the Law or an attempt to reaching such.

The analysis and the examples hereinafter focus mainly on disclosures of information which may have a "horizontal" effect, that is an effect over competition between direct competitors, as our experience shows that disclosures of information which may have anticompetitive effects are usually made by direct

¹ 11476 /04 State of Israel v. Discount investment company Ltd. (Supreme Court Rulings, Nevo 2010).

² See Bezek Benleumi (Determination of Restrictive Arrangement) 1997 Antitrust 3010364.

competitors. There may however, be situations where a "vertical" disclosure of information (i.e. amongst buyer and seller) could constitute a restrictive arrangement. In addition, a public statement made by a dominant firm might be considered as an abuse of dominant position, or an attempt to do so.

Section 2 of the Law describes the types of agreements that constitute a "restrictive arrangement"; pursuant to section 4, it is prohibited to be a party to such an arrangement.³ Section 2(a) provides the general definition of a "restrictive arrangement",⁴ while section 2(b) sets out several legal presumptions according to which any arrangement involving a restraint that relates to price, profit, market allocation, output or quality, shall be deemed a restrictive arrangement.

In fact, section 2(b) creates an irrefutable presumption that restraints relating to price, profits, market division, output or quality are restrictive arrangements. This path provides that instead of demonstrating harm to competition as defined under section 2(a), it is sufficient for the prosecution or plaintiff in a section 2 case to merely prove that the underlying "arrangement" relates to one of the typically anticompetitive issues listed under sections 2(b)(1)-(4).

In this context, it must be stated that the term "arrangement", defined in section 1 of the Restrictive Trade Practices Law, has a broad meaning.⁵ *Inter alia*, that is to say that the fact that a competitor's statement was made in public does not in its own mean that the unilateral disclosure of information is not a restrictive arrangement.

In general, a unilateral disclosure of information through press announcements by a competitor may be considered at least as an attempt to reach a restrictive arrangement, where the information disclosed is clear and specific enough so that at least one competitor could act in accordance with the anti-competitive scheme outlined by the statement in a direct or indirect way.

The attempt offence is defined in the Israeli Penal Law 5737-1977.⁶ If person A expresses himself in public and his statements could consider a restrictive arrangement if person B cooperated with him, especially when the arrangement concerns one of the matters mentioned in section 2(b) of the law, then it can constitute an attempt.

For example, when a competitor expresses himself in public and declares: "I'm going to raise my prices, and believe that my competitors would be wise to act in a similar manner", it might constitute an attempt to reach a restrictive arrangement between him and his competitors. This statement could evolve into a restrictive arrangement, where the competitors in fact do collaborate with the statement.

³ Section 4 of the Law is the general provision which prohibits any person from being party to a "restrictive arrangement" unless such an arrangement is cleared either where the parties satisfy the conditions of one of the block exemptions issued by the IAA pursuant to section 15A of the Law, or where the parties have obtained one of the various possible forms of clearance from the IAA or the Antitrust Tribunal.

⁴ Section 2(a) defines the term "restrictive arrangement" as (1) "an arrangement" (2) by "persons conducting business" (3) in which "at least one of the parties restricts itself" (4) in a manner that "is likely to prevent or reduce competition" (5) "between it and the other parties to the arrangement or any of them, or between it and a person not party to the arrangement."

⁵ 396/87 Kissin v. Petrolgas Israel Gas Co. (1969), Ltd. (District Court Rulings Vol. 32(6), at 650, 1990); 98/4465 Tivol (1993) Ltd. v. Shef HaYam (1994) Ltd.. (Supreme Court Rulings, Vol. 56(1)45, at para 28,2001).

⁶ Section 25 states that "A person attempts to commit an offense, if he – with intent to commit it – commits an act that does not only constitute preparation, on condition that the offense was not completed."

This kind of reference, regarding future plans, might be direct, such as in the example aforementioned, or indirect, such as in the case of a statement that implies the speaker's viewpoint and his expectations from his competitors. For instance, a competitor might state that: "the market prices are too low, and they should be higher" and in certain circumstances this statement will suffice in order to send a clear message to his competitors, inducing them to act upon it and raise their prices.

When a unilateral disclosure of information through press announcements by a competitor influenced another competitor's business conduct, by the competitor's following of statement, whether by action or omission, it might constitute a restrictive arrangement, to which both competitors may be parties.

The specifics of the restrictive arrangement are derived from the nature of the disclosed information and could of course pertain to various aspects of competition in a specific market. For example, a public statement may refer to current or future pricing in the market, to aspects of market allocation ("we do not intend to branch out beyond the northern part of the country"), aspects of quality ("in the next couple of years we do not plan on developing a more advanced version of product X, we believe that there is no demand for such a product, and I wouldn't suggest our competitors to be involved in such a project") etc.

Moreover, in some cases, a public anti-competitive statement might constitute a "facilitating practice", which in certain circumstances could, in itself, be regarded as a restrictive arrangement, provided that the agreement requirement is satisfied. Facilitating practices are actions, typically taken in an oligopolistic market, which assist competitors in coordinating or stabilizing collusion, inter alia through the elimination of strategic uncertainty and in coordination of their conduct.

In general, an oligopolistic market is characterized by a small number of substantial competitors, and may involve market players' low motivation to compete.⁷ One typical risk of an oligopolistic market structure is tacit collusion. Even though tacit collusion (completely independent behavior absent any form of communication between rivals) is not generally considered a restrictive arrangement, facilitating practices that might help competitors tacitly collude constitute a restrictive arrangement under certain circumstances.

Thus, in April 2009 the General Director issued a determination⁸ with respect to information exchanges between the five largest banks in Israel ("The Banks"), regarding the fees charged for bank services for households and small businesses.⁹ The IAA's analysis reviewed the connection between information exchange in an oligopolistic market and the creation and maintenance of a supra competitive equilibrium.

Information exchange among competitors in an oligopolistic market is a clear example of a practice that may facilitate collusion. The IAA concluded that the information exchanges between the banks were likely to prevent or reduce competition in the banking services for households and small businesses market, and that it actually restricted the competitive process in three aspects (in a nutshell): reducing of business uncertainties regarding changes of bank fees, their scope and their collection; decreasing incentives to inform consumers; Decreasing consumer incentives to search for a different bank.

⁷ 4465/98 Hevrat HaDelek Hayisraelit Ltd. v. Beer Yaqov gas station and anthers (1994) Ltd.. (Antitrust Tribunal, Vol. 2001(1)3669, at para 132 ,2001).

⁸ Pursuant to section 43(a)(1) of the Law, the General Director may issue a Determination that a specific arrangement constitutes a restrictive arrangement. Such a determination is significant in that it is prima facie evidence of its content in every legal proceeding.

⁹ See Bank Hapoalim Ltd., Leumi Bank Ltd., Israel Discount Bank Ltd., Mizrahi Bank Ltd. and the First International Bank of Israel Ltd (Determination of Restrictive Arrangement) 2009 Antitrust 5001411.

There are of course many ways to exchange information. One way is through unilateral disclosure of information, that is, a public statement on the business affairs of a firm that operates in an oligopolistic market. Such an action might reduce commercial competitive uncertainty and improve the recipients' ability to collude, under the presumption that an anticompetitive equilibrium serves the best interests of all the players in the market.

There are two main characteristics of public statements which may reduce competition: (a) the information pertains to future events, (b) the information was not public prior to the statement. Even though it is not necessary for both characteristics to exist in order for the information exchange to constitute a facilitating practice, the existence of both characteristics tends to increase the threat to competition, as they reduce uncertainty and thus make it easier to create and maintain a supra-competitive equilibrium.

That being the case, unilateral disclosure of information might be forbidden, whether it constitutes an actual invitation to collude or bring about a collusive outcome or whether it constitutes a restrictive arrangement in itself or an attempt to reaching such.

3. The factors relevant to the assessment of unilateral disclosure of information

The IAA might consider a number of factors in order to determine whether a unilateral disclosure of information through press announcements may have adverse effects on competition.

It should be noted that the factors mentioned hereinafter do not constitute an exhaustive list or a cumulative mandatory one. In particular, in different cases, not all characteristics listed hereinafter need to exist in order to prove that a particular case of unilateral disclosure of information has the potential of preventing or reducing competition.

3.1. The contents of the statement

Commerce is generally based upon free flow of information. Firms' statements declaring that they are about to raise or reduce their prices, market a new product, invest in R&D etc, are usually considered legitimate and important to the business world. Such statements enable costumers, suppliers, investors, regulators and others to plan ahead in an informed and efficient manner. Having said that, the question still arises – which unilateral disclosure of information might be considered "suspicious" from a competitive effect point of view? The two accumulating parameters are the relevance of the information and the relationship with competitors.

Relevance of the information – future information. Generally speaking, the potential adverse effects on competition depend to a great extent on the type of information disclosed. Statements that concern information pertaining to the future, explicitly or implicitly, are particularly suspicious. One can distinguish between two types of such information:

5. Explicit information regarding future conduct – straightforward statements regarding future conduct are especially problematic, since they diminish the uncertainty of the competitors and enable them to adjust their behavior to the one of the speaker. For example: "we intend to raise our prices by 15%". Moreover, these kinds of statements may be a direct message to the competitors about the way they are expected to act in the market.
6. Statements that indirectly imply future conduct – the information about future conduct in these statements does not have to be explicit and can be implied without requiring complicated interpretation. In other words, such a statement is easily seen as a "signal" intended for the competitors. For instance: "we believe that the current prices in the market are too low"

In both cases, it is important to examine the nature of the information, how particular and elaborate the data is, and to what extent it assists competitors in predicting the speaker's future behavior. It should be noted that information concerning pricing, quantities and market allocation, tend to have a significant anticompetitive effect. Therefore, information regarding those matters is especially problematic, since it facilitates collusion.

Relationship with competitors. Unilateral disclosure of information regarding future conduct is problematic if it relates, directly or indirectly, to the behavior of the competitors, e.g., when the statement consists of references or proposals to competitors. However, even if there is no explicit reference to specific competitors, a statement could still have an anti-competitive effect and therefore, the circumstances surrounding the statement, and its accumulated effect, should nevertheless be thoroughly examined. For example, if information provided in a statement is specific enough, the statement could have an effect on competition, even where competitors are not explicitly referred to.

3.2. *Publicity and context*

Unilateral disclosure of information has many shapes and forms. The main question is the likelihood that the data will reach the competitors. Statements might be regarded as "suspicious" in the case they were expressed in one of the following: (1) professional conferences, meetings open to the public, etc; (2) interviews with the media: radio, newspapers, TV, websites, social networks, internet forums, press conferences, media panels, etc; (3) other publications, such as pamphlets, letters and conference calls with investors and/or analysts. In effect, every unilateral disclosure of information on a medium that is accessible to the competitors might be used as a platform for anti-competitive statements.¹⁰

The focus is on unilateral disclosure of information in a medium that is accessible for the public or a part of it and therefore might be available to competitors, as opposed to statements being made in closed forums without the presence of competitors.

3.3. *The initiator of the disclosure of information*

It is doubtful whether any weight should be placed on the identity of the person initiating the disclosure of information: where information which may have an anti-competitive effect is disclosed, whether a competitor initiated the disclosure or he simply replied to a query is usually irrelevant.

3.4. *The structure and characteristics of the market*

The more concentrated the market, the more likely to occur are the anticompetitive effects of unilateral disclosure of information. In particular, when a market exhibits the characteristics that may support a supra-competitive equilibrium, there is a higher probability that unilateral disclosure of information will reduce (or even remove) uncertainties regarding the instruments of competition and hence will facilitate a collusive outcome.

3.5. *The existence of a legitimate business justification for the statement*

There might be legitimate justifications for making public statements on business matters, such as informing customers or investors about business plans or actions. The legitimacy of such statements should be examined in view of the circumstances surrounding the making of the statement, including the characteristics of the statements, and the market structure.

¹⁰ Certainly, a statutory obligation to publish the information would constitute an appropriate defense – as long as it was published in the scope and manner prescribed by law.

4. Summary

Unilateral disclosure of information potentially has both pro and anti competitive effects. The publication of economic and business information is of great value, but statements and announcements regarding business issues, that are accessible to competitors, may have an anticompetitive effect.

As presented above, the IAA's official position on the matter of unilateral disclosure of information is still being considered. The IAA might consider a number of factors in order to determine whether unilateral disclosure of information may have adverse effects on competition. The factors mentioned above do not constitute an exhaustive list, and in different cases, not all of the characteristics listed above need to exist in order to prove that a particular unilateral disclosure of information practice has the potential of preventing or reducing competition.

ITALY

1. Introduction

The Italian Competition Authority has addressed the issue of anticompetitive effects of information exchange among competitors in several decisions. In accordance with EU Competition Law the Italian Competition Authority condemns information exchanges on their own or together with other restrictions when their effect is facilitating collusion among competitors. The assessment of the anticompetitive effects of information exchanges depends mainly on the subject matter of information exchanged, in the level of detail and the frequency of exchange, on the nature of the product in question and on the market structure. Information agreements are normally permitted if they have as their sole object an exchange of experience, joint market research or joint preparation of comparative studies of industries or statistics and surveys.

The Italian Competition Authority argued in some cases that even when the structure of the relevant market is not oligopolistic an exchange of information may restrict competition if it concerns prices and if consumers do not benefit from greater transparency.¹ This position, held in a case concerning the insurance market, was upheld by the Supreme Administrative Court confirming that an exchange of highly confidential and sensitive information (e.g. prices) is unlawful not only in very concentrated markets but also in markets with a more fragmented structure.²

Unilateral diffusion of information by public announcements (usually via press releases) has also been considered by the Authority as an indirect exchange of information in some cases. It should be noted, however, that the anticompetitive effects of unilateral announcements were always assessed in combination with other – more direct – information exchanges and in the presence of other elements indicating collusion (such as the involvement of trade associations).

This contribution will provide a description of these cases and a brief discussion of the criteria that the Italian Competition Authority adopted in the decisions.

2. The case of Airlines Fuel surcharge³

In 2002 the Italian Competition Authority took a decision in a case concerning a concerted practice among the main Italian airline companies for an increase in airline tickets on domestic routes in the form of a fuel surcharge. The case involved, among other things, a press release by Alitalia where the company announced its intention to increase the fuel surcharge on domestic flights. In the Authority's view the unilateral diffusion of this information played a role in the collusive strategy analysed in the case. The analysis of this case might contribute to infer some of the principles applied by Authority to unilateral diffusion of information with anticompetitive effects.

¹ See Case RC Auto, 28 July 2000, n. 1377, Bulletin 30/2000. The case involved 40 insurance companies.

² The Authority's position was confirmed in another case concerning the insurance markets. the IAMA decision Insurance case 2000 as confirmed by TAR and Council of State Criteria: type of information. Exchange of information can be anticompetitive even in a non concentrated market and without prove of an agreement IAMA publicly provided information

³ Case I466 Compagnie aeree Fuel surcharge, 1 August 2002, n. 11038, Bulletin 31/2002.

Airline Fuel Surcharge

The case was initiated following complaints from consumers concerning the simultaneous application by some airlines of an equal supplementary charge (the so-called fuel surcharge) on all domestic routes. In fact, in June 2000 Alitalia, followed by the other airlines, had introduced a surcharge of approximately €5 on passenger flights on all domestic routes, which it justified on the basis of the increase in the cost of aircraft fuel. In August 2000 Alitalia had announced in a press release that the surcharge would be raised to approximately €12 from 1 September 2000 and, again, the other companies had applied an increase of the same amount.

In the course of the investigation the Authority ascertained that the aligned conduct by the main domestic airlines in two different occasions of price increase had been sustained through direct and indirect exchange of information. In particular, in the dawn raids carried out after opening the investigation the authority found evidence of exchanges of information concerning the introduction of the fuel surcharge.

The collusive behaviour had been facilitated by the characteristics of the market, an oligopoly, with frequent formal and informal consultation among competitors and price transparency.

In the decision the Authority noted that the business practice of announcing price increases beforehand had to be deemed equivalent to engaging in an indirect exchange of information since it allowed other companies to observe the reciprocal reactions and to adapt accordingly. This practice was likely to reduce the firms' reciprocal uncertainty regarding future behaviour and hence the risk normally inherent in any unilateral change of practice by market operators.

The Authority deemed that since the concerted practice was designed to coordinate the respective price strategies of horizontal competitors it constituted one of the most serious forms of restriction of competition. The seriousness of this anti-competitive practice also stemmed from the fact that the agreed application of the fuel surcharge by the companies participating in the collusion had been followed by a corresponding increase in the price of air transport by other airlines. The rise in prices resulting from the agreement had thus become a focal point towards which other operators not party to the agreement were induced to converge as a result of oligopolistic market dynamics. Although the agreement constituted a serious violation, the Authority decided to impose a modest fine in view of the difficulties faced by the market at the time the surcharge had been introduced as a result of the sudden, large increase in aircraft fuel costs and the structural crisis that had overtaken the whole air transport sector after 11 September.

In its decision the Authority made clear that public announcements regarding prices and directed to consumers are not, in themselves, anticompetitive (§ 256 of the decision). They can, however, raise concerns when they allow to create a time lapse for negotiation with competitors, in order to achieve an anticompetitive equilibrium. In this respect if price announcements allow the possibility to observe the reactions of competitors and to adapt a firm's conduct to its competitors' reactions, they can be considered an element facilitating collusion.

The Authority in its analysis of the specific case considered that when Alitalia publicly announced its intention to increase the fuel surcharge the price increase had not yet been communicated to the computer reservation system (CRS), and the company could therefore still revoke its decision. It was only after other companies, reacting to Alitalia's announcement, communicated the price increase to the CRS that Alitalia did the same.

This is the reason why the Authority disregarded the arguments of the parties that their behaviour had been the result of independent decisions, with a price leader, Alitalia, that decided to increase prices and was followed by the other companies. In the Authority's view the analysis of the facts showed that this was not a price leadership case. There was evidence that there had been contacts and exchanges of information among the parties on the occasion of the first price increase, and that on the occasion of the second

increase the supposed “followers” adopted the price increase before Alitalia, that announced it, had adopted the increase itself.

Coherently the companies that, although introducing the fuel surcharge, did not participate in the information exchange and actually increased their prices only after Alitalia did, were not considered to have taken part in the concerted practice.⁴

3. Unilateral diffusion of information through trade associations

Unilateral diffusion of information on prices was assessed, together with other elements, as evidence of collusion in concerted practices carried out within trade associations. These cases provide examples of how public diffusion of information on prices (in the form of price lists, indication about discounts, etc.) can serve the purpose of facilitating collusion around a focal price even in markets that are not very concentrated.

⁴ The Authority’s decision was upheld by the Administrative Tribunal (*CompagnieAeree-Fuel Surcharge* 8 May 2007, n. 4123).

Federfarma Teramo - Discount prices for the public

In May 2008 the Authority completed an investigation, pursuant to article 2 of Law n. 287/90, establishing that Federfarma Teramo, an association of pharmacy owners in the province of Teramo, had implemented a competition-restricting agreement on the pricing of non-prescription drugs sold by pharmacies in the province. The proceeding started upon learning that Federfarma Teramo had sent an announcement to all associated pharmacy owners indicating the maximum discounts to be applied to non prescription drugs.

During the investigation, the Authority established that Federfarma Teramo had distributed a memorandum to its associated members in November 2006, and that this memorandum contained a list of maximum sales-price discounts. This memorandum was intended to limit the discounts that pharmacies could apply on these types of pharmaceuticals, whose sales had recently been liberalized by Law no. 248/06, allowing pharmacies the freedom to set their own discount rates. Furthermore, evidence gathered during the investigation revealed that the Association's price indications had in fact succeeded in producing substantial limitations on the discounts offered by the pharmacies in the province of Teramo. A closer look at the discounts being offered at the time of the memorandum's distribution and during the six following months revealed a 10% discount over this relatively short time period. By reducing the size of the discounts offered, the Federfarma Teramo memorandum held final prices at a level that was artificially higher than the level which could otherwise have been reached in the period immediately after competitive pricing in the sector was first liberalized.

Bread price list

In June 2008 the Authority concluded an investigation establishing that the Bakers' Association of Rome had fixed prices for the most common types of bread sold by the bakeries in the territory of the province of Rome.

During the investigation, the Authority determined that the Bakers' Association had circulated a list of minimum bread prices throughout the province of Rome. This information was supplied through a price list that included: *i)* "recommended" price ranges for the two primary and most typical types of bread sold in the province; *ii)* recommended price increase ranges for all other types of bread. The price list was distributed at a public assembly to which all the bakers from the province of Rome were invited, and through interviews of the association's President given to the press and the television.

As to the extent of this agreement's impact, the Authority determined that approximately 40% of active bakers of the relevant market belonged to the Bakers' Union of Rome and Province association. The potential restrictions on competition (at least in relation to the association's most recent price indications), however, had an influence that surely extended well beyond the association's official members. The investigation proved, in fact, that these indications reached a much broader audience than the association members themselves, having been publicized through the press as well as through a television interview with the Union's President.

Price lists for pasta

In February 2009, the Authority concluded an investigation establishing the existence of an anticompetitive agreement by the main pasta manufacturers and their industry Association Unipi. The manufacturers involved in the agreement represented the majority of the national market for pasta (approximately 90%) and Unipi was the most representative industry association.

The agreement was reached through meetings at the industry association where price increases were discussed and agreed upon. After the meetings the industry association delivered several messages through the press and the television diffusing the amount of the increase agreed upon, apparently in order to convey to the public the fact that the increase in the price of the product less than compensated the increase in the cost of inputs (e.g. wheat). In the Authority's view the real purpose of the diffusion of this information was to convey to businesses the exact amount of the increase reaching out also to the firms that had not participated in the association meeting. In this way the increases to be charged to retailers became the focal point allowing each company, based on those figures and its own market positioning and cost structure, to determine their pricing policies in a collusive context.

In the Antitrust Authority's view, the plentiful documentation gathered during the course of the investigation showed that the companies colluded on a concerted strategy of price increases. The agreement affected the market in terms of average price increases to supermarket chains and prices applied by the retail trade to consumers. Specifically, as a consequence of the agreement, the price of pasta paid by retailers underwent an average, increase of 51.8%; most of this increase was passed on to consumers, given that the retail price grew over the same period by 36%.

4. Conclusions

The Authority, in assessing cases involving unilateral diffusion of sensitive information clarified that public announcements regarding prices and directed to consumers are not, in themselves, anticompetitive. It is, in fact important to distinguish potential benefits for customers, in the form of market transparency, from anticompetitive effects through facilitation and sustenance of collusive behaviour.

In order to make this assessment the Authority took into consideration other elements that are typically considered in the analysis of concerted practices such as direct exchanges, parallel behaviour and the absence of alternative explanations.

In the cases discussed above the unilateral diffusion of information (by the market leader or by the trade association) had, in the Authority's view, either the purpose of an invitation to collude or that of sustaining collusion in a non oligopolistic industry.

JAPAN

1. Introduction

“Disclosure of information” by an enterprise, can be an important issue in applying the Antimonopoly Act (hereinafter referred to as the “AMA”), in connection with “unreasonable restraint of trade” such as cartels and bid-rigging.

We will present four cases below which can be broken up into two large categories.

One category relates to cases that question if it is possible to acknowledge that a basic agreement, on the violating conduct, had been reached by enterprises if there were prior information exchanges or unilateral disclosure of information, while the existence of no “explicit” agreement is identified. As defined by Article 2, paragraph 6 of the AMA¹ and prohibited by Article 3, “unreasonable restraint of trade” is defined as: “business activities by which any enterprise, either by contract, agreement or any other means irrespective of its name, 'in concert with' other enterprises, mutually restrict their business activities to substantially restrict trade.” In order to deem a behavior of an enterprise as one “in concert” with other enterprises, the existence of a “communication of intent”² among the enterprises in question needs to be proved. Hence, in the case like the above mentioned, whether it is possible to say that there was a communication of intent between the enterprises would be the issue.

The other category relates to bid-rigging cases where unilateral information plays an important role in implementing the coordination of who will successfully receive orders (“order coordination”) after a basic agreement has been reached. In the current practice, the existence of a basic agreement among enterprises is regarded as the ultimate fact in proving a “communication of intent” while the order coordination itself is nothing more than an evidentiary fact which infers the existence of the ultimate fact (Tokyo High Court, Sep. 26, 2008, Stoker Furnace Bid-Rigging Case). We would like to briefly introduce the cases where unilateral disclosure of information could work as the mechanism to facilitate the order coordination, which is a point worth noting.

¹ The Antimonopoly Act, Article 2, paragraph 6: “The term ‘unreasonable restraint of trade’ as used in the Act means such business activities, by which any enterprise, either by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.”

² Please refer to Section 2 of this paper.

2. Unilateral disclosure of information undertaken in the course of forming a basic agreement

2.1 *Rescission of the hearing decision Case by Toshiba Chemical Corporation*³

2.1.1 Overview of violations

Toshiba Chemical Corporation (hereinafter referred to as “Toshiba Chemical”) and seven other companies in the same industry (hereinafter referred to as “the 8 companies”) held a special meeting on June 10, 1987 (hereinafter referred to as “special meeting in question”), at a time when a rising trend of export prices was becoming evident. In the special meeting in question, they exchanged opinions on raising the price of copper clad laminates used in printed circuit boards sold to domestic customers based on the trend of export prices, etc. Out of the 8 companies, the three largest initially declared that they would raise prices while the remaining five were requested to follow the big three by raising their own prices. The five companies, including Toshiba Chemical, did not express an opinion opposing the request.

Following that special meeting in question, the management of the 8 companies respectively instructed relevant departments to raise the price of the paper phenol copper clad laminates in their company. Then, they notified their domestic customers of the price increase and requested their consent.

2.1.2 Overview of the second decision by the Tokyo High Court

Toshiba Chemical insisted that, “So long as each company merely and mutually recognized that the other companies were going to raise prices, this fact only suggests that their recognitions coexisted but were unrelated to each other”, and therefore, in this case, it cannot be affirmed that there was a “communication of intent” among the companies.

In response, the Tokyo High Court defined a “communication of intent” as “an intention of collaborating with several enterprises on a price increase by mutually recognizing or predicting the implementation of the same or similar type of price increase.” In addition, in order to prove the existence of a ‘communication of intent,’ it is not enough for one enterprise to raise prices and for the others to merely recognize or acknowledge the fact, while at the same time, it is not necessary for there to be an explicit agreement among enterprises to mutually restrict each other. It is appropriate to consider that it is sufficient for the enterprises to recognize each other’s price increase and tacitly acknowledge the fact.

³ The Japan Fair Trade Commission (hereinafter referred to as “the JFTC”) had investigated Toshiba Chemical and the seven other companies in accordance with the provisions of the Antimonopoly Act and issued a recommendation on June 6, 1989, as the 8 companies were in violation of the provisions of Article 3 of the Antimonopoly Act (Unreasonable Restraint of Trade). Because Toshiba Chemical did not accept the recommendation while the seven other companies complied with that recommendation, the JFTC decided to commence hearing procedures against Toshiba Chemical on August 8, 1989. The JFTC subsequently instructed the hearing examiners to go through the hearing procedures and issued a hearing decision on September 16, 1992.

Toshiba Chemical then filed suit to rescind the hearing decision and the Tokyo High Court found that the fairness of the decision was impaired by the fact that a commission member who was disqualified to be involved in the hearing had taken part in a conference on the hearing decision. The decision was rescinded and the case was remanded to the JFTC (“The first Tokyo High Court decision”). On May 26, 1994, the JFTC, organizing the panel of four to exclude the commissioner in question, issued a cease and desist order just as they did in 1992. Toshiba Chemical filed suit to rescind the decision with the Tokyo High Court, but, on September 25, 1995, the Tokyo High Court dismissed the suit (“The second Tokyo High Court decision”).

Furthermore, regarding the proof of a “communication of intent,” the Court held that “If a specific enterprise exchanged information with other enterprises regarding a price increase and as a consequence they acted in the same or similar manner, the Court cannot but infer that they would expect each other to act cooperatively, thus a “communication of intent” existed as mentioned above, unless there was a special fact which showed that they undertook a price increase based on an independent judgment to be able to survive the competition in the market”. In this case, the existence of a “communication of intent” was inferred and a concerted action was regarded to exist because of the following facts: 1) The 8 companies met beforehand to exchange information and opinions; 2) The content of exchanged information and opinions was related to the price increase of the subject goods in this case; 3) Consequently, there was a concerted action to raise the sales price of the goods in question to domestic customers.

2.2 *Bid-rigging case for automatic postal code reading and sorting machines ordered by the former Ministry of Posts and Telecommunications*⁴

2.2.1 Overview of the violations

Both the Toshiba Corporation and the NEC Corporation were registered as qualified bidders in the open competitive bidding for automatic postal code reading and sorting machines (hereinafter referred to as “postal sorting machines”) which was placed by the [former] Ministry of Posts and Telecommunications (hereinafter referred to as the “Ministry”). From fiscal years 1995 to 1997, they participated in the competitive bidding for postal sorting machines. As a matter of fact, during the above mentioned period, the two companies received 70 orders among the total of 71 orders for postal sorting machines. (The two companies each received roughly half of the total value of orders placed by the Ministry.) In reality, prior to the opening of competitive bidding, the two companies mentioned above received information on the bidding (such as the type of postal sorting machine, number of units, the location of post offices where the machines would be deployed, the timetable for deployment, etc.) for which they respectively were supposed to bid from the Ministry officials in charge. Only the company which received the above information would participate in the particular bidding while the other company would not participate. For that reason, bids for that particular bidding would be submitted only by the company that had received the information while the remaining company, which had not received the information, would decline to submit the bid. With the result, the one company that submitted a bid would receive the order.

2.2.2 Overview of the decision by the Tokyo High Court

In this case, the point of issue was whether or not there was a “communication of intent” because unilaterally disclosed unofficial notifications of the officials of the Ministry to the plaintiffs served as a

⁴ The JFTC issued a recommendation against Toshiba Corporation and NEC Corporation on October 12, 1998, as they were in violation of the provisions of Article 3 of the Antimonopoly Act. However, because they did not accept the recommendation, the JFTC decided to commence hearing procedures against the two companies on December 4, 1998. On June 27, 2003, a cease and desist order was issued by the hearing decision, but the two companies filed suit in the Tokyo High Court to rescind the decision. On April 23, 2004, the Tokyo High Court found that the JFTC’s decision was in violation of the provision of Article 54, paragraph 2 of the Antimonopoly Act prior to the 2005 Amendment, which stipulated that the JFTC could issue a cease and desist order “when it is particularly necessary” and therefore, rescinded the hearing decision. Against this judgment, on May 7, 2004, the JFTC petitioned the Supreme Court for the acceptance of a final appeal and, on April 19, 2007, the Supreme Court held that, with regard to the High Court decision, “It should be recognized that the JFTC had the specialized discretion” and reversed the High Court judgment, remanding the case to the High Court. On December 19, 2008, the Tokyo High Court affirmed the JFTC’s hearing decision and dismissed the suit brought by the plaintiffs. (Thereinafter, on December 3, 2010, the Supreme Court dismissed the final appeal from the plaintiffs and the decision was upheld.)

means of order coordination between the plaintiffs and because matters such as the time, place or method of forming an agreement between the plaintiffs were not identified. Regarding this point, the Tokyo High Court stated that it was no problem to apply the criteria shown in the Toshiba Chemical case as a general standard to this case. In addition, the Court pointed out the following facts: (i) The plaintiffs had made unnaturally concerted action, that is, only the plaintiff who received an unofficial notification from the Ministry participated in the bidding while another plaintiff who did not receive the information did not participate; (ii) They had actually been competing in the technological development because they recognized that the comparison of the postal sorting machines' performance of reading zip codes would result in the difference in the number of the machines ordered. Based on these facts, the Court held that it was difficult to explain the fact that the plaintiff who did not receive an unofficial notification from the Ministry did not participate in the bidding by only the fact that the plaintiff did not receive the notification. Therefore, the Court stated that in addition to the unofficial notification by the Ministry, implicit communication of intent between the two plaintiffs, which stipulated that the plaintiffs would decide whether or not to participate in a particular bidding depending on whether they receive the unofficial notification from the Ministry or not, should be regarded as the reason to explain the fact. Consequently, the Court ruled that it was difficult to believe that the plaintiffs had accidentally exhibited the concerted action without their communication of intent.

2.3 *Summary*

In the case of Toshiba Chemical, where there was no explicit agreement on the day of the special meeting in question and only a request to raise prices from some enterprises to others, the Tokyo High Court identified the evidential facts such as prior information exchanges among the enterprises and concerted action for raising prices to prove the existence of a "communication of intent".

In the case of postal sorting machines, where there was only the unilateral disclosure of information regarding the bidding by the procuring ministry to the enterprises and no information exchanges between the enterprises, the Tokyo High Court acknowledged, just like the case of Toshiba Chemical, the existence of a "communication of intent (implicit agreement)" through the findings of evidential facts such as enterprises' actions.

3. **Unilateral disclosure of information upon a basic agreement**

Unilateral disclosure of information in the cases of "unreasonable restraint of trade" is seen in the process of not only forming a basic agreement among enterprises but also implementing the basic agreement and thus moving into a violating conduct.

For example, "Violation of the Antimonopoly Act in the Bid-Rigging concerning Orders for Water Meters Placed by the Tokyo Municipal Government" (2004)⁵ and "Bid-Rigging concerning Orders Placed by the Japan Green Resources Agency"⁶ differ from each other in that the former was a case where private

⁵ In July 2003, the JFTC investigated bid-rigging in orders for water meters placed by the Tokyo Municipal Government and filed accusation with the Prosecutor-General against four enterprises and five individuals engaging in the sales of water meters ordered by the Tokyo Municipal Government under Article 73, paragraph 1 of the Antimonopoly Act.

⁶ In May and June, 2007, the JFTC filed accusations with the Prosecutor-General against the corporations and other entities which, in compliance with the intent of the Japan Green Resources Agency, had predetermined a bid winner, and also agreed to help a prearranged winner to win a bid over businesses concerning geological research and location survey planning on main forest road projects procured by the agency in the fiscal years 2005 and 2006 by way of designated competitive bids, etc. In addition, 21 bidders were found to have acted illegally and, of these, with the exception of two persons who terminated the business in question, 19 were found to be in violation of the provisions of Article 3 of the

sector bidders planned to coordinate the orders while the latter was a case where an independent administrative agency,⁷ as the procurer, decided in advance which companies would be successful bidders. However these cases are similar in the following points:

1. There was a prior agreement among the bidders on “implementing the order coordination to the bidding in question”.
2. A liaison unilaterally disclosed information only to the specific enterprises that would receive orders in the bidding based on the arrangement among the bidders before the implementation of the bidding. In the water meter case, the “managing companies” which were designated in advance, played the role of liaison, while, in the case of the Japan Green Resources Agency, the liaison was the Japan Green Resources Agency, that is, the procuring agency itself.
3. Enterprises that were not informed by the liaisons in B above, of being the predetermined winner of the bids in question, helped those who received information to actually win the bid by means such as bidding at higher prices than that of the predetermined bid winner.

The reason for choosing a unilateral disclosure of information as a method for implementing a basic agreement is that, compared to contacting one another at meetings where attended by all the enterprises, it is thought to be more difficult for the illegal action to come to light. In this sense, unilateral disclosure of information in these cases noted above functioned as a mechanism that allowed successful implementation of a basic agreement. In the water meter bid-rigging criminal case, the Tokyo High Court decision (March 26, 2004) commented on the unilateral disclosure of information as follows: "in this case, the process of reaching an agreement on the order coordination was undertaken in an ingenious way, in which the “managing company” played a role as the keystone of the scheme, without meetings where the persons in charge at the enterprises concerned came together publicly.”

Antimonopoly Act (prohibition against the unreasonable restraint of trade) and were issued cease and desist orders under Article 7, paragraph 2 of the Antimonopoly Act and 13 were issued surcharge payment orders under the provisions of Article 7-2, paragraph 1 of the same Act on December 25, 2007. Furthermore, with regard to these violations, the JFTC found the involvement of the directors and employees of the Japan Green Resources Agency in the bid-rigging, and notified the agency of this fact on December 27, 2007.

<http://www.jftc.go.jp/pressrelease/07.december/07122702.html> [Japanese only]

⁷

In Japan, in order to prevent involvement in bid-rigging by employees of contracting agencies, the Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. was enacted in 2002, and put into effect in 2003. Under this law, if an employee of a procuring agency is found to be involved in bid-rigging, the JFTC can demand the head of the procuring agency to implement improvement measures. To date, the JFTC has found 11 involvements in bid-rigging under this Act, of which nine have resulted in the demand for the head of the agencies to implement improvement measures.

KOREA

1. Introduction

An enterpriser may publicly communicate its planned price increase or administration strategies via the press or other private channels on its own account. Any such unilateral behavior is ambivalent in that it is both pro-competitive and anti-competitive at the same time along with information exchanges. If an enterpriser makes its price public, or a business association discloses the average price level of its member companies to the market, for instance, these may facilitate price competition by revealing price data transparently. But in the other sense, it could also restrict competition by encouraging concerted acts and making any other attempt outside such collusion easy to control. Concerns over a possible concerted act only grow if the market in question has favorable conditions for such an anti-competitive agreement – that is, if the market is highly concentrated, has higher entry barriers, and deals with much standardized and homogeneous products.

Korea's Monopoly Regulation and Fair Trade Act does not regard unilateral communication itself as unlawful. An improper concerted act is established, in Korea, only when the existence of any kind of competition-suppressing "agreement" behind such acts is proved. Unilateral communication or information exchange or other kinds of communication is utilized as circumstantial evidence to infer such an agreement

2. Korea's Fair Trade Act & Unilateral Communication

2.1 *Legal standards*

Article 19 (1) of the Act prescribes the conditions constituting an improper concerted act. These are i) two or more enterprisers engaged, ii) the existence of a competition-restricting agreement, and iii) anti-competitiveness. The essential aspect forming an improper concerted act is the agreement against competition. An improper concerted act is established so long as there exists such an agreement, even without any actual actions pursued.

An anti-competitive agreement behind collusion means a meeting of minds to act collectively by enterprisers. It includes both explicit agreements and implicit agreements such as mutual understanding. The Act recognizes as an agreement not only active announcement but passive and tacit sensing or consciousness as well.¹ Therefore, how the involved parties have reached the "meeting of minds" does not influence the establishment of such agreement. From this, it is inferred that an agreement can be formed not just by a written explicit means but by a wink or a simple gesture according to a situation.²

The Act does not regulate conscious parallelism or concerted behaviors which have no agreement as a cartel. This is because conscious parallelism itself is not viewed to have any quality of mutual communication. Likewise, an enterpriser's unilateral communication is out of the cartel boundaries. These behaviors may be used in combination with other additional factors or independently as evidence for a potential anti-competitive agreement. But they do not solely constitute such agreement.

¹ Supreme Court Declaration on May 25, 2003.

² Seoul High Court Declaration on December 11, 2001.

2.2 *How to prove the existence of an anti-competitive agreement*

A broader definition of a competition-suppressing agreement has been adopted, which includes a tacit agreement. This broad application resulted in complex methods of proving the existence of an anti-competitive agreement at the practical level. There are methods to prove **by direct evidence, inference based on circumstantial evidence, and legal presumption.**

Typical examples of direct evidence are a written agreement or contract. Testimony of parties involved in such an agreement is also included. Although this is the most ideal way of confirming collusion, participants hardly leave such direct evidence.

Establishment by inference based on circumstantial evidence is a method to infer the existence of a cartel by using circumstantial evidence. Both direct evidence and circumstantial evidence can be equally used to prove the existence of an agreement under Article 19 (1) of the MRFTA. Circumstantial evidence is used more often to confirm cartel attempts than direct evidence in the actual process.

Legal presumption (Article 19(5) of the Act)³ refers to a practice to confirm a cartel if it meets certain conditions specified by law. The provision was introduced in 1986 and developed into a regulation in 2007. This was part of Korea's efforts to relieve the Korea Fair Trade Commission's burden of proof and enhance its regulatory effectiveness given the secretive nature of a cartel. But presumption made under these provisions is subject to overthrow by evidence to the contrary. And as the Supreme Court has required additional circumstantial evidence, this provision lost its influence and treated similar to presumption clauses in general evidence law.

2.3 *Unilateral communication used as circumstantial evidence for and anti-competitive agreement*

An enterpriser's unilateral communication or information exchange may be accepted as circumstantial evidence to infer the existence of a competition-suppressing agreement. But in this case, the behavior itself is not recognized as such an agreement. Such agreements are established only when the behavior is combined with other circumstantial evidences to implicate a possibility that enterprisers may have committed a concerted act.

The Guideline to Review Cartel Attempts (the KFTC's established rule), a lower-ranked provision of the MRFTA, provides that circumstantial evidence for an anti-competitive agreement includes a certain company's information exchange or unilateral communication on its price increase or output reduction. As for information exchange, the examples are (i) if enterprisers exchange or agree to exchange information on price, output, etc. The examples identified as unilateral communication includes (ii) the case wherein a certain enterpriser announces its intention to raise a price or reduce its output and waits to see other rivals' reaction before taking an action accordingly.

Unlike information exchange, unilateral communication has not been actively controlled. But in several cases, unilateral communication was considered together with other indirect evidence as circumstantial evidence to confirm agreement. More active law enforcement is expected regarding this issue especially in an oligopolistic market trading homogeneous goods.

³ Article 19 (5) of the Act: 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.

3. Relevant KFTC cases & judicial precedents

3.1 *Unilateral communication*

3.1.1 *Cartel of 6 LPG suppliers (December 2, 2009)*

The KFTC fined LPG importers and refineries in Korea and imposed corrective measures for being illegally engaged in information sharing and unilateral communication to maintain the price at virtually the same or similar level for the past 6 years.

Korea's LPG supply relies on the output of 4 refineries and import of 2 oil companies. The former accounts for about 40% and the latter, 60% of the entire oil supply of the country. The 2 LPG importers continued communication and jointly decided to narrow their price gap which existed naturally due to the disparity in import prices, extra expenses, domestic supply costs, etc. As a result they set a price actually at the same level and provided oil at this price to the 4 refineries. The refineries then simply reflected the importers' price in their own price setting. Therefore the price for the importers and the refineries had been set at a very similar or equal level.

KFTC examiners recognized the unlawful aspects of this case and presented several circumstantial evidences. First is that the 2 LPG importers were in a leading position in the market and their rivals were well aware of this. It was this situation where the two importers announced their price plans to the refineries. Next is that the respondents' employees engaged in price setting continued to meet and exchange price information. They also had executive-level, department-head-level and working-level meetings on the ad hoc basis. The third aspect is the LPG industry's characteristics prone to cartels such as a relatively higher entry barrier, low price elasticity of demand, and no gap in product quality. The industry also shows the same movement of prices at similar points of time. The other aspect presented was the fact that the respondents enjoyed unusually higher sales performance.

The commission admitted the examiners' opinion that the 4 refineries had joined the cartel attempt of the 2 importers. And the appeals court also supported its decision.⁴

3.1.2 *Cartel of 4 packed-kimchi⁵ manufacturers & retailers (July 20, 2011)*

The KFTC, in July 2011, cleared the suspicion of the alleged cartel among 4 packed-kimchi enterprisers. Korea's packed-kimchi market is oligopolistic. Company A has a market share of 55.8% there followed by Company B, C and D, with 7.1%, 6.2%, and 3.9%, respectively.

The Commission uncovered that Company B and C's division heads had asked Company A's counterparts about its price increase and Company A employees had told them about its plan. KFTC examiners viewed this as a tacit agreement.

The Commission decided that such a practice was not improper information exchange or unilateral communication that forms an anti-competitive agreement but just a genuine unilateral information searching activity. To support the decision the KFTC cited first that the communication among those companies were between personally familiar employees. It were only Company B and C that asked

⁴ Seoul High Court Declaration on January 11, 2012.

⁵ Refers to Korea's traditional kimchi produced for a commercial purpose. Kimchi is made of salted Korean cabbages marinated in seasoning (made by mixing chili powder, garlic, ginger, leek, radish, etc.) for a long time at a lower temperature to ferment. These cabbages are appropriately cut and packed to be sold at large retailers or other distributors.

questions to Company A. And there was no question coming from Company A to the other two. Such communication occurred just once. And the communication timing was only after the price increase was notified to other business partners.

3.1.3 *Cartel of life insurers' estimated interest rate & official interest rate (October 2011)*

It is a cartel attempt by 16 life insurers who continued to fix the interest rates of individual policies under a mutual agreement from 1998 to 2006. Initially, 6 insurers started to share rate information and spread it through other partner companies via facsimile, etc. But later on, Company A took a leading position to decide the rate unilaterally and notified it to other insurers.

The KFTC decided the attempt was illegal citing first that information exchange and unilateral communication had lasted for the long term. Plus, the rates had moved in a concerted manner. The exchanged information was sensitive trade secrets. The information was about future plans and had been shared even before relevant details were known to the market place. And Information was shared among higher-level employees who actually decided the rates.

3.2 *Information exchange*

3.2.1 *Supreme Court's precedent on coffee makers⁶*

Korea's coffee market is a duopoly with 2 coffee makers. The KFTC found a concerted act of increasing price in this market and decided it was unlawful. The first reason was that i) the price hikes were appeared to be intentionally concerted because the two had set the same price with each other even though they had had different cost breakdowns. And the other reason was the fact that ii) sales employees of the two firms' branch offices had shared price increase via facsimile. But the Supreme Court dismissed the case in the end.

The Supreme Court said i) the fact that prices were similar or the same was not enough to infer a possible anti-competitive agreement or tacit understanding in oligopolistic market because concerted acts could still appear without an agreement or understanding while enterprisers pursued their own behaviors to respond to their rivals. And the Court added that ii) the price information was exchanged on or after the day of price increase. This meant relevant details had already been known to other business partners. In this situation, it seemed not reasonable to guess they had let branch office employees, not those directly in charge of price setting at the headquarters, exchange price information. However, just usual price communication between sales employees looked very normal in the situation. Consequentially, the Supreme Court found that simple facsimile exchange between sales employees did not support to infer any potential agreement or tacit understanding.

3.2.2 *Supreme Court's precedent on steel pipe manufacturers⁷*

The case is about 4 enterprisers engaged in hot coil forming and welding to manufacture or sell steel pipes. Those enterprisers shared price information together and raised the prices 4 times almost simultaneously. The KFTC decided this behavior as an illegal concerted act. And the Supreme Court also accepted the decision.

The Supreme Court said that an anti-competitive agreement was inferred because i) attempts to set or maintain similar or the same prices had been shown 4 times in the market in terms of the timing and

⁶ Supreme Court Declaration on March 15, 2002.

⁷ Supreme Court Declaration on February 2, 2003.

increased amounts, ii) from the Company A's internal documents the motivation for a concerted price increasing could be inferred, ii) representatives or executive-level employees from the 4 firms had discussed price hikes factors before raising the prices and there had been evidence supporting the existence of this discussion, and iv) the 4 company executives normally had shared information on price-raising timing, increase amount, factors of increase, appropriateness, etc.

4. Conclusion

As it is shown in the cases above, the Korea Fair Trade Commission recognizes unilateral communication as circumstantial evidence used to prove the existence of cartel along with information exchanges. The Commission views if a market-dominating firm continues to announce price or output information, such practices can be accepted as evidence for collusion.

More concretely, if a market leader's price signaling causes concerted actions, unilateral communication or information exchange could be used to infer an anti-competitive agreement thus possibly establishing improper concerted acts. Normally, in such cases, unilateral communication has been viewed as weaker evidence than information exchange. However, we need to consider the current situation as revealed in the life insurers and the LPG industry examples. In these cases, market-leading companies have long made public their sensitive information intentionally. If other competitors are recognized to join the market-leading company's price strategies, unilateral communication could be accepted as evidence for a potential competition-suppressing agreement.

Unilateral communication or information exchange will become strong evidence if it is associated with the following features.

1. When the related market is oligopolistic and deals with homogeneous products - favorable conditions for an anti-competitive agreement
2. If the announced information is not processed statistics or transaction data of the past but detailed data on future plans such as each company's price-increasing factors, increase amount and time.
3. If data exchange or announcement is conducted for a continued period of time repeatedly and its timing is before an actual price rise.
4. If information exchanging or announcing parties are company representatives or executives who make decisions on the price.

The following is KFTC answer to the questions from the Secretariat.

4.1 *Does your antitrust law require the establishment of an "agreement" or a "contract" between competitors in order to find an infringement of the law's cartel provisions?*

Yes. Korea's Fair Trade Act recognizes a cartel if there exists a contract, accord, resolution or other forms of agreement that unfairly suppresses competition. The agreement behind an improper collusion means **a joint decision** by enterprisers including both explicit agreements and implicit agreements such as mutual understanding.

4.2 *Are these types of practices considered anticompetitive per se or by object or do you require that some sort of anticompetitive effect be established?*

It depends on the type of the concerted act in question. Per se anti-competitive behaviors are the cases generating only competition-restrictive effects obviously such as price cartel, output cartel, market

division, and big rigging. But if efficiency is gained at the same time as it is in joint production, joint purchase, joint R&D, joint marketing and standard setting, such cases are not treated as per se illegal. In this case, however, the former should also go through anti-competitiveness assessment.

4.3 *How do you assess unilateral communications of a firm's future prices or commercial strategy which constitute "cheap talk"? Do you think that cheap talk is a factor which can facilitate collusion?*

If "cheap talk" tends to invite other competitors to raise prices implicitly, that falls in the boundary of circumstantial evidence for anti-competitive agreement. Whether cheap talk facilitated collusion or not varies according to the characteristics of a market in question and the way information is exchanged. If cheap talk has continued on a regular basis especially in a relatively concentrated market trading homogeneous products, this is viewed to have a high likelihood for collusion.

4.4 *Do you distinguish between private communications(i.e. communications to competitors only) and public communications(i.e. communications to competitors and consumers alike)?*

Korea's law does not differentiate private communication from public communication by definition. But the KFTC has not considered any type of public communication as a possible cartel attempt. Private communication between competitors is regarded as more sound evidence in confirming an anti-competitive agreement than public communication which involves all of the general customers.

MEXICO

1. The legal standard of review

1.1 How do you distinguish genuinely unilateral communications from a concerted practice which has anti-competitive effects? Does your antitrust law require the establishment of an “agreement” or a “contract” between competitors in order to find an infringement of the law’s cartel provisions? Can “concerted actions” falling short of an agreement, which have anti-competitive effects, be captured by your competition agency?

Under Article 9 of the Federal Law of Economic Competition (hereinafter FLEC), absolute monopolistic practices or collusive agreements are defined as the contracts, agreements, arrangements or combinations among competitors with the purpose or effect of i) fixing prices, ii) restricting production, iii) dividing markets or iv) rigging bids. Therefore, it is required to establish the existence of an agreement or concerted action to find an infringement of the law’s cartel provisions. The article in question also provides that any exchange of information, among competitors with the purpose (object) or effect to fix, raise, or manipulate the purchase or sale price constitutes a per se infringement. Thus, reciprocity is required to find that information exchanges among competitors are unlawful.

In contrast, under the FLEC, it would not be unlawful if a firm unilaterally makes information available to competitors or the market place. It could only be considered an infringement of the competition law if it can be established that this disclosure of information led to a concerted action with one or more competitors.

1.2 Are these types of practices considered anti-competitive per se or by object or do you require that some sort of anti-competitive effect be established? How do you assess possible efficiencies from increased transparency due to unilateral announcements of competitors?

There is no per se approach for unilateral disclosure or exchanges of information as the Commission shall examine whether the practices are restrictive to competition. If the practices among competitors are conducted with the purpose (object) or effect of fixing or manipulating the purchase or sale price of goods and services, this will constitute a per se violation of Article 9 of the FLEC. In these cases, no further inquiry is required on their business purposes, neither on their anti-competitive or pro-competitive effects.

The CFC considers that unilateral publications may contribute to improve purchase or sales decision making by reducing search costs to consumers. However, the Commission is always mindful of the negative effects on competition that announcements might produce, by facilitating collusive agreements among competitors, especially when transparency involves the publication of prices and other sensitive information among market participants. The following are examples of information exchanges between competitors that are discouraged by the CFC:

- When the exchange consists of information about prices, production levels or commercial strategies;
- When the information shared is specific (allowing the identification of specific competitors or their future conduct);

- When the information shared is new and could influence adjustments in rival's future prices;
- When there is a repeated pattern of information exchanges;
- When the information is only available to certain competitors or audiences; or
- When the information has not been gathered by an independent consultant.

The conducts considered as acceptable disclosure of information are the opposite of those listed above and are the following:

- When the exchange is on historic prices or costs;
- When it is about general information and the data is aggregated;
- When it is widely shared with the general public;
- When the market involved is not concentrated and products or services are very different; or
- When it is collected and published by independent parties and competitors do not have access to the disaggregated data.

Again, it is worth to remark that a case by case approach is essential for the assessment of disclosure of information actions which might entail anti-competitive effects.

2. Types of announcements with possible anti-competitive effects

2.1 *How do you assess unilateral communications of a firm's future prices or commercial strategy which constitute "cheap talk" communications the primary purpose of which is to facilitate coordination rather than to improve market transparency and competition? Do you think that cheap talk is a factor which can facilitate collusion?*

The Commission assesses whether the content of the information disclosed through "cheap talk" has the purpose of facilitating collusion rather than enhancing transparency and competition in the market. Unilateral disclosure of sensitive information (prices, quantities, list of suppliers) could increase the likelihood of violating the FLEC, if proven that rivals were induced to modify their commercial strategy so as to fix, raise, or manipulate the purchase or sale price, reduce output or limit the volume of products and services offered, and split markets.

2.2 *What is your approach to "price signaling" or to "invitations to collude"? What factors do you take into account to establish if firms signaling prices are infringing competition rules? Are invitations to collude prohibited in your system? If yes, what is the legal standard for these actions? For example, do you require some form of "acceptance" by the target of the invitation?*

Disclosure of a firm future price or commercial strategy may be considered by the Commission a "public invitation to collude". However, this is not considered an infringement per se of the FLEC. As such, only an acceptance to participate in an agreement is sanctioned when their purpose or effect is to raise, fix or manipulate prices; reduce output or limit the volume of products and services offered; and to split a market of products and services.

2.3 *Do you distinguish between private communications (i.e. communications to competitors only) and public communications (i.e. communications to competitors and consumers alike)?*

The FLEC prohibits any agreement or combination among competitors, or exchange of information, with the purpose or effect of price fixing regardless of the private or public nature of the information.

The CFC has not conducted any investigation based on the analysis of public or private communications or information disclosures, but has provided informal opinions based on the criteria described on the answer to question 2 above, discouraging any information disclosure or exchange which is not intended to increase transparency in the market.

3. Enforcement related issues

3.1 *What factors can be used to distinguish between unilateral actions by firms and coordinated actions that could potentially be subject to a prohibition against unlawful agreements?*

Article 9 of the FLEC prohibits agreements that have the purpose or effect of raising, fixing or manipulating prices; reducing output or limiting the volume of products and services offered; or splitting a market of products and services.

Unilateral disclosure of information could only be considered an infringement of the competition law if it can be established that this disclosure led to a concerted action with one or more competitors.

However, the Commission is more likely to sanction information exchanges pursuant to an anti-competitive agreement rather than unilateral actions. This is partly due to the fact that for collaboration to take place, unilateral announcements still require rivals to interpret, trust and follow the disclosure of information. Thus, the likelihood of success of unilateral actions in harming competition is reduced and harder to prove.

To determine if collaboration among competitors increases or discourages competition, the Commission takes into account a set of factors that include the structure of the market and the conditions affecting the probability of success of coordinating. In this respect, it is considered that collaborations among rivals are less likely to harm competition when they are implemented in contestable markets with numerous competitors and heterogeneous products.

Another factor that the Commission analyzes is whether transparency enhancers are being used to support an anti-competitive collaboration instead of reducing information costs to consumers. In a bid-rigging case by pharmaceutical companies that sold medicines to the Mexican Social Security Institute (IMSS for its acronym in Spanish), the Commission found that the Federal Law of Access to Government Information and Transparency (FLAGIT) enabled firms involved in the cartel to monitor the bids presented by each participant in the bidding process. This helped the firms to learn its competitor's positions, thus facilitating the cartel operation. In this case, complementary hardcore evidence such as the bills of phone calls among the competitors showed the existence of an agreement.

3.2 *Under which circumstances 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? For example, does it make a difference if this information is taken into account by competitors in determining their own commercial strategy?*

See answer to question 2 paragraphs 4 and 5. above.

3.3 *Is it possible in your antitrust system to construe as an anti-competitive agreement a series of unilateral announcements of competitively sensitive information?*

It is possible. If competitors indeed use the information provided by a firm for adjusting their commercial strategy to conform an anti-competitive agreement, the Commission will investigate and sanction the existence of such a practice.

4. Policy guidance

4.1 *Have you issued any policy statements on how you assess unilateral disclosure of information with anti-competitive effects? Have you published guidelines in this area?*

The Commission has not yet issued any policy guidance on how to assess unilateral disclosure of information nor has it published guidelines in this area.

However, unilateral disclosure of information is an issue covered by a Guideline on Horizontal Collaborations Among Competitors (The Guideline) currently developed by the Commission. The Guideline seeks to explain how the Commission analyzes competition concerns that might be raised through unilateral disclosure or exchange of information among competitors under the FLEC.

In addition, the FLEC enables the CFC to respond inquiries by firms or any party concerned with the likelihood of violating the FLEC by unilateral disclosing information.

4.2 *Have courts clarified the legal standard for finding an infringement of the competition rules?*

Since the Commission has not investigated cases related to unilateral disclosure of information, the courts have not yet issued a ruling on this matter.

4.3 *In your practice, have you developed “safe harbors” that can help the industry to devise forms of unilateral communications which do not infringe competition law?*

The Guideline will discuss safety zones where the Commission would likely consider information disclosures as legitimate. Safe harbors under analysis include:

- R&D sharing;
- Security standards;
- Unilateral disclosure of sensitive information by SMEs that it is not likely to be followed by competitors;
- Information exchange about technology improvement and opportunities;
- The search for benefits on credit;
- Shared publicity for an industry; and
- Discussion and drafting of ethical and technical standards.

NORWAY

1. Introduction

The contribution from the Norwegian Competition Authority (NCA) presents our considerations related to unilateral information exchange in two recent cases: The first case the NCA decided to close, even though it involved two different instances where price lists were sent to competitors. We will present our considerations leading to this conclusion. The second case of unilateral information exchange led to substantial fines for one of the companies involved and leniency for fines for the other company. It can be mentioned that consideration relating to unilateral information exchange is also relevant to a case the NCA is currently handling.

The NCA has not issued any specific guidance with respect to unilateral information exchange. The prohibitions in the Norwegian competition act¹ article 10 and 11 are aligned with Article 101 and 102 TFEU, and Articles 53 and 54 of the EEA Agreement. The assessment of unilateral information exchange under the Norwegian competition act article 10 is based on the Guidelines on the applicability of Article 53 of the EEA Agreement to horizontal cooperation agreements (2002/C 266/01) and in particular the new EU horizontal guidelines.²

2. Case #1 involving three undertakings and a trade organization

Case #1 started as an ex-officio case. The NCA got permission from Bergen District Court to go on dawn raid to three undertakings and a trade organization. As a result of the dawn raid, the NCA found evidence of two instances of information exchanged between the three undertakings. In the first instance, undertaking A sent information by e-mail to undertaking B and C informing them of a notice of price increase sent to its customers the same day.

Undertaking B and C was informed that the price increase would be put in place a month later. A few months later, undertaking B sent information by e-mail to undertaking A containing information about a notice of price increase four days after it had notified its customers, and about a month before the changes were to be put in effect.

In this industry, it is customary that all price changes are notified in a letter to the customers a month prior to the change. Normally this is done twice a year. However, extraordinary price changes may occur. These two instances concerned extraordinary price changes.

Thus, it was a case involving information on price changes in percentages, sent directly to competitors before the effective date for the customers. The crucial issue to be assessed was whether these two separate instances of information exchange could be considered as restriction of competition by object. As mentioned above, our assessment in this case was based on the new EU horizontal guidelines.

¹ The Competition Act of 2004. Act of 5 March 2004 No. 12 on competition between undertakings and control of concentrations

² Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [Official Journal C 11 of 14.1.2011].

The new horizontal guidelines include a chapter concerning information exchange. Of particular relevance to the NCA assessment in the case, paragraph 74 was the most pertinent:

“Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object.”

These two instances of information exchange generated three decisive issues that had to be addressed concerning the scope of legal information exchange, before it could be concluded that the exchanges of information were restriction of competition by object:

- Unilateral communication
- Public versus private information
- Future prices versus price intentions for the future

2.1 *Unilateral communication*

After analyzing the seized documents and electronic evidence, the authority could not find any statements or other evidence that could confirm any further contact regarding the information of price increases that were sent, neither before nor after the e-mails were sent to the competitors. Thus, the information exchanged in these two instances seemed to be instances of unilateral communication.

The review of case-law by the Commission and the EU courts concerning the question of unilateral communication shows that it is not a requirement that an information exchange is mutual for it to be considered a concerted practice.

According to paragraph 62 in the Horizontal Guidelines, situations where only one undertaking discloses strategic information to its competitors, who accepts to receive this information, can constitute concerted practice. Undertakings receiving the information are presumed to accept the information, unless they explicitly confirm that they do not wish to receive this kind of information.

2.2 *Public versus private information*

The distinction between public and private information exchange is crucial in this context. In general, it will be no problem from a competition law point of view that competitors share genuinely public information. It follows from the Horizontal Guidelines paragraph 92.

When is information genuinely public? Information can be considered genuinely public when all competitors and customers have access to it on equal terms. However, even though it is possible to obtain the information in question from customers, it does not necessarily mean that the information is easily accessible for competitors.

In the case assessed by the NCA, the information regarding future price increases was sent directly to customers by mail. In the testimonials taken by the NCA when assessing the case, it was stated that the customers would spread information about the changes in prices within days after receiving the notice in the mail.

The NCA was also informed that competitors were removed from the mailing list of customers, even though they sometimes bought supplies from each other, because they first and foremost were considered as competitors. Thus, the competitors did not get the letters of price changes from each other on a regular basis.

The last statement supported, in the authority's opinion, that information cannot be considered genuinely public when sent by mail to the customers. In this case, the NCA concluded that the information exchanged in these two instances was not genuinely public.

2.3 *Future prices versus price intentions for the future*

In paragraph 73 and 74 of the Horizontal Guidelines, the wording is relatively clear: Exchange of *price intentions* is considered as a restriction of competition by object. However, in footnote 57 of section 74, it is stated that a public announcement of future prices the undertaking are *bound by, is not* to be considered as price *intentions*, and hence normally would not be found to restrict competition by object.

Thus, in the case it became crucial to assess whether the notice of price changes could be considered as price *intentions*, or if the prices were *binding* for the undertaking sending the notice.

In addition, the authority had to consider whether it was of any significance for the assessment that the undertakings receiving the notices from the competitors at the time they got the information had themselves not yet sent any notice on price changes.

The information exchanged in the case concerned information about future prices (future price changes reported in percentage), after customers had been noticed by letter, but before the new prices were announced on the undertakings webpage for registered customers.

Based on the facts of the case, it was from the authority's point of view not obvious that the information exchanged in the two instances could be viewed as price intentions, and consequently considered as restriction of competition by object. Thus, the authority decided to close the case.

3. Case #2: Two roofing companies participating in tender

In 2011, two roofing companies in the Bergen area were subject to administrative fines for infringement of the competition act in connection with a tender. However, one of the companies did under the leniency program not have to pay the fine because it notified the NCA about the illegal cooperation.

The two companies participated in a tender to roof the Norwegian Armed Forces' new administration building at Håkonsvern in the summer of 2008. This was a tender organized by Veidekke, the main contractor for the building project, in the summer of 2008. Two companies competed and handed in offers in the tender. Two days before the deadline for submitting bids, Fløysand Tak sent an e-mail to its competitor IcopalTak with an attachment that laid out the unit prices and the total price for the work.

IcopalTak did not in any way distance itself or protest about the information they received in the e-mail from Fløysand Tak. To the contrary, the e-mail and pricing statement were printed out and they were later found in IcopalTak's working folder for the project. Consequently, IcopalTak was aware of the competitor's price assessments when they submitted their bid. The e-mail reduced uncertainty in the tender procedure and facilitated coordination between the two competitors.

IcopalTak notified the NCA about illegal cooperation in February 2010. On the basis of information from IcopalTak, the NCA conducted a dawn raid in which documents and electronic material were seized. The NCA also took a number of formal statements in the case.

The NCA concluded that the unilateral information exchange in this case was a violation of the Competition Act's prohibition against cooperation between undertakings that restricts competition.

As a result of the illegal cooperation, Fløysand Tak AS had to pay an administrative fine of NOK 350 000 for infringement of the competition act. IcopalTak AS was fined NOK 1.2 million, but did not have to pay because the company notified the Competition Authority about the situation and cooperated with the Authority during the investigation, and was thus granted full leniency

Even though it is beside the issue discussed here, it nevertheless worth mentioning that this was the first time the NCA granted a company full leniency from administrative fines as a result of such notification.

4. Concluding comments

The assessment to determine whether the unilateral information exchange is a restriction of competition by object, or if an assessment of effects needs to be performed, is made on a case by case basis.

No *agreement* between the parties for unilateral information exchange is required for a case of unilateral information exchange to be considered as a violation of the competition act. Coordination is sufficient.

However, the first case presented illustrates that the scope of legal unilateral information exchange is not clear. Even with the new EU horizontal guidelines, there can be considerable uncertainty with regard to when a unilateral information exchange can be considered to be a violation of the competition act, and in particular to make the distinction between *price intentions* and unilateral exchange of information on *binding future price change*, and thus, to determine if the exchange of information is a restriction of competition law by object.

SPAIN

1. Introduction

There are certain product markets characterized by a high degree of concentration, the presence of few players, a weak power of negotiation on the demand side resulting from the existence of an atomized group of individual agents and relevant entry barriers where exchanges of information, in particular throughout advertising in the media (TV, radio, conventional press), can produce negative effects on competition, distorting the market and encouraging coordination or inviting to collude.

Unilateral disclosure of information frequently occurs in sectors such as telecommunications, tobacco or transportation (in particular airlines) in which major players are relevant well-known companies whose spokesmen tend to make announcements or communications to the market.

In such cases, there is always a first player who initially decides to move first in prices (hikes or cuts), commercial conditions or the launch of a new product/supply policy. Such movement could be understood as an invitation for competitors to move immediately or within a short delay, following the same policy. In markets coming from old monopolies, this first player will probably be the incumbent, which now has to bear in mind the reaction of its competitors to its commercial policy, being therefore not only useful but really essential these public announcements.

Under these circumstances, it is sometimes very difficult to draw the line between transparency policies of big companies, cheap talk or real invitations to collusion. When these 'facilitating practices' are performed between two or more companies in the form of public or private exchanges of information, they are generally examined under the notion of concerted practices and the discussion is focused on its effects and rationality.

But what happens when companies, 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? It should be taken into account that even a unilateral disclosure of information by one single company in a concentrated market could be enough to act as a signal or focal point for collusion, becoming extremely necessary to focus on individual reactions and effects in the market of such information disclosure.

The Spanish Competition Authority has dealt in two recent cases with this issue, reaching the conclusion that although there were reasons to investigate possible anticompetitive price coordination, no clear evidence was found, raising the standard of proof in this type of practices.

2. Some cases under the Spanish jurisdiction

2.1 *Cell phone rates (2007)*

In 2007, several Spanish cell phone companies (Telefónica Móviles España, Vodafone España and France Telecom España -Orange-) were involved in a case of announcement of rates hikes in the media (printed press especially).

Just before, in order to avoid the “rounding up” to each minute applied by the companies in the rates charged to their customers, the Government had approved a new regulation prohibiting this practice and making compulsory fees per second. Therefore, the expected reply of the companies was to increase their fixed minimum rate per call to offset this loss of revenue.

However, the announcements made by them were released in a relatively short lapse of time, leaving room to the suspicion that it could have been a coordinated move of the three operators who, in fact, announced the same fixed fee per call.

The case was initiated *ex officio* by the Investigations Division of the Spanish Competition Authority after having examined the contents of these press announcements to determine a possible infringement of the national competition law.

Later, a National Consumers Association (FACUA) submitted formally a complaint against the three companies for probable coordination among them by hiking their cell phone rates. Many other Consumers Associations (OCU, UCE, UNAE, ASGECO, AUSBANC and CEACCU) joined the complaint against the three companies.

The Investigations Division, in the light of the available facts and evidences, decided finally to institute a proceeding against the three companies on the ground of infringement of the National Competition Act.

This product market for cell phone services was featured as follows: i) supply concentrated in a few operators, ii) non differentiated product, iii) entry and expansion barriers, iv) lack of countervailing power on the demand side.

In its Statement of objections, the Investigations Division concluded that the three companies involved (MOVISTAR, ORANGE and VODAFONE) had performed a coordinated practice as prohibited in the Competition Act, being this practice the announcement by MOVISTAR of the increase of its rates as of March 1st 2007 earlier than regularly so that the other competitors (VODAFONE and ORANGE) one by one could follow the announcement of the price changes, and being this purpose the sole aim of this action.

However, the Council did not see any infringement of the competition rules by the companies in this case concluding in its resolution¹ in 2009 that:

“the explanations provided by TELEFÓNICA MÓVILES ESPAÑA (TME) seem to be rational and acceptable, since TME was compelled by law to change her rates before March 1st 2007 and to advertise those changes, at least, one month previous to the entering into force of this regulation. Regarding the way how these rates were announced, and especially the issuance of the e-invoices, there are no evidences that TME did something abnormal in terms of dates and channels the company usually chooses to make this kind of information public. The information strategy conducted by the company was reasonable indeed, taking into account the pressure exercised by the media on the company those days. Finally the same result would not have been very different if TME had advertised later (advertising was mandatory by law). The other two operators (FRANCE TELECOM ESPAÑA and VODAFONE) declared not to be ready to change their rates until they had not known TME’s offer. In fact they changed their rates offers only once they were aware of TME’s offer”.

¹ National Case: File 2759/07 “Teléfonos Móviles”.
<http://www.cncompetencia.es/Default.aspx?TabId=116&Numero=2759%2f07&ambito=Conductas>

Nevertheless, bearing in mind the difficulties to assess this type of cases and the potential damage for competition of these practices, it defined some criteria:

- The unilateral announcement by a competitor to other competitors of its commercial/business strategy with the aim of distorting the competition in the affected market and to enable competitors to “cooperate” following its behavior is an infringement of the competition rules.
- It is not necessary that the company is certain that the competitors will follow it. Absolute certainty is something no company can expect in any market structure.
- Unilateral announcement has nothing to do with Collective Recommendations. Collective Recommendations are result a coordinated will and determination among different market players.
- Indirect contacts among competitors may weaken competition, and unilateral announcements are considered as indirect contacts.
- Unilateral announcements may be “legal” unless the operator making the first announcement is able to influence and to determine the behavior of the competitors encouraging them to “cooperate” for the purpose pursued by the leader.
- Some moves are explicable and rational if the strategy chosen by the leader has clearly an economic motivation on its own.

Though the Council concluded that in this case the behavior could not be considered as illegal, it recognized that it had contributed to a decrease of the competition process and conditions in the affected market, since the companies seemed to be decided not to lose revenue and were expecting some signal from the leader to make the consequent moves.

2.2 Milk prices (2007)

Also in 2007, the Spanish Association of Milk Producers and some Milk & Dairy Producers (PULEVA/ PASCUAL) were under scrutiny of the Competition Authority for an allegedly coordinated agreement to increase the price of the processed milk. In particular, these major milk transformers had publicly announced an expected rise in the price of their milk reaching 1€/l in September 2007. Again, the similarity and relatively short lapse of time between these announcements left room to the suspicion that it could have been a coordinated move between the major players in the sector, which at the same time could be easily justified among consumers on the basis of the raw materials sharp rise that was taking place at that moment.

Therefore, the investigation was initiated after the Competition authority had news of this disclosure of information among these entities at three levels: i) press interviews, ii) release of newsletters, and iii) press notices.

A down raid was conducted at the premises of these companies looking for some evidences of a possible agreement among them since there were some suspicions against them.

However, these entities were finally cleared of any infringement of the competition rules in the absence of clear evidences of collusion.

Nevertheless, in its resolution,² the Council made clear that the general principle (based on judicial rulings by the Spanish and European High Courts) is that exchange of information is not admissible, and can threaten competition, in concentrated (oligopolistic) markets if:

- It discloses a company's strategy to competitors (and this disclosure can facilitate coordination among competitors).
- The facts and data disclosed are presented in detail, since for simply information purposes aggregated data would be enough.
- The facts and data disclosed are recent and therefore commercially valuable, that is, fresh information can be useful for other competitors and encourage coordination among different companies.

3. Some concluding remarks

The recent experience of the Spanish Competition Authority in cases of unilateral disclosure of information has not concluded in the end in the existence of a competition infringement in any case. Yet, the lessons learned from these past cases have contributed to shed some light on the facts which should be carefully assessed to draw conclusions in this type of "grey" cases.

In spite of the *case by case* analysis which must necessarily be followed to assess these practices, the following ideas might help draft an informal preliminary test to help us spot potential anticompetitive cases:

- **Market structure:** unilateral disclosure of information tends to occur in concentrated/oligopolistic markets with a few relevant players, product/services not very differentiated, relatively high entry barriers and a weak countervailing power on the demand side.
- **The role of the Leader:** usually there is a leading company in the concerned market (the former monopoly or the company with the largest market share). This company is frequently the first mover (for instance, releasing a press notice or advertising heavily in the media a price increase or reduction). To be effective, the leader must be able to influence the behavior of its rivals, even if it does not aim at achieving a coordinated strategy.
- **Timing:** the leading company frequently makes the announcements before the "natural" deadline in business, providing its rivals with enough time to assess the announced commercial strategy and to respond in a coordinated way.
- **Kind of the announcements:** sometimes it is argued that it is more efficient and cost reducing making an announcement in the media rather than sending a letter to the customer explaining the commercial changes adopted by the company.

However, invoicing can be used efficiently to deliver this information to the customer, avoiding disclosing sensitive information to everyone. When the customer is unknown and highly disseminated (i.e. buyers of tobacco products), press announcements can be more justified in terms of effectiveness.

² National case: File S/0018/07 "Milk Prices".
<http://www.cncompetencia.es/Default.aspx?TabId=116&Numero=S%2f0018%2f07&ambito=Conductas>

- **Rationality:** individual responses to moves made first by a competitor can be considered as economically rational. Sometimes it consists of a parallel behavior according to the leader-follower theories. However there are evidences that prove the opposite and that a divergent behavior from the leader refusing to follow its movements can benefit the company.
- **Uncertainty:** the Leader may not be sure that his rivals will undoubtedly follow its moves.
- **Transparency:** in many markets prices/rates are transparent and companies have access to this information in a very easy way (web sites, for instance). Press announcements do not increase the degree of knowledge on this field. However, they might facilitate anticompetitive practices.

TURKEY

1. Introduction

This contribution is intended to reflect the attitude of the Turkish Competition Authority (TCA) on unilateral information disclosure of undertakings which may constitute concerted practices within the context of competition rules. The contribution mainly depends on decisions of the Competition Board, which is the decision making body of the TCA, where appropriate.

2. The legal standard of review and enforcement related issues on unilateral communications

Turkish competition regime is based on European Union (EU) competition rules. In fact provisions of Article 4 of the Act No 4054 on the Protection of Competition (Turkish Competition Act) prohibiting anti-competitive agreements, concerted practices and decisions are almost identical to those of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Therefore “concerted practices” falling short of an agreement, which have anticompetitive effects, may well be captured by Turkish competition regime. Also in this context meetings of the minds (i.e. mutual agreement) of the undertakings concerned, whether written or oral, tacit or explicit, formal or informal, which have as their object or effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are regarded as infringements of Turkish Competition Act. Moreover, according to Article 4, the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings which are similar to those markets where competition is prevented, distorted or restricted constitute a presumption that the undertakings are engaged in concerted practice, even if the existence of an agreement cannot be proved.

As stated by the Secretariat,¹ making a distinction between purely unilateral communications that fall outside the reach of laws against concerted practices which fall within these laws can be a difficult task for competition authorities. Also it should be noted that the TCA does not have much experience in this field. However, it can be argued that in order to make a proper assessment a distinction should be made in the context the disclosure practices took place. That is, first, it should be taken into account whether these unilateral communications are private, which are available only for rivals or public, which are available for both competitors and buyers alike.

2.1 *Private communications to competitors*

The TCA believes that, in a situation where only one undertaking discloses information about its intended market conduct such as future prices, quantities, and strategies only to its competitors who accept it can constitute a concerted practice. In such a situation both the undertaking disclosing strategic information on its future plans and each competitor which receives strategic data from its rival without responding with an immediate and clear statement that it does not wish to receive such data should be deemed to be responsible for an infringement. This implication is clear from the case law of European

¹ See OECD Policy Round Tables Information Exchanges Between Competitors under Competition Law 2010 ([DAF/COMP\(2010\)37](#), p.21).

Court of Justice (ECJ)² and the case law of the Turkish Competition Board alike. Attitude of the Turkish Competition Board on this issue is apparent in several cases like *Work and Travel Agencies*,³ and recent *Automobile Manufacturers and Distributors*⁴ and *Private Schools II*.⁵ Related parts of the latter case are as follows:

“... It is clear that uncertainty as to the future, which is expected to exist in normal market conditions and is in a sense the source of competitive pressure on undertakings, will be substantially lessened if the undertakings meet together and exchange views on prices to be implemented. Also in a market where this kind of communication and information exchange takes place, it is impossible that undertakings’ commercial strategies are not affected by these contacts and the information exchanged. It is emphasized in the reference EU competition case law that in order to apply the presumption of concerted practice it is enough to demonstrate the anticompetitive object while there is no need to prove the anticompetitive effect. Moreover, unless competitors disprove, exchange of [this kind of] commercially sensitive information is presumed to give rise to a concerted practice. [...] In this context, meetings within the Association of Turkish Private Schools and Association of Ankara Private Schools and sharing information about prices to be implemented between competitors at these meetings are considered to be a breach of Article 4 of the Turkish Competition Act.”

Similar to ECJ case law, the Turkish Competition Board also confirms that private disclosure of intended future conduct, that is unilateral disclosure of future prices, quantities or strategies only to competitors should be considered as restrictions of competition by object. In order to apply the presumption that the relevant undertakings are engaged in a concerted practice within the meaning of Article 4 of Turkish Competition Act, it is sufficient for the TCA to prove that the relevant undertaking(s) either attended a meeting where this kind of commercially sensitive information is exchanged, or received or sent that information through other means (via phone calls, fax, e-mail etc).

The logic behind the object-based approach on this issue is that, it is very unlikely for customers to benefit from an information exchange which they are not aware of. For this reason it is difficult to find a way that the society benefits from private information exchanges on future prices and quantities between the companies.⁶ In this context, as is stated in the literature,⁷ the best possible explanation of this kind of unilateral communications of the firms should be efforts to coordinate future market behavior of rivals.

² See Joined Cases T-25/95 etc., *Cimenteries CBR and Others v Commission*, [2000] ECR II-491; Case C-8/08 *T-Mobile Netherlands BV and Others v RAD van bestuur van der Nederlands Mededingingsautoeriteit*, Judgement of 4 June 2009.

³ *Work and Travel Agencies* decision (dated 11.04.2007 and numbered 07-31/325-120).

⁴ *Automobile Manufacturers and Distributors* decision (dated 18.04.2011 and numbered 11-24/464-139). In this remarkable case 16 automobile manufacturers or distributors were imposed a total fine of 277 million Turkish Liras (approximately 110 million Euros) for infringing Article 4 of the Turkish Competition Act through sharing information on future price strategies, targets and stocks.

⁵ *Private Schools II* decision (dated 03.03.2011 and numbered 11-12/226-76).

⁶ For a different view see DOYLE, M. P. and C. M. SNYDER (1999), “Information Sharing and Competition in the Motor Vehicle Industry”, *Journal of Political Economy*, Vol:107, No:6, pp.1326-1364.

⁷ See CAFFARRA, C. and K. U. KÜHN (2006), “The Cost of Simplistic Rules for Assessing Information Exchange: The Italian Jet Fuel Decision”, in *The Pros and Cons of Information Sharing*, Swedish Competition Authority (Edt.), pp. 139,140; KÜHN, K. U. and VIVES, X. (1995), *Information Exchanges Among Firms and their Impact on Competition*, Office for Official Publications of the European

2.2 *Public announcements*

The assessment under second possible scenario where a concerted practice may be found regarding unilateral communications, namely public announcements, is more complicated. Although there is no case law on this issue in Turkey, in terms of public announcements, it can be said that the TCA shares the view in the European Commission's new Guidelines on Horizontal Cooperation Agreements.⁸ According to the Guidelines, “ ... depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination.”

However, unlike private announcements, in such a situation, several considerations need to be taken into account. For instance, careful attention should be paid whether these public announcements, e.g. public price announcements, constitute industry tradition with a historical background, whether buyers demand these announcements, whether or not these announcements are binding for companies before buyers, whether undertakings usually stick to and implement the prices announced before or, in contrast, they readjust their prices mutually following price announcements of rivals.

Hence an object-based approach may not be proper in all circumstances where undertakings publicly announce their future price and quantities as in some industries public announcements may involve commitments to customers. For instance, in markets where long term relationships exist between buyers and sellers, future price announcements may guarantee customers a maximum price to be implemented. In such a situation customers may have chance to adjust their production/purchase plans more efficiently. In addition, bargaining power of customers may increase, that is to say customers can request discounts on announced prices.⁹

In this sense, as far as it is observed that companies usually stick to the prices they announced, that is, if they usually do not revise or readjust their own earlier announcements before these announcement take effect in response to announcements made by competitors, potential efficiency gains of such announcements may be considered to be stronger than the collusive effects of the announcements.¹⁰

3. *Cheap talk and invitation to collude*

3.1 *Cheap talk*

Cheap talk can have a critical role on collusion, enabling a meeting of the minds among rivals on how to play the game. Because in a game where multiple equilibria exist, reaching a common understanding is

Communities, Luxembourg, p. 55; WHISH, R. (2006), “Information Sharing Agreements”, in *The Pros and Cons of Information Sharing*, Swedish Competition Authority (Edt.), p. 37.

⁸ “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements”, OJ (2011) C/11, para. 63.

⁹ See MØLLGAARD, H. P. and P. B. OVERGAARD (2007), *Information Exchange, Market Transparency, and Dynamic Oligopoly*, Economics Working Paper 2007-3, University Of Aarhus, Denmark, p. 14.

¹⁰ See KÜHN, K.U. (2001), “Fighting Collusion by Regulating Communication Between Firms”, *Economic Policy*, Vol. 16, No: 32, p.196; MOTTA, M. (2004), *Competition Policy Theory and Practice*, Cambridge University Press, New York, U.S. p.156.

only possible by overcoming or at least limiting strategic uncertainties. As the literature shows,¹¹ *cheap talk* can deal with it. This way firms may arrive at a commonly agreed price without inquiring the risk of losing market shares or triggering price wars during the period of adjustment on new prices.¹² In this regard, increasing communication about future plans of rivals may reduce strategic uncertainties which normally exist on markets and facilitate coordinated behavior.¹³

3.2 *Invitation to collude*

There are no specific rules directly prohibiting invitation to collude in Turkish Competition Act. During investigations, when there is evidence found on this kind of activities of a firm, the Turkish Competition Board inquires if the other parties changed their market behavior towards a way proposed by the firm that invites others to collude. Unless there is further evidence revealing that the parties had reached a common understanding and/or the invited parties changed their market behavior towards a collusive outcome, the Competition Board just warns the parties not to engage in anticompetitive practices.

For example, in one of the recent decisions of the Turkish Competition Board, namely *Hidrogen Peroxide*,¹⁴ although there was evidence revealing that one of the undertakings was seeking grounds for an agreement with the other, the Turkish Competition Board did not decide that the relevant undertakings were parties to an anti-competitive agreement as there was no further evidence that the other undertaking had responded affirmative to the one seeking an agreement or there was a mutual understanding between the two undertakings on market parameters. Likewise, in *Medical Gas*¹⁵ case, the Turkish Competition Board held that a document referring to an anticompetitive agreement between three rivals which was signed by one of the undertakings and mailed to the others to be signed would not meet alone the required standard of proof.

On the other hand, in *Adiyaman LPG*,¹⁶ *Peugeot Dealers*¹⁷ and *Automobile Manufacturers and Distributors*¹⁸ decisions, the Turkish Competition Board adopted an approach in parallel with *T-Mobile* decision of the ECJ. Pursuant to the three aforementioned cases, unless an undertaking, which participated in an anti-competitive meeting or received a communication in the same context, has publicly distanced itself from collusion as such, it will face the risk of being held liable for infringement of Article 4 of the Turkish Competition Act.

¹¹ See for instance FARREL, J. (1987), “Cheap Talk Co-ordination and Entry”, *RAND Journal of Economics*, Vol: 18, No: 1, s. 34-39.; FARRELL, J. and RABIN, M. (1996): “Cheap Talk”, *Journal of Economic Perspectives*, Vol. 10, No: 3, s. 103–118.; GILLESPIE, W. (1995), *Cheap Talk, Price Announcements, and Collusive Coordination*, U.S. Department of Justice Antitrust Division, Economic Analysis Group Discussion Paper, EAG 95-3.

¹² Motta, supra note 10,154.

¹³ Møllgaard and Overgaard, supra note 9, p. 8; VIVES, X. (2006), “Information Sharing: Economics and Antitrust”, in *The Pros and Cons of Information Sharing*, Swedish Competition Authority (Edt.), p. 89.

¹⁴ *Hidrogen Peroxide* decision (dated 25.01.2011 and numbered 11-05/88-31).

¹⁵ *Medical Gas* decision (dated 11.11.2010 and numbered 10-72/1503-572).

¹⁶ *Adiyaman LPG* decision (dated 25.10.2005 and numbered 05-73/986-273).

¹⁷ *Peugeot Dealers* decision (dated 06.08.2010 and numbered 10-53/1057-391).

¹⁸ See supra note 4.

4. Policy guidance

Presently there is an ongoing study to issue a policy guideline on assessment of horizontal cooperation agreements which is mainly based on the European Commission's new guidelines¹⁹ within the TCA. It is planned to be published within a few months. Nevertheless, as it is mentioned above, in a number of cases the Turkish Competition Board implicitly evaluated the standard of proof regarding anti-competitive horizontal agreements. With respect to judicial review of the decisions of the Turkish Competition Board, the Council of State, which is the high administrative court against the decisions of the former, has not clarified the evidential threshold to be met in a precise manner. On the other hand, under the light of a few exceptional rulings by the Council of State such as *SGK*,²⁰ it is possible to conclude that the decisions of the Turkish Competition Board regarding alleged infringements of Article 4 of the Turkish Competition Act should be based on clear, convincing and consistent evidence which eliminates uncertainty as to the unlawfulness of an act when considered holistically.

In practice there are no clear safeguards developed regarding unilateral disclosure of information in Turkish competition case law. However, the Turkish Competition Board laid down some general principles on the evaluation of information exchanges in its case law. In a number of decisions,²¹ the Turkish Competition Board remarked that, taken into account the particular characteristics of the market concerned, the type of information exchanged and the way information is exchanged, and in case certain measures taken, exchange of past and current data may be allowed.²² On the other hand, the Turkish Competition Board clearly stated in its decisions that, private exchange of future prices, quantities or market strategies shall not be tolerated and shall be considered as an infringement of Article 4 of Turkish Competition Act.²³

¹⁹ EU Commission's guidelines on horizontal agreements (see supra note 6).

²⁰ *SGK* decision (13th Chamber, dated 16.02.2010 and numbered E.2007/9330, K.2010/1325).

²¹ See for instance, the opinion by Competition Board given to Fertilizer Producers Association (which can be found in its decision dated 08.08.2002 and numbered 02-47/586-M), *ODD Exemption* decision (dated 14.07.2011 and numbered 11-43/916-285).

²² For instance, in *ODD Exemption* decision (supra note 21), with reference to the Guidelines on Horizontal Cooperation Agreements of the European Commission, the Turkish Competition Board stipulated that structure of the market and characteristics of the information exchanged are taken into account when an alleged infringement of Article 4 is considered.

²³ For example, in *Chipboard and/or Fiberboard* decision (dated 24.4.2006 and numbered 06-29/365-94) it has been stated that exchange of information concerning future competitive behaviours and strategies of the undertakings removes the uncertainty of the future behaviours thereby facilitating coordination of competitive behaviours and emergence of cooperative effects. Moreover, in *Petder* decision (dated 20.9.2007 and numbered 07-76/907-345) concerning collecting and publishing information by Petroleum Industry Association on developments and size of various markets such as fuel and LPG, it was considered that information exchanges on future forecasts might create the risk of coordination among rivals in oligopolistic markets. See also recent *Automobile Manufacturers and Distributors* case (supra note 4).

UNITED KINGDOM

Executive Summary

The UK's submission to the last roundtable in October 2010 highlights and discusses issues regarding exchanges of information in general.¹ This submission is in response to the OECD's invitation to the roundtable on "Unilateral disclosure of information with anticompetitive effects (e.g. through press announcements)" and focuses explicitly on issues of unilateral disclosure of information.

The European Commission's Horizontal Guidelines² have been adopted since the last roundtable. The OFT applies the Horizontal Guidelines when it applies Article 101 TFEU and has regard to them when it applies the Chapter 1 prohibition of the Competition Act 1998.

A literal interpretation of a unilateral information disclosure is a disclosure where information travels in only one direction. Such disclosures can be made in public, or made in private to one or more competitors. We consider both such disclosures. We also consider an apparent unilateral public disclosure to which a competitor subsequently makes a response. Finally we also consider situations where information is disclosed via an intermediary as these may involve related issues.

The main points to our submission are as follows:

- Public information disclosures are less likely to be harmful than private disclosures
 - They may be significantly more costly as signals to achieve coordination than private disclosures. Where public announcements are truly unilateral, they can reduce uncertainty in the market. However, the economic literature suggests the welfare effects of such reductions in uncertainty are sensitive to the specific assumptions of the market and nature and context of the information.
 - Public information disclosures can also generate significant benefits as they remove information asymmetries for consumers.
 - However, in some situations unilateral public disclosures may in fact facilitate coordination. For example, public announcements that set out a firm's actions contingent on the reaction of its competitors are likely to harm competition.
 - By their very nature, public announcements are easier to detect than private announcements and therefore one might expect harmful public announcements to occur relatively infrequently.

¹ See Information exchanges between competitors under competition law, OECD [DAF/COMP\(2010\)37](#).

² Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C11 14.1.2011), see in particular paragraphs 62 and 63.

- It may be difficult to separately identify unilateral public disclosures from public disclosures where competitors make public responses:
 - If competitors respond to an apparent unilateral disclosure the risk of coordination may be greater. This risk is particularly high when the public disclosure is on future pricing intentions that can be subsequently changed in response to a rival's public disclosure.
 - However, the OFT has not had any cases regarding such disclosures and therefore does not have direct experience in this area.
- Unilateral private disclosures of information are more likely to cause harm than public disclosures and are more likely to be an infringement of competition law:
 - Unilateral private disclosures in general will have less benefit as they do not facilitate consumer search or improve transparency to consumers.
 - It is also harder to envisage situations where firms have the incentives to provide pro-competitive information privately to competitors on a unilateral basis.
 - Finally companies engaging in anti-competitive information exchange have an incentive to keep evidence of their behaviour hidden. Consequently, while a private disclosure of future pricing may appear unilateral, it may support other less obvious communication that forms the basis of an anticompetitive agreement or concerted practice.
 - The OFT has had one case in this area – RBS/Barclays, relating to a private disclosure of RBS's future pricing intentions to Barclays.³
- Intermediaries create an additional complication as there may be a pro-competitive use of the information by the intermediary to bargain with two competitors.
 - The OFT has completed two information cases through third parties ("A2B2C" cases), *Hasbro*⁴ and *Replica football kits*.⁵ Both cases were found to be infringements by object.
 - The English Court of Appeal's judgment in *Hasbro* and *Replica Kit* sets out how the context of the exchange and expectations of the parties should be assessed to establish that there is a concerted practice or agreement in those "A2B2C" cases.⁶

³ OFT press release 34/10, 'RBS Agrees to Pay £28.5 Million Penalty for Disclosing Pricing Information to Competitor', 30 March 2010.

⁴ See <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/argos>.

⁵ See <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/football-kit>.

⁶ See *Argos Ltd/Littlewoods v Office of Fair Trading* [2006] EWCA CIV 1318, Case Nos 2005/1071 and 1074.

Umbro Holdings Ltd v Office of Fair Trading (Judgment on penalty) and *JJB Sports v Office of Fair Trading* [2006] EWCA Civ 1318, Case No 2005/1623.

1. Introduction

As the OFT's previous submission noted, the sharing of information between firms that are competitors can create significant efficiencies, provide benefits to consumers and increase overall welfare: information can assist consumers in making sound purchasing choices ("shop around"). Informed purchasing decisions by consumers provide incentives for competition between firms thereby increasing efficiency and welfare.

Furthermore, the sharing of certain information can allow firms to identify inefficiencies by benchmarking themselves against industry averages, improving allocative efficiencies and allowing firms to understand market trends better. Finally, information sharing on individual consumers' risk can reduce adverse selection and moral hazard problems and improve the functioning of some markets.⁷

However, the exchange of information can also be harmful primarily because it can facilitate coordination between firms: for example, sharing of data on future prices can help competitors in reaching a jointly profit maximising price structure (focal point). Additionally, information exchange can improve the internal stability (through easier monitoring) and external stability (through detection of new entrants) of collusion.⁸

A literal interpretation of a unilateral information exchange is one in which the information is not actually "exchanged" back and forth between two parties, but travels in only one direction. A stricter definition of "unilateral" might also include that disclosure must also be unsolicited. One can think of several possible situations in which an information disclosure could be described as unilateral. A major category of unilateral information disclosure, as envisaged by the OECD in its letter,⁹ is where public announcements are made to the market, for example concerning the future price of a product. A second category to consider is private unilateral information disclosures.

A public announcement may often not be truly unilateral if it elicits (whether by design or otherwise) responses from competitors. While a single public future price announcement looked at in isolation may appear unilateral, if it is followed by a series of subsequent announcements and responses by competitors, it may then be less likely to be truly unilateral and more likely to be capable of forming the basis of a collusive agreement or concerted practice. It may be a difficult assessment as to exactly at which point announcements cease to be unilateral and become a potentially harmful information exchange.

Finally, competitors may non-publicly disclose information to one another indirectly via third parties. For example a supplier may receive information on another supplier's future intentions from a retailer. Information disclosures via third parties create an additional complication as there may be a pro-competitive use of the information by the intermediary to bargain with two competitors.

The remainder of this paper is structured as follows. Section two considers public disclosures of information, looking at the benefit, the harm and the potential difficulties of classifying them as unilateral when there are competitor responses. Section three considers private disclosures of information, again looking at the potential benefits and harm. Section four considers disclosures of information via third parties.

⁷ Examples can be found in the credit and insurance market.

⁸ Motta, *Competition Policy Theory and Practice* (2004) "Detection of deviations is a crucial ingredient for collusion..."

⁹ COMP/2011.136; December 1, 2011.

2. Public disclosures of information

Assessing the effect of public disclosures of “unilateral” information is not just a case of assessing whether information flows solely in one direction. Relevant considerations include the content of the information, whether information forms part of a wider pattern of information exchange, how the information is used and what the expectations of the parties are in this regard. This section first considers the potential benefits and harm from truly unilateral public disclosures. It then considers how this may change if rival firms respond with information disclosures.

2.1 *Benefits from public disclosures*

In contrast to private disclosures of information, public announcements can add to the knowledge of all market participants, reducing information asymmetries and potentially increasing demand for products. They can also facilitate consumer search and so help drive competition. All else being equal, we therefore expect them to have greater potential to create efficiencies than private disclosures.

Public information disclosures can assist consumers in making informed purchasing decisions. Advertising is an example of public information disclosure that may be used to inform consumers of the current product price, characteristics and features. Identifying and comparing products is likely to be easier for consumers if firms announce the respective information publicly and if it is easily accessible so that consumers can make easy comparisons between competing offers.

Further, public unilateral information disclosures, such as advertising, tend to increase market transparency. By reducing search costs for substitutes, consumers can more easily switch to alternative products in case of price increases. Information shared on price comparison websites may further reduce time and costs for consumers.¹⁰ In theory, this will lead to a more elastic demand which in turn is likely to reduce a given firm’s market power and prices.

Information disclosures on future intentions, as opposed to current prices, might be of special concern to competition authorities as they are more likely to facilitate coordination. However, public disclosures of such information can also provide benefits to consumers: whereas information on current prices will help consumers to “shop around”, public dissemination of future intentions notifies customers of changes before they take place. This allows customers to plan their responses in advance and optimise consumption over time.¹¹ For example, customers may decide to stockpile quantities before an announced price increase or defer purchases before the introduction of a new product design.

Information on future pricing announcements has the potential to be more beneficial in less transparent markets as matching buyers and sellers may be more difficult and transaction costs higher. As such, future price announcements may create greater benefits in markets for consumer goods than, for example, a market for specialist products in which there are only a few buyers who are well informed.

Besides direct benefits for consumers, unilateral public information sharing has the potential to increase efficiencies for firms. Firms can learn from announcements of investment plans, changed (macroeconomic) conditions or growth prospects in an industry, etc. For example, a firm may announce new investment plans in a region because it expects significant regional demand growth. Other firms will

¹⁰ However, note that price comparison sites might potentially facilitate price coordination between competitors.

¹¹ This is particularly the case when announcing the pricing of new products – allowing customers to decide whether to continue consuming the old product or buy the new product.

learn from these announcements and may update their own investment plans. In theory, such learning has the potential to be beneficial as it can increase adjustment speed within an industry.

Additional information available will usually reduce uncertainties (for example with respect to demand or investment decisions)¹² and can potentially assist in a more efficient allocation of supply to consumers.¹³ It might also assist firms in solving commitment problems.¹⁴ New entrants might find it easier to enter a specific market because information asymmetries are reduced. In the OFT's recent commitments case on motor insurance, highly disaggregated future pricing data was shared through a market analysis tool which was regularly updated.¹⁵ The OFT was concerned that the information could be used to facilitate coordination. However, the OFT also recognised that the information exchange may give rise to some efficiency benefits in helping insurers to expand or enter into the writing of policies where otherwise they may have been reticent, for example due to the potential cost of future claims. The remedy that the OFT accepted was designed to fully address its concerns around the risk of coordination while avoiding undue constraints on market entrants and hence encouraging healthy competition in the market.¹⁶

2.2 *Harm from unilateral public disclosures*

Kuhn and Vives have written extensively on the impact of “unilateral” disclosures of information.¹⁷ Their review questioned whether a reduction in uncertainty will harm consumers, absent any tacit or explicit coordination between firms. Intuitively if a firm releases new information that updates rivals’ beliefs regarding the evolution of demand, the rivals will change their outputs or prices depending upon the information disclosed. These adjustments may be upwards or downwards. These theories are sometimes termed “softening competition” theories of harm, whereby reductions in uncertainty without any coordination, tacit or otherwise, soften the degree of competition that would otherwise exist.

Kuhn and Vives show that the impact of a unilateral disclosure of information is highly sensitive to the market and information characteristics. The outcome depends on the type of uncertainty, the type of competition (price or quantity) and the firm’s expectations.¹⁸ In certain circumstances a unilateral disclosure of information can improve consumer welfare, whilst in others it may reduce it.

¹² A. Dixit, “Entry and Exit Decisions under Uncertainty” (1989a) 97(3) *Journal of Political Economy* 620.

¹³ R. Jensen, “The Digital Provide: Information (Technology), Market Performance, and Welfare in the South Indian Fisheries Sector” (2007) 122(3) *The Quarterly Journal of Economics* 879.

¹⁴ See Motta, *Competition Policy Theory and Practice* (2004) for a discussion in the case of a durable good monopolist.

¹⁵ Press release: <http://www.of.gov.uk/news-and-updates/press/2011/129-11>.

¹⁶ The requirements of the commitments offered by the insurer parties necessary to remove the OFT’s competition concerns included requirements that pricing information must (i) be anonymised and aggregated across at least five insurers; and (ii) not be supplied to insurers until prices are already ‘live’ in policies sold by brokers.

¹⁷ KU Kühn and X Vives, ‘Information Exchanges among Firms and their Impact on Competition’ (Office for Official Publications of the European Community, Luxembourg, 1995), III.

¹⁸ In general when competition is through prices only, firms have an incentive to share the information but it may harm consumers. When competition is through quantity, or two stage capacity and price, firms may have an incentive to bilaterally exchange the information and it will benefit consumers. See Clarke, R.N., *Collusion and the Incentives for Information Sharing*, *Bell Journal of Economics* 14, 1983, pp. 383-394. Vives, X., *Duopoly Information Equilibrium: Cournot and Bertrand*, *Journal of Economic Theory*, 1984. For a summary and discussion of this literature, see Kuhn and Vives, *ibid*.

2.3 *Harm from public disclosures that are not unilateral*

As stated in our previous submission, the OFT believes that the main risk for disclosures of information is the risk of the disclosure facilitating or leading to coordination. However in this respect public disclosures may be significantly more costly as a signal to achieve focal pricing and coordination than private disclosures.

In particular one of the main concerns with future pricing intentions is that they carry the risk of allowing firms to arrive at a “focal point” for price without the risk of losing sales as a result of implementing a price increase. However a public announcement to change price may commit the firm to implementing that price much more than a private announcement. In this way an announcement regarding future prices may actually be more similar to a current price announcement if the fact that it is made in public provides it with a commitment value akin to a current price announcement.

This is not to say that public announcements cannot be harmful. For specific types of public announcements, the commitment engendered by making the disclosure public may actually facilitate coordination. This may particularly be the case where the information disclosure involves commitment to actions that are contingent on a competitor's response. These announcements may create greater internal stability for a collusive agreement, as a firm can simultaneously communicate focal points and credible punishment strategies (which may be more credible as they have been publicly committed to). For example, a firm may publicly announce a future price rise and simultaneously reassure its shareholders it will commit to this price rise provided that it does not lose customers to its competitors, in which case it would respond aggressively. These announcements could provide both a focal point on price and a threat to punish the competitor if it deviates.¹⁹

An alternative form of “contingent” public announcement is a price matching policy, whereby a firm commits to match its competitors price. It is important to note that these announcements may generally be indicative of strong competition and so have to be considered carefully.²⁰ However, they can be used to coordinate. A price matching announcement can be used to signal a punishment strategy: if a competitor deviates from a collusive equilibrium by lowering its price, then the firm commits to match it. Lu and Wright (2010)²¹ show that the use of price-matching punishments by firms to collude has both benefits and costs compared to stronger/optimal punishment strategies.²² It may mean that the collusive outcome is not

¹⁹ Two recent cases in the US are particularly instructive in this respect, although both were taken under s 5 of the FTC Act rather than s 1 of the Sherman Act. In the FTC consent order against Valassis, Valassis’ president and chief executive officer, in a public call with analysts, detailed its strategy to increase its prices including 1) abandoning its 50 percent market share goal; 2) aggressively defending its existing customer base and market share; 3) submitting price bids at levels substantially above current market prices for current News America customers; and 4) monitoring News America’s response to its new business strategies. If News America competed for Valassis customers and market share in the future, then the price war would resume.’ Valassis Communications, 2006, FTC File No 051 0008.

In the FTC consent order against U-Haul, U-Haul’s CEO made statements in a public analyst call suggesting that U-Haul would raise its rates, and would maintain the new rates so long as Budget did not respond by price cutting in a way that took market share from U-Haul. He added that Budget need not match the U-Haul prices exactly, but could lag behind by 3–5%. Matter of U-Haul Int’l, Inc and AMERCO, 2010, FTC File No 081-0157.

²⁰ These types of announcements are fairly common, for example in the groceries sector.

²¹ Lu, Y. and Wright, J. (2010), Tacit Collusion with Price-Matching Punishments, *International Journal of Industrial Organization*.

²² Such as reverting to competitive pricing.

as harmful as punishment is less severe. On the other hand, the simplicity of the arrangement may mean it can be implemented through unilateral public announcement and reduces the need for explicit direct communication between the firms.²³

Public announcements regarding future intentions may also be harmful when they do not have a commitment value. Public announcements of future prices that do not create a commitment to implement the price may be used as a means of signalling pricing intentions between competitors, similar to private disclosures of future pricing intentions. Several factors may be relevant to assess whether public announcements have the potential to cause harm.

An obvious point is that the content of the information disclosure is important, as when considering the impact of other types of agreement on competition. Unilateral announcements of current pricing are in general unlikely to be harmful and indeed are used by many firms to advertise their products to consumers. Similarly announcements of non-strategic variables, such as cost, have less capacity to lead to harm than announcements of strategic variables, such as price or quantity. Individualised future pricing or quantity intentions are much more likely to be harmful.

Furthermore, the context of the information disclosure in question within any other information flows occurring in the market is also important. For example, if there is a single unilateral public announcement by one firm about future pricing and no other related information flows, then the announcement is less likely to be able to facilitate coordination in itself. If, on the other hand, the announcement is one of a series of announcements by the firm, then there is a greater possibility that these announcements can facilitate coordination, as the announcing firm will have feedback from observing the actions of its competitors in response to announcements. Finally, when several competing firms are repeatedly making announcements within the same market, then the risk of coordination is greater still.

For example, referring back to the OFT's recent commitment decision in motor insurance, future pricing data was shared through a market analysis tool which was regularly updated.²⁴ As insurers were able to adjust prices after sharing the information and so did not have to commit to them, the OFT considered that there was a risk that they might be able to use the information exchange to signal focal points. This case did not involve the public sharing of information as the data involved was not freely available. However, it serves to illustrate where public information exchange may be harmful.

Public pricing announcements have the potential to be harmful in certain situations where there is price leadership (where one firm announces its future price first and then its competitors follow suit).²⁵ The economic literature identifies several mechanisms whereby price leadership can facilitate collusion. For example, Rotemberg and Saloner (1990)²⁶ argue that asymmetric information may be the reason for

²³ See OFT1379, *Conjectural Variations and Competition Policy: Theory and Empirical Techniques, a report prepared for OFT by RBB Economics* (October 2011), for a more detailed discussion of tacit collusion where rivals account for each others' responses.

²⁴ Press release: <http://www.of.gov.uk/news-and-updates/press/2011/04-11>.

²⁵ Price leadership has been documented in many cartel cases. In the Vitamins cartel, for example, the firms designated a company which would lead a price increase. The Decision of the European Commission states:

“The parties normally agreed that one producer should first “announce” the increase, either in a trade journal or in direct communication with major customers. Once the price increase was announced by one cartel member, the others would generally follow suit.”

See the Commission Decision COMP/E-1/37.512—Vitamins (OJ 2003 L 6, p. 1) at paragraph 203.

²⁶ See Rotemberg and Saloner, "Collusive price leadership" (1990), *Journal of Industrial Economics*.

collusive leadership to arise. They study an infinitely repeated game where in each period one firm perfectly knows the current state of demand while the other only knows the distribution of demand shocks. The authors show that collusive equilibria are possible in which the informed firm first sets its price while the uninformed one then matches this price. Mouraviev and Rey (2009)²⁷ show that price leadership can facilitate the internal stability of a cartel, as by sequencing the order in which prices are set the price leader can relax its incentives to deviate from a collusive equilibrium.

2.4 Policy implications

In the OFT's view public information disclosures are generally likely to be less harmful than private disclosures, and so are normally less of a concern. They can generate benefits as they remove information asymmetries for consumers, potentially increasing demand and facilitating consumer search which may in turn intensify competition. However this does not mean they are free of risk, as future pricing disclosures carry the risk of signalling focal prices particularly when they have no real commitment value. Where they are truly unilateral, the economic literature suggests their effects on competition are ambiguous. Furthermore there may be legal issues regarding whether such disclosures can be examined under competition law in the absence of a meeting of minds.

Public 'contingent' announcements of what a firm will do subject to the reaction of its competitors are relatively easy to identify and are more likely to cause concerns. More generally public disclosure of information allows the competition authority and potential complainants sight of the exchange, significantly increasing the probability of harmful agreements being identified and made the subject of investigation and, if appropriate, proceedings.²⁸ Furthermore, it reduces the difficulty of gathering evidence of likely effect.

3. Unilateral private disclosures

3.1 Benefits of unilateral private disclosure

Importantly, private disclosures are not observed by consumers and customers and so do not facilitate consumer search or increase transparency. On balance they are therefore much less likely to create substantial consumer benefits than public information disclosures.

However, some private disclosures of information can result in efficiencies. These are set out in more detail in the OFT's previous submission. In summary, some disclosures of information can allow firms to benchmark themselves in critical areas against other firms, including actual or potential competitors. This can promote innovation and best practice and enhance efficiency, which can drive competition in markets. In addition, they can allow companies to understand market trends and experience and hence better plan to match supply with demand. For example, this could be the case in markets where demand fluctuates significantly, where a market is undergoing significant technological change or where consumer tastes and preferences are rapidly changing. Information sharing on individual consumers' risks can also be important in reducing the problems of adverse selection (where firms cannot tell good consumers from bad

²⁷ See Mouraviev and Rey, "Collusion and Leadership" (2009), *International Journal of Industrial Organisation*.

²⁸ One of the economic rationales for high fines that accompany them is the general deterrence signal it provides to agreements which may be hard to spot. For example, the optimal fine for a secret cartel needs to be high in order to discourage other secret cartels, specifically because the probability of detecting them is likely to be low (given their secret nature). Given that their detection and prosecution rates are expected to be significantly higher, the optimal fine for exchanges conducted in public may be lower than secret exchanges.

consumers) and moral hazard (where a consumer who is protected from risk may behave differently than if fully exposed to the risk).²⁹

However, the incentives for companies to provide such information unilaterally in most cases appear small. While such efficiencies may exist in certain cases, in general it is harder to envisage in most of these situations information disclosures that would be unilateral.

3.2 *Harm from unilateral private disclosure*

Compared to public announcements, it is harder to classify where private information disclosures directly between competitors regarding future intentions are truly unilateral.

In the UK, when considering the assessment of whether or not an information exchange constitutes an agreement or concerted practice under Article 101 TFEU or Chapter I of the Competition Act 1998, “reciprocity” in the broad sense is not always essential. For example, a one way disclosure can amount to a concerted practice in certain circumstances where that information is ‘at the very least’ accepted by the recipient (e.g. *Tate and Lyle v Commission*).³⁰ Further, for private communications over future intentions regarding strategic variables such as prices and quantities, UK and EU case law suggests that where an undertaking participating in concerting arrangements remains active on the market, there is a presumption that it will take account of the information exchanged with its competitors.³¹ Where the information disclosed to competitors consists of future pricing/quantity intentions, such disclosure is likely to constitute a restriction of competition by ‘object’ rather than ‘effect’.

In March 2010, the OFT announced the outcome of a case involving the sharing of information regarding future pricing intentions in the banking sector, notable because it involved a one-way disclosure of future pricing intentions, from one party to another.³² The final decision was issued in January 2011.³³ In this case, the OFT investigated the sharing of confidential, future pricing information by RBS to Barclays which Barclays took into account in determining its own pricing. While the OFT considered there to be a presumption from the precedent case law that the type of pricing information shared would influence the conduct on the market of the recipient, it also found evidence that Barclays had in fact used the information provided by RBS to inform its own strategy.

A situation where private unilateral disclosure may require more detailed analysis is where firms operate at several levels of the supply chain and are each other's customers as well as competitors.³⁴ In these cases the distinction between disclosing information to customers (in some ways similar to public

²⁹ Padilla and Pagano show that sharing information in these types of industries (e.g. banks or insurance) reduces lock in for customers. AJ Padilla and M Pagano, “Sharing Default Information as a Borrower Discipline Device” (1999) 44(10) *European Economic Review* 1951.

³⁰ GC (then CFI) Judgement of 12 July 2001, Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co Ltd v Commission of the European Communities* [2001] ECR II-02035.

³¹ See Case C-49/92P *Commission of the European Communities v Anic Partecipazioni SpA* [1999] ECR I-4125; and Case C-199/92P *Hüls AG v Commission of the European Communities* [1999] ECR I-4287 (n248); and Joined Cases T-25/95 etc *Cimenteries CBR SA and Others v Commission of the European Communities* [2000] ECR II-491.

³² OFT press release 34/10, “RBS Agrees to Pay £28.5 Million Penalty for Disclosing Pricing Information to Competitor”, 30 March 2010.

³³ OFT press release 05/11, “OFT issues decision in loan pricing case”, 20 January 2011.

³⁴ Distinct from A2B2C cases where information is exchanged between competitors via an intermediary.

disclosures) and to competitors can become somewhat blurred. It may therefore become more necessary to consider the knowledge of the parties and the context of the disclosures in detail. However, the OFT has not undertaken any cases of this type.

3.3 Policy implications

Competition law has been sceptical regarding unilateral private disclosures of confidential future pricing information, treating such disclosures similarly to private exchanges of information. The concern with private disclosures appears not simply to be the information that is exchanged, but also the manner in which it is exchanged. A famous quote by Adam Smith seems to be particularly pertinent with respect to this: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”³⁵ Just like Adam Smith, competition law appears to be sceptical of competitors being able to curtail themselves from using the information to coordinate.

Such scepticism also appears to tie in with economic thinking. Unilateral private information disclosures in general will have limited benefits to consumers as they do not facilitate consumer search or improve transparency. Further, it is harder to think of situations where firms will have incentives to provide pro-competitive information to their competitor on a unilateral basis. Finally, it is important to note that companies engaging in anti-competitive information exchange have an incentive to keep evidence of their behaviour hidden. Consequently, while a private disclosure of future pricing may appear unilateral, it supports other less obvious communication that forms the basis for the agreement.

4. Information disclosure via third-parties

4.1 Benefit from information disclosure via third parties

The same benefits of information disclosure discussed above also have the potential of applying in indirect disclosure of information cases in some circumstances. However, it is worth noting that there may also be additional pro-competitive justifications when the third party is a downstream retailer. Retailers regularly go back and forth in negotiations between competing suppliers in order to get the best possible terms. In negotiation, they may quote prices to one supplier available from that supplier’s competitor in order to negotiate a lower price from the first supplier. In some circumstances, this may be an important way in which they are able to exploit their bargaining position, which may result in benefits to consumers in terms of lower prices and greater choice in the downstream markets.

4.2 Harm from information disclosure via third parties

Information disclosures involving intermediaries are similar in nature to private information disclosures directly between competitors in that they have many of the same benefits and concerns. However, the incentives for the intermediary to participate in such information disclosures may raise additional questions.

For instance, a retailer may have little incentive to pass on harmful information from one supplier to another where they are attempting to collude as this facilitates higher prices, directly increasing the retailer's costs and reducing its profits. However, retailers may still act as a conduit for exchanges if the suppliers have market power and are able to coerce them to do so. They may also participate if the

³⁵ A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, edited by E Cannan (London, Methuen, 5th edition, 1904), book I, ch X, pt II, 152.

suppliers use side payments to provide the retailers with incentives, or if the retailers are focused on ensuring parity with their rivals rather than lower input prices for themselves.

Considering the inverse situation of a supplier passing through harmful information to two retailers, a supplier may again have little incentive to pass on the information if this facilitates higher retail prices, hence reducing the suppliers demand and profits. However, as previously suppliers may still act as a conduit where retailers have bargaining power, for example where they control access to significant group of customers, or where they are incentivised with side payments or bonuses.

Information sharing can infringe competition law even if the exchange of information does not occur directly between competitors. The OFT has investigated cases of so-called ‘hub-and-spoke’ arrangements regarding the exchange of commercially sensitive information through third parties—for example, from one retailer to another through their supplier. The English Court of Appeal’s judgment in *Hasbro*³⁶ and *Replica Kit* held that the following test was sufficient for deciding that appeal.³⁷ Where,

1. a retailer (A) discloses to supplier (B) its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one),
2. B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and
3. C does, in fact, use the information in determining its own future pricing intentions,

then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition.

The Court noted that such a case is all the stronger where there is reciprocity: in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so.

In all of the above scenarios, the provision of, receipt of or passing on of information between competitors through an intermediary in such circumstances is anticompetitive and an infringement of competition law.

4.3 Policy implications

Information disclosures via intermediaries create an additional complication as there may be a pro-competitive use of the information by the intermediary to bargain with two competitors. They may in some cases result in benefits and in others may be used to facilitate coordination. Where these disclosures involve non-public information regarding future pricing/quantity intentions constituting a concerted practice, the case law assesses these as “object” infringements rather than ‘effect’ infringements.

³⁶ *Argos Ltd/Littlewoods v Office of Fair Trading* [2006] EWCA CIV 1318, Case Nos 2005/1071 and 1074.

³⁷ *Umbro Holdings Ltd v Office of Fair Trading* (Judgment on penalty) and *JJB Sports v Office of Fair Trading* [2006] EWCA Civ 1318, Case No 2005/1623. The Court noted in that this formulation was sufficient to address the issues raised in the case.

UNITED STATES

1. Introduction

This submission provides an overview of how the unilateral disclosure of information to competitors is evaluated under U.S. antitrust laws.

Both antitrust law and other aspects of U.S. law favor the disclosure of accurate information to consumers, customers, investors, and other members of the public. Markets generally operate more efficiently when participants convey relevant information, such as prices, quality, and other product attributes, to others in the market. For example, companies often provide information about future price increases to allow customers to adjust their production plans or the timing of their purchases.¹ Similarly, securities markets perform more efficiently when companies disclose relevant information about financial performance, company operations, and business plans to investors.

The antitrust concern regarding unilateral disclosures of information is that they may, in some circumstances, facilitate anticompetitive harm. For example, disclosure may be accompanied by a direct invitation by a competitor to collude—a company may unilaterally offer to raise its prices if a competitor will follow suit. Or disclosure may provide competitors with information that allows them to coordinate tacitly in a manner that lessens competition. A unilateral disclosure of information also may raise anticompetitive concern by providing competitors with other price or non-price information about future plans, which would allow those competitors to alter their business plans in a way that reduces competition.

The possibility that unilateral information disclosures could result in anticompetitive harm is broadly recognized. An FTC study published in 1985 found that price signaling by companies can increase prices in the affected market. The study looked at price books for generators that the two main market participants published, which made the pricing of products with numerous options more easily understood. The study concluded that prices had in fact been maintained at an artificially high level through this price signaling.²

Economists and others have also recognized the possibility that disclosures of certain types of information may drive competitors in a market towards an equilibrium outcome that is anticompetitive.³

¹ See, e.g., *E.I. DuPont de Nemours & Co. v. Federal Trade Commission*, 729 F.2d 128, 134 (2d Cir. 1984).

² David F. Lean, Jonathan D. Ogur & Robert P. Rogers, *Does Collusion Pay . . . Does Antitrust Work?*, 51 SOUTHERN ECON. J. 828, 838-39 (1985).

³ See, e.g., Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 Antitrust Bulletin 143, 163 (1993) (statements may allow industry members to identify a non-competitive outcome as optimal and select it in parallel); Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L.J. 719, 732 n.53 (2004) (companies may make statements, even without a commitment to action, that affect the expectations of other competitors); PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1419d (2d and 3d eds. Aspen Publishers 1998-2010) (Aug. 2011 Update) (“[A] solicitation to raise prices in concert may reduce the uncertainty, either by setting a target price or by raising confidence that rivals will follow.”). In addition, in some cases, an invitation to collude may in fact have

One such type of disclosure has been described as “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.⁴ If the terms of agreement are complex (*e.g.*, specifying prices in numerous markets) but there is a common desire to reach agreement, cheap talk can help firms reach a collusive equilibrium.⁵

Under U.S. antitrust law, unilateral conduct, such as a unilateral disclosure of information, does not violate Section 1 of the Sherman Act, which prohibits a “contract, combination . . . or conspiracy” that unreasonably restrains trade.⁶ This is because a unilateral act does not constitute the agreement required to create a violation of Section 1.⁷ A unilateral disclosure of information may, in certain circumstances, violate Section 5 of the Federal Trade Commission Act (“FTC Act”), which prohibits “unfair methods of competition,”⁸ or Section 2 of the Sherman Act, which prohibits efforts to “monopolize, or attempts to monopolize,” including acts to “combine or conspire” with another person to monopolize.⁹

The remainder of this submission reviews how U.S. courts, and the U.S. Federal Trade Commission (“FTC”) and the U.S. Department of Justice’s Antitrust Division (“DOJ”) (collectively, “the U.S. antitrust agencies”), have applied Section 5 of the FTC Act and Section 2 of the Sherman Act to the unilateral disclosure of information. In applying these laws, the U.S. antitrust agencies evaluate the legality of unilateral disclosures of information by considering such factors as the nature and quantity of information disclosed, the specificity and context of the information disclosure, the nature of the industry and the

been accepted, but there is not sufficient evidence to prove an agreement was struck. *See* Susan S. DeSanti and Ernest A. Nagata, *Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, 63 ANTITRUST L.J. 93, 106 (1994).

⁴ Joseph Farrell & Matthew Rabin, *Cheap Talk*, 10 J. ECON. PERSP. 103 (Summer 1996).

⁵ Studies have shown such mechanisms have been effective in the airline industry. *See* William Gillespie, “Cheap Talk, Price Announcement, and Collusive Coordination,” EAG 95-3, Discussion Paper, Economic Analysis Group, Antitrust Division, U.S. Department of Justice (Sept. 25, 1995); *see also* Severin Borenstein, *Rapid Price Communication and Coordination: The Airline Tariff Publishing Case*, in THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY (John E. Kwoka, Jr. & Lawrence J. White eds., 3d ed. 1999).

⁶ 15 U.S.C. § 1. The Supreme Court has held that “the dissemination of price information is not itself a per se violation of the Sherman Act.” *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 113 (1975).

⁷ *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).

⁸ Although violations of the Sherman Act are also deemed to be violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, the Supreme Court has held that Section 5 of the FTC Act also applies to some conduct that does not violate the Sherman Act. *See, e.g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) (Section 5 gives FTC authority “to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws”); *see also Atlantic Refining Co. v. FTC*, 381 U.S. 357, 369-70 (1965) (FTC has power to challenge practices “that do not assume the proportions of antitrust violations”); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (Section 5 power is “particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.”); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) (Section 5 includes Sherman Act violations as well as “practices that the Commission determines are against public policy for other reasons”) (dictum); *DuPont*, 729 F.2d at 136-37 (“Although the Commission may under § 5 enforce the antitrust laws, including the Sherman and Clayton Acts, it is not confined to their letter. It may bar . . . conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit.”) (citations omitted).

⁹ 15 U.S.C. § 2.

market involved, and whether there are procompetitive business justifications for the disclosure of information.

2. Antitrust enforcement actions involving unilateral disclosures of information

The U.S. antitrust agencies have pursued only a small number of antitrust cases involving unilateral information disclosures. This section summarizes the significant cases the agencies have brought. These cases have generally involved disclosure of information and other statements that, in light of the context and other facts, appeared to be invitations to collude. With the exception of the *American Airlines* case, none of these actions was litigated before a court. All of these cases resulted in settlement agreements without a judicial finding that the conduct violated the antitrust laws.

The *U-Haul International* case involved U-Haul, a company that rents trucks to individuals for moving household goods.¹⁰ The company's profits were limited by aggressive competition in the market. The FTC alleged in its complaint that U-Haul had developed a strategy by which it would raise its rental rates and then call its competitors to disclose that it had made rate increases, encourage them to increase rates as well, and threaten to reduce its rates again if the competitors did not raise their rates. In addition, the FTC alleged that U-Haul had announced on an investor conference call that it recently had increased its rates and had encouraged its main competitor to do the same, while warning that it would drop its rates if its competitor did not match them within a specific period of time. The FTC alleged that these private and public disclosures created a significant risk of anticompetitive harm—because the proposals could have been accepted and, even if not formally accepted, they could have led to less aggressive competition—and thus violated Section 5 of the FTC Act. Accordingly, the FTC reached a consent decree with U-Haul that prohibited future efforts to use communications of this type to raise or stabilize prices or otherwise to coordinate with other companies on pricing.

The *Valassis Communications* matter involved an alleged invitation to collude from one publisher of newspaper advertising inserts to its only rival in that market.¹¹ The FTC alleged in a complaint that, during a public earnings conference call, the CEO of Valassis announced a new strategy for raising prices of inserts. The company knew that its rival, News America, would be monitoring the call. The FTC alleged that Valassis intended to facilitate collusion through its announcement. Moreover, it alleged that there was no legitimate business reason for Valassis to disclose its new pricing strategy. The FTC determined that if News America had accepted the invitation from Valassis, higher prices and reduced output of newspaper advertising inserts were likely to result, and that the conduct accordingly violated Section 5. Valassis entered into a consent order with the FTC that prohibits unilateral communications, both public and private, concerning the company's willingness to refrain from competing with rivals or to coordinate pricing with them, as well as prohibiting actual coordination on pricing.

In the *Stone Container* case, the FTC challenged a unilateral initiative to increase linerboard prices through a scheme that included unilateral disclosures of information.¹² The FTC alleged in a complaint that

¹⁰ Complaint, U-Haul Int'l., Inc., FTC File No. 081-0157 (July 14, 2010), available at <http://www.ftc.gov/os/caselist/0810157/100720uhaulcmpt.pdf>; Decision & Order, U-Haul Int'l., Inc., FTC File No. 081-0157 (July 14, 2010), available at <http://www.ftc.gov/os/caselist/0810157/100720uhauldo.pdf>; Analysis of Agreement Containing Consent Order to Aid Public Comment, U-Haul Int'l., Inc., 75 Fed. Reg. 35,033 (June 21, 2010), available at <http://www.ftc.gov/os/caselist/0810157/100609uhaulanal.pdf>.

¹¹ *In re Valassis Communications, Inc.*, F.T.C. No. C-4160 (April 19, 2006) (consent order), available at <http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisDecisionandOrder.pdf>.

¹² *In re Stone Container Corp.*, 125 F.T.C. 853 (1998), all relevant information available at <http://www.ftc.gov/os/caselist/c3806.shtm>.

Stone Container, the largest U.S. manufacturer of linerboard, had failed in a recent effort to lead an industry-wide increase in prices because industry inventory was relatively high. Renewing its effort to increase prices, Stone Container sought to purchase inventory from its competitors and draw down its own inventory, while reducing production at its factories by a similar amount. In arranging for the purchases of linerboard, Stone Container executives communicated to their counterparts at the other companies that Stone Container would reduce its output and replace that production with its purchases from the competitors, and that it believed these actions would support price increases in the industry. In addition to these private statements, Stone Container used public statements and press releases to communicate its objectives. The FTC alleged that these acts and statements constituted an invitation by Stone Container to its competitors to join in a coordinated price increase, violating Section 5 of the FTC Act. Stone Container entered into a consent decree with the FTC that barred the company from future communications requesting or suggesting raising, fixing, or stabilizing prices.

In the *Precision Moulding* matter, the manager of the dominant manufacturer of certain art framing products asserted during a meeting with its competitor that the competitor's pricing was "ridiculously low" and suggested that the company should not "give the product away."¹³ The manager also threatened a price war that the competitor would not survive. Based on this conduct, the FTC alleged that the company had violated Section 5 of the FTC Act. The FTC entered into a consent decree with the company barring it from requesting or urging price increases or price stabilization, as well as from entering into agreements regarding price.

In the *AE Clevite*, case, the FTC alleged that a company had complained at a meeting to a competitor about its low pricing of locomotive engine bearings.¹⁴ The two companies together held about 95 percent of the market in this product. The FTC alleged that a company official had stated that its competitor was "ruining the market" and then sent by facsimile a list comparing the two companies' pricing. The FTC viewed this disclosure of pricing information as an implied invitation not to compete on price and a violation of Section 5. The FTC reached a consent agreement with the defendant, barring the defendant from requesting, suggesting, or proposing to competitors that they jointly raise or fix prices.

The FTC alleged in the *YKK (U.S.A.)* matter that YKK, a manufacturer of zippers and zipper installation equipment, had told its competitor to stop offering free equipment to customers as part of their zipper purchases because the conduct was "unfair and predatory."¹⁵ The FTC alleged that the request proposed to eliminate a form of discounts in violation of Section 5, and, if accepted, would have reduced competition between the companies, which together had over 80 percent of the zipper market. The FTC entered into a consent decree with YKK prohibiting suggestions or requests to competitors to fix or raise prices or to cease providing discounts or free equipment.

In *Quality Trailer Products Corp.*, the FTC alleged in a complaint that the company's employees told its competitor at a meeting that the competitor's prices for a group of certain axle products were too low.¹⁶ In addition, the employees explained that, because of the state of the industry, the two companies did not need to compete on price, and they stated that they would not price their axle products below a specified amount. The FTC alleged that, had the invitation been accepted, the agreement would have been an unlawful restraint of trade, violating Section 5 of the FTC Act. Accordingly, the FTC reached a consent decree with the defendant that prohibited future communications that requested or suggested raising, fixing, or stabilizing prices.

¹³ *In re Precision Moulding Co.*, 122 F.T.C. 104 (1996).

¹⁴ *In re AE Clevite, Inc.*, 116 F.T.C. 389 (1993).

¹⁵ *In re YKK (U.S.A.) Inc.*, 116 F.T.C. 628 (1993).

¹⁶ *In re Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992).

Finally, in *United States v. American Airlines, Inc.*, the United States brought monopolization charges under Section 2 of the Sherman Act against an airline company whose president proposed to a competitor that they raise prices in sequence.¹⁷ This case did not involve a unilateral price disclosure. The president of American Airlines contacted the president of its competitor, Braniff, to discuss the aggressive competition between the two airlines on a number of routes. The two airlines' combined market shares were between 60 and 90 percent on a number of non-stop routes from Dallas-Fort Worth, but they had been engaged in an aggressive price war. American's president proposed that Braniff raise fares by 20 percent, and promised that American would then raise its fares the next day by the same amount. Braniff's president demurred, and did not raise prices as proposed. American sought to dismiss the DOJ's complaint for failure to state a claim under the Sherman Act; the district court agreed and dismissed the complaint. On appeal, the court of appeals concluded that the elements of an attempted monopolization case under Section 2 had been met, because if Braniff had accepted American's offer, the two airlines together would have had monopoly power.¹⁸ American subsequently entered into a consent decree that prevented the conduct from reoccurring, resolving the DOJ's competitive concerns.

Although unilateral conduct cannot violate section 1, as mentioned in paragraph 6 above, unilateral price disclosures can facilitate collusion among competitors, which may, in certain circumstances, violate section 1. In 1992, the DOJ sued eight of the largest U.S. airlines and the Airline Tariff Publishing Company ("ATP") for price fixing and for operating ATP, their jointly owned fare-exchange system, in a way that facilitated collusion in violation of Section 1 of the Sherman Act.¹⁹ ATP was a complex system for the exchange of information among major airlines, which was widely and openly operated to disseminate fare information through computer reservation systems and travel agents. ATP provided a means for the airlines not only to disseminate fare information to the public but also for them to engage in essentially a private dialogue on fares. The airlines designed and operated ATP's computerized fare-exchange system 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. ATP thus operated in "a manner that unnecessarily and unreasonably allowed [the airlines] to coordinate fares." The case was resolved with a judicial consent decree crafted to ensure that the airline defendants did not continue to use any fare dissemination system in a manner that unnecessarily facilitated price coordination or that enabled them to reach specific price-fixing agreements.

3. Criteria considered in assessing the legality of unilateral information disclosures

Although unilateral disclosure of information is generally not likely to harm competition, and can have procompetitive benefits, there are instances when it has the potential to create anticompetitive effects. The following are among the criteria that are relevant to determining whether a unilateral disclosure of information is likely to harm competition:

- *The nature and quantity of the information disclosed.* Disclosing extensive information regarding pricing, output, major costs, marketing strategies and new product development is more likely to

¹⁷ 743 F.2d 1114 (5th Cir. 1984).

¹⁸ *Id.* at 1118. Microsoft was also found to have engaged in an unlawful attempt to monopolize the Internet browser market by proposing to Netscape that Microsoft develop browsers only for Windows computers and Netscape develop only for other operating systems. See *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 46 (D.D.C. 2000), *aff'd in part and rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

¹⁹ *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>.

have anticompetitive implications. In particular, disclosure of information about future pricing generally has the greatest potential for anticompetitive harm because, if agreed to, a price-fixing agreement would result. Even in the absence of an agreement, disclosure of information about future pricing has a greater likelihood of promoting tacit collusion than disclosure of other information.

- *The specificity and context of the information disclosed.* A disclosure expressing a willingness to raise prices by a specific amount (or similar information, such as a specific output reduction) creates a greater likelihood of anticompetitive harm than disclosure of less specific information. Thus, for example, a recipient of specific information can easily conform to a particular figure—such as the 20 percent price increase proposed by American Airlines or the price floor proposed in Quality Trailers. Similarly, Stone Container’s statements regarding its output and inventory reductions provided competitors with specific information regarding the company’s plans in the context of its attempt to raise industry prices. More generally, a disclosure containing terms of coordination has a greater likelihood of creating anticompetitive harm than one without such terms.
- *Whether the disclosure is public or private.* Disclosure of information in a public setting may inform the market in ways that promote competition. In comparison, disclosure of information in private does not provide these potential benefits or does so to a lesser degree. Private communications may also, in certain circumstances, more readily allow for non-verbal implicit confirmation that the disclosed information has been accepted by the competitor as a proposal for common action. Several of the examples set out above involved private communications between upper-level employees with the authority to adjust pricing and output. In some instances, in addition to their private communications, companies used public communications, such as press releases, in ways that furthered the companies’ objectives.
- *The nature of industry and market.* In concentrated industries, a unilateral disclosure of information is more likely to create the possibility of anticompetitive effects because tacit or express collusion is more likely. This is particularly true if the disclosure is made by a company with a dominant position in the market in an attempt to influence a competitor with a significant position. Similarly, other structural market characteristics, such as homogeneous products or barriers to entry, may make successful collusion more likely, thus raising the risk that a disclosure of information could be anticompetitive. By comparison, a disclosure of information in an unconcentrated industry with robust competition is less likely to lead to industry-wide coordination that will have anticompetitive effects. In several of the examples described above, such as the *American Airlines*, *Valassis*, and *Stone Container* cases, the market involved a low number of participants. However, other cases did not necessarily involve high market shares, including the *Quality Trailer Products* case.
- *Procompetitive business justifications for the disclosure of information.* As noted above, information disclosures, particularly when made publicly, can benefit the operation of the market by providing participants with better information on which to make decisions.²⁰ For example, public statements likely to be of general interest to customers and others in the market, such as planned price increases or factory downtime during which the company may not be able to supply customers, may be more likely to have a procompetitive purpose. Information disclosures made in private, by comparison, are less likely to provide information to market participants.

²⁰

See du Pont, 729 F.2d at 134.

4. Conclusion

Unilateral disclosure of information is often procompetitive and helps improve the functioning of markets. However, in certain circumstances such disclosures have the potential to be anticompetitive. U.S. courts and antitrust agencies evaluate whether such disclosures violate Section 5 of the FTC Act or Section 2 of the Sherman Act. Unilateral disclosures of information, however, do not, standing alone, violate Section 1 of the Sherman Act.

There have been relatively few fully litigated cases involving unilateral information disclosures, so that the precise contours of what is permissible and what may violate the antitrust laws in the United States are not completely clear. Some of the considerations the U.S. antitrust agencies may take into account are the nature of the information disclosed, including how specific it is, whether the information is disclosed broadly to the public or privately communicated only to competitors, whether the industry at issue is concentrated, and whether there are legitimate procompetitive reasons for the disclosures.

EUROPEAN UNION

1. Introduction

Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries, thereby making markets more efficient. Moreover, companies may improve their internal efficiency through benchmarking against each other's best practices. Sharing of information may also help companies to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand etc. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice.

At the same time, information exchange may lead to restrictive effects on competition. Most importantly, in situations where information exchange enables undertakings to be better aware of market strategies of their competitors (reduces strategic uncertainty in the market) it may facilitate collusion.¹ Since in markets where collusion, i.e. coordination or alignment of companies' competitive behaviour is feasible, there are normally multiple possible collusive equilibria, communication can help competitors to collude by reducing strategic uncertainty as to which equilibrium should be played.

The unilateral disclosure of information can also help competitors to collude by reducing strategic uncertainty as to which equilibrium should be played. To that end, firms can also use information as signals to influence the terms of a collusive outcome. Communication can also help monitoring of deviations from collusion, as well as entry, which is important for ensuring stability of collusion. Unilateral disclosure of strategic information can also stabilise collusion by allowing competitors to build trust between each other.

The European Commission has dealt in the past with a number of cartel and antitrust cases where information disclosure was at the heart or part of an anti-competitive agreement or concerted practice.² In connection with the recent OECD roundtable from October 2010 the Commission has also issued a paper on "Information exchange between competitors under competition law".³ It addressed the Commission's experience and viewpoint on competition law and policy concerns related to informal information sharing arrangements between competitors and to more formalised industry-wide information sharing systems through trade or business associations. In December 2010, the European Commission adopted a revised and extended guidance paper on the EU antitrust rules applicable to horizontal co-operation agreements ("Horizontal Guidelines").⁴ The Horizontal Guidelines include for the first time a section on information exchange. While the section on information exchange focuses on "information exchange" as opposed to

¹ By collusion this paper understands coordination (i.e., alignment) of companies' competitive behaviour that result in restrictive effects on competition.

² Case C-7/95 P, *John Deere*, [1998] ECR I-3111; Case C-89, 104, 114,116,117,125-129/85, *Wood Pulp*, [1993] ECR I-1307; Case C- 194/99 P, *Thyssen Stahl* [2003] ECR I-10821.

³ See [DAF/COMP\(2010\)37](#).

⁴ See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, O.J. C 11 of 14.1.2011.

"unilateral information disclosure", many of the concepts and the framework of analysis could also be applied, *mutatis mutandis*, to unilateral disclosure, provided such unilateral disclosure forms part of an agreement or a concerted practice under Article 101 TFEU.

The likely effects of an information exchange or disclosure on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case-specific factors. An assessment of restrictive effects on competition compares the likely effects of the information exchange/communication with the competitive situation that would prevail in the absence of that specific information exchange/communication. It must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation. Whether or not an exchange of information/disclosure will have restrictive effects on competition depends on both the economic conditions on the relevant markets (such as concentration, transparency, stability, complexity, symmetry etc.) and the characteristics of the information exchanged or disclosed (the strategic nature of its subject matter, its age, frequency, aggregation etc.), which may modify the relevant market environment towards one liable to coordination.⁵

Information exchanges can be found in very different contexts. They may be self-standing exchanges between competitors (the so-called pure information exchanges) or be part of another type of horizontal agreement (e.g., the parties to a production agreement share certain information on costs). The assessment of the latter type of information exchanges would normally be carried out in combination with an assessment of the respective horizontal co-operation agreement. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the explicitly agreed terms. These types of exchanges of information are normally assessed as part of the cartel. Finally, information exchange may be found to have the object of fixing prices or quantities, and in those situations would normally be considered and fined as cartels.

This February 2012 roundtable discussion focuses on unilateral disclosure of information with anti-competitive effects. It is distinct from a system of information exchange between competitors (by themselves or through a third party) as it does not necessarily have an immediately reciprocal character as the term "information exchange" indicates. This paper draws on the guidance set out in the Commission's Horizontal Guidelines and the case-law of the European Courts to stimulate this roundtable's discussion. However, nothing in this paper should be read as in any way qualifying these Guidelines or the case-law of the European Courts, or affecting the European Commission's position on any particular case.

2. The legal standard of review

Information disclosure can only be addressed under Article 101 TFEU if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings.⁶ In line with the case-law of the Court of Justice of the European Union ("the Court"), the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage of an agreement, practical cooperation between them is knowingly substituted for the risks of competition.⁷ The criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual plan to have been worked out, are more to be understood in the light of the concept

⁵ See paragraphs 77-94 the Horizontal Guidelines.

⁶ The existence of an agreement, a concerted practice or decision by an association of undertakings does not prejudice whether the agreement, concerted practice or decision by an association of undertakings gives rise to negative effects on competition or has the object of restricting competition.

⁷ Case 48/69 *ICI v. Commission (Dyestuffs)* [1972] ECR 619, para. 64. See also Case C-8/08, *T-Mobile Netherlands*, para. 26; Joined Cases C-89/85 and others, *Wood Pulp*, [1993] ECR 1307, para. 63.

inherent in the provisions of the Treaty on competition, according to which each company must determine independently the policy which it intends to adopt on the internal market and the conditions which it intends to offer to its customers.⁸

By its very nature, then, a concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants.⁹ The Court of Justice distinguishes concerted practices from parallel behaviour. Parallel behaviour is not in itself prohibited by Article 101(1) TFEU. Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.¹⁰ Parallel conduct, of itself, will only be held to establish the existence of a concerted practice in a scenario where concertation constitutes the only plausible explanation for the parallel conduct.¹¹

3. Unilateral information disclosure in itself

It is necessary to bear in mind that, although Article 101 TFEU prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors.¹²

In its judgment in the *Wood Pulp case*, the Court stated that the unilateral announcements of quarterly prices to customers at issue in that case constituted market behaviour which did not lessen “*each undertaking's uncertainty as to the future attitude of its competitors. At the time when each undertaking engages in such a behaviour, it cannot be sure of the future conduct of the others.*”¹³ It should be noted that in the *Wood Pulp case*, the announcements were made at the request of the customers and were regarded as a ceiling price below which the transaction price could always be renegotiated.

In other words, it has to be shown that the disclosure of information is capable of reducing uncertainties concerning the intended or contemplated conduct of the participating undertakings. As a unilateral information disclosure of one undertaking will normally not reduce the uncertainties of the behaviour of the other undertakings in the market, it can therefore not normally by itself (i.e. in the absence of acceptance or acknowledgement of the information by the other party) be seen as a concerted practice falling under Article 101 TFEU.¹⁴ On the other hand a seemingly unilateral announcement would not be unilateral if part of a concerted practice.

⁸ Case C 7/95 P, *John Deere* [1998] ECR II- 957,, para 86.

⁹ Case 48/69 *ICI v. Commission (Dyestuffs)* [1972] ECR 619, para. 65

¹⁰ Case 48/69 *ICI v. Commission (Dyestuffs)* [1972] ECR 619, para. 66.

¹¹ Case C-89, 104, 114,116,117,125-129/85, *Wood Pulp*, [1993] ECR I-1307, para. 71.Cases 29 & 30/83 *CRAM & Rheinzink* [1984] ECR 1679, para. 16.

¹² Case C-89, 104, 114,116,117,125-129/85, *Wood Pulp*, [1993] ECR I-1307, para. 71. Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73, *Suiker Unie and Others v Commission*, [1975] ECR 1663, para. 174.

¹³ Case C-89, 104, 114,116,117,125-129/85, *Wood Pulp*, [1993] ECR I-1307, para. 64.

¹⁴ Cf. Case C-8/08, *T-Mobile Netherlands*, [2009] ECR I-4529, paragraph 43: “*An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.*”

A unilateral information disclosure can constitute a concerted practice under Article 101(1) TFEU where there is reciprocity or acceptance. As stated by the General Court of the European Union ("General Court"); *“the concept of concerted practice does in fact imply the existence of reciprocal contacts [...]. That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it”*.¹⁵

Therefore, a truly unilateral disclosure of commercial information, of itself, – i.e. with no element of reciprocity or acceptance – would normally not be captured by the wording of Article 101(1) TFEU. However, it cannot be ruled out that there may be cases where what appear at first glance to unilateral disclosures of commercial information may, upon closer examination, constitute a concerted practice.

4. Unilateral announcements constituting a concerted practice in violation of Article 101(1) TFEU

According to the revised Horizontal Guidelines, a situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice.¹⁶ Such disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour.¹⁷ For example, mere attendance at a meeting where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices.¹⁸

Depending on the specific circumstances, even one unilateral disclosure of information, for example in a meeting might be seen as evidence of a concerted practice. In Case C-8/08, *T-Mobile Netherlands*, the Court of Justice stated that *“depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails.”*¹⁹

When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it can show "proof to the contrary".²⁰

¹⁵ Joined Cases T-25/95 and others, *Cimenteries CBR*, [2000] ECR II-491, paragraph 1849.

¹⁶ See Horizontal Guidelines, para. 62. See also Joined Cases T-25/95 and others, *Cimenteries*, [2000] ECR II-491, paragraph 1849.

¹⁷ See Opinion of Advocate General Kokott, Case C-8/08, *T-Mobile Netherlands*, [2009] ECR I-4529, para. 54.

¹⁸ See Joined Cases T-202/98 and others, *Tate & Lyle v Commission*, [2001] ECR II-2035, para. 5.

¹⁹ Case C-8/08, *T-Mobile Netherlands*, [2009] ECR I-4529, para. 59.

²⁰ See Case C-199/92 P, *Hüls*, [1999] ECR I-4287, para. 162; Case C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, para. 121. Horizontal Guidelines paragraph 62.

5. Private vs. public disclosure

The fact that information is disclosed in public decreases the likelihood of a collusive outcome producing negative effects on the market to the extent that non-coordinating companies, potential competitors, as well as customers may be able to constrain potential restrictive effects on competition.

Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, it generally does not constitute a concerted practice within the meaning of Article 101(1) TFEU unless it contained a direct or indirect invitation to collude.²¹ Generally, the disclosure of information to the public at large, for example through a press release, can often be seen as beneficial. Customers with complete knowledge of what is on offer may fully utilize their power of choice. Competition can be maximized.

However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination.²²

6. Conclusion

Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1) TFEU. However, depending on the facts underlying the case at hand, and providing an element of reciprocity or acceptance can be established, the possibility of finding a concerted practice cannot be excluded.

The Horizontal Guidelines includes for the first time a section on information exchange. While the section on information exchange focuses on "information exchange" as opposed to "unilateral information disclosure", many of the concepts and the framework of analysis could also be applied, *mutatis mutandis*, to unilateral disclosure, provided such unilateral disclosure forms part of an agreement or a concerted practice under Article 101 TFEU.

²¹ Horizontal Guidelines, para. 63.

²² Horizontal Guidelines, para. 63.

BULGARIA

1. General remarks

The concept of effective competition is based on the grounds that each undertaking on a relevant market should establish and perform its activity independently of its rivals on the market and should avoid coordinated behavior with that of the other market participants¹ having as its object or effect the prevention, restriction or distortion of competition. Effective competition can be achieved in markets where the risk of competition acts as an incentive to the market participants to deploy sound and intelligent market strategies. The risk of competition is related to the uncertainty an undertaking experiences about its competitors' key business decisions in terms of prices, volume of sales, discounts, future market intentions etc. Keeping sensitive market information of each market participant unknown between competitors is therefore a crucial point in maintaining the desired level of market uncertainty that would ensure the effective competition on a given market.

Indeed, the information exchange between competitors enhances the transparency on the market. It may be harmless to competition because in most of the cases keeping sensitive market information of each market participant unknown is a crucial point in maintaining the desired level of market uncertainty that would ensure the effective competition on a given market. Information exchange between competitors may be beneficial to the competitive structure of the market for example in markets with many sellers and buyers and to consumers. A focal point for competition authorities is to distinguish between anti and pro competitive information exchange. When the information exchange cannot be shown to be anti competitive by object, its effects are to be taken into account. This will be the case for oligopolistic markets where tacit collusion may be facilitated. In such a case account should be taken of the relevant market, the specific characteristics of the information exchange, its purpose, conditions of access to it, participants and type of information exchanged (public or confidential, aggregated or detailed, historic or current), periodicity of exchange.

It is therefore paramount to ensure the autonomy of the participants in the market and to guarantee their free economic initiative. Therefore, any disclosure of sensitive commercial information may eliminate the uncertainty about the behavior of the competitors which is inherent to the effective competition and, moreover, facilitate collusion between them. It is a constant practice of the Court of Justice of the European Union (CJEU) to remind that the exchange between competitors of information which can be used for building a cartel has to be considered as constituting *per se* prohibited concerted practice within the meaning of Article 101 of the Treaty on the Functioning of the European Union (TFEU)².

2. Bulgarian legislation and CPC enforcement practice

The provision of Article 15 (1) of the Bulgarian Law on Protection of Competition (LPC) contains a general prohibition of all types of agreements between undertakings, decisions by associations of undertakings, as well as concerted practices of two or more undertakings having as their object or effect the prevention, restriction or distortion of competition on the relevant market. The provision of Article 15

¹ CPC decision 1150/27.12.2007 – Sunflower and cooking oil.

² Case T-2/89 Petrofina SA v Commission [1991] ECR II-01087.

LPC similarly to that of Article 101 TFEU does not contain a specific prohibition of information exchange that restricts competition and therefore this notion is understood within the general prohibition of anticompetitive collusion between competitors. From a legal point of view, information exchange, as a phenomenon that facilitates collusion between competing firms can constitute a single infringement of Article 15 of the LPC/ Article 101 of the TFEU or constitute an element of a broader anticompetitive agreement for example a practice sustaining the functioning of a cartel. Information exchange can fall under Article 15 of the LPC and Article 101 of the TFEU if it establishes or is part of an agreement, a concerted practice or a decision of an association of undertakings.

The exchange of information is a form of horizontal collaboration between competitors, where they share directly or indirectly, unilaterally or bilaterally, past, actual or future information about their business decisions in terms of prices, volume of sales, discounts, and future market intentions etc. The disclosure of information could be performed unilaterally (when the undertaking announces commercial information to the other participants on the market) or multilaterally (by the establishment of a multilateral mechanism of information sharing of business information).

In 2008 the CPC investigated a few cases where public announcement of price increases for example has been made by representatives of associations of undertakings. These are the cases: Sunflower seeds and oil producers, Eggs and poultry meat producers, Raw milk and dairy products producers, Bread producers. In the first two cases sanctions has been imposed to the associations but as well as to members of their managing boards because they were found to agree on and to perform through the medium of the association an exchange of sensitive commercial information.

Taking into account that the CPC does not have practice with regard to unilateral disclosure of information with anticompetitive effects in similar cases the authority intends to follow the established practice of the European Commission and the European courts as well as the EU Guidelines on the application of Article 101 of the TFEU. According to the provisions of the Guidelines a situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour. When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.

The situation is different if a company makes an unilateral announcement, for example through a newspaper, which generally does not constitute a concerted practice within the meaning of Articles 15 of the LPC and Article 101 of the TFEU. However, depending on the facts in the specific case, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements could prove to be a strategy for reaching a common understanding about the terms of coordination.

The definition of concerted practice in the Bulgarian Law on Protection of Competition encompasses the coordinated action or omission of two or more undertakings. The concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement has been concluded, practical cooperation between them is knowingly substituted for the risks of competition. It precludes any direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question, taking into account the nature of the products or services offered, the size and number of the undertakings, and the volume of the said market. This does not deprive companies of the

right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. This precludes any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, thereby facilitating a collusive outcome on the market. Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion, if the data exchanged is strategic.

In the case of unilateral disclosure of business data concerning the commercial policy of the undertaking to the other participants on the relevant market, it can reduce the market uncertainty for the others and conduce to coordinated market behaviours. In general, price announcements in advance may be performed to inform the market operators about their future pricing intentions. But at the same time, the LPC does not prohibit unilateral conduct such as unilateral price announcements. In the absence of any practical experience on this issue the Bulgarian Commission on Protection on Competition would follow the practice of the ECJ. In *Dyestuffs* the ECJ held that the advanced price announcements rendered the market artificially transparent and eliminated all uncertainty between the operators as regards the rates of increases, future conduct and the risks inherent in an independent change of conduct. On the other hand in *Woodpulp* the ECJ held that price announcement in advance did not, *per se*, constitute an infringement of Art.101 of the TFEU.

Even if it cannot be established a clear cut agreement, a concerted practice arises in particular if only one company unilaterally discloses strategic information to a competitor and the competitor accepts this information without protest which conduce to distortion of competition. It is assumed that a company that receives e.g. strategic data from a competitor (in a meeting, by mail or electronically) accepts this information, unless it explicitly refuses to receive the data. On the other hand, there is no concerted practice, if the unilaterally disclosed information of a company is publicly known information.

In the case of unilateral disclosure of sensitive business information the first thing to consider is the existence or not of an effect on the market or to appraise the reaction of the other market participants. It is most likely for the unilateral disclosure of information to be followed by the other market players if the announcing undertaking holds an important market position. The absence of reaction of the other market players could on the one hand mean that the announcing undertaking is unable to conduce to any practical cooperation. If the announcement is followed by the other market players it still does not mean that the parallel behaviour may be qualified as a concerted practice. It could only serve to the Commission as an indication of a concerted practice. Like the ECJ held in *Dyestuffs*, parallel behaviour may not by itself be identified with concerted practice but might be strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions on the market, having regard to the nature of the product, the size and number of undertakings and the volume of the market. In order to prove the existence of a concerted practice and apply the competition prohibition rules it is necessary to look into the market characteristics, the position on the market of the price maker, the characteristics of the product and to look for other plausible explanations which conduce to higher prices. It is important whether the advance price communication corresponds to a legitimate business justification or the conduct might be considered to be an illegal exchange of information which amounts to indirect contact between the undertakings.

Otherwise it is important to note that the border between the existence of concerted practice and purely unilateral disclosure of information should be assessed on a case by case basis.

In 2011 the Commission on Protection of Competition adopted *Guidelines on information exchange between competitors*. The guidelines are designed to give more clarity to undertakings and associations of undertakings on the forms of information exchange and their possible anti competitive effects. Exchange of

information that can be qualified as sensitive or strategic commercial information is usually treated as a restriction of competition. This is the information related to prices, volumes of sales, marketing strategies, production quality, investments and technologies etc.

As far as unilateral disclosure of information is concerned the Guidelines foresee that when a company reveals to its competitors commercially sensitive information about its marketing policy, it reduces the strategic uncertainty for other market participants regarding the functioning of the competitive process and leads to coordinated behaviour. Moreover, the mere presence on a meeting where an undertaking unilaterally discloses business information to its competitors may be treated as a concerted practice. When an undertaking receives strategic data unilaterally disclosed by a competitor (whether at a meeting, by mail or electronically), there is a presumption that it has accepted the information and that it will change its market behaviour accordingly. The undertaking may rebut the presumption by proving its clear statement to competitor that it does not want to receive the disclosed information.

COLOMBIA

1. Introduction

The right to free enterprise is enshrined in Colombia's Constitution. Notwithstanding the foregoing, the exercise of this right is not absolute: it can be neither abusive nor arbitrary. For this reason, the principles of reasonableness and proportionality impose limits on free enterprise. Competition Law in Colombia stands as one of those limitations, so that people and entities in the exercise of their economic activities should follow its provisions.

The purpose at hand is the analysis of information exchanges between competitors, from the experience the Superintendence of Industry and Commerce has had in the performance of its functions.

Information exchanges between competitors are behaviors that are not presumed anticompetitive in first instance. This implies that their study and trial must be particular and specific, done in a case-by-case basis. Moreover, exchanges of information between competitors that occur in domestic markets can be direct or indirect. This classification distinguishes whether competitors are the agents who directly perform the exchange of information (direct) or whether there is a third party through whom the exchange is done (indirect).

The document is divided into seven sections including this introduction. The second section discusses the characteristic of information exchanges and their potential to infringe Competition Law. The third section classifies information exchanges. The fourth section presents the indirect exchange of information type and describes the actions undertaken by business associations and professional communities when exchanging data. The fifth section presents a summary of the most prominent investigations performed by this Office, related to exchanges of information between economic agents. The sixth section concludes the contribution.

2. The exchange of information

Information exchanges between competitors include any type of methods, mechanisms or systems used by competitors to share relevant commercial information about their businesses. These information movements do not always imply a violation to Competition Law. The legality of such exchanges and their harm to the conditions of a determined market must be assessed taking into account the characteristics and the specific content of the exchanged material: it is not the same - in the light of potential harm - if the information exchanged relates to future business strategies and prices, than if it contains features or preferences of the population of a city.

Furthermore, there are certain exchanges of information that can generate competitive effects, such as increases in efficiency or costs reductions. Also, as said before, some information exchanges do not necessarily constitute a breach to free and fair competition, as those in which the information exchanged serves to compare commercial practices between competitors.

The Superintendence's experience has led to the identification of two ways through which information exchanges usually occur. Firstly, we find exchanges that take place with the unique purpose of socializing information and are made independently of any additional factors. On the other hand, there are

information exchanges that occur in order to support agreements whose primary purposes are other than the exchange of information. This type of exchange is usually intended to support anticompetitive conducts.

In either case, the criteria indicated below must be taken into account when determining the threat or harm information exchanges can cause to competition.

2.1 *Types of exchanged information that could have negative effects on free and fair competition*

“Knowing the market’s key features (i.e.: demand, available production capacity, investment plans) facilitates the development of efficient and effective business strategies”. Therefore, if a type of information can be categorized as truly public, that is, accessible to the general public without costs, then it should be classified as beneficial for the market, since this information can help potential competitors to project their input and consumers to select among services and products.

On other hand, information that deals with prices, quantities, qualities of the good produced, or future business strategies and competitive variables can be classified as sensitive between competitors. These types of information are considered commercially sensitive because they could facilitate the implementation of price agreements, consciously parallel behaviors between competitors, or any other anticompetitive practice enshrined in Act 155 of 1959 and Decree 2153 of 1992.

However, special attention should be paid when such exchanges of sensitive information take place. For example, if the information corresponds to historical data its potential to foster anticompetitive conducts could be less compared to that of current or future data. Similarly, if the exchanged information corresponds to aggregated market variables it would have less possibility to infringe law if compared to specific data.

3. Direct and indirect exchange of information

Theory indicates information exchanges can be classified as direct or indirect, depending on whether these are directly performed by competing agents who circulate the information among themselves, or whether there is a third party - which may well be an information agency- like an association in charge of moving information among competitors.

Investigations carried out by the Superintendence of Industry and Commerce show that information exchanges that have been detected in domestic markets are of an indirect nature, especially those where the primary purpose is the exchange of information itself.

This being so, direct exchanges are normally used for carrying out anticompetitive agreements, to ensure their compliance, or to promote and encourage tacit or explicit collusion between competitors.

4. Indirect exchanges of information

In accordance with the results obtained from investigations conducted by the Superintendence, when we face such type of exchanges it is necessary to further analyze the role of business and professional associations in the exchange of information, given that these entities normally collaborate, develop or gloss this conduct.

Colombian Law contains enshrined in its Constitution the right to freedom of association. This is understood as the faculty of all individuals or corporations with ability to join and form groups, professional and business associations or organizations with legitimate targets, to achieve common goals and to protect the interests of their members.

Notwithstanding the foregoing, it is noteworthy that in those cases where associations -created under the right to associate - pursue economic projects, their actions also fall within the scope of the rights to free enterprise.

As said before, associations can potentially serve as forum or meeting places where members exchange information and discuss relevant matters to them all. As unionized members are usually competitors of a same market, their possibility of generating negative effects on competition by exchanging sensitive information is high.

Given this, it should be noted that Associations developing properly the activities for which they were created do not imply a concern for the Competition Authority. To properly develop guild activities means to: (1) meet to discuss common interest issues, (2) make decisions by involving the majority of the unionized members, (3) suggest those decisions and policies to the affiliates and, in general, (4) develop any action that embodies the will of the association and that is communicated to all its members.

Thus, one of the most important tasks carried out by an association has to do with the collection of information for studies, reports or similar work related to the development of industry it pertains to or with the calculations of statistics based on sensitive information provided by its members. If such documents do not present information at an aggregated level they can reveal elements that threaten free competition.

The situation described above constitutes an excess of the legitimate purposes of associations, since it would lead to their use as scenarios where partners / competitors exchange sensitive information. This situation would also encourage the creation of coordination mechanisms, thus fostering collusion between competitors. In addition, informal discussions on prices, quantities and future business strategies can lead to agreements that could transgress the rules of free competition. These possibilities do not imply that associations cannot propose studies or discussions on issues relevant to their members; it only means that associations should refrain from promoting commercial coordination among their affiliates.

Also, even when members report to their association information designated as sensitive, this could not be a threat to competition if the information is not forwarded to all members and confidentiality standards are utilized. Similarly, chances of violating Competition Law would be mitigated if the information is revealed at an aggregated level in the form of historical data.

Similarly, there are risks of sensitive information exchanges in the meetings held by such entities. In those meetings, the association should pay particular attention to the way in which information is socialized among its members. In this regard, it is recommended to keep public agendas of the issues discussed on the meetings held by the association. Also, a record of each meeting can be kept. Furthermore, data brought to the attention of members should correspond to historical data, since – as said before - information associated with current or future commercial variables could encourage anti-competitive conducts.

5. Relevant cases

5.1 *Sanctions against the Association of Colombian Advertising Companies (UCEP), the private national television channels CARACOL TV and RCN TV, and an audience measurement company IBOPE COLOMBIA.*

Through Resolution 23890 of 2011 the Superintendence of Industry and Commerce sanctioned UCEP, an association gathering the most important advertising agencies and media centers. The Research conducted by the Superintendence indicated that UCEP, CARACOL TV, RCN TV and IBOPE made a legal agreement to limit the access to information on television advertising to other TV channels and media. As a result of this agreement, an important study describing the preferences of Colombia's

television audience was restricted to third parties. On the one hand, the mentioned Research was not available – during at least 8 months – to international TV channels operating in Colombia. other agents participating in the market.

The Superintendence of Industry and Commerce found the conduct reprehensible as it considered the Study to be a necessary input for the decision-making process of enterprises operating in the television advertising market. In this particular case, UCEP, although an association in nature, was sanctioned as an agent of the market since it actively exercised the prohibited conduct and was a contracting party to the agreement in question.

5.2 *Sanction imposed to the Colombian Association of Integral Medicine (ACEMI) and to 14 health insurance companies for carrying out an anticompetitive agreement.*

On August 30, 2011, by Resolution No. 46111 the Superintendence of Industry and Commerce imposed a penalty on ACEMI for violating the prohibition contained in Article 4 of Decree 1663 of 1994, and to 14 health insurance companies pertaining to the Contributory Scheme,¹ union members of ACEMI. As the Superintendence could determine, the parties performed an anticompetitive agreement that affected Colombia's Health Care Market. The Agreement was active between 2007 and 2010, a three-year period during which the parties' legal representatives executed and tolerated the imputed anticompetitive conducts.

The Superintendence Research concluded that the 14 Health Insurance Companies, by using ACEMI as the backdrop and as active instigator of the deal, agreed in a concerted manner to (i) affect the supplied levels of health care services by defining a list of procedures that should be denied to patients. This agreement allowed the cease of competition among the 14 enterprises, (ii) Prevent the transparency of information required by the regulator to determine the UPC² (As it was verified by the Superintendence, ACEMI instructed its members on the content of the information to be submitted and, also, exchanges of sensitive information between competitors were performed within the Association) and, (iii) Create a mechanism to set the UPC and, therefore, define indirectly –without competing- the price of health insurance in Colombia

5.3 *Sanction imposed on the Risaralda Hospital Association for exercising and anticompetitive agreement.*

Under Resolution 41687 of 2011 the Superintendence of Industry and Commerce imposed sanctions on Risaralda Hospital Association for violating the prohibition contained in Article 4 of Decree 1663 of 1994, and on its legal representative for perpetrating and tolerating anticompetitive behaviors.

The Association took decisions that were intended and had the effect of restricting and distorting competition in the health care market. It participated both, as consultant and as representative of State Hospitals, in procurement negotiations between its unionized members and the health insurance companies³ of the state of Risaralda. The Superintendence of Industry and Commerce determined that Risaralda Hospital Association fixed procurement conditions and prices agreed upon standard for the

¹ Colombia's Health Care System is divided into two schemes: Contributory and Subsidized. People who are capable of paying for their medical care are part of the Contributory Scheme. In addition, poor and vulnerable populations pertain to the Subsidized Scheme where medical services are funded by the State.

² *Per capita payment for health care services* (Unidad de Pago por Capitación UPC): prepayment of a fixed amount per person, which entitles the payer to receive medical services for a predetermined period of time.

³ Pertaining to the Subsidized Scheme of Colombia's Health Care System.

services offered by its members. Consequently, Risaralda's health insurance companies contracted with the unionized hospitals under the same contractual conditions during the period from 2004 to 2008.

The Superintendence considered that the conduct described above exceeded what is permitted to a business association.

5.4 *Penalty imposed on the Colombian Association of Producers and Suppliers of Sugar Cane - PROCANA- and the Committee-Association of Sugar Cane Growers of Risaralda Mill AZUCARI.*

The Superintendence of Industry and Commerce, through Resolution 33141 of 2011 sanctioned PROCANA and AZUCARI (whose members, by that time, produced more than 20 of the supply of raw sugar cane) for establishing a joint trading system when negotiating with sugar cane mills. This system allowed PROCANA and AZUCARI to define the purchase price and the contractual conditions at which mills bought sugar cane for ethanol production (an oligopsonistic market) from their members. The Superintendence found that AZUCARI and PROCANA developed model contracts that affected competition and requested authority to act on behalf of their members.

The joint negotiation strategy began in 2005, after the General Assemblies of the Associations unanimously approved it, and was maintained at least until late 2008.

The Superintendence deemed that, since AZUCARI and PROCANA achieved legal representation as well as the participation of all their members in the joint trading system, they influenced the pricing policies of all their unionized sugar cane growers. Under the above, AZUCARI and PROCANA also transgressed the prohibition enshrined in section 2 of Article 48 of Decree 2153 of 1992.

As to the dosage of the fine, the Superintendence made distinction between the two associations considering that PROCANA conceived and promoted the joint trading system while AZUCARI lately applied it.

The Superintendence also took into account that the joint sugar cane growers' trading scheme sought to mitigate the effects of an existent purchase price agreement between sugar mills. In addition, it is worth mentioning that the Superintendence, under Resolution 6839 of 2010 and Resolution 42411 of 2010, punished sugar mills for this agreement.

5.5 *Sanction imposed on FENDIPETRÓLEO (National Division), FENDIPETRÓLEO (Boyacá Division), FENDIPETRÓLEO (Casanare Division), and Six (6) Gas Stations in Duitama.*

The Superintendence of Industry and Commerce found that FENDIPETRÓLEO (National Division), FENDIPETRÓLEO (Boyacá Division) and FENDIPETRÓLEO (Casanare Division) transgressed the provisions of Article 1 of Law 155 of 1959 and in paragraph 2 of Article 48 of Decree 2153 of 1992, by influencing 6 gas stations to raise their prices for regular gasoline and diesel. Furthermore, the gas stations were also influenced to desist from their intention of decreasing the prices of the mentioned products.

On the other side, the 6 gas stations operating in the city of Duitama violated the provisions of paragraph 1 of Article 47 of Decree 2153 of 1992, by carrying out an agreement to fix the prices of the gasoline and diesel sold at their sites. The Superintendence characterized the behavior as a "consciously parallel practice".

5.6 *Sanction imposed on the Association of Retail Distributors of Fuel and Oil Derivatives of the State of Nariño-ADICONAR*

The Superintendence of Industry and Commerce, by Resolution 25420 of 2002 - confirmed by Resolution 35523 of 2002 - sanctioned ADICONAR for influencing agents in the fuel distribution market (regulated market) to lower the prices of their products. Through this behavior, ADICONAR affected the autonomy of its members and their actions in the market, therefore distorting the conditions thereof.

During the course of the investigation it was established that from 1999 to 2001 ADICONAR, through newsletters, informed its members the prices they should charge for regular gasoline, premium gasoline and diesel.

5.7 *Sanction imposed on the Real Estate Association of Cali and Valle del Cauca, BIENES Y CAPITALES S.A. and INMOBILIARIAPACÍFICO LTDA.*

The Superintendence of Industry and Commerce, through Resolution 277600 of 1999, sanctioned the Real Estate Association of Cali and Valle del Cauca, and the enterprises BIENES Y CAPITALES S.A. and INMOBILIARIA PACÍFICO LTDA, for carrying out an arrangement or agreement to fix the prices of leasing and appraisal of real estate in the city of Cali and in the state of Valle del Cauca.

The Superintendence found that the statutes of the Association contained an obligation to fix the policies of the services provided by the unionized members. Among the fixed policies, the Association had the faculty to "regulate the fees its members (could) charge for marketing purposes, sale, management, leasing and real estate appraisals and other similar or related."

The Real Estate Association of Cali and Valle del Cauca made the agreement in the form of a concerted action, since the association's board set the policies and decided the fees that unionized members should charge for real estate services, leasing and valuation of property. The rates were established periodically by the Association's board and were taken as a guideline by its members.

5.8 *Sanction imposed on the National Association of Private Security Agencies-ANDEVIP.*

The Superintendence of Industry and Commerce, by Resolution 29302 of 2000 sanctioned ANDEVIP and its unionized private security services companies. The Superintendence's investigation found that the parties: (1) Agreed to fix minimum prices for several private security services, (2) Determined the services supplied by each of the unionized companies, (3) Fixed the contractual conditions under which the companies supplied services and, (4) Prohibited provision of free additional services or of discounts.

ANDEVIP was a meeting point where different security companies deliberated and decided to agree on rates and on other aspects identified above, for which they signed a "pact of honor".

It is pertinent to note that the sanctioned companies sought to justify their anticompetitive agreement arguing that it was "fair" and "essential for meeting the financial requirements that labor regulations impose on employers"

6. Conclusions

Not all exchanges of information involve a violation of Competition Law. Depending on the information's characteristics, some exchanges can generate efficiencies, reduce transaction costs, and diminish adverse selection.

Exchanges of information that constitute a violation to Competition Law are generally indirect, conducted with the aid of third parties who collect the information and forward it between the unionized members.

Direct anticompetitive information exchanges are usually part of systems designed to control and monitor agent's compliance to anticompetitive agreements.

In oligopolic markets, information exchanges do not have as much importance as in other market structures, since competitors' characteristics and their marketing strategies are easily identifiable.

Agreements directly or indirectly involving exchange of information with high level of detail and speed and individualization are restrictive not only in the framework of the agreement, but as restrictive conduct by itself.

PERU

According to Background Paper: “Information Exchanges Between Competitors Under Competition Law” issued by the OECD Competition Committee, the exchange of information among competitors could raise concerns whenever “it enables firms to tacitly collude to increase prices, share or allocate markets” and “makes it easier for co-operating firms to detect and therefore punish deviating firms”.¹

The Peruvian Competition Commission (Indecopi) assesses exchanges of information as part of collusive practices to fix prices, reduce output or set other conditions, but our Competition Act does not consider unilateral exchanges of information as prohibited practices itself, as they do not fit on the legal description as “agreements, decisions, recommendations or concerted practices”. However, we have had the opportunity to examine unilateral declarations as traces that could eventually lead to findings of collusive practices in the form of recommendations or decisions.

For instance, in mid-2008 the Competition Commission initiated an administrative procedure against a transport association. The investigation was triggered by the declarations of the president of the association regarding an increase in the prices of passenger transportation.

The Competition Commission considered that, because of the specificity of the declarations regarding the date and amount of the price increase, these announcements were aimed to persuade the transport firms to raise their prices. Additionally, as the association president was the person who made those statements, the Competition Commission considered that he had enough influence over the associated transporters to achieve its anticompetitive goal. Accordingly, a collusive practice in the form of recommendations to increase the prices on passenger transportation was proved and therefore the association and its president were fined.

In late 2008 the chairman of a dairy companies association, discussing a government proposal to increase electricity prices, stated that such increase would result in an increase of milk prices, among other foodstuffs. The Competition Commission initiated an administrative procedure in order to determine whether such declarations could qualify as a collusive practice in the form of recommendations or decisions aimed to increase milk prices.

As a result, the chairman and the association recognized that, even not deliberately, the statements could have produced negative effects in the market. Therefore, they signed a commitment by which they agreed to cease its conduct. Also, they agreed to prepare and distribute a document for all members of the Peruvian major industrial association, explaining the practices that may constitute anticompetitive behavior, and to hold, in conjunction with the Competition Commission an event dedicated to explain to members of industry the scope of Peruvian Competition Act.

¹ Information Exchanges Between Competitors Under Competition Law, par. 2.

ROMANIA

Romanian Competition Law no. 21/1996 prohibits any agreements between undertakings or associations of undertakings, any concerted practices, or decisions by the associations which have as an object or as an effect the restriction, prevention or distortion of the competition on the Romanian market or on a part of it.

An information exchange including price signalling in some circumstances can only fall under article 5(1) (and article 101(1) of TFUE insofar as it may affect trade between Member States) if it can be shown that it establishes or is part of an agreement, a concerted practice or a decision of an association of undertakings.

Therefore, concerted practices that fall short of an agreement can be captured and sanctioned by Romanian Competition Council (*hereinafter referred as RCC*). An essential condition for article 5(1) of the Competition Law (and article 101(1) of TFUE insofar as it may affect trade between Member States) to apply is the existence of some form of co-ordination where firms, without concluding an agreement or plan of action, knowingly substitute practical co-operation between them for the risk of competition. Absent this requirement, the Romania Supreme Court similarly to European Court of Justice (ECJ)¹ established that this provision could simply not apply.

The most illustrative expression of this principle in this respect remains the judgement of the Supreme Court of Justice in Romania in the Carpatcement cement case where the Court made it clear by referring to the ECJ verdict in the Woodpulp case,² that in an oligopolistic market, the competitors can adapt themselves intelligently to existing and anticipated conduct of their competitors and it is upon the competition authority the burden to prove that there is no alternative explanation for the conduct found, given that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. In other words, parallel behaviour by itself does not constitute a concerted practice under Article 5(1) of the Competition Law and that such a parallelism can be regarded as proving the existence of an agreement or a concerted practice only in cases where concertation, and not the oligopolistic structure of the market, constitutes the only plausible explanation for such parallel behaviour. Therefore, an anti-competitive parallel behaviour (for instance, high prices) not only constitutes a conduct perfectly compatible with article 5 of the Competition Law and article 101 of the Treaty insofar as it may affect trade between Member States but also provides for a defence against any claims of concerted practices based on parallel behaviour on the market.

This landmark decision set a high standard of proof for horizontal agreements in the absence of direct evidence in Romania. At the same time, it clarified the probative value of an internal document describing the future commercial behaviour of the main competitors in the context of parallel behaviour on an oligopolistic market.³ More specifically, by stressing out the plausible alternative explanations for the

¹ *ICI v Commission* [1972] ECR 619.

² See case C-89/95, C-104//85, C-114/85, C-116/85, C-117/85, and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and Others v. Commission*, (1993) I-1307.

³ For more details about the Carpatcement cement case, see Romania's submission for the 2010 October Roundtable on *Information exchanges between competitors under competition law*.

handwritten note and on the uncertainty of the circumstances wherein it was conceived, the Supreme Court concluded on the standard to be met by a document in order to prove the concurrence of wills, namely “*it has to prove beyond any reasonable doubt the involvement in an agreement either express or tacit or to a concerted practice of two or more companies*”.

More recently, in A&A vs. Romanian Competition Council, the judicial courts validated RCC’s main findings and standard of proof with respect to the inference of collusion from the firms’ behavior. In this file, the vertical agreement at hand had as object the allotment of diabetic products portfolio between Eli Lilly’s distributors especially for the national bid organized by the Ministry of Health in 2003 (the national tender counted for approximately 99 per cent of the national market for this product). The functional rules of the national bid set up a system imposing to all participants the submission of an authorization from the producers. Thus, every producer exercised its right to authorize its distributors to take part in the national bid and, on the other hand, to authorize the products granted to its distributors for the tender in question. As far as the Eli Lilly’s products are concerned, the distributors came forward to the tender only with one product, albeit having had the possibility to compete one against each other by participating to all three tenders concerning the insulin products produced by Eli Lilly.

Although prior to the auction, all three distributors had distributed several product ranges from Eli Lilly, when required to provide explanations on the reasons for the decision to participate in the auction with only one product, they gave contradictory reasons: A&A initially mentioned that Eli Lilly allocated to it a part of the products, then it argued that it was its own decision; Relad stated that it was its own decision, while Mediplus declared that it did not have national experience in the distribution of insulin. The distributors also invoked technical and logistic capacity issues.

Although the auction rules imposed the reiteration of the entire procedure in case of sole participation, at each distributor’s request, which produced a confirmation from Eli Lilly as being the sole distributor for each product tendered (Humulin for A&A, Humalog for Relad and actos for Medicare), the bid was finalized by direct negotiation.

Against this background, the competition authority issued a decision⁴ finding an infringement of competition law and sanctioned the pharmaceutical producer and three distributors for participation into a market-sharing cartel active between April 2003 and May 2005 with fines in a total amount of Euro 22.7 million.

Reviewing the Competition Council’s decision, the judicial courts validated its main findings, particularly on the reasoning of the existence of the meeting of minds of the participants. Indeed, the meeting of minds of the participants to the agreement was proved based on a body of unilateral documents (the request of authorization of each distributor in relation to only one product, different products submitted to the producer and the confirmation issued by the producer stating for each distributor as being sole distributor for one product), an internal document of Eli Lilly laying down the possible scenarios for the national tender and indicating the most desirable option (“split the market...”) followed by the subsequent behavior on the market of the distributors; another internal document of Relad, drawn up prior to all this events, designing its plan to distribute all the products of Eli Lilly was withheld as proof and corroborated with the rest of evidence.

In its defense, A&A argued it was a unilateral decision of the producer to authorize each of the distributors for a different type of product. However, due to the fact that the products could only have been offered in the auctions through the distributors according to the eligibility conditions, the Court retained that the decision could not be considered unilateral as long as it could not have been implemented without

⁴ Decision no.15/2008.

the distributors' agreement. In other words, Eli Lilly could not have unilaterally implemented its preferred scenario, and the distributors did not oppose to it, but applied it in practice.

The court held also that the apparent unilateral communications must be interpreted in the context of the continuous and traditional trade relationships between the parties.

What's peculiar in this case is that RCC had to fine Eli Lilly during the investigation because it has not provided to the RCC all the pages of the respective document from the beginning, but only after another request.

This landmark judgement is relevant particularly in consideration of the fact that vertical agreements cannot be defended arguing unilateral conduct of the producers when it can be proven that the distributors tacitly agreed and the producer could not have implemented the conduct by itself, without cooperation from the distributors.

This judgment is also important for the assessment of the probative value of various type of evidence and by indicating a holistic approach in corroborating the body of evidence.

It seems therefore that Romanian case law has evolved to create a presumption of a causal connection between the disclosure of unilateral information and the parties' subsequent conduct in the market – such that the recipient of the information is presumed to take account of the information, where they remain active in the market.

That means that a concerted practice requires an element of reciprocity, in that contact between competitors must be more than merely passive. This goes hand in hand with ECJ's judgement in *Ciminteries v Commission* [2000] ECR II-491 at [1849] i.e. a concerted practice may be found to exist where a competitor makes a statement of intention to a competitor that eliminates, or substantially reduces, uncertainty as to its conduct,⁵ *provided that* the recipient accepts the information thus provided without protest.⁶ Hence, the prohibition on concerted practices under Romanian competition law does not prohibit conduct that is entirely unilateral. The recipient is required to prove otherwise to avoid liability. In order to establish that the disclosure was entirely unilateral, or to avoid being a party to a prohibited concerted practice, a competitor must publicly distance itself from the conduct, or act in a manner contrary to the information provided.

⁵ *Ciminteries v Commission* [2000] ECR II-491.

⁶ *Ciminteries v Commission* [2000] ECR II-491, [1849], [1852].

RUSSIAN FEDERATION

1. Legal standard for analysis and assessment

«Naked» cartels are illegal both in the OECD member-states and Russia. The notion “cartel” was introduced into the Russian legislation by “the third antimonopoly package” of amendments¹ (hereinafter – “the third antimonopoly package”). Before the adoption of “the Third Antimonopoly Package” was adopted the norm that prohibited horizontal and vertical agreements had been in effect.

¹ January 6 – 7, 2012 the Federal Law «On Introduction of Amendments to the Federal Law “On Protection of Competition” and certain legislative acts of the Russian Federation” and the Federal Law “On Introduction of Amendments to the Code of Administrative Violations of the Russian Federation” came into force. They constitute “the third antimonopoly package”.

Legal provisions

Part 1 Article 11 of the Federal Law of 26.07.2006 №135-FZ “On Protection of Competition” (hereinafter “Law on Protection of Competition”) defines the aforementioned notion as follows:

“Agreements between competing economic entities – that is economic entities that sell goods on the same market, shall be recognized as cartels and shall be prohibited if such agreements lead or can lead to:

1. *fixing or maintaining prices (tariffs), discounts, markups (surcharges) and (or) additions to prices;*
2. *increasing, reducing or maintaining prices in course of competitive bidding;*
3. *dividing the goods market according to a geographic principle, quantity of sales or purchases of the goods, the mix of goods or a composition of buyers or sellers (customers);*
4. *reducing or terminating production of the goods;*
5. *refusing to conclude contracts with particular sellers or buyers (customers)”.*

Moreover, according to the “the third antimonopoly package” “agreements” and “concerted practices” are two different notions that are provided for by different Articles of the Law on Protection of Competition.

According to Point 18 Article 4 of the Law on Protection of Competition, “agreement” is “a written understanding contained in a document or several documents, as well as verbal understanding”.

According to Article 8 of the Law on Protection of Competition:

*“1. **Concerted practices** of economic entities are actions of economic entities on a goods market that are exercised in the absence of an agreement and meet the totality of the following conditions:*

1. *the outcome of such actions meets the interests of each of the above economic entities;*
2. *actions are known in advance to each of participating economic entities due to a public statement made by one of them about exercising such actions;*
3. *actions of each of the above economic entities are caused by actions of other economic entities, participating in concerted actions, and are not due to the circumstances equally affecting all economic entities on the relevant goods market. Such circumstances, in particular, can be changing regulated tariffs, changing prices for the raw materials used to produce goods, changing prices for the goods on the global goods markets, considerable changing of the demand for the goods within no less than one year or within the period of existence of the relevant market if less than one year.”*

Before the “The Third Antimonopoly Package” was adopted, notions “agreements” and “concerted practices” were included in the same Article of the Law on Protection of Competition and caused misunderstanding and confusion both when the proceedings were initiated and when the courts considered the cases. At present when legal categories are defined and used in different Articles, neither misunderstanding, nor confusion will be caused, since the agreement *per se* is mutual agreement between two economic entities, which invokes *inter alia* criminal liability, in case it is a cartel, while concerted practices are actions that are not associated with agreements and will never invoke criminal liability.

Concerted practices have certain external characteristics, one of which is a public announcement by a person on its planned behavior and subsequent behavior of other persons who have heard the aforementioned public announcement and considered that such a public behavior will be beneficial. The fact that they make such a decision and start to act accordingly, do not come to agreement with their competitors, but nevertheless the consequences, associated with restriction of competition for the market is a ground for prosecution and punishment.

Actions taken by economic entities can be recognized as concerted practices, if the entities had been informed in advance about such actions in connection with public announcement made by one of the entities intentions to behave in a certain planned manner.

Public announcement is an announcement to the public by an official of the economic entity in question concerning conditions of circulation of the commodity in future, first and foremost, concerning planned (future) price for the commodity. Such an announcement can be made during the conference, in mass media, Internet or *via* other means of communication that allow to broadcast the message to unidentified audience. In case public announcement was not made, actions cannot be qualified as concerted practices, which significantly narrows the scope of application of the aforementioned norm of the Law on Protection of Competition.

Moreover, should persons act in a manner that does not enable them to eliminate competition on the respective commodity market and that is covered by Article 13 of the Law on Protection of Competition, such actions are qualified as concerted practices. Thus, the scope of the Article's application which covers concerted practices, becomes significantly smaller (the Article that prohibits anticompetitive agreements shall be applied more effectively).

For an economic entity dominating on the market the announced intention to stop producing the commodity may be a violation. However, if the production of the commodity is associated with release of new commodities, such an action does not violate the antimonopoly legislation.

Should the economic entity deliberately decide not to compete, it violates the antimonopoly legislation. In this case the antimonopoly body will consider only the public announcement of the market participant.

The behavior of economic entity that follows the market leader (without previous public announcement) will not be regulated by a new definition of concerted practices.

The minimum term of supervision over the commodities market during market analysis (definition of the market dynamics) is one year. This period was set forth since it is necessary to decide on the issue whether there was violation of the antimonopoly legislation or not. It allows to show dynamics of season changes in prices within different periods and to exclude mistakes. This period is applied not to qualify the violation, but rather to assess the commodity market, on which the price has changed.

1.1 Differences between Article 11 and Article 11¹ of the law Protection of Competition

Prohibition of anticompetitive agreements and concerted practices are regulated by different Articles of the Law on Protection of Competition:

- Article 11 (prohibition of competition restricting agreements by the economic entities) and
- Article 11¹ (prohibition of concerted practices restricting competition by economic entities).

Difference between Article 11 and Article 11¹ is that Article 11¹ sets forth anticompetitive consequences for the market as a result of concerted practices by economic entities holding a share of more than 20 % on the commodity market. Thus, if concerted practices do not cause such consequences, then there is no violation.

The Antimonopoly Service applies a softer approach, conducts analysis of the situation resulted from such concerted practices or in connection with current economic consequences. The decision is made only on the ground of the conducted analysis. It means that in accordance with Article 13 of the Federal Law on Protection of Competition officially prohibited concerted practices might be found acceptable.

Violation is an action taken by a competitor to fix prices for the commodity which are similar to the ones of the economic entity that has already announced the price increase for the same commodity.

In case the prices for the commodity are shown publicly (e.g. prices for petroleum on the filling stations), there is no announcement and competitor's actions directed at changing the prices are simultaneous might be a sign of violation of the antimonopoly legislation only if there is an agreement between the economic entities in question. Should there be no agreement; the actions in question do not constitute any violation.

“The third antimonopoly package” entitles the FAS Russia to forward admonitions to the market participants, in case the participant is engaged into unilateral disclosure of information to the market. Furthermore, the admonition *per se* is not a sign that such a behavior might lead to consequences associated with restriction of competition.

If a person considers that it is not involved into unilateral disclosure of information, then no one can convince of the reverse. However, if these consequences occurred, the FAS Russia will be empowered to apply the measures of antimonopoly regulation. If the behavior in question does not cause restriction of competition, non-execution of the notification (warning) in this case is not a ground to prosecute the company.

2. Types of announcements with potential anticompetitive effects

Certain types of contractual terms and conditions may be qualified as announcements, if they can significantly affect the consumer, especially if this consumer is an industrial one, and unfavorable conditions significantly restrict competition and affect other commodities markets. More often this phenomenon is connected with price parameters, when prices' increase, prices' fixation, maintenance of prices on certain level through available markets mechanisms are announced.

The FAS Russia shares the opinion that these are the most typical situations associated with conditions that can be announced and that can cause restriction of competition, *i.e.* prices for commodities or conditions associated with acquisition of the commodity in question. Conditions may vary; they may restrict significantly the purchase ability of consumers, cause inconveniences or out them in unfavorable position.

3. Challenges

The challenges are the following:

- necessity of active monitoring of the Internet and other mass media so as to find announcements, concerning prices or conditions for the commodity circulation in future, made to the public by officials of economic entities in question;
- advocacy of a new legal norm;
- collection of evidence to define whether there is violation of the antimonopoly legislation in a form of announcements, concerning prices or conditions for the commodity circulation in future, made to the public made by officials of economic entities.

4. Strategic guidelines

At present the FAS Russia does not dispose of the cases of unilateral disclosure of information with anticompetitive effects. The FAS Russia will be able to summarize the practice on this issue in a one- or two-year period.

CHINESE TAIPEI

1. Introduction

This paper will elaborate on Chinese Taipei's legal standard of review of concerted actions, the types of announcements with possible anticompetitive effects, enforcement cases, and policy guidance.

2. The legal standard of review

Article 14 of the Fair Trade Act prohibits enterprises from engaging in concerted actions. The term "concerted action (or cartel)," as defined in Article 7 of the Fair Trade Act, refers to the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading territory with respect to such goods and services, etc., and thereby restrict each other's business activities. It further qualifies "concerted action" as being limited to a horizontal concerted action at the same production and/or marketing stage which would affect the market function of production, the trade in goods or the supply of and demand for services. In addition, the term "any other form of mutual understanding", as referred to here, means other than by contract or agreement, a meeting of minds whether legally binding or not which would, in effect, lead to joint actions.

To collect evidence, in addition to "contracts" or "agreements," a mutual understanding can also be reached by "other forms" which would in effect lead to joint actions through "a meeting of minds." The so-called "any other form of mutual understanding" includes gentlemen's agreements and concordant action. A gentlemen's agreement refers to an agreement that only has moral, economic or societal binding force. Coordinated actions (tacit understandings) refer to cases where the parties consciously and knowingly enter into communication and expression of intent but do not mean to be legally bound.

When competing enterprises in question have mutual understandings to jointly determine the prices of products or services, limit the terms of quantities, restrict the trading counterparts or trading territories with respect to such goods and services, and thereby restrict each other's business activities, such a concerted action is sufficient to affect the market functions, hence violating Article 14 of the Fair Trade Act prohibiting concerted actions. In other words, in addition to a contract or agreement, regulations against concerted actions in the Fair Trade Act also cover other forms of mutual understanding which would in effect lead to joint actions through a meeting of minds. To prove a coordinated action is illegal, if a mutual understanding seems to be the only rational explanation for such coordinated actions, the Fair Trade Commission (hereinafter the "FTC") could infer the existence of a meeting of minds among competitors from circumstantial evidence.

3. Types of announcements with possible anti-competitive effects

Cheap talk: Objectively, before enterprises achieve mutual understanding, there is not necessarily a pre-established plan. They may apply direct or indirect approaches, such as a public announcement of market information, mutually indirect conveyance of business strategies, or direct exchange of general business information. However, purely social get-togethers and contact between enterprises are not enough to prove if the appearance of such coordinated conduct is most likely to deem the existence of mutual

understandings. Hence, to determine whether “cheap talk” can facilitate collusion, the FTC’s decisions depend on the purpose of the cheap talk.

Price signaling: The FTC uses evidence in determining if a concerted action exists, not only to apply direct evidence of such a contract or an agreement between enterprises as the judgment standard, but also to apply circumstantial evidence. If circumstantial evidence is adopted and proven valid, even if it can only substantiate other facts (indirect facts), such other facts can serve by rules of experience and logic as the basis to infer the act to be unlawful. In practice, the FTC has handled a case involving two leading domestic gasoline suppliers. The initiating party announced its decision to change prices in the media so as to detect the reaction of its rival or achieve mutual understandings by means of exchanging price information. As a consequence, the two enterprises here did not just reach the same price levels, but rather, they communicated their intent in advance and their actions led to simultaneous moves at the same time. Such a price announcement constituted “other forms of mutual understanding” (detailed information about the case is presented later in this paper).

Whenever the FTC is unable to obtain direct concrete evidence of a cartel agreement, it makes every attempt to acquire indirect evidence to substantiate the notion of a “mutual understanding of a cartel” among competitors. Such evidence is based on the FTC’s observations of competitors with the same or similar conduct which might substantiate a “meeting of minds”. During its investigations, the FTC further makes inferences from its observations of the “inducement, economic benefits, the timing of such similar action, the possibility of substituting different actions, the frequency and the duration of the acts which are deemed harmful to market order, the concentration and concordant degree of the conduct, etc.” Furthermore, such testimony has been made by respondents when they have presented themselves before the FTC. To be sure, the FTC has applied such circumstantial evidence in the past to support its decisions against some accused parties

4. Enforcement cases

4.1. Case 1: Petroleum products market

China Petroleum Corporation (hereinafter the “CPC”) and Formosa Petroleum Corporation (hereinafter the “FPCC”) are the two largest suppliers in the domestic wholesale and retail markets for gasoline and diesel fuel. The price adjustments of the two companies were in the past characterized by the following patterns and were deemed to constitute an unlawful concerted action:

- The initiating party would announce a price adjustment decision (including the time and range of the price adjustment) through the media in advance, and such an announcement was usually made around half a day or a few hours before the price adjustment took effect.
- Whenever one of them made such an announcement, its rival would normally immediately announce to follow, and then the wholesale prices of the two competitors would be adjusted within the same range at the same time.
- If the rival would not follow or announce to adjust price by different margins, the initiating party would immediately withdraw or amend its earlier announcement.

The FTC contended that CPC and FPCC publicly exchanged views and communicated their intent in advance and their actions led to simultaneous moves (simultaneously adjusted wholesale prices within the same range on 19 occasions from April 2002 to September 2004), and in fact constituted a “meeting of minds”; as such, it was deemed a prohibited “concerted action.” When its rival observed and chose whether to follow or not based on its ability and incentive, the initiating party could thus maintain its prices

or withdraw from the price war or readjust its pricing strategy to maximize the profits of both sides. Meanwhile, CPC and FPCC used facilitating practices such as issuing press notices and advance price announcements to decrease competition. On the one hand, the initiating party released to the rival the information of imminent price adjustment. On the other hand, the initiating party forced the rival to follow its decision by announcing the withdrawal of its price increase decision or reduction of the price margins. Transparency of the prices helped facilitate collusion.

Again, according to the decision of the Supreme Administrative Court in 2009, “when it is difficult to obtain substantial evidence of concerted actions, the competition authorities shall adopt ‘reasonable presumption,’ taking as an example the majority of enterprises in the same market increasing prices simultaneously within the same range at the same time. While the price rises were not justified by supply and demand factors, it could express reasonable doubt based on the indirect evidence and use such evidence to infer the existence of a ‘meeting of minds.’ To overturn the inference, it needed to require the subjects of conduct to provide justifiable reasons to prove the determination of the price adjustments solely based on the demand and supply factors.”

In this case, the Supreme Administrative Court also upheld the FTC’s decision that the two gasoline suppliers simultaneously adjusted wholesale prices within the same range and their actions lead to uniform wholesale prices, which the majority of gas station operators typically followed to adjust their price lists within the same range at the same time and thus restricted their price competition and in the end affected the interests of consumers. In other words, the advance price announcements had substantially lessened competition, both in the horizontal and vertical competition dimension. In addition, the range of the price decreases as a consequence of the concerted actions could result in less reduction than based on the normal market function and could thus restrict gas station operators’ retail price competition and impact the interests of consumers in the same way. Although CPC and FPCC are the only two gasoline suppliers in Chinese Taipei, the domestic petroleum products market has been liberalized to allow free competition. As potential competitors do exist, concerted price decreases can still lessen the market competition. Therefore, it is unjustifiable to deem that such price decreases are not harmful to market competition.

4.2. Case 2: Fresh milk market

The FTC recently handled a case where the three largest dairy companies, namely, Wei Chuan Corp., Uni-President Enterprises, and Kuangchuan Corp., jointly and consistently increased the recommended retail price of fresh milk in violation of Article 14 of the Fair Trade Act which prohibits the concerted actions. The detailed information about this case which has been illustrated in a paper has been submitted to the 2012 Global Forum on Competition as an issue of discussion at the Roundtable on Competition and Commodity Price Volatility.

The FTC was of the opinion that the public disclosure of any information related to the prices of fresh milk products helped sustain the concerted actions. It was impossible for the market information released through various media between August 15 and October 9 in 2011, whether it came from the enterprises in question or from the media, to not sustain the concerted practice. On September 6, the media first disclosed “the price of fresh milk is to go up next month.” This was followed by “the price of fresh milk is to rise by 12%” on September 23, and “the price of fresh milk is to increase by over NT\$6 per liter from next month” on September 26. A comparison between the prices before/after announcements showed that the enterprise had no justification for the price rise. In an oligopolistic market, the enterprises need not engage in naked cartels. Winking an eye or a meeting of the minds is already enough to enhance a tacit understanding and such information can also lower the risk of the competitors detecting the post-price-rise market beforehand or deciding not to follow, which helped sustain the tacit collusion.

5. Policy guidance

In 2011, the FTC advised enterprises to establish an “Anti-trust Code of Conduct for Enterprises”, which had to include actions and non-actions to guide enterprises to comply with the competition law when engaging in business practices and thus reduce the risk of violations. The Code of Conduct provides more details to enterprises that have had to avoid several forms of anti-competitive behavior such as the following:

1. Say no and leave immediately when a competitor intends to discuss sensitive market information, such as prices, quantities, capacity utilization rates, trading counterparts, and so forth.
2. Maintain a high level of alertness to the contents of documents and letters, emails and text messages between businesses.
3. Obtain competitors’ price information that is limited to that already made public or statistics of past general information compiled by trade associations.
4. Keep track of the questions from industrial analysts or market survey institutions.
5. Avoid discussion with friends from competing companies about business information and the use of personal email or telephone for business correspondence.
6. Do not discuss with competitors sensitive competition-related information by email, telephone, text messages, or at meetings or trade associations meetings.
7. Do not use public announcements or news releases or convene meetings in the name of trade associations to solicit competitors to cooperate in adjusting prices or productivity or create opportunities for competitors to discuss sensitive competition-related information.

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 Unilateral Disclosure of Information with Anticompetitive Effects.

1. Introduction

The antitrust community has long struggled with the question of whether, and if so how, to police unilateral conduct that may facilitate concerted action among competitors. Whereas an actual collusive agreement presents a clear enforcement response, strategic activity by individual firms in interdependent, oligopolistic markets presents a difficult and uncertain enforcement issue. Recent actions by several prominent enforcement agencies demonstrate an increasing propensity to challenge unilateral disclosures, based on the fear that such conduct may facilitate anticompetitive concerted activity. This trend makes the Committee’s consideration of unilateral disclosures especially appropriate at this time.

Business entities operate both as sellers and purchasers of goods to and from other business entities. When competing firms limit competition between them, either tacitly or explicitly, the associated anticompetitive harm will extend to business entities who are both immediate and indirect purchasers. Thus, the business community shares the competition authorities’ interest in ensuring an effective response to harmful concerted conduct among competitors.

Aside from cartel activity—explicit horizontal agreements to restrict competition that lack any enhancement of productivity or consumer welfare—the effects that disclosures of information may have on competition are often difficult to predict. Information sharing may have substantial pro-competitive benefits such as reducing informational asymmetries, increasing efficiency, and enhancing customer choice. As we discussed in our October 2010 paper on Information Exchanges Between Competitors, enforcement agencies should not overlook these pro-competitive benefits in formulating a policy regarding information exchanges.¹

Enforcement based on unilateral disclosures requires careful consideration by competition authorities. While many information exchanges are implemented through a formal arrangement among multiple parties—for example, a trade association statistical programme—a unilateral disclosure represents behavior of a single firm. While it may be feared that certain unilateral disclosures “signal” a desired course of action to competing firms in the industry and therefore appear to resemble more obvious forms of overt collusion, unilateral disclosures, like explicit information-sharing arrangements, may also serve pro-competitive purposes and are even less likely than information exchanges to result in concerted action.

Because of these inherent ambiguities, BIAC believes that unilateral disclosures should not be considered inherently suspect, much less illegal, absent proof of actual or likely anti-competitive effects. Indeed, since unilateral disclosures are unlikely to produce anticompetitive effects in the majority of instances, it is essential to avoid excessive enforcement action or inflated tendencies to investigate,

¹ See October 2010 BIAC Discussion Paper on roundtable topic, Information Exchange Between Competitors Under Competition Law.

condemn or penalize such conduct. Otherwise the incentives for firms to compete aggressively, totally independent of any coordination with their competitors, could be chilled, thereby rendering markets less rather than more competitive.

The trend in recent competition law developments relating to unilateral disclosures tends toward overemphasizing the potential competitive harm of unilateral disclosures. BIAC believes that convergence among the agencies in application of new rules and policies relating to unilateral disclosures, and the clarification of existing rules, is needed.

BIAC is particularly concerned with the agencies' treatment of unilateral disclosures that are public. While there is general consensus that, compared to private disclosures, public disclosures are less likely to facilitate concerted action and more likely to have a pro-competitive justification, there is considerable inconsistency in enforcement relating to public disclosures among the agencies.² In BIAC's view, public unilateral disclosures should be considered presumptively legal, not only on competition grounds but also because, for many businesses, certain public disclosures that have a potential bearing on competition may actually be *required* by other areas of law. Thus, active competition enforcement against public disclosures may create a paradox for businesses, where certain disclosures that are required by one set of laws could form the basis for liability under another.

2. Unilateral disclosures provoke difficult enforcement issues

As discussed in our October 2010 discussion paper, a unilateral disclosure is broadly grouped under competition law as a type of information exchange among competitors. In some jurisdictions, information exchanges can be used as evidence to infer the existence of a cartel or considered problematic on a standalone basis.³ In the standalone context, unilateral disclosures present a unique enforcement question because the disclosures are not agreements themselves and, thus, must be solely analyzed based on their potential to facilitate tacit concerted activity. Indeed, a unilateral disclosure is not an "exchange" in any well-founded sense.

A threshold issue to consider in evaluating the competitive effects of unilateral disclosures is whether the alleged conduct actually facilitates concerted action or, alternatively, whether the alleged conduct is merely rational, profit-maximizing behaviour of independent entities in a market where individual firms may exhibit a certain degree of interdependence. Even where it may be thought that such interdependence results in supracompetitive prices or other anticompetitive impact, enforcement agencies and scholars uniformly agree that the latter (interdependent profit-maximizing behaviour) cannot and should not be policed.⁴ Thus, any enforcement action against unilateral disclosures on a standalone basis must, at a minimum, establish a causal relationship between the disclosure and competitive harm.

² See *infra*.

³ See *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 368-69 (3d Cir. 2004).

⁴ See *Ethyl v. FTC*, 729 F.2d 128, 135 (2d Cir. 1984) ("The Commission acknowledged that § 5 does not prohibit independent pricing by an individual firm, even at high levels, in an oligopolistic industry"); European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Guidelines"), 11 January 2011, ¶ 61 (prohibition against concerted action "does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors"); Areeda and Hovenkamp, ANTITRUST LAW (2011) ¶ 1436a ("interdependent pricing is not regarded as a violation of [antitrust law] because, among other reasons, it cannot be remedied without making antitrust tribunals price control agencies, without incongruently controlling oligopoly pricing more intensively than the more dangerous monopoly price, or without restructuring markets on an enormous scale exceeding the ability or mandate of those tribunals. Furthermore, it is both unfair and socially costly to punish under the criminal or treble

This fine distinction between concerted action facilitated by unilateral disclosures and merely parallel conduct in interdependent markets illustrates why a presumption of illegality, such as *per se* or *quasi per se* treatment, is inappropriate for unilateral disclosures. For example, the *per se* rule evolved in the U.S. to address “conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict competition and decrease output.”⁵ Such cannot be said about unilateral disclosures of information and, enforcement agencies should be required to show by affirmative proof in light of the specific relevant facts and circumstances (rather than by any presumption such as a *per se* rule), that the actual or potential harm of the disclosure outweighs its pro-competitive aspects.⁶ Resolution of this question will likely depend on a number of factors, including the nature of the information disclosed and the context in which it was disclosed, the nature of the market involved, evidence of actual competitive harm, and the legitimate business justifications for the disclosure.

3. Type and effects of unilateral disclosure

The clearest end of the unilateral disclosure spectrum is an “invitation to collude” through either an explicit offer to conspire or, implicitly, through a direct non-public disclosure of future pricing intentions to the specific attention of a competitor without an alternative explanation (e.g., because the competitor is also a customer). Such disclosures have been generally condemned by competition authorities because they are likely to result in anticompetitive effects and are unlikely to have any pro-competitive justification.⁷

Other unilateral disclosures are not so easily characterized. For example, a manufacturer may routinely provide advance notification of its price increases to customers. Such disclosures have a clear pro-competitive effect of eliminating information asymmetries, which will allow the customers sufficient time to recalibrate their own purchasing, production, or sales plans or, potentially, to seek out substitutes in the market. Even if these price notifications reach a competitor and affect its decision-making, this should not prevent the manufacturer from providing the customer with useful information, and the pro-competitive purpose and effect of the disclosure should not be discounted.

Public disclosures pose a particularly difficult enforcement question. While some competition authorities have recently challenged certain public disclosures that indicate future intentions under a “signaling” theory, the public nature counsels against stringent enforcement. When disclosures are made publicly, all market participants including customers, suppliers, investors and manufacturers of complements, are able to gain the benefit of the increased transparency, thereby reducing the likelihood of anticompetitive purpose or effect and establishing likely legitimate business justifications for the disclosure. Due to these ambiguities, there should be a presumption of legality for public disclosures absent proof of a causal relationship between the public “signaling” and the alleged competitive harm.

damage sanctions of the Sherman Act oligopolists, who can rationally proceed only by observing and estimating their rivals' behavior.”).

⁵ *Business Electronics v. Sharp Electronics Corp*, 485 U.S. 717, 726 (1988).

⁶ *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986) (“we are slow to extend the *per se* rule to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious”); see also *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 35, 50 (1977) (courts apply *per se* rule only after they “have had considerable experience with the type of restraint at issue”).

⁷ See Guidelines paragraphs 73-74; J. Thomas Rosch, “Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission,” Remarks Before The George Mason Law Review’s 14th Annual Symposium on Antitrust Law, February, 9, 2011 at 8 (discussing FTC’s “cartel-like” responsibility with “intivations to collude”).

The existence of disclosure requirements in other areas of law also counsels against stringent treatment of public disclosures. This issue arises most prominently in the context of company disclosures to securities markets, including investment analysts, which, in some circumstances, are legally required. For example, in the United States, a company may be subject to enforcement by the federal Securities and Exchange Commission if it were found to have made an “untrue statement of a material fact” or a “misleading” statement through an *omission* of a material fact.⁸ In this context, a company’s disclosure regarding, for example, capacity reduction (i.e., cost-cutting) strategy may be required by law to provide investors with material information to evaluate the company’s stock price. Likewise, the disclosure of the impact of a competitor’s actions in the marketplace often is deemed legally required. This issue is particularly acute when a disclosure is made in response to a question from investors or investment analysts.

4. The enforcement landscape against unilateral disclosure is increasingly stringent

Recent actions by the European Commission, Australia, and the U.S. Federal Trade Commission indicate an increasing effort to police unilateral disclosures.

In Europe, standalone information exchanges between competitors, including unilateral disclosures, are covered under Article 101 TFEU. Article 101 broadly prohibits both agreements and concerted action with either an object or effect on competition. While information exchanges are not specifically identified by Article 101 and were not historically the subject of active enforcement in Europe, they have more recently been subject to enforcement actions by the Commission⁹ and the member states.¹⁰

The European Commission released its long-awaited Guidelines in January 2011 governing the application of Article 101 to information exchange. The Guidelines relied upon principles established in prior case law, but were designed to clarify and expand upon existing competition rules.

Paragraphs 62 and 63 of the Guidelines discuss unilateral disclosures specifically. While a unilateral disclosure is distinguished from a “decision by association of undertakings,”¹¹ it still may be found in violation of Article 101 if it results in a “concerted practice.”¹² The Guidelines consider it “irrelevant” whether information is exchanged unilaterally or through an agreement, reasoning that unilateral disclosures “reduce strategic uncertainty” and “increase the risk of limiting competition and of collusive behaviour.” The Guidelines further find that “mere attendance at a meeting where a company discloses its

⁸ 17 C.F.R. § 240.10b-5.

⁹ See, e.g., Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, 2009 E.C.R. I-4529; Cases T-25/95, Cimenteries CBR SA, et alv.Comm’n, 2000 E.C.R. II-491.

¹⁰ See, e.g., 30 March 2010 OFT Press Release, “RBS Agrees to pay £28.5 million penalty for disclosing pricing information to competitor” and 15 October 2003 Italian Antitrust Authority Press Release, “The Competition Authority has begun an investigation into the life assurance business of Ras, Generali, Alleanza, Generalivita, and Ina Vita.” The Authority concluded that a series of unilateral communications of insurance companies to a database amounted to a facilitating practice and condemned the communications as concerted practice.

¹¹ See, e.g., decision 505/VI/2010 of the Greek Competition Commission (press announcement by an association of flour mills in Greece regarding possible price hikes due to market developments considered as a decision by an association of undertakings).

¹² A “concerted practice” is defined by the Guidelines as “a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risk of competition.” Guidelines¶ 60.

pricing plans to its competitors is likely to be caught by Article 101” and, moreover, that any company who “receives strategic data from a competitor . . . will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.”¹³

In Paragraph 63, the Guidelines carve out a distinction for a disclosure that is “genuinely public,”¹⁴ (such as through a newspaper), finding that “this generally does not constitute a concerted practice within the meaning of Article 101(1).” However, the Guidelines do not provide any safe-harbours for public disclosures, stating that “a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors,” the accumulation of which “could prove to be a strategy for reaching a common understanding about the terms of coordination.”¹⁵

Once a concerted practice has been established, the analysis moves to determining, under Article 101, whether it had an anticompetitive “object or effect.” The Guidelines first provide that information exchanges between competitors of “individualised data regarding intended future prices or quantities” should be considered a “restriction of competition by object” and, thus, fined as cartels. The Guidelines further indicate that such disclosures should be given quasi-per se treatment, stating that they are “very unlikely” to provide countervailing efficiencies under Article 101(3).¹⁶

For all other data exchanges, the Guidelines provide a framework for a rule of reason analysis. First, the Commission will consider the type of data exchanged and the characteristics of the market to determine whether the disclosure had a “collusive effect.” Regarding the type of data exchanged, the Guidelines distinguish: (a) strategic vs. non-strategic information; (b) degree of market coverage; (c) aggregated vs. individualized data; (d) age of data; (e) frequency of the information exchange; and (f) public vs. non-public information.¹⁷ If a “collusive effect” is found, the burden shifts to the defendant to show, under Article 101(3) that the disclosure had a pro-competitive benefit that was a least restrictive alternative.

The Guidelines state that by artificially increasing transparency in the market, the exchange of strategic information can facilitate coordination. This may occur through (i) enabling companies to reach a common understanding on the terms of coordination, (ii) increasing the internal stability of a collusive outcome on the market and by (iii) increasing the external stability of a collusive outcome.¹⁸ When analyzing the effects of an information exchange, the counterfactual is a central point of reference, “[t]he assessment of restrictive effects on competition compares the likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange.”¹⁹

In Australia, the Parliament has recently passed the Competition and Consumer Act Amendment Act of 2011, which will prohibit certain unilateral disclosures relating to price (including discounts, allowances, and credits) when the law becomes effective in the middle of 2012. While this statute will be further defined by regulation, the current expectation is that it will apply only to the banking sector.

¹³ Guidelines paragraph 62.

¹⁴ “Genuinely public information” is defined as “information that is generally equally accessible (in terms of costs of access to all competitors and customers).” Guidelines paragraph 91.

¹⁵ Guidelines paragraph 63; see also paragraph 94.

¹⁶ Guidelines paragraph 74.

¹⁷ Guidelines paragraph 86-94.

¹⁸ Guidelines paragraph 65-68.

¹⁹ Guidelines paragraph 75.

The Australian act subjects private disclosures to quasi per se treatment, providing an exception for disclosures made “in the ordinary course of business.”²⁰ For public disclosures (i.e., price signaling), the Act prohibits any disclosure made “for the purpose of substantially lessening competition in a market.” Factors to consider in determining this issue include: (a) the specificity of the price information; (b) whether the information is past, present or future; (c) how readily available the information is to the public; and (d) whether the disclosures are part of a pattern of similar disclosures by the company.²¹

In contrast to the EC and Australia, the United States has no regulations or guidelines that specifically cover unilateral disclosures of information. While such disclosures may fall under the Sherman Act, the enforcement possibilities under that statute are relatively limited. Unilateral disclosure as a standalone claim cannot fall under Section 1 because the statute requires an “agreement” between multiple parties in restraint of trade.²²

However, because an “agreement” need not be explicit, courts may rely upon unilateral disclosures as evidence to infer an implicit “meeting of minds.”²³ For example, in a recent case, *In re Delta/AirTran Baggage Fee Antitrust Litigation*,²⁴ the plaintiffs successfully survived the defendants’ motion to dismiss a per se horizontal conspiracy claim that rested solely on allegations of signaling through unilateral public disclosures. Plaintiffs had alleged that two defendant airlines had made public statements both to analysts and at industry conferences regarding their intentions to reduce capacity and institute a baggage fee. In lieu of alleging an explicit agreement, plaintiffs claimed that each defendant’s public statements provoked collusive responses by the other that was not in their independent self-interests but for an alleged agreement.²⁵ While the court recognized that the alleged conduct might have constituted lawful “conscious parallelism,” it did not believe the case should be dismissed prior to discovery on this “mere hunch.”²⁶

Absent a plausible claim of an agreement, Section 2 of the Sherman Act may also provide an avenue for challenging unilateral disclosures as “attempted monopolization” where market circumstances allow proof that the parties involved might have attained or exercised monopoly power by acting together. In *United States v. American Airlines, Inc.*,²⁷ the Department of Justice successfully challenged a unilateral, private invitation to collude by the CEO of an airline to the CEO of a direct competitor, through which the first CEO explicitly requested the competitor to raise its prices in parallel (which the competitor rejected). Despite the novelty of the theory, which has since been criticized by some commentators, the court held that the DOJ had properly alleged a “dangerous probability” of monopolization because the invitation to

²⁰ Competition and Consumer Amendment Act (No. 1) 2011 § 44ZZW.

²¹ *Id.* § 44ZZX.

²² In contrast, a multi-party agreement to exchange information, for example, through a trade association is covered by Section 1 of the Sherman Act and judged under the Rule of Reason. *See United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975).

²³ *American Tobacco v. United States*, 328 U.S. 781, 810 (1946). As one court put it, “a *knowing wink* can mean more than words” *Esco Corp. v. United States*, 340 F.2d 1000,1007 (9th Cir. 1965) (emphasis added).

²⁴ 733 F. Supp. 2d 1348 (N.D. Ga. 2010).

²⁵ *Id.* at 1361.

²⁶ *Id.* at 1363.

²⁷ 743 F.2d 1114 (5th Cir. 1984)

collude was unambiguous and, had the competitor accepted, the firms would have had combined market power in certain specific defined relevant markets for airline service.²⁸

In response to the limitations for challenging unilateral conduct under the Sherman Act, the Federal Trade Commission has been increasingly interested in applying Section 5 of the FTC Act as a means of challenge conduct that may facilitate concerted action. Because Section 5 of the FTC Act broadly prohibits “unfair competition” and has neither the “agreement” nor “monopoly power” requirements of sections 1 and 2 of the Sherman Act, respectively, the FTC considers Section 5 as filling a “gap” in the enforcement tools available against unilateral conduct that may facilitate anticompetitive harm.²⁹

The FTC’s enforcement record under Section 5 of the FTC Act has varied over time. In its early application, FTC initially took the view that “conscious parallelism” was actionable under Section 5 of the FTC Act, but backed away in the face of strong opposition by Congress and the business community.³⁰ In the 1980s, the FTC attempted to revive the application of Section 5 to interdependent conduct in the absence of an actual agreement among competitors. However, in two notable cases, *Boise Cascade Corp v. FTC*³¹ and *Ethyl v. FTC*,³² these efforts were strongly rebuked by the courts.

While *Boise Cascade* did not involve any allegations of unilateral disclosures, *Ethyl* involved several allegations of facilitating practices, including the defendants’ unilateral provision of advance notice of future price increases to customers. Relying on the “patent uncertainty” of the FTC’s theory of concerted action, the court held that, absent a tacit agreement on prices, the FTC must show either “(1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.” With respect to the price disclosures, the court found a “fine distinction” between permissible and impermissible conduct, concluding that “the FTC’s rulings and order appear to represent uncertain guesswork rather than workable rules of law.”³³

Following the *Ethyl* and *Boise Cascade* decisions, the FTC has generally applied Section 5 to less ambiguous unilateral conduct that it characterizes as “invitations to collude.” The FTC has brought several “invitation to collude” cases from the 1990s to the present, finding them to be *per se* illegal.³⁴ One notable trend in these cases is the FTC’s recent willingness to rely on public disclosures to support allegations of a *per se* violation. In early “invitation to collude” cases, previous FTC commissioners had distinguished

²⁸ *Id.* at 1117-1119. Other courts and commentators have distinguished this opinion based on its unique facts. For example, in *In re Delta/AirTran Baggage Fee Antitrust Litigation*, the court rejected a joint attempted monopolization theory and distinguished *American Airlines* as involving facts that were “much more egregious than the facts alleged here.” 733 F. Supp. 2d at 1367 n.15.

²⁹ See J. Thomas Rosch, “The FTC’s Section 5 Hearings: New Standards for Unilateral Conduct?,” Remarks to ABA Antitrust Section Spring Meeting, March 25, 2009.

³⁰ See *Boise Cascade Corp v. FTC*, 637 F.2d 573, 576 (9th Cir. 1980) (discussing early FTC policy and public response).

³¹ 637 F.2d 573 (9th Cir. 1980).

³² 729 F.2d 128 (2d Cir. 1984).

³³ *Id.* at 139.

³⁴ See, e.g., *Quality Trailer Products*, 115 F.T.C. 944 (1992); Complaint, *MacDermid, Inc.*, FTC File No. 991-0167, 1999 FTC LEXIS 191 (Dec. 21, 1999); Complaint, *Stone Container Corp.*, 125 F.T.C. 854 (1998); Complaint, *Precision Moulding Co.*, 122 F.T.C. 104 (1996); Complaint, *YKK (U.S.A.) Inc.*, 116 F.T.C. 628 (1993); Complaint, *A.E. Clevite Inc.*, 116 F.T.C. 389 (1993).

private disclosures, which were “utterly without efficiency justification,” with public disclosures, in which “market structure analysis, and legitimate efficiency justifications should be given full consideration.”³⁵

However, in two recent cases, *Valassis* and *U-Haul*, the FTC obtained consent orders based on “invitations to collude” involving public disclosures without analyzing the likelihood of competitive harm.³⁶ For example, in *Valassis*, the FTC based its complaint solely on statements made by the defendant’s CEO in an earnings call with investment analysts, where the defendant allegedly attempted to establish a price floor with its competitor.³⁷ In an analysis accompanying the proposed order, the Commission stated that it may challenge such conduct “as an invitation to collude under Section 5 of the FTC Act even where the conduct did not result in competitive harm.”³⁸ These cases suggest that the FTC is willing to extend *per se* treatment to unilateral disclosures that are alleged to amount to invitations to collude, in the absence of anticompetitive effects.

5. The business community needs reasonable, consistent standards governing unilateral disclosures

While BIAC appreciates the efforts of the agencies to protect against concerted action, it is concerned that the pendulum has swung too far in favor of enforcement against unilateral disclosures of information. In the modern economy, a substantial number of efficient, competitive industries are characterized by moderate or high levels of concentration. As the *Ethyl* court recognized, there is a “fine distinction” between lawful, unilateral conduct and impermissible concerted action when information exchanges occur in concentrated industries.³⁹ In light of this, a proper standard of proof suggests that enforcement agencies:

[O]we[] a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that business will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.⁴⁰

³⁵ Kevin J. Arquit, *The Boundaries of Horizontal Restraints: Facilitating Practices and Invitations to Collude*, 61 ANTITRUST L.J. 531 (1993); see also Mary Lou Steptoe, *The Impact of Section 5 of the FTC Act on Communications Among Competitors*, Remarks Before ABA Section of Antitrust Law, Advanced Antitrust CLE Inst. (Oct. 15, 1993), *reprinted in* 7 Trade Reg. Rep. (CCH) ¶ 50.120 (cautioning against extending *per se* treatment to “instances of public communications, ”where there are “more likely to be efficiency justifications” and “the public nature of the communication itself may cast doubt on a real collusive purpose or expectation”).

³⁶ Complaint, *Valassis Commc'ns*, FTC File No. 051-0008 (Apr. 19, 2006), *available at* <http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf>; Decision & Order, *Valassis Commc'ns*, FTC File No. 051-0008 (Apr. 19, 2006), *available at* <http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisDecisionandOrder.pdf>; Complaint, *U-Haul Int'l*, FTC File No. 081-0157 (July 14, 2010), *available at* <http://www.ftc.gov/os/caselist/0810157/100720uhaulcmpt.pdf>; Decision & Order, *U-Haul Int'l*, FTC File No. 081-0157 (July 14, 2010), *available at* <http://www.ftc.gov/os/caselist/0810157/100720uhauldo.pdf>.

³⁷ *Valassis* Complaint paragraphs 11-13.

³⁸ *Valassis* Analysis at 5; *see also* *U-Haul* Analysis at 4 (the Commission need not “define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision”).

³⁹ 729 F.2d at 139; *see also* *Areeda and Hovenkamp* paragraph 1436f (“We must conclude with a frank recognition legal attention to unilaterally adopted facilitating practices is fraught with double uncertainty. We have seen substantial doubt not only about the content of Sherman Act § 1 and FTC Act § 5, but also about the application of any plausible legal rules.”).

⁴⁰ 729 F.2d at 139.

Otherwise, this lack of clarity and unpredictability could have a chilling effect which might actually deter disclosures which are desirable and procompetitive.

To that end, BIAC believes that, at a minimum, the enforcement agencies should work to establish safe harbours for unilateral conduct that is innocuous or generally pro-competitive and, thus, will not be subject to enforcement action. For example, no business entity should be subject to competition enforcement for any public disclosure that is required by another area of law or has clear pro-competitive business justification.⁴¹

BIAC also believes that enforcement agencies that harbour enforcement intentions regarding unilateral communications should establish a framework for the competitive analysis of unilateral disclosures. This need is particularly strong for the U.S. Federal Trade Commission, given its increasing reliance on Section 5 of the FTC Act to challenge public disclosures on a standalone basis to fill coverage “gaps” under the Sherman Act, including its more recent challenge of public unilateral disclosures as “invitations to collude.” Such guidance has already been strongly advocated by former FTC Chairman Kovacic.⁴²

While BIAC appreciates the efforts undertaken by the European Commission to establish its Guidelines for unilateral disclosures, these Guidelines should be revised to provide clearer standards of enforcement. In particular, Paragraph 63, which relates to public disclosures, should be revised to provide both (a) well-defined safe harbours; and (b) clear standards to determine when a public disclosure may be unlawful. Similarly, BIAC believes that more explanation is needed to clarify the “ordinary course” exception for non-public price disclosures in the Australian Competition and Consumer Act.

Agencies should analyze likely anticompetitive effects centered around a plausible theory of harm that aims to explain why (unilateral) exchanges of information contribute to restrictive effects on competition. Consideration of the counterfactual alone, i.e. the competitive situation that would have prevailed in the absence of the specific information exchange, does not fully address the need for a causal connection between the information exchange and the increased potential for anticompetitive effects. This applies in particular to markets that already display a certain degree of transparency and lend themselves already to some degree of interdependent strategic behaviour.

BIAC is also concerned with the increasing trend by enforcement agencies to subject certain unilateral disclosures to *per se* or quasi *per se* treatment without consideration of actual or likely competitive effects. While some unilateral disclosures may constitute unambiguous “invitations to collude,” the trend in FTC enforcement in the United States illustrates the risk that *per se* treatment will extend to conduct that produces ambiguous effects, for which such application is inappropriate.⁴³ BIAC also believes that the imposition of quasi *per se* standards by the European Commission and Australian Competition Act for certain information exchanges does not take into account the inherent uncertainty in categorizing unilateral disclosures and determining an anticompetitive purpose.

⁴¹ See *Valassis* Consent Order at 3-4 (providing a safe harbour for any public disclosure of information that is “required by the Federal Securities Laws”).

⁴² See William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, ANTITRUST L.J. 929, 944 (2010) (“The first institutional predicate is for the Commission to articulate, in a policy statement or guidelines, its views about what constitutes an unfair method. Such an articulation should describe how the agency will exercise its enforcement discretion and, beyond that, set forth a high-level framework for analyzing Section 5 cases in adjudication”).

⁴³ See *Business Electronics*, 485 U.S. at 726.

Given these policy concerns, BIAC proposes the following framework governing the enforcement of unilateral disclosures. First, the agencies should provide clear safe harbours for certain public unilateral disclosures to be considered categorically lawful. As discussed above, BIAC believes that disclosures required by law or having a clear pro-competitive justification should fall within this safe harbor.

Second, unilateral disclosures should be considered presumptively lawful absent an indicia that the disclosure prompted (or, in the case of an invitation to collude, was designed to prompt) concerted action from a rival. BIAC offers the following indicia for consideration:

- (a) evidence that the disclosure was made privately to one or more rivals and not to the general public;
- (b) evidence that there was an actual, non-public response to a public disclosure by one or more of its rivals;
- (c) evidence that information disclosed was by its nature demonstrably more meaningful or intended to be more meaningful to rivals than to customers and/or suppliers;
- (d) evidence that the disclosure was accompanied by covert actions or other efforts to conceal and avoid detection by enforcement agencies;
- (e) evidence that the discloser and its rivals had a recent history of proven, sanctioned, anticompetitive behavior through public disclosures; or
- (f) evidence of specific intent harm competition.

Absent one or more of these indicia, the unilateral disclosure should be considered lawful because there would be no evidence (as opposed to supposition) indicating a risk that the disclosure was or could be reciprocated by a competitor.

Finally, if one or more these indicia exists, the disclosure should be subjected to a rule of reason analysis in which actual or likely anticompetitive effects are weighed against the procompetitive benefits. Importantly, these indicia should be considered in context, rather than in isolation, to ensure that they are consistent with the alleged mechanism of coordination that forms the basis for any potential enforcement action. BIAC emphasizes that, due to the inherently ambiguous nature of unilateral disclosures, a presumption of illegality is inappropriate, even if one of the above indicia are satisfied. Rather, competition agencies should establish actual or likely anticompetitive effects resulting from a unilateral disclosure before the burden shifts to the defendant to show those effects are outweighed by pro-competitive efficiencies.

SUMMARY OF DISCUSSION

The Chair opened the roundtable on unilateral disclosure of information with anticompetitive effects and welcomed the delegations present. She introduced the topic of the roundtable by noting that communications between competitors can increase market transparency and, under certain conditions, facilitate collusion, which makes these practices both an important and challenging subject of study and discussion. The roundtable builds on the policy discussions of an earlier roundtable on information exchange between competitors under competition law, organized by the OECD in October 2010, which focused on information exchanges between competitors and formal information exchange systems run by associations and other businesses. The present roundtable focused on policy and enforcement questions surrounding purely unilateral communications by firms directed either at competitors or the public at large.

Most, if not all, competition agencies around the world view hard-core cartels as unlawful. Conversely, tacit collusion resulting purely from oligopolistic inter-dependence is generally not seen as a competition law violation. Yet, between these two extremes, firms engage in a wide range of practices that may reduce strategic uncertainty and facilitate collusion. They may include unilateral communications to the market on elements such as price, costs or capacities, which provide focal points on which competitors may align their behaviour. As such, these practices may result in higher prices and be harmful to consumer welfare. The challenge remains in distinguishing anticompetitive unilateral communications used for signalling purposes, from pure unilateral conduct with no anticompetitive effects for the purposes of taking enforcement action. This roundtable, benefiting from over 20 submissions and expert contributions, is focused on identifying the key issues in overcoming that challenge.

The Chair introduced the three panel experts contributing to this roundtable, Prof. Peter Mollgaard, Head of the Department of Economics at the Copenhagen Business School, Prof. Massimo Motta, among other positions, the Dean of the Barcelona Graduate School of Economics, and Mr. Mark Whitener, Senior Counsel of competition law and policy at General Electric.

Opening the discussion, the Chair invited Prof. Mollgaard and Prof. Motta to discuss, from an economic perspective, the potential of unilateral communications to increase market transparency and offer a focal point around which competitors may align.

Prof. Mollgaard explained that his presentation would provide an introduction to the questions of collusion and transparency, while Prof. Motta's presentation would deal with the effects of increased transparency.

Prof. Mollgaard opened the debate by considering the definition of transparency and its basic effects with respect to competition. Transparency is usually defined as the degree to which market participants are informed about prices and product or service quality. Generally, increased transparency is negative in concentrated markets and positive in dispersed markets where search costs are high. Despite its positive connotation, transparency in concentrated markets can produce negative competitive effects and lead to higher prices for consumers as several cases illustrate.

Before discussing these cases, Prof. Mollgaard explored in greater depth the economic theory behind the effects of transparency in different market structures. In the perfect competition model, transparency is one of the fundamental assumptions on which the model is built. Without transparency, the model fails to

deliver the efficiencies generally associated with it. However, perfect competition is a rare phenomenon in the real world, where markets usually fall somewhere on the continuum between perfect competition and monopoly. In contrast to perfect competition, where transparency is not only good but necessary, other market structures elude easy categorization as to whether transparency is beneficial or not.

While a detailed case-by-case assessment is generally necessary in these situations, economic theory still allows for several general categorizations. For example, transparency in highly fragmented markets is generally beneficial, because it reduces search costs and lowers prices. On the other hand, in dynamic oligopolistic markets, transparency is typically problematic because of its potential to facilitate collusion or at least create focal points on which competitors may align their behaviour. Lack of information impedes the ability of competitors to detect and punish deviation, which makes collusion difficult. Transparency removes this uncertainty and allows firms to effectively monitor adherence to a collusive arrangement and punish any deviations from it. The situation is slightly more complex in markets with heterogeneous products where reaching an agreement on price and monitoring is difficult given the product variety. Information exchange in these markets is sometimes dismissed as ‘cheap talk’ for the lack of verifiability of the communicated information; however, even in these conditions, transparency can create the focal points that facilitate reaching co-ordinated equilibria around which firms can align their prices.

As for transparency on the consumer side, Prof. Mollgaard discussed some of the recent literature on the rather counter-intuitive effect that increased transparency can have. It was already mentioned that better informed consumers foster competition on the supplier side. Possessing information about prices and product quality of all suppliers allows consumers to quickly switch between them. While this is good in static, one-off markets, it can be potentially problematic in dynamic markets where it makes punishment for cheating on a collusive arrangement quicker and harsher and, as such, facilitates collusion. Prof. Mollgaard concluded that, as far as transparency on the consumer side is concerned, both full transparency and complete opaqueness have the potential to facilitate collusion on the supplier side, while moderate transparency would minimize the scope for collusion.

Having provided an introduction to the competitive effects of transparency, Prof. Mollgaard turned to two examples, the Danish ready-mix concrete case and the Airline Tariff Publishing Company case (ATP), which illustrate some of the theoretical points well.

The Danish concrete case shows clearly the collusive potential of increased transparency in oligopolistic markets. In that case, the four producers of ready-mix concrete in Aarhus started, initially at the behest of the Danish competition authority, publishing information about their prices and previously secret discounts. Within six months, their prices generally aligned and increased by 20% overall compared with the average prices prior to the public announcements of discounts. This shows how improved information about past prices and discounts can facilitate co-ordination among competitors in a concentrated market.

The ATP case concerned a US joint venture, set up by eight major airlines for the purpose of collecting information about ticket fares and availability, which was subsequently disseminated back to the airlines through a computer reservation system. While beneficial, the information exchange contained two problematic features, which could be used for signalling and, as such, could facilitate the reaching of collusive equilibria. These were the first and last ticket day, which were essentially dates in the future at which a rate either started to apply or expired. However, since the rate could be changed at any time prior to the relevant date these prices were considered examples of ‘cheap talk’. Nonetheless, they could be used both for signalling future price intentions, which would be carried out if the other airlines followed. Similarly, they could be used as a threat of price war should the other airlines not follow a proposed fare increase. The investigation in this case showed that since the establishment of the information exchange, one-way fares in certain categories increased by 20 dollars. Ultimately, the case was settled by the US

Department of Justice through a consent decree, which prohibited first ticket days (making any fare changes immediate) and last tickets days unless they were used in an advertising campaign.

As to the lessons for competition policy, Prof. Mollgaard explained that a determination as to whether the disclosure of information by a firm is problematic or not will depend on the type of information, its granularity and the parties to whom the information is disclosed. Disclosing past, highly aggregated data is generally less likely to lead to collusive outcomes than disclosing information about future intentions in a non-committal manner. Also, sharing information only with competitors (so-called private communications) is usually more problematic than disclosing it to both customers and competitors (so-called public communications), although recent literature shows that well informed customers may facilitate the effectiveness of any punishment for deviation from a collusive agreement. In summary, increased transparency can facilitate collusion depending on what kind of information is exchanged, in what manner and between whom.

The Chair thanked Prof. Mollgaard for setting the framework for discussion and turned to Prof. Motta to share his views on the effects of unilateral disclosure of information.

Prof. Motta began by explaining that firms wishing to collude generally face two main issues: first, how to co-ordinate; and second, how to enforce the agreement reached. Increased transparency makes it easier for firms to overcome both of these issues. The sharing of information about volumes and past and present prices allows for the monitoring and enforcement of an agreement, although this generally presumes a mutual information exchange rather than unilateral disclosure. The latter is, however, very useful in overcoming the issue of how to reach an agreement without directly communicating. Since firms are unable to directly communicate about their future intentions, unilateral disclosure is a 'second best' solution in that it serves as a signalling device for firms to align their behaviour around the best equilibrium. In addition to its role in enabling firms to reach a collusive equilibrium, unilateral disclosure of information allows for its modification in reaction to changing demand or other market shocks.

Unilateral disclosure of information and information exchange in general also have pro-competitive effects. Increased transparency on the buyer side of the market is beneficial in that it lowers search costs and increases competition among sellers. In contrast with private announcements between competitors, which generally produce anticompetitive effects, publicly made announcements about future prices and output are, in principle, positive insofar as there is commitment on the part of the firm making the announcement to actually sell at that price. Unilateral announcements of future prices that are contingent on the behaviour of other competitors may be harmful to competition and consumer welfare as illustrated by the ATP case.

In terms of policy, Prof. Motta suggested that unilateral public announcements of future prices or output with commitment value should be generally viewed as pro-competitive. On the other hand, private announcements or public announcements without commitment value are normally anticompetitive and should be viewed with suspicion. As to making public announcements of information other than price and output, Prof. Motta expressed his belief that public announcements of information that normally has pro-competitive effects on the market, such as market intelligence, should be viewed with suspicion as it is unlikely to be beneficial.

In concluding his presentation, Prof. Motta discussed several examples of unilateral communications and the way in which they should be assessed. The first dealt with a company advertising its future prices in a newspaper, which should be viewed as pro-competitive because it has an inherent commitment value in that customers can purchase the product for the announced price. By contrast, private announcements by one company to its competitor(s) have no commitment value and can serve as signalling device that enables competitors to align their behaviour and as such should be treated as anticompetitive. The third

example dealt with auctions for multiple 3G licences where CEOs of the bidding companies sometimes publicly announce in which of the auctioned licences their companies are interested. Prof. Motta suggested these practices be prohibited, because they allow firms to indirectly communicate their intentions and possibly adjust their bidding behaviour accordingly.

Finally, Prof. Motta discussed the various public announcements a company may make concerning the situation in the market, for example, rising input prices or reduced demand, and the expected behaviour of that company and its competitors. While some announcements of this sort are generally anticompetitive, such as a company publically stating that in light of sinking demand it is very likely that all suppliers will lower their prices, this is a complex area which does not lend itself to easy categorization. Prof. Motta emphasized the need to set up clear guidelines as to the legality of different types of press announcements and expressed his conviction that this roundtable will go a long way in preparing the ground for that.

The Chair thanked Prof. Motta and noted that his presentation focused on the means and types of communications. She then asked the two experts whether they would agree that a crucial element in assessing possible pro or anticompetitive effects of unilateral information disclosure is the type and method of communication used.

Both Prof. Mollgaard and Prof. Motta agreed that the types and means of communication are important elements of classification. The private or public nature of announcements, as well as their commitment value, is generally a good starting point in analysing the possible effects the announcements may have on competition.

The Chair remarked that enforcement agencies often grapple with how to show negative effects of unilateral disclosure of information, and she asked the two experts whether they could provide any guidance as to how to go about it.

Prof. Mollgaard and Prof. Motta noted the general reluctance of enforcement agencies to demonstrate effects in collusion cases. They are usually treated as *per se* or object infringements for which the showing of effects is not required. By trying to show effects, agencies could open their decisions to other lines of attack and thus potentially undermine their overall validity if they fail to prove the effects to the requisite legal standard. While Prof. Motta agreed with treating private announcements of future prices and output as infringements by object, Prof. Mollgaard suggested that enforcement agencies might wish to consider measuring effects in collusion cases so as to aid customers in subsequent damage claims.

Mr. Davies, Head of OECD Competition Division, asked Prof. Motta about his suggestion to prohibit price announcements that have no commitment value and whether doing so would inhibit price negotiations between sellers and buyers.

Prof. Motta responded that prohibiting noncommittal price announcements should not, in his view, present an obstacle to the customers' ability to negotiate lower than announced prices. The possibility of downward price negotiation is not undercut by insisting that customers can purchase a product for at least the announced price.

Mr. Whitener raised the point of balancing pro and anticompetitive effects of transparency in any competitive assessment and asked the two economic experts on how enforcement agencies should go about it.

Prof. Mollgaard noted that a possible measure, albeit an imperfect one, is to look at the evolution of prices before and after the relevant conduct. Where prices, controlled for other factors, have risen, a conclusion might be reached that the conduct had anticompetitive effects.

In contrast, Prof. Motta argued that rather than relying on ex post assessment in individual cases, he would favour ex ante presumptions of legality in cases of public announcements with commitment value, because empirical research shows that the benefits of increased price transparency on the customer side generally outweigh any possible negative effects, such as facilitating collusion.

The Chair thanked the two panellists for their views and turned to the countries' submissions. She invited the Australian delegation to comment on the difficulties of proving the existence of an agreement when confronted with unilateral disclosure of information and the recent amendments to the Competition and Consumer Act in this respect.

The Australian delegation explained that, in Australia, the case law has interpreted the statutory cartel prohibition as requiring proof of a commitment to act in order to prove the existence of a contract, arrangement or an understanding with a competitor. This interpretation substantially narrowed the scope of anticompetitive conduct that can be caught under the cartel prohibition provision. For example, in 2007 the Australian Competition and Consumer Commission (ACCC) lost a case against petrol station operators, which had been privately communicating their intended price movements to each other over the phone in code, because the agency was unable to show commitment on the part of the participants to follow each other's announcements. Referring to this and other cases, the ACCC recommended that legislative changes be made in order to broaden the type of conduct that can be caught by the term "understanding". Following a public consultation by the Treasury department, an amendment to the Competition and Consumer Act was passed in November 2011, adding two new provisions dealing with unilateral conduct by undertakings. The provisions contain a per se prohibition of private disclosure of pricing information between competitors and of public disclosure of pricing or other information if made for the purpose of substantially lessening competition. The new rules come into force in June 2012 and will be first applied to the banking sector. They may be extended to other sectors in the future, based on the experience with their application to banking.

As to why the Australian government chose to enact prohibitions of certain unilateral disclosures, rather than extending the concept of an understanding, the Australian delegation explained that this choice was made against the background of criminalization of cartel conduct in Australia. Extending the scope of the cartel prohibitions raised concerns about both its potential over-inclusiveness and the implications this could have for the criminal standards, the introduction of which was being contemplated at the time.

The Chair next turned to Romania, to discuss the Romanian Supreme Court's *Carpatcement* judgment and its impact on the enforcement of competition rules in oligopolistic markets

The Romanian delegation explained that the *Carpatcement* judgment arose from a case in the cement market in Romania in which the Romanian Competition Council (RCC) sanctioned three major cement producers, including Carpatcement, for an infringement in the form of a concerted practice. With respect to Carpatcement, the RCC relied on a hand-written note outlining Carpatcement's future behaviour, which had been found at the premises of another participant to the infringement and which, in combination with the competitors' parallel behaviour in an oligopolistic, highly transparent market, was deemed to constitute evidence of a concerted practice. Upon appeal, the Romanian Supreme court quashed the RCC's decision, referring to the judgment of European Court of Justice in *Woodpulp* and holding that parallel conduct alone cannot be regarded as proof of collusion unless collusion is its only plausible explanation. Concerning the standard of proof, the court, referring to the quasi-criminal nature of competition law sanctions, held that the evidence relied upon must prove beyond a reasonable doubt the existence of a concerted practice. Following this judgment the RCC has focused on solidifying its analysis and strengthening the body of evidence that it relies on in its cases.

The Chair invited the Belgian delegation to comment on its submission, which focuses on the importance of showing that the competitors benefited from a unilateral disclosure of information in order to establish the existence of an infringement.

The Belgian delegation began by noting that Belgian law, which closely mirrors EU law in this respect, prohibits both agreements and concerted practices. In order for unilateral disclosure of information to qualify as a concerted practice, there must usually be evidence that the competitors benefitted from the announcement. In determining benefit, the Belgian competition authority would normally look at the characteristics of the market, the nature of information disclosed and the means of disclosure. The companies may, however, always prove that they did not receive such information or that any change in behaviour was not a result of receiving it. The delegate then emphasized, in response to a question from the Chair, that while the Competition Authority does take into account the means of such unilateral communication in its assessment, it has relatively little experience in this area.

The Chair then asked the Chilean delegation to discuss how it approached the difficult endeavour of distinguishing illegal co-ordinated action from legitimate co-ordinated action or parallel conduct in concentrated markets.

The Chilean delegation referred to its submission for a full description of a relevant case in the private health insurance market but added that the tribunal, while rejecting their complaint, issued a dissenting opinion emphasizing the difficulty in obtaining direct proof in cases where the agreements or interactions between companies are secret. Upon appeal, the Supreme Court also rejected the claim by a split decision. The Court explained that where there are two possible explanations for the conduct in question, direct evidence of contact between firms is necessary. Consequently, the competition law was amended to grant the agency additional powers to request or obtain more direct proof.

The United Kingdom delegation took the floor and described a case involving the Royal Bank of Scotland (RBS) and Barclays, which was decided by the Office of Fair Trading (OFT) in March 2010 (final decision was announced on 20 January 2011). RBS and Barclays are major players in the market for loans to professional services firms such as law firms, real estate firms and accounting firms. The case concerned RBS's disclosure of its future pricing intentions, both generally and in relation to several specific loans, to its main competitor, Barclays.

The OFT has qualified this private disclosure of future pricing intentions as a concerted practice with the object of preventing, restricting or eliminating competition. This determination requires a showing of implementation. The case law provides a presumption that a firm that remains active on the market takes into account the information received from a competitor, and the OFT indeed found evidence that Barclays had actively taken into account the information received from RBS when pricing its products.

As to the factors used to establish the infringement, the OFT used, in addition to the private nature of the disclosure and the fact that the information had been taken into account by Barclays, several other subsidiary elements relating to the context in which the disclosure has occurred. In particular, the OFT considered the high level of concentration in the market. Another factor was that the relevant employee of RBS had been previously employed by Barclays, and through the disclosure, which occurred in social contexts on the fringes of industry events and over the phone, sought to relay information to his former colleagues at Barclays.

The Chair then invited the United States delegation to discuss the two recent cases described in its submission, which dealt with disclosure of information in the context of public conference calls with investors and market analysts.

The United States delegation began by noting that as the roundtable discussion showed, the context in which disclosure of information takes place is of utmost relevance, which is well illustrated by the cases described in its submission. Two of these cases, *U-Haul International* and *Valassis Communications*, involved public disclosure of information in communications with investors and analysts that were accompanied by private communications with competitors. The Federal Trade Commission (FTC) investigated both cases under Section 5 of the FTC Act and concluded both of them by consent decree and, as such, they were not tested by the courts; however, they provide significant guidance on the importance of the context in which the disclosure takes place.

In the *U-Haul International* case, the truck rental company U-Haul, in its calls with investors, announced planned increases of its rental rates with the proviso that they would be reduced again if competitors did not follow suit by certain dates. This was accompanied by private announcements of the same content to U-Haul's competitors. In *Valassis Communications*, the CEO announced a new pricing strategy during a public earnings conference call he knew would be monitored by Valassis's main competitor, despite there being no legitimate reason in the context of that call. Both U-Haul's and Valassis's practices were qualified as invitations to collude by the FTC.

The United States delegation concluded by emphasizing the importance of the context in which disclosure took place in these two cases. There likely would be no reason for concern in situations of public disclosure, to the extent required by securities laws, if not accompanied by any private communications.

The Chair turned to the European Commission delegation to describe the legal standard applicable to unilateral disclosure of information under EU law and to expand on the role of reciprocity in that context, as mentioned in its submission.

The European Commission (EC) delegation explained that EU law prohibits both agreements and concerted practices with an anticompetitive object or effect. Concerted practice has been defined in case law as situations where competitors knowingly substitute practical co-operation for the risks of competition. The requirement of reciprocal contact, which is an element of concerted practice, is satisfied when a competitor requests another competitor to disclose its future intentions or accepts such information where provided regardless of whether it requested it.

The concept of concerted practice also requires implementation, showing that the companies involved took the information into account in determining their conduct on the market. However, implementation is presumed when the companies involved remain active in the market. Building on this case law, the European Commission included a chapter on information exchange and unilateral disclosure of information in its 2011 Horizontal Co-operation Guidelines. The guidelines state that a company will be presumed to have adapted its market behaviour on the basis of strategic data received from a competitor unless it responds in a clear statement that it does not wish to receive such data.

Genuinely public announcements, the benefits of which were set out by Prof. Motta, would generally not be deemed to constitute a concerted practice under the Horizontal Co-operation Guidelines, unless they are used for signalling purposes, for example, where the announcements of one competitor are followed by announcements of others. The delegation closed its presentation by emphasizing the importance of context and the detailed assessment of all relevant individual circumstances for determining whether unilateral disclosure of information constitutes concerted practice.

The Chair then invited Mr. Whitener to comment on the topic from the business perspective.

Mr. Whitener began by highlighting the common goals of the enforcement and business communities, namely to design sufficiently clear rules so as not to impede legitimate or efficiency-enhancing conduct. He emphasized that where laws are ambiguous, businesses will refrain from any questionable activity simply to avoid investigation by competition authorities. Therefore, rules should be explicitly defined so as to prohibit only anticompetitive conduct.

These rules should also fit logically into the established framework of competition law in which economic theory plays an important role. However, Mr. Whitener explained, equally necessary is real world applicability. Rules should distinguish between anticompetitive and legitimate practices in a way that can be administered by competition authorities as well as explained to private actors. In the area of unilateral communication, the rules are as yet unclear. Some jurisdictions have passed legislation while others are awaiting test cases to apply theories. In this context authorities should apply basic principles of competition law, taking into account legal justifications and efficiencies, which often exist even in cases where conduct seems on its face dubious.

The context of the information disclosure must be taken into account in any assessment of its legality. With respect to public communications, much of the information provided by companies is required by other regulatory authorities. These rules are also not entirely transparent. Therefore, companies must decide what to disclose given equally harsh punishments for failure to do so adequately. Another environment that demands information disclosure is the market itself. Companies attempt to satisfy this desire for information through quarterly financial reporting, public statements, press releases and trade shows. In addition, public companies are subject to analyst calls during which a spokesperson makes a few opening statements, then financial analysts ask specific and often highly technical questions. Therefore, businesses must have clear guidelines to understand the limits of what they can disclose in these myriad of contexts.

In today's environment of rapidly shared and ubiquitous information, companies are punished for failing to provide information that later becomes public. One recent example is that of Netflix, which rents DVDs by mail and increasingly provides content through online streaming. Given the growing popularity of the latter medium, Netflix decided to change its pricing model to reflect the shift. It announced this plan ostensibly to notify and explain the coming change to customers. However, the change was so unpopular with customers, (with even regulators and politicians speaking out against it) that Netflix eventually retracted. To appease these stakeholders, Netflix could have issued a position paper or run the idea by consumer groups before committing to such a change, but doing so could have invited accusations of price co-ordination with rivals. This example yields no clear answer but demonstrates that businesses may have legitimate reasons for making a statement about possible future pricing.

In terms of policy recommendations for treating unilateral communication, Mr. Whitener strongly encouraged fact-based competitive analysis in lieu of per se rules or even strong presumptions of illegality. Many national authorities have shared useful lessons learned from cartel cases, but it is important to understand why, for example, even public announcements of future pricing can have clear legitimate justifications as in the Netflix case. Conditions unique to each market must also be taken into account. If effective co-ordination would be quantity-based, then price announcements could have little impact. Although it is difficult to presumptively categorize any conduct in this area, there is reason to move towards a safe harbour for public announcements given that they often benefit customers, suppliers and regulators. Those legitimate justifications should not be negated simply because a competitor might also have found such information useful.

Even cases with so-called "bad facts", like the *Valassis* case mentioned by the US delegation, can be applied to the template for analysis set forth above. Despite the absence of showing of actual harm, as was

unnecessary in that case, Valassis put forth no legitimate justifications and the industry in question was susceptible to co-ordination.

Although anticompetitive intent was found to be persuasive in this case, the purpose driving the conduct is not useful as an analytical matter. The motivations may be mixed and are not as important as the likely net effects of the actual conduct. The market conditions may be such that public communication is unlikely to have any effect. Therefore, guidance is necessary on what is understood to be efficient and legitimate, in particular to navigate the demands of competition laws, securities laws and the public demand for information.

The analytical approaches employed in cartels, mergers and abuse of dominance investigations are all helpful in this area as co-ordinated action, susceptibility of markets and a balancing of justifications and harm are all elements to be examined. Mr. Whitener closed by commending competition authorities on bringing few onerous and unjustified investigations, but stressed that caution should be exercised when analysing conduct in this area.

The Chair then invited questions or comments for any of the panelists.

The Israeli delegation made two comments. First, since restraint of trade is a criminal offence in Israel, the mere attempt or invitation to collude can be prosecuted. Second, the delegation noted the potential downside to public announcements having commitment value. Once a firm has made a commitment, its rivals can respond accordingly, thus facilitating a more stable collusion.

In response to the potential downside of public pricing announcements having commitment value, Prof. Motta agreed that the literature also indicates these two opposite effects. However, much of the empirical research shows that when there is more publicity about prices, the result is often lower prices. Therefore, in view of wanting simple administrable rules, firms should be permitted to make public announcements with commitment value. He also advised caution on applying any criminal standards to public announcements, which are distinct from private communications amounting to invitations to collude.

Prof. Mollgaard drew an analogy between the current discussion and the prohibition of mergers with concerted or co-ordinated effects where the merger would lead to increased transparency and ease of collusion between rivals. If those situations are deemed unlawful, then tacit collusion through public communication could also be deemed unlawful.

In response, Mr. Whitener distinguished between the act in question, be it a merger or a practice, and the susceptibility of the market to that act. While it is widely agreed that simply acting with conscious awareness of your competitors' actions is lawful, altering the market susceptibility to those practices could be actionable. He also emphasized the temporal difference between a merger, which results in lasting structural changes to a market, and public statements about pricing, which can change from one day to the next. It is logical then that the latter receives less restrictive treatment.

The Chinese Taipei delegation expressed doubt that any public announcement of a price increase could be in the public interest rather than an attempt at communicating with rivals.

Mr. Whitener described an example of how an analyst call might play out. If the company relays that it is facing cost pressure, it is likely that the analyst will push to find out not only if prices will rise but by exactly how much. In this scenario, it is unlikely that the analyst is trying to instigate a cartel. He simply wants the information necessary to advise his clients whether to buy or sell.

The Chair then opened the floor to general questions or comments.

The Dutch delegation asked the Australian delegation whether they anticipated enforcement problems under their new prohibitions against disclosure of pricing information for the purpose of substantially lessening competition.

The Australian delegation responded that, for the purposes of the new legislation, pricing information is defined broadly enough to avoid much debate. The next step would be to establish the circumstances surrounding the disclosure to see whether it would fall under one of the exceptions to the prohibition. The delegation agreed that it will take some time to work through the new prohibitions in practice.

The Chair then asked the Italian delegation to discuss their experience with unilateral disclosure of information through trade associations, in particular a case involving price lists for bread.

The Italian delegation reiterated the general policy outlined in their submission that public pricing announcements directed at consumers are not in and of themselves anticompetitive. However, disclosure through trade associations provides more nuanced issues. One of the few cases the authority has faced in this respect involved a meeting of a local bakers' association in which a list of suggested minimum prices was announced. The meeting was open to the public, but given the dispersed nature of the market for small local bakeries, it was difficult to see how the price list could benefit consumers. The authority felt additionally compelled to intervene as a signal to other local markets, for fear that consumers could interpret newly instituted prices as official mandates. Many locally sourced products had government administered prices until the nineties.

The Chair then asked the Korean delegation to discuss the role of unilateral communication in the LPG cartel discussed in their contribution.

The Korean delegation described the cartel involving two LPG importers, comprising 60% of the market, fixing wholesale prices then informing the four refineries, which comprised the other 40% of the market. Under Korean law, an illegal cartel is established by showing agreement whether formal or informal. In this case, the Korean Fair Trade Commission (KFTC) found tacit collusion on the basis of unilateral notification by the importers and conscious following by the refineries. The parties appealed but the decision was upheld by the Seoul High Court in January 2012.

The Chair then asked the Japanese delegation to discuss the standard of proof required to show intent under the Anti-Monopoly Act (AMA), specifically with respect to the chemical corporation case mentioned in its submission.

The Japanese delegation began by describing two broad categories of cases. The first is determining whether a basic agreement can be established. As the AMA requires an enterprise to act in concert with another to find an unreasonable restraint of trade, the key fact-finding issue is showing that there was a communication of intent while an agreement cannot be identified explicitly. The second category involves bid rigging cases in which unilateral communication is used to relay which company will receive the order, after the initial agreement has been reached.

The delegation then addressed the Toshiba chemical case referenced by the Chair, which fell into the first category of cases. Eight chemical companies met to address the increasing price of exports. The three largest companies declared they would raise prices on laminates and requested the other five to do the same. While those five, including Toshiba, did not express an intention to support or oppose the request, subsequently all eight companies increased their prices. The Tokyo High Court found that there was enough evidence of communication of intent, defining it as the "intention of collaborating with several enterprises on a price increase by mutually recognizing or predicting the implementation of the same or

similar type of price increase.” While explicit agreement was not required, prior information exchanges and the concerted action of raising prices were sufficient to prove intent.

The Chair then asked BIAC to conclude with comments about the day’s discussion from the business perspective.

BIAC reiterated Mr. Whitener’s point that the business community is also interested in forestalling illegal co-ordination, especially given the fact that 55% of sales of goods are business to business. At the same time, companies wish to preserve the right to operate freely within the relevant laws. This can prove to be a delicate balance between restrictions on communication, as discussed in the roundtable, and disclosures required by law, as with the Sarbanes-Oxley Act.

BIAC then addressed some of the inconsistencies presented in the submissions. The Secretariat background paper suggests an empirical lack of systematic or lasting anticompetitive effects for unilateral disclosure of information, be they public or private. There is also theoretical work indicating that transparency is beneficial to competition. Logically then, such disclosure is not conducive to per se presumptions. Rather, enforcers must balance the informational benefit with actual anticompetitive effects to avoid assuming the role of regulators.

The Chair closed the roundtable by thanking the expert panelists for their presentations and all the delegations for their submissions and contributions to the discussion.

COMPTE RENDU DE LA DISCUSSION

La Présidente ouvre la table ronde sur les communications unilatérales ayant des effets anticoncurrentiels et salue les délégations présentes. Elle expose le thème de la table ronde en précisant que les communications entre concurrents peuvent renforcer la transparence du marché, et, dans certaines conditions, favoriser les collusions ; à ce titre ces pratiques constituent un sujet d'étude et de discussion important et complexe. La table ronde s'appuie sur les débats qui se sont tenus dans le cadre d'une table ronde précédente sur l'échange d'informations entre concurrents en droit de la concurrence, organisée par l'OCDE en octobre 2010, qui portait sur les échanges d'informations entre concurrents et sur les systèmes formels de partage d'information gérés par des associations ou des entreprises. Le débat de la présente table ronde est centré sur certains aspects relevant de l'action publique et de la répression dans le domaine des communications strictement unilatérales émanant d'entreprises et destinées soit aux concurrents soit au grand public.

La quasi totalité des autorités de la concurrence dans le monde considèrent les ententes injustifiables comme illicites. À l'inverse, les collusions tacites, qui résultent exclusivement d'une interdépendance oligopolistique, ne sont généralement pas considérées comme une infraction au droit de la concurrence. Toutefois, entre ces deux extrêmes, les entreprises se livrent à une multitude de pratiques susceptibles de réduire l'incertitude stratégique et de favoriser les collusions. C'est notamment le cas des communications unilatérales au marché sur certains éléments comme l'évolution des prix, des coûts et des capacités, qui fournissent des points de convergence sur lesquels leurs concurrents peuvent s'aligner. À ce titre, ces pratiques présentent le risque de provoquer une hausse des prix et de porter préjudice au consommateur. Dans un contexte de répression, toute la difficulté consiste à distinguer les communications unilatérales ayant des effets anticoncurrentiels, utilisées pour donner des indications sur les comportements projetés, des simples communications unilatérales non préjudiciables à la concurrence. Cette table ronde, qui bénéficie de plus de 20 soumissions et contributions d'experts, s'attache à recenser les principales questions qui se posent dans le traitement de ces pratiques.

La Présidente présente les trois experts qui feront un exposé lors de cette table ronde : le professeur Peter Møllgaard, chef du département Économie de la Copenhagen Business School, le professeur Massimo Motta, qui est notamment doyen de la Barcelona Graduate School of Economics, et M. Mark Whitener, conseiller en droit et politique de la concurrence de General Electric.

La Présidente ouvre les débats en invitant MM. Møllgaard et Motta à faire le point, sous l'angle économique, sur la capacité des communications unilatérales à renforcer la transparence du marché et à fournir des points de convergence sur lesquels les concurrents peuvent s'aligner.

M. Møllgaard précise que son exposé consistera en une présentation des questions de collusion et de transparence, et que celui du M. Motta portera sur les effets d'une transparence accrue.

M. Møllgaard propose d'abord une définition de la transparence et de ses effets premiers sur la concurrence. La transparence se définit généralement comme le degré d'information des acteurs du marché sur les prix, les produits ou la qualité de service. D'une manière générale, les effets d'un renforcement de la transparence sont négatifs sur les marchés concentrés et positifs sur des marchés fragmentés sur lesquels les coûts de recherche sont élevés. En dépit de sa connotation positive, la transparence sur les marchés

concentrés peut s'avérer préjudiciable à la concurrence et provoquer des hausses de prix pour les consommateurs, comme l'illustreront plusieurs exemples.

Avant de passer à l'étude de ces cas, M. Møllgaard expose de façon plus détaillée la théorie économique relative aux effets de la transparence en fonction de la structure des marchés. Dans le modèle de concurrence parfaite, la transparence est l'une des hypothèses fondamentales sur lesquelles est construit ce modèle. En l'absence de transparence, le modèle ne produit pas les gains d'efficacité qui lui sont généralement associés. Toutefois, dans la réalité, la concurrence parfaite est un phénomène rare et, dans les faits, les marchés se situent quelque part entre la concurrence parfaite et la situation de monopole. À l'inverse du marché en concurrence parfaite, sur lequel la transparence est non seulement utile mais nécessaire, d'autres structures de marché échappent à une classification rapide des effets de la transparence.

Dans ces situations, une évaluation au cas par cas est généralement nécessaire, mais la théorie économique propose toutefois de grandes catégories. Ainsi, la transparence sur les marchés très fragmentés est généralement bénéfique parce qu'elle réduit les coûts de recherche et fait baisser les prix. À l'inverse, sur des marchés oligopolistiques dynamiques, la transparence pose souvent problème du fait de sa capacité à favoriser la collusion ou, à tout le moins, à créer des points de convergence sur lesquels les concurrents peuvent s'aligner. En l'absence d'informations, les concurrents n'ont pas la possibilité de repérer ni de sanctionner les écarts, ce qui rend les collusions difficiles. La transparence lève cette incertitude et permet aux entreprises de surveiller efficacement le respect d'un accord d'entente et de sanctionner tout écart. La situation est plus complexe sur les marchés dotés de produits hétérogènes, où la diversité des produits complique la conclusion et le suivi d'accords sur les prix. Sur ces marchés, l'échange d'informations est parfois considéré comme de simples propos libres (*cheap talk*) du fait de l'impossibilité de vérifier les informations communiquées ; pour autant, même dans ces conditions, la transparence crée des points de convergence qui facilitent l'instauration d'un équilibre coordonné autour duquel les entreprises peuvent aligner leurs prix.

Pour ce qui concerne la transparence du côté des consommateurs, M. Møllgaard évoque des travaux récents sur l'effet relativement paradoxal d'un accroissement de la transparence. Comme nous l'avons vu, plus les consommateurs sont informés, plus la concurrence s'intensifie entre les fournisseurs. Informés sur les prix et la qualité des produits de tous les fournisseurs, les consommateurs sont plus enclins à passer rapidement de l'un à l'autre. Cette situation est bénéfique sur des marchés figés, ponctuels, mais peut s'avérer problématique sur des marchés dynamiques, où les sanctions en cas d'écart par rapport à un accord d'entente seront plus rapides et plus brutales, et, partant, favoriser les collusions. M. Møllgaard en conclut que, pour ce qui concerne le consommateur, tant la transparence totale que l'opacité complète sont susceptibles de favoriser les collusions entre fournisseurs, alors qu'une transparence modérée permet de restreindre la portée de la collusion.

Après avoir présenté les effets de la transparence sur la concurrence, M. Møllgaard illustre son propos et certains points théoriques par deux exemples : une affaire concernant le marché danois du béton prêt à l'emploi, et l'affaire de l'ATP (*Airline Tariff Publishing Company*).

L'affaire du béton danois montre clairement qu'un renforcement de la transparence sur des marchés oligopolistiques augmente le risque de collusion. Dans cette affaire, quatre producteurs de béton prêt à l'emploi d'Aarhus, ont commencé, initialement sur les consignes de l'autorité danoise de la concurrence, à publier des informations sur les prix et les remises, auparavant confidentielles, qu'ils pratiquaient. Dans les six mois qui ont suivi, les prix ont été globalement alignés et ont augmenté de 20 % au total par rapport aux prix moyens observés avant la publication des remises. Cette affaire tend à démontrer que le relèvement du niveau d'information sur les prix et remises antérieurs facilite la coordination entre les concurrents sur un marché concentré.

L'affaire de l'ATP concerne une co-entreprise créée par huit grandes compagnies aériennes américaines ayant pour objet de centraliser les informations sur les tarifs aériens et les disponibilités, pour les communiquer à toutes les compagnies aériennes via une plate-forme de réservation électronique. Une particularité de ce système, par ailleurs bénéfique, posait problème car pouvait être utilisée pour donner des indications de prix et, partant, faciliter la collusion. Il s'agit des communications sur des tarifs qui entreront en vigueur à une date annoncée à l'avance, et valables sur une période déterminée (*first/last ticket days*). Toutefois, comme ces tarifs pouvaient être modifiés à tout moment avant l'ouverture de la vente et la date d'entrée en vigueur indiquée, ces annonces ont été considérées comme des exemples de « libres propos ». Pour autant, elles pouvaient servir à donner des indications sur les intentions en matière tarifaire qui seraient mises en œuvre si les autres compagnies aériennes s'alignaient. De même elles pouvaient être utilisées comme une menace de guerre des prix si les autres compagnies ne suivaient pas l'augmentation tarifaire proposée. L'enquête dans cette affaire a montré que depuis l'instauration du système d'échange d'informations, les billets simples dans certaines catégories avaient augmenté de 20 dollars. L'affaire a été réglée par un jugement d'expédient du ministère américain de la Justice interdisant ces pratiques (les changements de tarifs doivent prendre effet immédiatement), sauf dans le cadre d'une campagne publicitaire.

En termes d'enseignements à tirer dans le domaine de la politique de la concurrence, M. Møllgaard explique que l'établissement du caractère problématique ou non de la publication d'informations par une entreprise dépend de la nature de l'information, de sa précision et des destinataires visés. La publication de données passées et hautement agrégées est généralement moins susceptible de donner lieu à des collusions que la divulgation d'informations sur des intentions futures d'une façon qui n'engage pas son auteur. De même, l'échange d'informations exclusivement entre concurrents (les communications privées) est, d'une manière générale, plus préjudiciable à la concurrence que la communication d'informations aux consommateurs et aux concurrents (les communications publiques); cependant, des travaux récents montrent que les sanctions en cas d'écart par rapport à un accord d'entente sont d'autant plus efficaces que les consommateurs sont bien informés. En résumé, une transparence accrue peut faciliter la collusion en fonction de la nature, des destinataires des informations communiquées, et des moyens utilisés.

La Présidente remercie M. Møllgaard d'avoir posé le cadre général des débats, et invite M. Motta à présenter son point de vue sur les effets des communications unilatérales.

M. Motta commence par expliquer que les entreprises souhaitant constituer une entente se heurtent généralement à deux grandes questions: premièrement comment se coordonner; et deuxièmement, comment faire appliquer les conditions convenues. Le renforcement de la transparence aide les entreprises à surmonter ces obstacles. Le partage d'informations sur les volumes et les conditions tarifaires passées et actuelles permet le suivi et l'application de l'accord, même si cela suppose généralement un échange réciproque et non des communications unilatérales. Ces dernières s'avèrent toutefois très utiles pour parvenir à un accord sans communiquer directement. Les entreprises n'ayant pas la possibilité de communiquer directement entre elles sur leurs intentions, les communications unilatérales apparaissent comme la meilleure solution possible dans ce contexte, puisqu'elles donnent des indications sur lesquelles les concurrents peuvent s'aligner pour atteindre un équilibre collusoire. En outre, les communications unilatérales permettent de modifier les comportements en fonction de l'évolution de la demande ou d'autres chocs sur le marché.

Les communications unilatérales, et l'échange d'informations en général, recèlent également des effets favorables à la concurrence. Pour l'acheteur, le renforcement de la transparence est bénéfique puisqu'il réduit les coûts de recherche et intensifie la concurrence entre vendeurs. Contrairement aux communications privées (entre concurrents), qui produisent généralement des effets anticoncurrentiels, les communiqués publics relatifs aux prix et à la production à venir sont, en principe, positifs, dans la mesure où l'entreprise qui en est l'auteur s'engage à vendre effectivement aux prix annoncés. Lorsque, dans le

cadre de communications unilatérales, les prix annoncés sont fonction du comportement des concurrents, les effets sur la concurrence et pour les consommateurs peuvent être préjudiciables, comme le montre l'affaire de l'ATP.

En termes de politique de la concurrence, les communications publiques unilatérales sur les prix ou la production à venir ayant valeur d'engagement, doivent, selon M. Motta, généralement être considérées comme pro-concurrentielles. À l'inverse, les communications privées, ou les communications publiques n'ayant pas valeur d'engagement, sont normalement anticoncurrentielles et doivent éveiller les soupçons. Quant aux communications ne portant ni sur les prix ni sur la production, M. Motta estime que les communications publiques d'informations ayant normalement des effets pro-concurrentiels sur le marché, comme les renseignements concernant le marché, doivent susciter la méfiance car il est peu probable qu'elles soient favorables à la concurrence.

Pour conclure, M. Motta présente plusieurs exemples de communications unilatérales et examine la façon dont elles doivent être évaluées. Le premier exemple concerne une entreprise qui communique sur ses prix futurs au moyen d'un encart publicitaire dans la presse écrite – cette communication doit être considérée comme favorable à la concurrence puisqu'elle a, intrinsèquement, valeur d'engagement dans la mesure où les consommateurs pourront acheter le produit au prix annoncé. En revanche, les communications privées d'une entreprise à l'intention de son/ses concurrent(s) n'ont pas valeur d'engagement et peuvent servir d'indication permettant aux concurrents de s'aligner sur le prix annoncé et, à ce titre, doivent être considérées comme anticoncurrentielles. Le troisième exemple porte sur la procédure d'enchères pour l'attribution de plusieurs licences 3G, au cours de laquelle les dirigeants de certains opérateurs candidats font connaître publiquement les licences qui les intéressent. Selon M. Motta, ces pratiques devraient être prohibées car elles permettent aux entreprises de communiquer indirectement leurs intentions et, éventuellement, d'adapter leur offre en conséquence.

Enfin, M. Motta évoque les différents communiqués qu'une entreprise peut publier en réaction à l'évolution du marché, par exemple, une augmentation des prix des intrants ou une baisse de la demande, et le comportement attendu de cette entreprise et de ses concurrents. Certains communiqués de ce type ont en général des effets anticoncurrentiels – c'est le cas lorsqu'une entreprise annonce publiquement que, compte tenu de la baisse de la demande, il est très probable que l'ensemble des fournisseurs baisseront leurs prix ; il s'agit d'un cas complexe qui ne se prête pas à une classification aisée. M. Motta insiste sur la nécessité d'élaborer des orientations claires quant à la légalité des différents types de communiqués de presse et exprime sa conviction que cette table ronde contribuera à faire un grand pas dans ce sens.

La Présidente remercie M. Motta et relève que son exposé porte sur les types de communication et les moyens utilisés. Elle demande ensuite aux deux experts si l'on peut estimer que le type de communication et les méthodes utilisées constituent des éléments essentiels dans l'évaluation des effets potentiellement favorables ou défavorables à la concurrence des communications unilatérales.

M. Møllgaard et M. Motta s'accordent à penser que ces deux éléments sont importants dans la classification des communications. La nature, publique ou privée, des communications, de même que leur valeur d'engagement, sont généralement de bons points de départ pour l'analyse des effets potentiels de ces communications sur la concurrence.

La Présidente fait observer que les autorités de la concurrence ont souvent des difficultés à démontrer les effets négatifs des communications unilatérales, et demande aux deux experts s'ils peuvent apporter leur éclairage sur ce point.

M. Møllgaard et M. Motta soulignent la réticence généralement observée chez les autorités de la concurrence à démontrer les effets des cas de collusion. Ceux-ci sont généralement traités de façon

systématique (*per se*) ou comme des infractions « par objet » auquel cas la démonstration des effets n'est pas nécessaire. En tentant de démontrer les effets, les autorités de la concurrence pourraient exposer leurs décisions à d'autres lignes d'attaque et ainsi potentiellement compromettre la validité de leurs décisions si elles ne parviennent pas à apporter de preuves jugées suffisantes au regard des critères requis. M. Motta se déclare favorable à l'idée de traiter les communications privées sur les prix et la production futurs comme des infractions par objet, et M. Møllgaard émet l'idée que les autorités de la concurrence pourraient souhaiter mesurer les effets des affaires de collusion afin d'aider les clients dans leurs demandes d'indemnisation ultérieures.

M. Davies, Chef de la Division de la concurrence de l'OCDE, revient sur la proposition de M. Motta d'interdire les communications sur les prix n'ayant pas valeur d'engagement, et se demande si cette pratique ne risque pas d'entraver les négociations tarifaires entre les vendeurs et les acheteurs.

M. Motta répond qu'à son avis, l'interdiction des communications sans engagement sur les prix ne devrait pas restreindre la capacité des clients à négocier des prix inférieurs à ceux annoncés. Ce n'est pas parce que le client sait qu'il peut acheter un produit pour le prix annoncé qu'il n'a pas la possibilité de négocier à la baisse.

M. Whitener s'interroge sur les moyens, lors d'une évaluation, de mettre en balance les effets proconcurrentiels et anticoncurrentiels d'un renforcement de la transparence, et demande aux experts comment les autorités de la concurrence doivent procéder en l'espèce.

M. Møllgaard répond qu'il est envisageable, bien que cette mesure soit imparfaite, d'observer l'évolution des prix avant et après la conduite examinée. Si l'on constate une augmentation des prix, indépendamment d'autres facteurs, il est possible de conclure à des effets anticoncurrentiels.

M. Motta quant à lui, estime qu'au lieu de se fier sur une évaluation *a posteriori* de chaque affaire, il serait préférable de se fonder sur une présomption de légalité *a priori* pour les cas de communication publique ayant valeur d'engagement ; la recherche empirique montre en effet que, pour le consommateur, les avantages d'une transparence accrue sur les prix l'emportent généralement sur les effets négatifs éventuels (ex. : favoriser les collusions).

La Présidente remercie les deux experts pour leur éclairage et passe aux soumissions des délégations. Elle invite la délégation australienne à faire part de ses observations sur la difficulté à démontrer l'existence d'une entente en présence de communications unilatérales et sur les récentes modifications du *Competition and Consumer Act* à cet égard.

La délégation australienne explique qu'en Australie, selon l'interprétation faite par la jurisprudence de l'interdiction légale des ententes, il est nécessaire de fournir une preuve d'un engagement pour établir l'existence d'un contrat, d'un arrangement ou d'un accord avec un concurrent. Cette interprétation réduit considérablement le périmètre des conduites anticoncurrentielles susceptibles de tomber sous le coup de cette interdiction. Ainsi, en 2007, la Commission australienne de la concurrence et de la consommation (ACCC) a perdu contre des exploitants de station-service qui se communiquaient de manière privée l'évolution projetée de leurs prix de façon codée par téléphone, au motif qu'elle n'a pas réussi à démontrer l'engagement des participants à suivre les annonces des autres. S'appuyant entre autres sur cette affaire, l'ACCC a préconisé une modification de la loi dans le sens d'un élargissement du type de conduite pouvant être couvert par la notion d'« accord ». À l'issue d'une consultation publique organisée par le Trésor, un amendement à la loi sur la concurrence et la consommation (*Competition and Consumer Act*) a été adopté en novembre 2011, ajoutant deux nouvelles dispositions relatives aux conduites unilatérales des entreprises. Ces dispositions prévoient une interdiction systématique (*per se*) à la fois des communications privées sur les prix entre concurrents, des communications publiques sur les prix et d'autres informations si

elles ont pour objet de restreindre substantiellement la concurrence. Ces nouvelles règles entrent en vigueur en juin 2012 et s'appliqueront dans un premier temps au secteur bancaire. Elles pourront être étendues à d'autres secteurs à l'avenir, en fonction du retour d'expérience de leur application aux banques.

S'exprimant sur le point de savoir pourquoi les autorités australiennes ont choisi de proscrire certaines communications unilatérales plutôt que d'élargir la définition de la notion d'accord, la délégation australienne explique que ce choix s'inscrit dans le contexte de la pénalisation des ententes en Australie. Élargir la portée des interdictions présentait le risque qu'elles deviennent trop générales et suscitait des inquiétudes quant aux implications éventuelles en termes d'application des principes du droit pénal, qui était à l'étude à l'époque.

La Présidente propose ensuite à la Roumanie d'évoquer la décision de la Cour suprême roumaine dans l'affaire *Carpatcement*, ainsi que ses effets sur l'application des règles de la concurrence sur des marchés oligopolistiques.

La délégation roumaine explique que le jugement *Carpatcement* est intervenu dans le cadre d'une affaire concernant le marché roumain du ciment, dans laquelle le Conseil roumain de la concurrence (CC) a poursuivi trois grands producteurs de ciment, dont *Carpatcement*, pour pratique concertée. Pour ce qui concerne *Carpatcement*, le CC s'est appuyé sur une note manuscrite décrivant le futur comportement de *Carpatcement* sur le marché, trouvée dans les locaux d'un autre participant à cette infraction et qui, associée au comportement parallèle des concurrents sur un marché oligopolistique, hautement concurrentiel, a été considérée comme une preuve de pratique concertée. En appel, la Cour suprême a infirmé la décision du CC, se référant à l'arrêt « pâte de bois » de la Cour européenne de justice, et estimant que le parallélisme des comportements ne peut à lui seul constituer une preuve de collusion, sauf si la collusion s'avère la seule explication cohérente. Pour ce qui concerne le niveau de preuve, la Cour, se référant à la nature quasi pénale des sanctions en matière de droit de la concurrence, a considéré que les éléments de preuve utilisés doivent démontrer au-delà de tout doute raisonnable l'existence d'une pratique concertée. À la suite de cette décision, le CC s'est attaché à approfondir ses analyses et à renforcer les faisceaux de preuves qu'il constitue.

La Présidente invite la délégation belge à commenter sa soumission, qui se concentre sur l'importance de démontrer que les communications unilatérales bénéficient aux concurrents, afin d'établir l'infraction.

La délégation belge entame sa présentation en rappelant que le droit belge interdit les accords et les pratique concertées, se rapprochant ainsi étroitement en l'espèce du droit européen. Pour qu'une communication unilatérale soit qualifiée de pratique concertée, il faut normalement établir la preuve que les concurrents ont profité de cette communication. Pour cela, l'autorité de la concurrence belge examine les caractéristiques du marché, la nature des informations divulguées et les moyens utilisés pour les communiquer. Les entreprises ont par ailleurs la possibilité d'apporter la preuve qu'elles n'ont pas reçu ces informations ou qu'une modification éventuelle de leur comportement ne résulte pas de la réception de ces informations. Le délégué précise, en réponse à une question de la Présidente, que l'autorité de la concurrence tient compte dans son évaluation des moyens utilisés pour ces communications unilatérales, mais qu'elle dispose d'une expérience relativement réduite en la matière.

La Présidente demande alors à la délégation chilienne d'exposer la méthode utilisée au Chili pour discerner les actions coordonnées illégales des actions coordonnées légitimes ou déterminer le parallélisme des comportements sur des marchés concentrés.

La délégation chilienne renvoie à sa soumission pour une description complète d'une affaire sur ce sujet sur le marché de l'assurance maladie privée, mais ajoute que le tribunal, tout en rejetant la plainte, a émis une opinion dissidente soulignant la difficulté à obtenir des preuves directes dans les affaires où les

accords et les contacts entre les entreprises sont secrets. En appel, la Cour suprême a également rejeté la plainte par une décision partagée. La Cour a estimé que lorsqu'il existe deux explications possibles au comportement en question, une preuve directe de l'existence d'un contact entre les entreprises est nécessaire. En conséquence, le droit de la concurrence a été modifié afin d'accorder des pouvoirs supplémentaires à l'autorité de la concurrence pour demander et obtenir des preuves plus directes.

La délégation britannique prend la parole pour évoquer une affaire impliquant la Royal Bank of Scotland (RBS) et Barclays, sur laquelle une décision a été rendue par la Commission britannique de la concurrence (Office of Fair Trading, OFT) en mars 2010 (le jugement final a été publié le 20 janvier 2011). RBS et Barclays sont des acteurs de premier plan sur le marché des prêts dans le secteur des services professionnels (cabinets juridiques, cabinets comptables et agences immobilières). L'affaire porte sur la communication, par RBS, de ses intentions en matière de stratégie tarifaire, à la fois sur un plan général et plus précisément pour certains prêts spécifiques, à son principal concurrent, Barclays.

L'OFT a qualifié cette communication privée de pratique concertée ayant pour objet de d'empêcher, de restreindre ou de fausser le jeu de la concurrence. Cette qualification nécessite de démontrer l'existence d'une adaptation des comportements. Selon la jurisprudence, une entreprise qui reste active sur le marché est présumée tenir compte de l'information reçue de la part d'un concurrent, et l'OFT a apporté la preuve que Barclays avait activement intégré l'information reçue de la part de RBS dans la tarification de ses produits.

Pour établir l'infraction, l'OFT s'est appuyé non seulement sur la nature privée de la communication et le fait que l'information avait été prise en compte par Barclays, mais également sur plusieurs autres éléments subsidiaires liés au contexte dans lequel s'inscrivait cette communication. L'OFT a notamment tenu compte du degré élevé de concentration du marché. En outre, les employés concernés chez RBS travaillaient précédemment chez Barclays, et cherchaient par cette communication, qui est intervenue dans des contextes sociaux en marge d'événements professionnels et par téléphone, à relayer l'information à leurs anciens collègues de Barclays.

La Présidente invite alors la délégation américaine à commenter deux affaires récentes décrites dans sa soumission, concernant la divulgation d'informations à l'occasion de conférences téléphoniques avec des investisseurs et des analystes financiers.

La délégation américaine relève dans un premier temps que les débats de la table ronde montrent l'importance déterminante que revêt le contexte dans lequel s'insère la communication d'informations, ce qu'illustrent parfaitement les affaires décrites dans sa soumission. Deux de ces affaires, *U-Haul International* et *Valassis Communications*, portent sur la divulgation d'informations dans le cadre de communications avec les investisseurs et les analystes, parallèlement à des communications privées avec des concurrents. La Federal Trade Commission (FTC) a enquêté sur ces deux affaires en s'appuyant sur l'article 5 de la loi instituant la FTC et les a closes par jugement d'expédient – elles n'ont donc pas été portées devant les tribunaux. Pour autant, elles donnent des indications significatives sur l'importance du contexte dans lequel s'inscrivent les communications.

Dans l'affaire *U-Haul International*, la société de location de camions U-Haul, a annoncé, lors d'une réunion avec les investisseurs, de futures augmentations de ses tarifs de location, en précisant que ces tarifs seraient de nouveau revus à la baisse si les concurrents ne lui avaient pas emboîté le pas au terme d'un calendrier défini. Cette même information était par ailleurs communiquée en privé aux concurrents de l'entreprise. Dans l'affaire *Valassis Communications*, le directeur général a annoncé une nouvelle stratégie tarifaire à l'occasion d'une conférence téléphonique publique destinée à présenter les résultats de l'entreprise, sachant que cette conférence serait suivie par le principal concurrent de Valassis ; il n'y avait

aucun motif légitime à cette annonce dans le contexte de cette conférence téléphonique. Dans le premier comme dans le second cas, ces pratiques ont été qualifiées d'invitation à la collusion par la FTC.

La délégation américaine conclut en soulignant l'importance du contexte dans ces deux affaires. Ces communications publiques n'auraient probablement pas éveillé les soupçons, dans la mesure où elles s'inscrivaient dans les limites prescrites par la loi sur les valeurs mobilières, si elles ne s'accompagnaient pas de communications privées.

La Présidente demande à la délégation de la Commission européenne de décrire les principes juridiques applicables aux communications unilatérales en vertu du droit européen et d'apporter des précisions sur le rôle de la réciprocité dans ce contexte, comme indiqué dans sa soumission.

La délégation de la Commission européenne (CE) fait savoir que le droit européen proscrit les accords et les pratiques concertées ayant pour objet ou pour effets de restreindre le jeu de la concurrence. Les pratiques concertées ont été définies par la jurisprudence comme des situations où les concurrents substituent sciemment une coopération pratique entre eux aux risques de la concurrence. Le critère de contact réciproque, qui est un élément de la pratique concertée, est réputé rempli dès lors qu'un concurrent demande à un autre de divulguer ses intentions ou accepte cette information lorsqu'elle est communiquée, indépendamment de celui qui en a fait la demande.

La notion de pratique concertée implique également une adaptation des comportements, qui montre que les entreprises concernées ont tenu compte de l'information pour orienter leur conduite sur le marché. Toutefois, l'adaptation est présumée lorsque les entreprises concernées restent actives sur le marché. À partir de cette jurisprudence, la Commission européenne a ajouté un chapitre sur l'échange d'informations et les communications unilatérales dans la version 2011 de ses Lignes directrices sur les accords de coopération horizontale. Ces lignes directrices disposent qu'une entreprise sera présumée avoir adapté son comportement sur le marché en fonction d'informations stratégiques reçues de la part d'un concurrent, sauf si elle fait savoir clairement qu'elle ne souhaite pas recevoir ces informations.

Les communications strictement publiques, dont les avantages ont été décrits par M. Motta, ne sont pas, d'une manière générale, considérées comme des pratiques concertées aux sens des Lignes directrices sur les accords de coopération horizontale, sauf si elles sont utilisées pour donner des indications, par exemple, lorsque les communications d'un concurrent sont suivies de communications émanant des autres concurrents. La délégation clôt son exposé en soulignant l'importance du contexte et de l'évaluation détaillée de l'ensemble des circonstances spécifiques pour établir si une communication unilatérale constitue une pratique concertée.

La Présidente invite ensuite M. Whitener à exprimer le point de vue des entreprises sur ce sujet.

M. Whitener commence par rappeler les objectifs communs poursuivis par les autorités de la concurrence et les entreprises, à savoir, élaborer des règles suffisamment claires pour ne pas freiner les comportements légitimes ou porteurs de gains d'efficacité. Il fait observer que lorsque les lois sont ambiguës, les entreprises s'abstiennent de toute activité équivoque dans le seul but d'éviter une enquête de la part des autorités de la concurrence. C'est pourquoi il faut des règles explicites, qui n'interdisent que les comportements préjudiciables à la concurrence.

Ces règles doivent également s'inscrire de façon logique dans le cadre du droit de la concurrence existant, dans lequel la théorie économique joue un rôle important. Toutefois, ajoute M. Whitener, l'applicabilité dans le monde réel est tout aussi nécessaire. Les règles doivent opérer, entre les pratiques anticoncurrentielles et les pratiques légitimes, une distinction qui puisse être gérée par l'autorité de la concurrence et expliquée aux acteurs privés. En matière de communications unilatérales, ces règles

manquent encore de clarté. Certains pays ont adopté des lois, d'autres préfèrent s'appuyer sur la jurisprudence pour appliquer des théories. Dans ce contexte, les autorités devraient appliquer les principes de base du droit de la concurrence, en tenant compte des motifs juridiques et des gains d'efficience, qui sont souvent présents, même dans les affaires où les comportements semblent à première vue douteux.

Le contexte dans lequel s'inscrit la communication doit être pris en compte dans l'évaluation de sa légalité. Pour ce qui concerne les communications publiques, la plupart des informations communiquées par les entreprises sont requises par les autorités de tutelle. Là encore les règles ne sont pas entièrement transparentes. Aussi, les entreprises doivent décider quelles informations publier compte tenu du fait que les sanctions sont tout aussi sévères en cas de publication inadéquate. Autre environnement exigeant la publication d'informations : le marché lui-même. Les entreprises tentent de répondre à cette demande d'information par la publication de leurs résultats trimestriels, par des communiqués de presse, des déclarations publiques, des salons professionnels. En outre, les entreprises cotées doivent organiser des conférences avec des analystes au cours desquelles, après un bref exposé du porte-parole de l'entreprise, les analystes financiers posent des questions précises et souvent très techniques. Pour ces raisons, les entreprises ont besoin d'orientations précises pour appréhender les limites de ce qu'elles peuvent divulguer dans ces multiples contextes.

Dans l'environnement actuel où l'information est omniprésente et circule rapidement, les entreprises sont sanctionnées lorsqu'elles se sont abstenues de publier une information devenue publique ultérieurement. Une situation illustrée par Netflix, spécialiste de la location de DVD par courriel et de la fourniture de contenu par diffusion en flux (*streaming*). Compte tenu de la popularité croissante de ce dernier média, Netflix a décidé de modifier sa grille tarifaire pour refléter cette nouvelle tendance. Il a communiqué ouvertement sur ce projet afin d'informer et d'expliquer ce prochain changement à ses clients. Mais ce projet a été très mal accueilli par les clients (même les autorités de tutelle et la classe politique se sont prononcées contre), au point que Netflix s'est finalement rétracté. Pour contenter ses actionnaires, Netflix aurait pu publier un document exposant sa position, ou tester l'idée auprès de groupes de consommateurs avant de lancer dans un tel changement, mais ce faisant il aurait pu être soupçonné de coordonner ses prix avec ses concurrents. Cet exemple n'apporte pas de réponse précise, mais montre que les entreprises peuvent avoir des raisons légitimes de faire des déclarations sur l'évolution possible de leurs prix à l'avenir.

Pour le traitement des communications unilatérales, M. Whitener préconise fortement une analyse concurrentielle fondée sur les faits plutôt que des interdictions systématiques ou même de fortes présomptions d'illégalité. Plusieurs autorités nationales ont fait part d'enseignements précieux tirés d'affaires d'ententes, mais il est important de comprendre pourquoi, par exemple, des communiqués publics sur les prix futurs peuvent avoir des motivations légitimes, comme dans le cas de Netflix. Les conditions propres à chaque marché doivent également être prises en compte. Si la coordination effective se fonde sur la quantité, il est alors possible que les annonces de prix aient peu d'effets. Même s'il est difficile de classer *a priori* les comportements en la matière, il y a de bonnes raisons pour s'orienter vers une zone de sécurité pour les communiqués publics compte tenu des avantages qu'ils apportent souvent aux clients, aux fournisseurs et aux autorités de tutelle. Ces motivations légitimes ne doivent pas être niées au seul motif qu'un concurrent pourrait également trouver l'information utile.

Le cadre analytique proposé peut s'appliquer même aux affaires comportant des infractions, comme l'affaire *Valassis* citée par la délégation américaine. Malgré l'absence de preuve d'un préjudice réel, ce qui n'était pas nécessaire en l'espèce, Valassis n'a avancé aucune justification légitime et son secteur d'activité était susceptible de se coordonner.

L'intention anticoncurrentielle était convaincante en l'occurrence, mais il n'est pas utile, dans le cadre de l'analyse, de tenter d'établir les motivations d'un comportement donné. Les motivations peuvent être

multiples et sont moins importantes que les effets nets probables du comportement réel. Les conditions de marché peuvent être telles que la communication publique est peu susceptible d'avoir des conséquences. C'est pourquoi il est nécessaire d'avoir des indications sur ce qui est considéré légitime et source d'efficacité, notamment pour répondre aux différentes exigences du droit de la concurrence, des lois sur les valeurs mobilières et des attentes du public en matière d'information.

Les méthodes d'analyse utilisées dans les enquêtes sur les ententes, les fusions et les abus de position dominante ont toutes leur utilité en la matière puisque la coordination des actions, la sensibilité des marchés et l'équilibre entre les justifications et le préjudice sont autant d'éléments à examiner. M. Whitener clôt son exposé en se félicitant du fait que les autorités de la concurrence n'ont que rarement procédé à des investigations onéreuses et injustifiées, mais rappelle que la prudence doit être de mise lorsqu'elles analysent des comportements dans ce domaine.

La Présidente invite les intervenants à exprimer leurs questions et commentaires.

La délégation israélienne fait deux observations. Premièrement, la restriction du commerce étant un crime en Israël, une simple tentative de collusion ou invitation à la collusion peut être passible de poursuites. Deuxièmement, la délégation relève un inconvénient potentiel des annonces publiques ayant valeur d'engagement ; lorsqu'une entreprise a pris un engagement, ses concurrents peuvent réagir en conséquence et favoriser ainsi une collusion plus stable.

S'exprimant sur ce dernier point, M. Motta reconnaît que la littérature sur le sujet fait état de ces deux effets contraires. Pour autant, la plupart des travaux de recherche empirique montrent que l'augmentation de la publicité sur les prix se traduit souvent par une baisse de ceux-ci. C'est pourquoi, dans l'optique d'instaurer des règles simples, les entreprises devraient être autorisées à faire des communications publiques ayant valeur d'engagement. Il recommande également la prudence dans l'application des principes du droit pénal aux communications publiques, qui se distinguent des communications privées constituant des invitations à la collusion.

M. Møllgaard constate une analogie entre le débat en cours et l'interdiction des fusions ayant des effets concertés ou coordonnés dès lors que la fusion conduirait à une transparence accrue et faciliterait la collusion entre concurrents. Si ces opérations sont considérées comme illégales, alors les collusions tacites via des communications publiques doivent également être considérées comme illégales.

Dans sa réponse, M. Whitener opère une distinction entre l'action en question, qu'il s'agisse d'une fusion ou d'une pratique, et la sensibilité du marché à cette action. Il est largement admis qu'une action menée en ayant conscience des actions des concurrents est légale, mais que modifier la sensibilité du marché à ces pratiques pourrait être passible de poursuites. Il souligne également la différence de temporalité entre une fusion, qui se traduit par des changements structurels durables sur un marché, et les déclarations publiques sur les prix, qui peuvent changer d'un jour à l'autre. Il est donc logique que ces dernières soient traitées de façon moins restrictive.

La délégation du Taipei chinois fait part de ses doutes sur le fait que l'annonce publique d'une augmentation de prix puisse se faire dans l'intérêt du public sans constituer une tentative de communiquer avec les concurrents.

M. Whitener décrit le rôle qu'une conférence d'analystes peut jouer à cet égard. Si au cours d'une conférence, une entreprise fait état de tensions sur ses coûts, l'analyste tentera selon toutes probabilités d'aller plus loin non seulement pour savoir si les prix vont augmenter, mais pour connaître l'ampleur exacte de cette augmentation. Dans ce scénario, il est peu probable que l'analyste tente de constituer une

entente. Il cherche simplement l'information nécessaire pour pouvoir conseiller à ses clients de vendre ou d'acheter le titre.

La Présidente invite alors l'ensemble des participants à faire part de leurs observations ou questions générales.

La délégation néerlandaise demande à la délégation australienne si elle prévoit des difficultés dans l'application des nouvelles interdictions frappant les communications sur les prix ayant pour objet de restreindre substantiellement la concurrence.

La délégation australienne répond que dans la nouvelle loi, la notion de communication sur les prix est définie de façon suffisamment large pour couper court à la plupart des interrogations. La prochaine étape consistera à établir les circonstances dans lesquelles s'inscrivent les communications afin de voir si elles correspondent à l'une des exceptions à ces interdictions. La délégation reconnaît qu'il faudra un peu de temps pour appliquer les nouvelles interdictions en pratique.

La Présidente invite la délégation italienne à faire part de son expérience des communications unilatérales émanant d'associations professionnelles, notamment dans le cadre d'une affaire concernant le prix du pain.

La délégation italienne rappelle les principes généraux évoqués dans sa soumission, selon lesquels les communications publiques sur les prix destinées aux consommateurs ne sont pas considérées, ni par nature ni systématiquement, comme anticoncurrentielles. Il convient toutefois d'être plus nuancé pour ce qui concerne les communications émanant d'associations professionnelles. Parmi les quelques affaires de ce type traitées par l'autorité de la concurrence, l'une concernait la réunion d'une association locale de boulangers, au cours de laquelle une liste de prix minimum conseillés a été communiquée. La réunion était ouverte au public, mais compte tenu de la nature fragmentée du marché des petites boulangeries locales, les avantages de la communication de cette liste de prix aux clients étaient peu évidents. L'autorité de la concurrence s'est en outre sentie obligée d'intervenir pour lancer un signal aux autres marchés locaux, par crainte que les consommateurs n'interprètent l'adoption de ces nouveaux prix comme une préconisation officielle. Précisons que de nombreux produits locaux ont bénéficié de prix réglementés jusque dans les années 1990.

La Présidente demande à la délégation coréenne de décrire le rôle des communications unilatérales dans une affaire d'entente sur le GPL mentionnée dans sa contribution.

La délégation coréenne décrit l'entente impliquant deux importateurs de GPL qui représentaient 60 % du marché, dans le cadre de laquelle les prix de gros étaient fixés puis communiqués aux quatre raffineries représentant les 40 % restants du marché. Aux termes du droit coréen, une entente illégale est établie lorsque l'existence d'un accord, formel ou non, est démontrée. En l'espèce, l'autorité coréenne, la Korean Fair Trade Commission (KFTC), s'est appuyée sur la communication unilatérale émanant des importateurs et sur le fait que les raffineries les ont suivis consciemment, pour établir l'existence d'une collusion tacite. Les parties ont fait appel mais la Haute Cour de Séoul a confirmé la décision en janvier 2012.

La Présidente propose ensuite à la délégation japonaise d'aborder la question du niveau de preuve requis par la loi contre les monopoles (AMA), notamment dans le cas de l'entreprise chimique citée en exemple dans sa soumission.

Dans un premier temps, la délégation japonaise décrit les deux grandes catégories d'affaires. La première consiste à déterminer si l'existence d'un accord initial peut être établie. Comme l'AMA impose qu'une entreprise agisse de concert avec une autre pour établir une restriction excessive du commerce, le principal objectif de l'enquête consiste à démontrer la divulgation des intentions même si un accord ne

peut être identifié de manière explicite. La seconde catégorie concerne les affaires de soumissions concertées, dans lesquelles les communications unilatérales sont utilisées pour informer sur l'entreprise qui recevra la commande, après la conclusion de l'accord initial.

La délégation présente ensuite l'affaire Toshiba Chemical, évoquée par la Présidente, qui relève de la première catégorie. À l'issue d'une réunion sur l'augmentation des prix des exportations, organisée entre huit entreprises chimiques, les trois plus grands groupes ont fait part de leur intention d'augmenter les prix des stratifiés et demandé aux cinq autres de faire de même. Ces cinq entreprises, dont Toshiba, n'ont manifesté aucune intention de se conformer ni de s'opposer à cette demande, mais il s'avère que les huit entreprises ont par la suite augmenté leurs prix. La Haute Cour de Tokyo a estimé disposer de preuves suffisantes pour établir la divulgation d'intentions, qu'elle a définie comme « l'intention de collaborer avec plusieurs entreprises pour augmenter des prix en reconnaissant ou en prévoyant l'instauration d'une augmentation identique ou similaire ». Démontrer l'existence d'un accord explicite n'était pas nécessaire, les échanges d'information antérieurs et l'augmentation concertée des prix étant suffisants pour établir l'intention.

La Présidente invite le BIAC à conclure les débats de la journée en exprimant le point de vue des entreprises.

Le BIAC reprend à son compte l'affirmation de M. Whitener sur le fait que les entreprises souhaitent elles aussi prévenir toute coordination illégale, sachant notamment que 55 % des ventes de produits interviennent entre entreprises. Parallèlement, les entreprises souhaitent préserver la possibilité d'agir librement dans le cadre des lois applicables. Il faut donc trouver un délicat équilibre entre restrictions sur les communications, comme évoqué lors de cette table ronde, et publication obligatoire d'informations en vertu de la loi, comme la loi Sarbanes-Oxley.

Le BIAC attire alors l'attention sur quelques incohérences relevées dans les soumissions. Le document de référence du Secrétariat évoque l'absence, d'après les observations, d'effets anticoncurrentiels systématiques ou durables des communications unilatérales, qu'elles soient publiques ou privées. Par ailleurs, des travaux théoriques indiquent que la transparence est bénéfique à la concurrence. Logiquement, dès lors, ces communications ne devraient pas générer des interdictions automatiques. Il faudrait donc que les autorités de la concurrence mettent en balance les effets bénéfiques de l'information et ses effets anticoncurrentiels réels pour éviter d'avoir à jouer le rôle du régulateur.

La Présidente clôt la table ronde, remercie les experts pour leurs exposés, et l'ensemble des délégations pour leurs soumissions et leur participation aux débats.