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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Price Transparency which was held by the Committee on Competition Law and Policy in June 2001.

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 several published in a series 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 la transparence des prix, qui s'est tenue en juin 2001 dans le cadre de la réunion du Comité du droit et de la politique de la concurrence.

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

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

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegate submissions, and the background paper, a number of key points emerge.

- (1) *As a general rule, increased price transparency will benefit buyers unless it results in considerably increased risks of collusion among sellers.*

One way to describe price transparency is to refer to the costs in time and money required to discover actual transactions prices (hereafter simply referred to as "prices" in contrast to "list prices"). The lower those costs, the more transparent the market. Considered in this light, a certain degree of price transparency is necessary for competition to exist since there would be little point in competing on price unless consumers are reasonably able to compare prices.

In addition to its potential to increase competition, enhanced price transparency could benefit consumers by lowering search costs. This direct benefit helps explain why consumer organisations generally tend to favour greater price transparency.

- (2) *Under certain conditions, increased price transparency can significantly increase the probabilities of conscious parallelism and anti-competitive co-ordination.*

Increased price transparency could help sellers engage in conscious parallelism which, although not illegal in most countries, nevertheless harms consumers. In a sufficiently concentrated market, the process could start by one seller simply raising its price and watching to see if others follow. The price leader's risks in doing that are lower when sellers are quickly and accurately informed of price changes, especially if buyers are not. Under those circumstances, the leader will not have to wait long to see if others will follow and stands to lose few customers in the interim.

In addition to facilitating conscious parallelism, increased price transparency could also encourage tacit or outright collusion by generally making it easier for co-operating firms to detect and therefore punish deviating firms. Such "cheating" must somehow be deterred if co-ordinated anti-competitive pricing is to be sustained for any length of time.

The competitive risks of increased price transparency, under certain market conditions, have not always been sufficiently appreciated by government policy makers. There have been instances where government mandated increases in price transparency seemed to have produced higher rather than lower prices, probably because they facilitated anti-competitive co-ordination among sellers. But in other cases some government sponsored increased price transparency may have led to enhanced price competition. The difference in outcomes reflects the importance of market conditions in determining the impact of changes in price transparency.

- (3) *Increased price transparency is unlikely to significantly increase the risk of anti-competitive co-ordination unless the affected markets are already particularly susceptible to such co-ordination.*

In some markets there would be little risk of anti-competitive co-ordination even if there were a very high degree of price transparency. Broadly speaking, anti-competitive co-ordination is less likely to take place in markets characterised by: low levels of concentration; large number of sellers; low barriers to entry; low transparency as to prices, quantities transacted and marketing strategies; asymmetries among sellers and product offerings; rapidly changing demand and cost conditions; lumpy purchasing patterns; and the presence of one or more maverick competitors.

- (4) *Assuming a market is prone to anti-competitive co-ordination, the effects of increased price transparency should be assessed by considering impacts on how and when buyers and sellers learn about prices, and on their relative abilities to react to price changes. From the buyer's point of view, enhanced price transparency is more likely to be harmful the more it is biased in favour of improving seller as compared with buyer information and options. This point can be illustrated with reference to business to consumer electronic commerce.*

Because it should reduce search costs, electronic commerce is expected to increase price transparency in affected markets. In actual fact, things might evolve somewhat differently. Electronic commerce software ("shopbots") that generate greater price transparency for consumers can also be employed by sellers to monitor their competitors. To the extent that sellers make more intensive use of shopbots than buyers, sellers in electronic markets may typically learn about price cuts well before a significant number of consumers have had a chance to switch suppliers in response to them. That means electronic commerce may end up improving price transparency more for sellers than buyers. In addition, electronic commerce may further favour sellers by making it easier, cheaper and faster for them to change prices in response to competitor moves. Over time, rapidly matched price cutting could put a damper on price competition in electronic marketplaces, further tend to steer competition towards non-price dimensions, and make things less rather than more transparent for consumers.

One can make three general observations about the impact of asymmetric increases in price transparency:

- a. activities enhancing transparency only among businesses are more worrisome than transparency enhancement among businesses and their clients;
 - b. measures by firms or associations to restrict the availability of price information to consumers, while presumably leaving price transparency among sellers unchanged, raise important dangers for competition; and
 - c. measures extending to consumers transparency which already exists among businesses should generally be pro-competitive.
- (5) *In markets conducive to anti-competitive co-ordination, direct exchanges of price information among suppliers deserves close scrutiny.*

As with most unilateral or collective practices potentially having anti-competitive objectives or effects, direct exchanges of price information may also have pro-competitive impacts. For example, such exchanges may allow companies to better match salesperson remuneration to effort and skill, i.e. to isolate

the effects of variation in market conditions. They may also play a role in improving decisions concerning capacity expansions or reductions. Competition authorities should be aware of such benefits, but should seek to ensure they are obtained at minimal risk to competition.

The anti-competitive risks associated with the direct exchange of prices can be significantly reduced by requiring the data exchanged to be sufficiently aggregated and old. This will make it considerably less useful in reaching and maintaining anti-competitive arrangements than up to date individualised price data. That is perhaps the main point to retain from the much discussed European Commission's *UK Tractor* case even though that case featured the exchange of detailed sales rather than price data.

Unless reliable fire walls can be erected and maintained, aggregation necessarily requires involving a third party in a price exchange, and that in itself could lower the risks associated with the exchange. Third party involvement necessitates some initial co-ordination, but it eliminates an excuse to engage in an ongoing, wider range of potentially harmful "cheap talk".

In addition to considering the appropriate level of aggregation and age of exchanged price data, competition authorities should ensure that such exchanges are public to maximise possible benefits to consumers. They should also consider what the parties would likely do if a particular price exchange were prohibited. In some markets, it may be relatively easy to accomplish the same thing through price lists unilaterally posted on a web site or published in a newspaper. Such alternatives may or may not make the information more accessible to buyers than under the prohibited proposal.

- (6) *In markets prone to anti-competitive co-ordination, sharing intentions about future pricing can be a potent form of "cheap talk".*

This point is particularly evident in the United States *Airline Tariff Publishing Company* case and a similar case that arose in Brazil. The ability to share future price intentions through feeding data into a computerised reservation system, apparently gave airlines a low risk means of moving to mutually acceptable prices, with little risk of having to transact much if any business at a series of temporary price quotes. It also allowed them to identify and credibly threaten retaliation against fares they particularly wanted changed again without actually risking important revenue losses.

- (7) *Price fixing by professional associations is almost always harmful for competition and is often illegal. In contrast, recommended price setting and other measures by professional associations which have important effects on price transparency call for a careful balancing of pro- and anti-competitive effects.*

Consumers may face particularly high transactions costs in certain markets. Transactions costs may be especially high as regards professional services where it is inherently difficult for consumers to determine what they need and to estimate the quality of proffered products. Various regulations have been enacted in most countries to improve the functioning of such markets.¹ Sometimes these regulations permit professional associations to take actions affecting price transparency, for example publishing suggested tariffs for various services. Competition authorities should insist that any such price lists present "recommended" rather than mandatory prices. They should not necessarily prohibit price guidance, however, especially if a significant number of members and non-members are diverging from the recommended prices, and consumers are aware of that fact. This in turn brings up the question of restrictions on price advertising.

Many professional associations restrict truthful, non-deceptive advertising of prices, claiming that such advertising could confuse consumers and lead to hidden quality reductions. Such claims have been undermined by a growing body of econometric studies. Competition authorities should therefore seek changes in governing statutes so that professional associations are no longer able to block truthful, non-deceptive price advertising.

- (8) *Facilitating practices, and in particular meeting competition clauses (MCCs) and most favoured nation clauses (MFNs) could have significant, possibly asymmetric effects on price transparency.*

In their many variations, MCCs and MFNs can introduce valuable price flexibility into long term contracts and may also offer valuable insurance to certain actors. That may explain why they are found in a wide range of market settings and are often adopted unilaterally by sellers sometimes on request by their customers.

Sellers using MCCs essentially offer their customers important incentives to share with them what they know about rivals' prices. This could be an important consideration in markets where either list or transactions prices are difficult to discover. Thanks to MCCs, sellers could have the same price information as all their customers combined. That could be considerably more price information than sellers would otherwise enjoy, and will almost certainly tend to increase what they know relative to any single buyer.

Including MFNs in sales contracts should make it more difficult for firms to engage in selective discounting, thus tending to close the gap between list and harder to observe transactions prices. This plus the fact that generalised discounting is more visible to both buyers and sellers, could mean that MFNs improve price transparency in a market. It is not obvious whether that effect will be biased in favour of either buyers or sellers.

There may well be cases where competition authorities believe that MCCs and/or MFNs have been adopted for an anti-competitive purpose or are having such an effect either for reasons related to price transparency or to other factors. When such cases arise, the capacity of competition authorities to prohibit them may depend critically on whether there is evidence of a larger anti-competitive arrangement.

- (9) *The optimal degree of price transparency in public procurement could involve a difficult trade-off between desires to reduce corruption on the one hand and to protect competition on the other.*

An obvious way to ensure that authorities in charge of public procurements award contracts solely on merit is to require that the detail of competing bids be published. This would make it considerably easier for aggrieved parties to detect and bring complaints against unfair or corrupt practices. Unfortunately, it also facilitates detecting cheating on bid rigging arrangements.

In countries where public trust in governing bodies is particularly low, it may be politically untenable to insist that bids in public procurement remain secret. In other countries, a high degree of bid transparency may be mandated by various international trade agreements. Absent such considerations it might be wise not to publish bids, or at least not until considerably after the contract is awarded. One competition authority sometimes urges those conducting public procurements to disavow a commitment to accepting the lowest bid. Another authority cautioned against making detailed calculations public when such a practice could lead to anti-competitive co-ordination in other markets.

- (10) *Many countries have found it difficult to decide policies regarding price transparency in retail gasoline markets.*

Highly concentrated retail gasoline markets could be almost textbook examples of markets where price co-ordination is particularly easy and attractive. The product is largely homogeneous, purchases are small and frequent, sellers have symmetric costs, and demand is reasonably stable. Moreover, there are usually just a few refineries supplying the market and they are often in a good position to co-ordinate prices especially if they are vertically integrated into retailing. But here, measures to increase price transparency may merely extend to consumers information already available to sellers. Many countries for this or other reasons have adopted measures making it easier for motorists to compare petrol prices.

Mandating increased price transparency in retail gasoline markets has often been followed by a significant increase in allegations of price fixing mostly based on simple observations of simultaneous identical changes in prices. But such parallel pricing is not in itself sufficient proof of anti-competitive behaviour.

- (11) *The ambiguous effects of various means of enhancing price transparency make them natural candidates for application of a case by case, rule of reason approach. Restrictions on price transparency may, however, appear counter-intuitive from a consumer point of view. Competition authorities should therefore take special care to elaborate and publish the criteria they will consider in dealing with allegations that increased price transparency has anti-competitive objectives or effects.*

The commercial advantages of legal certainty and predictability always mitigate in favour of competition authorities explaining how they will apply discretion in particular cases. In the case of price transparency enhancement, some form of guidance seems particularly appropriate, not just to facilitate compliance but also to ensure that consumer groups and other parts of the government are aware of what the competition authority is seeking to do. Even a simple list of criteria to be considered would help to point out the dangers inherent in greater price transparency in certain market situations.

NOTE

¹ For a survey of the important issues in this domain, see "Competition in Professional Services", the proceedings of the CLP's Working Party 2 roundtable on professional services which was held in June 1999. This document is available at: <http://www.oecd.org/daf/clp/Roundtables/profser00.htm>.

SYNTHÈSE

par le Secrétariat

Des discussions qui ont eu lieu dans le cadre de la table ronde sur la base des contributions des délégués et du document de référence qui ont été présentés, on peut dégager un certain nombre de points essentiels.

- (1) *En règle générale, l'amélioration de la transparence en matière de prix est bénéfique pour les acheteurs à moins qu'elle n'entraîne un accroissement considérable des risques de collusion entre vendeurs.*

La transparence en matière de prix peut se définir en référence aux coûts en temps et en argent qu'il faut supporter pour découvrir les prix réels auxquels s'effectuent les transactions (par la suite simplement désignés par le terme "prix" par opposition aux "prix de catalogue"). Plus ces coûts sont faibles, plus le marché est transparent. Dans cette perspective, une certaine transparence en matière de prix est nécessaire pour que la concurrence s'exerce sachant que les vendeurs n'ont guère intérêt à rivaliser sur ce front si les consommateurs ne sont pas raisonnablement en mesure de comparer les prix.

Outre qu'elle peut accroître la concurrence, une plus grande transparence en matière de prix pourrait être bénéfique pour consommateurs en abaissant les coûts de recherche. Cet avantage direct explique en partie pourquoi les organisations de consommateurs sont généralement favorables à une plus grande transparence en matière de prix.

- (2) *Dans certaines conditions, une plus grande transparence des prix peut sensiblement accroître la probabilité de parallélisme délibéré ("conscious parallelism") et/ou voir s'organiser une coordination des prix à caractère anticoncurrentiel.*

Une plus grande transparence des prix pourrait inciter les vendeurs à pratiquer un parallélisme délibéré nuisible aux consommateurs quoiqu'il ne soit pas illégal dans la plupart des pays. Dans un marché suffisamment concentré, le processus pourrait commencer par un vendeur auquel il suffirait de relever ses prix et d'attendre que les autres lui emboîtent le pas. Les risques encourus par l'instigateur du mouvement sont en effet plus faibles lorsque les vendeurs sont rapidement et exactement informés des variations de prix qui surviennent, et d'autant plus faibles d'ailleurs si les acheteurs, eux, ne le sont pas. En pareil cas, l'instigateur n'a pas à attendre longtemps pour savoir si les autres le suivront et ne risque donc pas de perdre beaucoup de clients dans l'intervalle.

Outre un parallélisme délibéré, une plus grande transparence des prix pourrait également encourager toute forme de collusion (y compris la collusion dite "tacite") en facilitant généralement le repérage, et partant, la sanction, par les entreprises qui coopèrent, de celles qui ne suivent pas le mouvement. Il convient de prévenir d'une manière ou d'une autre ce type d'abus dès lors que la fixation coordonnée de prix à caractère anticoncurrentiel dure un tant soit peu.

Les responsables de l'action gouvernementale n'ont pas toujours pris la juste mesure des risques pour la concurrence associés à une plus grande transparence des prix dans certaines circonstances. Il est arrivé que les dispositions prises par les pouvoirs publics pour renforcer la transparence en matière de prix

aient apparemment entraîné des hausses de prix, probablement parce qu'elles avaient favorisé une coordination à caractère anticoncurrentiel entre les vendeurs. Dans d'autres cas en revanche, les mesures prises sous l'impulsion des pouvoirs publics pour accroître la transparence en matière de prix ont entraîné une intensification de la concurrence sur les prix. Ces résultats diamétralement opposés donnent une idée de l'importance qu'il faut accorder aux conditions qui règnent sur le marché lorsqu'on cherche à déterminer l'impact de mesures ayant des effets sur la transparence des prix.

- (3) *Il est peu probable qu'une plus grande transparence des prix augmente sensiblement le risque de coordination à caractère anticoncurrentiel sauf si les marchés concernés sont déjà particulièrement exposés à ce type de risque.*

Sur certains marchés, le risque de coordination à caractère anticoncurrentiel est faible même si la transparence des prix est très grande. De façon générale, il est plus faible sur des marchés caractérisés par : une faible concentration, la présence d'un grand nombre de vendeurs, des barrières à l'entrée peu élevées, un manque de transparence en ce qui concerne les prix, les quantités échangées et les stratégies de commercialisation appliquées, l'existence d'asymétries entre les vendeurs et entre les offres de produits, des variations brutales de la demande et des paramètres de coût, des comportements d'achat répondant à des schémas très éclatés, et la présence d'un ou de plusieurs concurrents se situant en marge du mouvement.

- (4) *En supposant qu'un marché soit prédisposé à donner lieu à une coordination à caractère anticoncurrentiel, les conséquences d'une plus grande transparence des prix doivent être évaluées en examinant les effets sur la façon et le moment où les acheteurs et vendeurs sont renseignés sur les prix et ainsi que sur leurs facultés respectives de réagir aux variations de prix. Du point de vue de l'acheteur, une transparence accrue en matière de prix risque d'autant plus d'être préjudiciable qu'elle contribue indûment à favoriser le vendeur par rapport aux informations dont dispose l'acheteur et aux choix qui s'offrent à lui. Le commerce électronique entre entreprises et consommateurs est l'une des situations qui peut le mieux illustrer cet état de fait.*

Parce qu'il devrait permettre de réduire les coûts de recherche, on pense que le commerce électronique va améliorer la transparence en matière de prix sur les marchés concernés. Dans les faits, il se peut que la situation évolue un peu différemment. Les logiciels de commerce électronique ("shopbots") qui contribuent à améliorer la transparence en matière de prix pour les consommateurs peuvent également être utilisés par les vendeurs pour surveiller leurs concurrents. Dans la mesure où les vendeurs font davantage usage de ces instruments que les acheteurs, ils peuvent en principe être informés des baisses de prix survenues sur les marchés électroniques bien avant qu'un nombre important de consommateurs aient eu le temps de changer de fournisseur pour en bénéficier. Il en résulte que le commerce électronique peut aboutir à une amélioration de la transparence en matière de prix qui bénéficie davantage aux vendeurs qu'aux acheteurs. De plus, il peut aussi contribuer à avantager les vendeurs en leur donnant les moyens de faire varier leurs prix plus facilement, plus rapidement et à moindre coût en réaction aux décisions de leurs concurrents. A terme, le fait que toute baisse de prix donne rapidement lieu à un rattrapage pourrait mettre sous l'éteignoir la concurrence sur les prix sur les marchés électroniques, contribuer à axer la concurrence sur des critères autres que les prix, et enfin placer le consommateur dans une situation où la transparence serait finalement moindre.

On peut formuler trois observations générales sur l'impact des améliorations asymétriques de la transparence en matière de prix :

- a. les activités contribuent à renforcer la transparence uniquement entre les entreprises présentent plus de dangers que celles qui favorisent le renforcement de la transparence entre les entreprises et leurs clients ;
- b. les mesures prises par les entreprises ou les organisations professionnelles pour restreindre l'accès des consommateurs aux informations sur les prix, tout en ayant vraisemblablement aucun effet sur la transparence en matière de prix entre les vendeurs, font planer de graves menaces sur la concurrence ; et
- c. les mesures destinées à faire bénéficier les consommateurs de la transparence qui existe déjà entre les entreprises devraient en principe servir la concurrence.

(5) *Sur les marchés prédisposés à donner lieu à une coordination à caractère anticoncurrentiel, les échanges directs d'informations sur les prix entre fournisseurs doivent être surveillés de près.*

Comme pour la plupart des pratiques unilatérales ou collectives pouvant avoir des objectifs ou des effets anticoncurrentiels, les échanges directs d'informations sur les prix peuvent également exercer une influence positive sur la concurrence. Par exemple, ils peuvent permettre aux entreprises de rémunérer leur force de vente selon des critères qui tiennent mieux compte de ses efforts et de ses compétences, c'est-à-dire d'isoler les effets des évolutions survenues dans les conditions qui prévalent sur le marché. Ils peuvent en outre contribuer à améliorer la prise de décisions concernant l'accroissement ou la diminution des capacités. Les autorités de la concurrence devraient prendre en considération ces aspects bénéfiques, mais également veiller à ce qu'ils puissent être mis à profit avec un minimum de risques de porter atteinte à la concurrence.

Les risques pour la concurrence associés à l'échange direct d'informations sur les prix peuvent être notablement réduits si l'on exige que les données échangées soient suffisamment agrégées et anciennes. Elles seront en effet nettement moins utiles que des données individualisées et à jour pour parvenir à conclure et appliquer des accords à caractère anticoncurrentiel. C'est peut-être le principal point à retenir de l'affaire *UK Tractor* qui a suscité tant de débats au niveau de la Commission européenne bien qu'il ait plutôt été question dans ce cas d'échanges de données relatives au chiffre d'affaires que d'échanges de données sur les prix.

Si l'on ne peut pas ériger et maintenir des coupe-feux fiables, l'agrégation suppose obligatoirement l'intervention d'une tierce partie dans l'échange de données sur les prix, et cela, en soi, peut permettre de limiter les risques associés à cet échange. L'intervention d'une tierce partie nécessite dans une certaine mesure une coordination initiale, mais elle élimine toute excuse pour se livrer de façon suivie, sous quelque forme que ce soit, à des activités de transmission stratégique d'informations risquant de se révéler préjudiciables.

En dehors des critères concernant le degré d'agrégation des données sur les prix qui doit être requis et l'ancienneté des données, les autorités de la concurrence devraient veiller à ce que les échanges soient rendus publics afin de maximiser les avantages que peuvent en retirer les consommateurs. Elles devraient également se demander ce que les parties feraient selon toute probabilité si une forme particulière d'échange de données sur les prix était prohibée. Sur certains marchés, il peut être relativement facile de parvenir au même résultat en décidant unilatéralement de diffuser des catalogues de prix sur l'Internet ou de les publier dans un journal. Ces solutions peuvent, ou non, selon le cas, rendre l'information plus accessible aux acheteurs que l'échange prohibé.

- (6) *Sur des marchés prédisposés à donner lieu à une coordination à caractère anticoncurrentiel, la communication d'intentions concernant la fixation des prix à venir peut constituer un instrument puissant de "transmission stratégique d'informations".*

Cela est particulièrement évident dans l'affaire *Airline Tariff Publishing Company* qui a éclaté aux États-Unis, ainsi que dans une affaire similaire au Brésil. La faculté de communiquer des intentions concernant la fixation des prix à venir en alimentant un système de réservation informatisé offre apparemment aux compagnies aériennes un moyen peu risqué de parvenir à des tarifs acceptables par tous tout en évitant au maximum d'avoir à réaliser un grand nombre de transactions à des prix annoncés provisoirement. Elle leur permet par ailleurs de repérer les tarifs qu'elles souhaitent tout particulièrement voir varier à nouveau, et d'adresser des menaces de riposte crédibles sans véritablement s'exposer à de lourdes pertes.

- (7) *La fixation de prix par des organisations professionnelles est presque toujours préjudiciable à la concurrence, et souvent illégale. En revanche, l'adoption par des organismes professionnels de prix conseillés et de mesures autres ayant des effets sensibles sur la transparence en matière de prix passe par la recherche d'un équilibre entre les conséquences favorables et défavorables que ces dispositions peuvent avoir sur la concurrence.*

Les consommateurs doivent parfois supporter des coûts de transactions particulièrement élevés sur certains marchés. Ces coûts sont quelquefois extrêmement élevés dans le secteur des services professionnels où les consommateurs ont par définition beaucoup de difficulté à déterminer ce dont ils ont besoin et à évaluer la qualité des prestations offertes. La plupart des pays ont adopté diverses réglementations visant à améliorer le fonctionnement de ces marchés.¹ Quelquefois, ces dispositions autorisent les organisations professionnelles à prendre des mesures ayant des effets sur la transparence en matière de prix, telle la publication de barèmes proposés pour divers services. Les autorités de la concurrence devraient faire pression pour que les barèmes de ce type soient présentés comme des tarifs "conseillés" et non imposés. Elles ne devraient toutefois pas nécessairement interdire la publication de recommandations en matière de prix, en particulier dans les cas où un nombre important d'adhérents et de non-adhérents n'appliquent pas les prix recommandés et où les clients sont conscients de cet état de fait. Se pose alors la question des restrictions à la publicité sur les prix.

Beaucoup d'organisations professionnelles imposent des restrictions en matière de publicité sur les prix même s'il s'agit de messages véridiques et non déceptifs au motif que ce type de publicité peut induire les consommateurs en erreur et entraîner une baisse insidieuse de la qualité. Cet argument est démenti par un nombre croissant d'études économétriques. Les autorités de la concurrence devraient donc s'employer à revoir les règles en vigueur afin que les organisations professionnelles ne soient plus en mesure de s'opposer à la diffusion de messages publicitaires véridiques et non déceptifs.

- (8) *Certaines pratiques telles que les clauses d'alignement sur la concurrence et la clause de la nation la plus favorisée (NPF), pourraient avoir des conséquences notables, et éventuellement asymétriques, sur la transparence en matière de prix.*

Sous leurs nombreuses formes, les clauses d'alignement sur la concurrence et la clause de la nation la plus favorisée peuvent introduire une flexibilité des prix appréciable dans les contrats à long terme, et de surcroît offrir une garantie précieuse à certains acteurs, ce qui peut expliquer pourquoi on les retrouve dans une multitude de configurations de marché et pourquoi elles sont souvent adoptées unilatéralement par les vendeurs, quelquefois à la demande de leurs clients.

Les vendeurs qui ont recours à des clauses d'alignement sur la concurrence offrent principalement à leurs clients des incitations fortes à leur faire part de ce qu'ils savent sur les prix pratiqués par la concurrence. C'est un aspect qui pourrait se révéler important sur des marchés où il est difficile d'obtenir des catalogues de prix ou de connaître le prix des transactions effectuées. Grâce aux clauses d'alignement sur la concurrence, les vendeurs peuvent disposer des informations sur les prix recueillies par l'ensemble de leur clientèle, ce qui représente une masse de renseignements nettement plus importante que celle dont ils disposeraient autrement, et ce qui contribue presque sans aucun doute à enrichir les informations qu'ils possèdent sur chaque acheteur.

L'introduction de la clause de la nation la plus favorisée dans leurs contrats de vente devrait freiner les entreprises tentées de procéder à des réductions sélectives des prix. Le résultat pourrait être une réduction de l'écart entre les prix réels et les prix de catalogues, ces derniers étant beaucoup plus faciles à connaître. Si l'on ajoute à cela que l'application généralisée de prix réduits est plus visible aussi bien du point de vue des acheteurs que de celui des vendeurs, on pourrait en déduire que l'introduction de la clause de la nation la plus favorisée dans les contrats de vente améliore la transparence en matière de prix sur le marché concerné. Il est difficile de savoir si le processus se révélera en fin de compte plus profitable aux acheteurs qu'aux vendeurs ou si ce sera l'inverse.

Il peut parfaitement exister des situations où les autorités de la concurrence sont amenées à considérer que les clauses d'alignement sur la concurrence et/ou la clause de la nation la plus favorisée ont été adoptées à des fins anticoncurrentielles ou produisent des effets anticoncurrentiels soit pour des raisons liées à la transparence en matière de prix, soit pour d'autres raisons. Dans ces situations, leur capacité d'interdire l'adoption de ces clauses dépend avant tout des éléments de preuve de l'existence d'un accord plus large à caractère anticoncurrentiel qui sont en leur possession.

(9) *Pour arriver à doser de manière optimale la transparence en matière de prix dans le cadre de marchés publics, il est parfois nécessaire de procéder à un délicat arbitrage entre la volonté de combattre la corruption d'un côté, et celle de préserver la concurrence de l'autre.*

Un des moyens les plus évidents de s'assurer que les autorités responsables de la passation des marchés publics attribuent les contrats uniquement en fonction des mérites respectifs des soumissionnaires consiste à publier les offres détaillées. Il devient ainsi nettement plus facile pour les parties qui ont été lésées de détecter les pratiques déloyales ou entachées de corruption et d'intenter des actions à l'encontre de ces pratiques. Malheureusement, cette solution facilite également, en cas de soumission concertée, le repérage des protagonistes n'ayant pas respecté leurs engagements.

Dans les pays où la confiance de l'opinion publique dans les institutions est particulièrement limitée, il peut se révéler politiquement impensable de faire pression pour obtenir que les offres demeurent secrètes dans le cadre de la passation de marchés publics. D'autres pays se voient contraints, en vertu de divers accords commerciaux internationaux, de faire régner une grande transparence sur les offres. Quoiqu'il en soit, il peut aussi se révéler judicieux de ne pas publier les offres, ou tout au moins, de ne pas le faire pendant un long laps de temps après l'attribution du contrat. Dans certains cas, les autorités de la concurrence insistent pour que les personnes qui conduisent les procédures de passation des marchés publics refusent de s'engager à accepter l'offre la plus basse. Dans d'autres, elles mettent en garde contre la publication de calculs précis lorsque ce type de pratique pourrait conduire à une coordination à caractère anticoncurrentiel sur d'autres marchés.

- (10) *Nombreux sont les pays qui ont éprouvé des difficultés à arrêter des mesures relatives à la transparence en matière de prix sur le marché de la vente d'essence au détail.*

Le marché de la vente d'essence au détail qui est extrêmement concentré pourrait presque faire figure de cas d'école pour illustrer le fonctionnement de marchés où la coordination en matière de prix est particulièrement facile et tentante. Le produit est extrêmement homogène, les achats sont fréquents et portent sur de petites quantités, les vendeurs ont des coûts symétriques et la demande est raisonnablement stable. De plus, l'approvisionnement est généralement assuré par une poignée de raffineries qui sont souvent en bonne position pour coordonner leurs prix surtout si elles sont intégrées verticalement jusqu'au niveau de la vente au détail. En l'espèce cependant, les mesures visant à renforcer la transparence en matière de prix consistent parfois simplement à donner aux consommateurs accès aux informations dont disposent déjà les vendeurs. C'est pour cette raison, entre autres, que beaucoup de pays ont adopté des dispositions destinées à permettre aux automobilistes de comparer plus facilement les prix pratiqués.

Le fait d'avoir imposé une plus grande transparence en matière de prix sur le marché de la vente d'essence au détail a souvent contribué à apporter de l'eau au moulin de ceux qui affirment que les prix sont fixés principalement en fonction de la simple observation de variations simultanées et de même amplitude des prix. Néanmoins cette évolution en parallèle des prix pratiqués ne constitue pas en soi une preuve suffisante de l'existence de pratiques anticoncurrentielles.

- (11) *Les effets ambigus des divers moyens mis en œuvre pour améliorer la transparence en matière de prix incitent naturellement à préconiser une stratégie au cas par cas inspirée par le bon sens. Les restrictions à la transparence en matière de prix peuvent toutefois sembler contraires à ce qu'on pourrait concevoir intuitivement comme étant de l'intérêt du consommateur. Les autorités de la concurrence devraient donc veiller tout particulièrement à définir et rendre publics les critères qu'elles entendent appliquer pour se prononcer sur le bien-fondé des affirmations de ceux qui prétendent que l'amélioration de la transparence en matière de prix a des objectifs ou des effets anticoncurrentiels.*

Les avantages commerciaux qui s'attachent à la stabilité et à la prévisibilité des dispositifs juridiques conduisent toujours à inviter les autorités de la concurrence à expliquer comment elles appliqueront leur pouvoir discrétionnaire dans des circonstances données. Dans le cas du renforcement de la transparence en matière de prix, il semble particulièrement souhaitable de pouvoir disposer de quelques orientations à cet égard, non seulement pour faciliter le respect des règles en vigueur, mais aussi pour veiller à ce que les associations de consommateurs et les instances du secteur public concernées comprennent bien ce que les autorités de la concurrence cherchent à faire. Une simple liste de critères à considérer aiderait à attirer l'attention sur les dangers inhérents au renforcement de la transparence en matière de prix dans certaines situations.

NOTE

¹. Pour avoir un aperçu des grands enjeux dans ce domaine, se reporter aux actes de la table ronde organisée en juin 1999 par le Groupe de travail N°2 du Comité du droit et de la politique de la concurrence, qui ont été publiés sous le titre "La concurrence dans les services professionnels". Ce document est consultable sur l'Internet à l'adresse suivante : <http://www.oecd.org/daf/clp/Roundtables/profser00.htm>.

BACKGROUND NOTE

WILL A GREATER DEGREE OF PRICE TRANSPARENCY HELP OR HARM BUYERS?

by the Secretariat

1. Introduction

There are a wide variety of privately and publicly induced changes in price transparency that competition authorities might need to assess. For example, competitors could decide to systematically inform one another of their current list prices, or governments could require companies to disclose invoice pricing or could move in the opposite direction by empowering self-regulatory bodies to restrict advertising. There could also be instances where competition authorities find it necessary to examine meeting competition clauses or base point pricing where effects on price transparency are an inherent part of the analysis.

Throughout the paper, price transparency refers not just to prices but also to key elements of pricing policy, such as discounts and finance charges. In addition we will sometimes refer to list prices, but wish at the outset to distinguish these from what will be referred to as "transactions prices", i.e. actual invoice prices.

One way to think about price transparency is to examine what it costs to discover transaction prices. Seen in that light, a particular level of price transparency does not really exist in a market wide sense, except in polar extremes. One could imagine a market where search costs are so low that all market participants know all prices instantaneously. That market would have perfect price transparency. At the other extreme, search costs could be so high that buyers and sellers know only the prices they individually transact at, i.e. a complete lack of price transparency. In between those extremes fall "real world" markets, where individual buyers and sellers have different information about prices and would have to incur different costs to augment that information.

The short answer to this paper's question is that increased price transparency will generally benefit buyers *except* where it makes a significant contribution to fostering anti-competitive oligopolistic co-ordination among sellers. In addition, five generalisations seem warranted:

- exchanges of price information among competitors are less likely to be harmful to competition, the older and more aggregated are the data and the more they relate to list rather than transactions prices;
- increases in price transparency confined to improving the ability of buyers to make price comparisons will generally make buyers better off;
- increasing what sellers know about their rivals' prices, while holding constant the degree of price transparency enjoyed by buyers, has a greater potential to harm than to help buyers;
- systematic differences in when buyers and sellers obtain information about changed prices and in how rapidly they are able to respond to such changes can be very significant - in particular, buyers will tend to be worse off if sellers learn of their rivals' price cuts and are

able to respond to them before many buyers have an opportunity to purchase at the initially lower prices; and

- under certain market conditions, it makes sense to prohibit agreements to share price information as well as certain other facilitating practices (e.g. most favoured nation clauses and meeting competition clauses), especially if these are widespread in a market or are adopted pursuant to an agreement among competitors.

The paper begins with a discussion of the benefits and costs of price transparency. It then probes the links between increased price transparency and the probability of anti-competitive co-ordination, a blanket term covering tacit collusion, conscious parallelism, price leadership and practices having similar effects. This is followed with considering some specific policy issues and a section drawing together our conclusions.

2. Benefits and Costs of Enhanced Price Transparency

2.1 *Pure competition (i.e. perfect competition less perfect information)*

In an extreme situation where all buyers face prohibitively high search costs, price competition among sellers may not occur. Instead, each seller could effectively enjoy a "monopoly" as regards its existing clientele and could try to set prices at the point where marginal revenue equals marginal costs.

Things become considerably more complicated when one moves away from this polar position to consider what could happen if, for example, some buyers are perfectly (i.e. costlessly) informed as to prices while others face considerable search costs, or some variant on that theme. Stiglitz (1989) explored some of those complexities when he examined how the predictions of the perfect competition model change if one drops the assumption that information, including that relating to prices, is perfect. For the homogeneous commodities case, Stiglitz found that even small search costs can have major repercussions including:

1. equilibrium may not exist;
2. when equilibrium exists, prices in such markets may be considerably in excess of the competitive level (marginal costs); and an increase in the number of firms may not result in a lowering of prices;
3. alternatively, equilibrium may be characterised by a price distribution;
4. demand curves may be kinked.¹

The first point includes the possibility that there may be no transactions at all. Buyers and sellers could refuse to transact unless they have some assurance that the price is "correct", i.e. that they are dealing with sufficiently liquid markets.² Turning to the second point, prices may be above competitive levels because of the local market power that imperfect information gives rise to. As for a larger number of firms not necessarily being associated with lower prices, this could happen because multiplying the number of firms and/or outlets tends to increase the search costs buyers must incur to find the lowest priced seller. That in turn could reduce their willingness to make such a search, and when buyers are less willing to search for lower prices, sellers are naturally less willing to compete on price. Stiglitz' third point is linked to the expectation that with imperfectly informed buyers, sellers will be able to price discriminate, generally charging higher prices to those with higher search costs. Exactly how and why demand curves might be kinked depends on specific assumptions concerning buyers. For example, if buyers can be neatly divided into those who merely shop at the nearest outlet, and those who search for and patronise lower

priced sellers, demand curves facing individual sellers might be quite inelastic above their current prices and much more elastic below those prices.

Summing up concerning the "pure" competition case (i.e. perfect competition minus perfect information), a sufficiently significant increase in price transparency could result in markets emerging where there were none before, or at least none having equilibrium prices. In some situations it could also produce lower prices and reduce the incidence of price discrimination. With pure competition, increased price transparency is generally good for at least the buyers with the highest search costs, but may not necessarily increase economic efficiency.³

2.2 *Firms are not perfectly informed and are not price takers, but there is no anti-competitive co-ordination among them*

Several possibilities emerge in this case. Three of them, i.e. monopoly/monopsony, dominant firm, and monopolistic competition are discussed in an Annex. The only generalisation obviously emerging from them is that buyers are more likely to be better off if they are the main beneficiaries of any increased price transparency.

In the non-co-operative oligopoly (oligopsony) situation, a small number of sellers (buyers) recognise their interdependence and set prices and outputs based on certain observations of what their rivals are doing. They do not, however, engage in anti-competitive co-ordination, i.e. there are no co-ordinated effects.⁴

The effects of increased price transparency in the non-co-operative oligopoly case have been examined by Kühn and Vives (1995) and Kühn (2001). They determined that increased price transparency could bring gains or losses in *static* efficiency depending on whether sellers tend to set outputs or prices, and on how the enhanced transparency assists sellers in adjusting output or price to prevailing demand conditions. Predicting the probability and magnitude of the potential static gains/losses would require very precise knowledge of industry characteristics. Because of the need for a high, perhaps unattainable, level of industry specific information, Kühn and Vives (1995) concluded their analysis of this phenomenon by recommending that competition authorities ignore static effects when formulating policies towards information exchange among firms. It seems likely that exactly the same policy conclusion would be appropriate in the case of non-co-operative oligopsony.

2.3 *Oligopoly, including the possibility of anti-competitive co-ordination*

Could enhanced price transparency affect the probability of anti-competitive co-ordination? This issue is best analysed by investigating how increased price transparency might affect incentives and abilities of buyers and/or sellers to co-ordinate a rise in prices and to take steps to detect and deter "hidden competition"/"cheating" that would tend to restore competitive pricing. In what follows, we will simplify the exposition by confining ourselves to co-ordination among sellers. We note, however, that co-ordination among buyers will almost by definition improve their welfare (assuming it does not lead to competition law sanctions).

Sellers' abilities to settle on a mutually acceptable level of supra-competitive prices could be significantly assisted by increased price transparency. This is because competition laws generally impose heavy sanctions on firms directly communicating in order to arrange an anti-competitive agreement making it considerably safer to proceed by way of inter-active price adjustments.⁵ How well such adjustments work depends significantly on the prevailing degree of price transparency.

With a sufficiently small number of firms and enough price transparency, initial "agreement" on anti-competitive prices could be achieved through a trial and error process perhaps refined through resort to price leadership by one or more firms. The co-ordination process could begin by one oligopolist simply raising its price and watching to see if others follow. The price leader's risks in doing that depend somewhat on the prevailing degree of price transparency. The risks are lower when sellers are quickly and accurately informed of price changes and buyers are not. Under those circumstances, the leader will not have to wait long to see if others will follow and stands to lose few customers in the interim. Risks for price leaders would presumably be still lower if they could make their suggestions strictly in the form of non-binding price announcements (more on this later).

In addition to facilitating reaching an anti-competitive consensus, increased price transparency could also help firms sustain that arrangement by assisting in detecting and punishing hidden competition.

The more prices exceed competitive levels, the more individual sellers stand to gain, at least in the short run, by secretly cutting price. This is the "prisoner's dilemma" which tends to undermine all attempts at oligopolistic co-ordination, whether formal (i.e. explicit collusion) or otherwise (i.e. tacit collusion, conscious parallelism, price leadership etc.). Stable anti-competitive co-ordination requires that firms find a way to make co-operation the "dominant strategy", meaning a credible way must be found to detect and punish cheating.

Potential cheaters have strong preferences concerning the degree and type of price transparency prevailing in a market. While keeping rivals in the dark, a cheater would like key buyers to be instantly informed of its hidden competition. A cheater would also prefer that in the event its rivals suspect hidden price cutting, they would find it difficult to distinguish between the effects of cheating and volume losses due to unexpected changes in demand. Cheaters would also prefer that firms considering retaliation against suspected cheating are unable to identify the firms responsible, or for some other reason are unable to engage in customised retaliation. This would mean punishment must be meted out in the form of a generalised price war that would be both more expensive and less effective than a customised response. All this is not to imply that the kind of price transparency optimal for cheaters is highly likely. Indeed, if it were, anti-competitive co-ordination would be quite improbable to begin with. The point instead is that competition authorities need to carefully analyse the form increased price transparency takes when seeking to determine its potential to facilitate anti-competitive co-ordination.

In this and previous sections we have said nothing about how increased price transparency might affect barriers to entry. It could happen that the same factors enhancing price transparency also improve the ability of potential new entrants to gauge incumbents' profitability. Moreover, improved price transparency could reduce the risk facing new entrants by putting them in a better position to estimate the prices they would likely receive for their products. Reduced risks for new entrants should in turn mean faster, larger scale entry. Enhanced price transparency could also reduce or eliminate periods of trial and error as new entrants iterate their way towards profit maximising prices. All this tends to benefit buyers through shortening periods in which they might have to endure supra-competitive pricing, and by generally reducing sellers' incentives to engage in anti-competitive co-ordination.

Recapping this section of the paper, enhanced price transparency for buyers will usually benefit them, unless it simultaneously increases the probability of anti-competitive seller co-ordination.⁶ A case by case approach is clearly called for, one that pays close attention to both market conditions and the specific way in which price transparency is being or will be enhanced.

3. Key Factors Influencing How Increased Price Transparency Could Affect the Probability of Anti-competitive Co-ordination

3.1 *Market and product characteristics*

The more other market conditions render anti-competitive co-ordination unlikely, the more increased price transparency will probably help rather than harm buyers. Prominent among market conditions that could but not necessarily would discourage anti-competitive co-ordination are: low barriers to entry; a large number of sellers; a low level of concentration; low transparency as to quantities transacted and marketing strategies; asymmetries among sellers and product offerings; rapidly changing demand and cost conditions; lumpy purchasing patterns; and presence of a maverick competitor. Since these were covered in an earlier roundtable discussion dealing with oligopoly they will not be discussed in detail here.⁷

As an example of how market conditions might affect the probability of anti-competitive co-ordination, consider the hypothetical case of two petrol stations located across the street from each other in a small, isolated town.⁸ Suppose there are no other petrol stations within a radius of 100 kilometers, no new ones can be opened up in that area, and the protected duopolists post their list prices at the entry of their stations in plain view of passing motorists, and each other. There are good reasons to expect that the petrol stations would in time charge identical, approximately monopoly level prices. The market is highly concentrated, demand levels are reasonably stable and predictable, the product is simple, homogeneous and purchased in small amounts rather than significant lumps, and sellers learn of changes in list prices before most buyers and can quickly match those changes. In addition, if either petrol station were to offer secret discounts, it would be easy for its rival to actually observe clients changing seller. One might also expect that "loyal" customers would soon inform the higher priced station of what is going on. Cheating is quite unlikely in such a situation.

In addition to emphasising the importance of market conditions in assessing the impact of price transparency, the hypothetical petrol station example illustrates another important point. It is highly unlikely that posting list prices, i.e. increased price transparency, would make much difference to the predicted outcome. The conclusion on that score would be quite different, however, if there were say twenty instead of just two petrol stations in town. Under those circumstances, with or without listed prices, sellers could still fairly easily keep abreast of their rivals' prices by simply driving to each station on a regular basis and noting the prices at the pumps. Presumably sellers would have a greater self-interest in doing that than would buyers. In such a situation, posting listed prices would probably benefit buyers because it would improve their ability to make price comparisons, without at the same time making much difference to the probability of anti-competitive co-ordination.⁹

Summing up as regards market conditions, competition authorities should be more concerned about increased price transparency the more market conditions favour anti-competitive co-ordination, and the more enhanced price transparency contributes to the risk of such co-ordination occurring.¹⁰ They should generally be less concerned, the more enhanced price transparency tends merely to bring buyers closer to having the same information sets as sellers.

3.2 *Differential effects of various types of increased price transparency*

As just noted, increased price transparency could have different effects according to exactly what it consists of, and how it impacts on the ways buyers and sellers normally obtain price information in a particular market. It may or may not affect important asymmetries in what buyer and seller groups know about prices and in their speeds of reaction to price changes. Similarly it may or may not extend to

allowing sellers to share pricing intentions through making non-binding price announcements. In addition, some types of enhanced price transparency significantly increase sellers' abilities to be certain that hidden competition has occurred and to identify the firm(s) responsible. All three of these differences have an important impact on how price transparency could affect the probability of anti-competitive co-ordination.

3.2.1 Relative speed of buyers' versus sellers' reactions, and a comment on electronic marketplaces

As noted in the petrol station example, the more price transparency enables sellers to respond faster than buyers to price changes, the worse the situation generally is from a competition perspective. This is worth bearing in mind when considering the direct exchange of price lists among sellers. Although sellers may be able to obtain rivals' price lists through their customers, that does not alter the fact that a direct exchange could make a critical difference in some markets. It could allow sellers to match rivals' price cuts faster than most buyers can place orders, thus allowing them to retain customers that otherwise might have been wooed away by rivals' lower prices. That would reduce incentives to compete on price and tend to harm buyers.¹¹ In assessing the importance of information exchange, it is not merely what competitors know that is critical, but also when they know it.

The issue of buyer versus seller speed of response to price changes could be particularly important in newly emerging electronic marketplaces, both the business to consumer (B2C) and the business to business (B2B) varieties.

At first sight one might think B2C e-marketplaces would be good examples of enhanced price transparency contributing to increased competition. Through the use of automated search engines (i.e. "shopbots") consumers should seemingly enjoy the benefits of lower cost, quicker price searches and consequent increased competition among sellers. There are several offsetting factors, however, that could cause things to turn out somewhat differently. Chief among them is that sellers could have a considerably greater interest in incurring the costs, in both time and money, involved in repeated resort to the various shopbots.¹² Moreover, when they learn about rivals' price reductions they can quite quickly and cheaply alter their price menus to meet the competition.¹³

Existing empirical work on B2C e-marketplaces reveals a considerable degree of price dispersion even for seemingly homogenous goods.¹⁴ This appears difficult to square with the notion that e-marketplaces offer a high degree of price transparency. It should be noted, however, that these marketplaces are still at an early stage of development and payment and delivery uncertainties remain to be worked out. Once that is done, the advantages of trust and branding that certain sellers now enjoy could be eroded and price transparency might have the desired pro-competitive effect of reducing both prices and observed price dispersion. Whether such benefits will actually be realised probably depends somewhat on general market characteristics, especially on the number of competing sellers.

While B2B marketplaces share the transparency issues discussed in relation to B2Cs, asymmetries in price information as between buyers and sellers might be considerably less given the greater sophistication of businesses. There could be something to be concerned about, however, if a B2B is set up in a way that builds in some information asymmetry, e.g. allows certain buyers or sellers to know more than others about prices, input costs and quantities transacted. The chances of this happening might be quite low for marketplaces owned by neutral third parties who presumably have a strong interest in attracting as many buyers and sellers as possible to their sites. They would hardly wish to acquire a reputation of favouring some actors over others. Such might not be the case, though, for B2Bs owned by major buyers or sellers, especially if the disadvantaged buyers or sellers have few good substitute sites to turn to. In any case, regardless of who owns an exchange, there could be significant risks they will be used to facilitate communication about prices and other matters that ends up harming parties not connected to

the exchange, i.e. final consumers.¹⁵ Fire walls could help reduce but might not be able to eliminate the risk of this occurring.

It has been argued that the advent of e-marketplaces should lead to re-thinking anti-trust policy towards information exchange.¹⁶ In the past competition authorities could more easily rely on content to flag whether information was intended primarily for customers or rival sellers, and could consequently prohibit exchanges of certain types of information. Electronic marketplaces could render this considerably more difficult by greatly increasing information flows and effectively blocking monitoring through the use of encryption. In addition, there might be little point in forbidding direct exchanges of information since third party Internet sites could rapidly emerge to provide an indirect exchange of the same information. There seems to be little difference between a direct exchange of current price lists among sellers and providing the same information in a continually up-dated on-line catalogue.

3.2.2 *Exchanging information about future as opposed to current prices*

Section II's analysis focused principally on price transparency regarding past or current prices. What, though, are the competitive impacts of transparency concerning future prices? It is common practice in some markets for sellers to pre-announce price changes. Buyers could presumably benefit from learning future prices since this allows them to more optimally time their purchases. Buyers might also, at least as a group, benefit from future price announcements used in effect to offer "sale" prices to better informed buyers. Neither of these benefits will probably be realised in situations where advance price announcements are focused on sellers rather than buyers, or where there is no commitment to transact at the pre-announced prices (i.e. sellers are free to change prices in advance of their becoming effective). At the same time, there appear to be some clear dangers involved in permitting sellers to communicate non-committed price intentions to their rivals.

There can be situations where it is far from obvious what price or prices would be mutually satisfactory to a group of sellers seeking to co-ordinate their pricing. Direct communication could solve that problem, but would amount to illegal, heavily sanctioned collusion. The earlier described trial and error process of adjusting prices in a general upward direction is another possible solution, but it seems quite inferior to announcing uncommitted price intentions. Actual price changes which are out of synch with what rivals are charging entails risks of lost sales when prices are above rivals' levels, or of triggering a price war, when prices are below those levels. In contrast, nothing much is risked by announcing price changes that can readily be rescinded in the event rivals refuse to follow, especially if such announcements are received only by sellers.

Non-binding pre-announced price changes not only facilitate arranging and optimising anti-competitive co-ordination, they might make co-ordination more sustainable. This is because such announcements could be used as threatened punishment for recalcitrant cheaters. Such threats are clearly less costly than actual price reductions, but that advantage could also count as a disadvantage.

Threatened price reductions, indeed all instances of non-binding pre-announced price announcements, are a good example of "cheap talk", which Farrell and Rabin (1996, 116) defined as "...costless, nonbinding, nonverifiable messages that may affect the listener's beliefs." Viewed through a game theoretic lens, the kind of cheap talk most likely to affect outcomes is the "self-signalling", "self-committing" variety. A firm resorting to non-binding pre-announced price changes as a punishment threat may wish its threat to be believed, even if it has no intention of actually carrying out it out. In that sense such threats cannot be described as "self-signalling". They are also not likely to qualify as "self-committing" because the threatening firm does not necessarily have an incentive to actually charge low prices based on its belief that the suspected cheater has believed the threat.

There is one sense in which punishment threats constitute more than cheap talk. They can be used to notify cheaters that they have been "caught". The signal could perhaps even be customised to suggest exactly what kind of repentance is sought, by what time, by which firms and in which sub-markets. The United States Airline Tariff Publishing (ATP) case, brought by the U.S. Department of Justice (DOJ) and settled by consent decree in March 1994, is an example of such signals actually being used by eight of the largest U.S. airlines. It also serves to illustrate the importance of several other important points related to price transparency including the significance of suppliers being able to react faster than buyers. Gillespie (1995, 8-9) described the ATP case as follows:

To understand the government's case against ATP and the airlines, some background on the functioning of ATP and the airline industry in general is relevant. ATP maintains a central database of all airline fares that it distributes both to its airline members who use it for their internal reservation systems as well as their pricing departments, and to the major computer reservation systems (CRSs) that serve travel agents. By making changes in its fares with ATP, an airline could update all the relevant outlets for its tickets at once. Airlines are charged a fee for each change, so that changes are not absolutely costless, but the fees for any change are very small relative to the revenues involved. Since ATP updates all CRSs once a day, airlines can quickly observe and respond to each other's fares using this system, with (at most) a one day lag. Since any significant price movement can be quickly matched by competitors, the potential benefits from cheating on any collusive price are usually small relative to the advantages of maintaining a high price.

The government argued that the airlines were using ATP not just to disseminate fares to consumers, but were also using ATP to communicate with other airlines about prices for fares that were not available for sale to consumers. The airlines were able to distribute this information because in addition to information regarding the purchase price of a fare between two cities, the airlines could also attach two pieces of information that governed when a fare could be sold to consumers. The first piece of information was known as a first ticket date (FTD). The FTD represents the first date of sale for a fare. The second piece of information was known as the last ticket date (LTD). The last ticket date governs when a fare ceases to be available for sale. (8-9)

Gillespie went on to provide a hypothetical illustration of how ticket fare announcements could permit airlines to engage in cheap talk to help drive up fares, and noted as well how ATP may have been used to eliminate unwanted discount fares:

A second type of cheap talk between airlines involved the use of last ticket dates on current fares as a way to eliminate unwanted discount fares. By attaching a last ticket date just a few days away to an existing fare (a "short" LTD), an airline could communicate to another airline that it wanted a fare removed. As with increases, if the discounting carrier did not remove the fare, the carrier wanting to remove the discount could roll the last ticket date [i.e. move it forward] on its discount fare until it was matched by all competitors (9).

There also were incidents where future price announcements mediated by ATP could be regarded as a type of threatened punishment, i.e. offering to drop actual or prospective discount fares in exchange for rivals doing the same regarding actual or planned fares. In addition, the airlines apparently resorted to the use of "footnote designators" in which they developed a kind of code to link together various markets, thereby indicating the tradeoffs they wanted rivals to keep in mind.

The airlines maintained that advance notice of fare changes benefited customers by allowing them to purchase tickets before fares went up. The government countered by pointing out, *inter alia*, that:

1. the advance notice was minimal and so variable as to belie any real policy of supplying consumers advanced notice; and
2. the ticketing dates attached to fares were frequently changed with the result that consumers were sometimes induced to fix their travel plans before they really had to, i.e. LTDs were frequently changed.¹⁷

The ATP case was settled by two very similar consent decrees, one in December 1992 involving two airlines, and the other in March 1994 concerning six more. Gillespie described the latter decree and its hoped for impact as follows:

All the airline defendants are prohibited from using first ticket dates on any of their fares, and ATP is prohibited from disseminating any fares containing first ticket dates. This provision is designed to eliminate one mechanism whereby the airlines engaged in virtually costless cheap talk about future fare levels. Without first ticket dates, airline fares will become available for sale immediately. An airline wanting to increase its fares will have to take some risk that the other airlines will not follow a price increase, and this change will increase the costs of negotiating a multimarket trade.

The consent decree also contains a similar provision that applies to last ticket dates. With the exception of last ticket dates used in advertised promotions, the airlines are not permitted to use last ticket dates in ATP. As with the provision on first ticket dates, this provision is designed to end costless communication about which discount fares should be removed. An airline can still match a discount fare placed in its own markets, and can still add discount fares in other markets. Unlike before, however, that airline will not be able to costlessly indicate that the discounts should be removed by a certain date, or that its own discount fares are not part of an attempt to lower fares in general. (14)

Gillespie was careful to point out that eliminating cheap talk in the ATP case would not necessarily mean a collusive outcome will be avoided, just that it would become more difficult to reach and sustain in the face of changes in market conditions requiring constant changes in "agreements".

It is interesting that the DOJ insisted on abolishing the use of FTDs and restricting resort to LTDs rather than merely requiring that they be binding. The "negotiations" alleged in the case would presumably have been much more difficult to conduct without the ability to change FTDs and LTDs or even to totally withdraw announced fare changes. Moreover, permitting the use of firmly set FTDs and LTDs would have given airlines the option of allowing travellers to plan their trips so as to avoid projected higher prices.

In another case involving what might be regarded as cheap talk, the European Commission decided that a large number of wood pulp producers had violated what was then Article 85(1) by colluding on price announcements and transactions prices, and by exchanging price information. Ultimately the European Court of Justice rejected the Commission's claim that the price announcements and parallel pricing were proof of collusion among the firms. One significant difference between this and the ATP case was that "...generally there were no revisions of prices after public announcements in the trade press."¹⁸ Another was that there was evidence that buyers had pressured the companies to make quarterly prior price announcements. This indicated that buyers were using the price announcements to assist them in their own future planning. A final difference was in the number of companies alleged to be co-ordinating, i.e. eight in ATP compared to about fifty in the wood pulp case. The European Court of Justice found that the price announcements by the wood pulp manufacturers:

...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 others.¹⁹

The European wood pulp case serves to underline that although pre-announced price changes can facilitate co-ordination, it is far from clear that they always do so. Attention must always be paid to whether buyers or sellers are best placed to react to the announcements, whether future prices are in fact fixed or are instead often varied before they become effective, and whether the announcements confer efficiencies on buyers.

3.2.3 *Degree of aggregation, age and type of information exchanged*

Unexpectedly large reductions in Firm A's quantity sold could point to possible cheating by its rivals, but it could also be explained by simple fluctuations in demand including changes in tastes and preferences for differentiated products. Firm A would have little difficulty distinguishing between the two possibilities if it enjoyed a very high level of price transparency, namely if it constantly received up to date information concerning its rivals' transaction prices. Somewhat less useful would be a record of the exact quantities sold by each seller. A distant third best would be current aggregated price or quantity data or information relating to costs or general market research.²⁰ Aggregated data would be even less useful if it were old rather than current data.

As one moves further away from sellers having up-to-date, seller specific transactions prices or quantities, it will take longer for firms to become certain that cheating is occurring, and simultaneously make it more difficult to identify cheaters. Identification difficulties could make a significant difference to the probability of anti-competitive co-ordination, particularly if it is the only missing ingredient in the recipe for customised response to cheating.

Based on the above insights, competition authorities would seem justified in prohibiting the direct or indirect exchange of up-to-date, disaggregated price or quantity data. Exactly how much aggregation and age they should insist on before relaxing that prohibition would presumably depend on market conditions, including the general availability of other co-ordination enhancing information. A case by case rather than a *per se* illegal approach seems warranted. In addition to giving competition authorities the ability to consider both the costs and benefits of an exchange of price or quantity data, a case by case approach would lend itself to considering whether claimed benefits could be obtained just as well through the exchange of less competitively sensitive data.

A relatively recent European Union case highlights the dangers inherent in disaggregated exchange of information. It also illustrates that sharing disaggregated sales data might sometimes be as harmful to competition as exchanging disaggregated price data. The case arose when the United Kingdom's Agricultural Engineers Association Limited, a trade association for UK tractor manufacturers and importers, obtained and shared with its members unit by unit data pertaining to new tractor license registrations. The information included: name of producer, brand, serial number, sales agent, and postal code of the buyer. Using these data, the manufacturers were able to monitor most individual tractor sales.

The European Commission prohibited the information exchange as being itself an anti-competitive practice, i.e. it did not argue that the exchange was part of a more general anti-competitive agreement. The Commission maintained that:

...the high market transparency between suppliers on the United Kingdom tractor market which is created by the Exchange takes the surprise effect out of a competitor's action thus resulting in a

shorter space of time for reactions with the effect that temporary advantages are greatly reduced. Because all competitive actions can immediately be noticed by an increase in sales, the consequences are that in the case of a price reduction or any other marketing incentives by one company the other can react immediately, thus eliminating any advantage of the initiator.²¹

The Court of First Instance upheld the Commission's prohibition, stating in part:

As the [tractor companies] correctly argue, on a truly competitive market transparency between traders is in principle likely to lead to the intensification of competition between suppliers, since in such a situation the fact that a trader takes into account information made available to him in order to adjust his conduct on the market is not likely, having regard to the atomised nature of the supply, to reduce or remove for the other traders any uncertainty about the foreseeable nature of its competitors' conduct. On the other hand, the Court considers that, as the Commission argues this time, general use, as between main suppliers, of exchanges of precise information at short intervals, identifying registered vehicles and the place of their registration is, *on a highly concentrated oligopolistic market...and on which competition is as a result already greatly reduced and exchange of information facilitated*, likely to impair considerably the competition which exists between traders. In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all the competitors the market positions and strategies of the various individual competitors.

In its next paragraph, the Court of First Instance added that:

Provision of such information to all suppliers...enables a given trader to forecast more precisely the conduct of its competitors, so reducing or removing the degree of uncertainty about the operation of the market which would have existed in the absence of such an exchange of information.²²

The tractor manufacturers claimed their exchange of information was necessary for efficient monitoring of their sales personnel. The European Commission and the Court of First Instance rejected this justification because they believed the claimed benefits could have been accomplished by exchanging more aggregated, less competitively sensitive data.

4. Some Specific Policy Issues

4.1 Trade associations

The earlier mentioned e-marketplaces are certainly not the only fora where businesses may indirectly exchange information, including sensitive price or quantity data. Trade associations, such as the one featured in the UK Tractor case, are a far more established means of doing the same thing. A detailed examination of the pro- and anti-competitive potential of trade associations lies beyond the scope of this paper, but there are four points requiring brief mention:

- exchanges of information through trade associations could be less dangerous than direct transfers of sensitive information because intermediation might slow the process and old information is usually less dangerous for competition than up-to-date data - the significance of this point is diminishing as trade associations and their members make increasing use of the Internet;²³

- a notable exception to the first point might arise if trade associations are used not only to exchange information, but also to verify it;²⁴
- given the anti-competitive potential of asymmetric price transparency, it would be better if trade associations share as widely as possible any price data they have collected, i.e. through media or publications likely accessible to both buyers and sellers; and
- if the exchange of accurate price data would not harm competition and such data are not published by government agencies, competition agencies should normally not object to trade associations acting as intermediaries for the exchange.

The last point is a good example of the devil being in the details. How can competition authorities be sure that industry associations will not act as deliberate or unwitting channels for sharing the firm level data they use to compile the legitimately shared, more likely aggregated data? Some precautions are easy to suggest, such as prohibiting firms from supplying the trade association with current price data, and ensuring there is no sharing or exchange of staff between a trade association and each of its members. Other safeguards are difficult to specify in advance and could well vary from one market to another.

The exchange of price data through a trade association presumably requires at least an implicit agreement among rivals to keep one another apprised of pricing behaviour. This supplies another reason why competition authorities should perhaps take notice of such exchanges, especially in markets prone to anti-competitive co-ordination. In contrast, no such implied agreement can be read into normal price advertisements.

4.2 *Price advertisements*

Informing buyers of list prices through advertising basically amounts to guaranteeing them a maximum price until an announced date or further notice. It is difficult to see how this can be anti-competitive, especially since it would usually increase price transparency as much for buyers as for sellers. The only obvious exception would be in rare situations where: a) sellers can more easily and cheaply directly inform buyers of current prices so that price advertising makes little economic sense; *and* b) in the absence of advertising, sellers would have considerable difficulty in discovering their rivals' list prices.

Despite the seeming benefits of advertising, many professional associations have restricted it, sometimes relying on government regulation to enforce their restrictions.²⁵ Such bans have increasingly come under attack partly because of empirical studies showing that price advertising can benefit consumers.²⁶

4.3 *Governmentally mandated enhanced price transparency*

Many governments have taken steps to foster price transparency despite good reason to suspect that such efforts are not always beneficial for buyers. Several such experiences are related below.

4.3.1 *United States experience with the National Industrial Recovery Act (NIRA) and more recently in the rail sector*

In the mid 1930s U.S. industries were permitted to negotiate with the National Recovery Administration (NRA) codes of conduct that probably facilitated anti-competitive co-ordination. The codes contained different provisions in different industries. The most frequently found provision was "open price filing systems" which Krepps (1999, 892) described as follows:

The provisions for open price filing systems required firms to file current and future prices with code authorities. The names of individual sellers were then reported along with their submitted price lists. Further, the codes prohibited deviations from filed prices without prior notification of the code authorities, and the NRA was empowered to prosecute firms against whom complaints were brought by competitors. These open price filing systems served to facilitate price collusion by exposing firms that announce[d] low prices and prohibiting firms that announce[d] high prices from deviating therefrom. (reference omitted)

Describing regression work focused on this program, Krepps stated:

An econometric comparison of industries with and without codes reveals no systematic differences in the change in price-cost margins over the period surrounding the NIRA. These regressions do suggest, however, that certain facilitating practices, namely open price filing systems, did result in higher margins even after the codes themselves were abolished....[O]pen filing systems had the greatest impact on post-NIRA margins in industries with intermediate concentration levels. (893)

Some fifty years later, the U.S. had another interesting experience with government induced increased price transparency, this time confined to railways. Fuller et al. (1990, 265) sketched its outline and effects as follows:

The Staggers Rail Act of 1980 granted railroads freedom to establish rates and enter into confidential contracts with grain shippers. Recent legislation (1986) required that certain contract terms be disclosed. This study shows rail rates in the Plains region commenced an upward trend after implementation of the disclosure policy. Results suggest contract disclosure and increased reliance on posted tariffs facilitated rate co-ordination within the oligopolistic railroad industry.

This conclusion was reinforced by a later study conducted by Schmitz and Fuller (1995). Its abstracts reads:

This study evaluates the impact of railroad contract disclosure regulation (PL99-509) on rail rates for corn on four important shipment corridors. After the passage of this regulation, rail rates increased on corridors with no direct barge competition while rates decreased on corridors with substantial direct competition from barge traffic. The paper concludes that such rate change patterns may be a result of increased information combined with the highly concentrated structure of the rail industry. (97)

It is interesting to note that the apparent reason for PL99-509 was that small shippers believed they were being discriminated against by the railroads. The result of the regulation was a considerably greater reliance on posted tariffs. Schmitz and Fuller's empirical work demonstrates both the potential of increased price transparency to facilitate co-ordination, and the importance of other market conditions in affecting that result. On routes where there was strong inter-modal competition, increased price transparency was apparently not associated with collusion.

Further to the importance of general market conditions, a number of Canadian and American empirical studies have demonstrated that in a market featuring a good many more prices and probably a larger number of competitors than are found in U.S. railroad markets, increased price transparency apparently benefited consumers. In specific, when governments collect and disseminate price data so as to help consumers compare retail grocers, grocery prices fall.²⁷

4.3.2. *Danish ready-mix concrete*

The Danish competition statute of 1990 emphasised the role of market transparency in promoting competition. This helps explain why the Danish Competition Council (CC), concerned about reports of individualised confidential discounts, decided to increase price transparency in the ready-mix concrete markets in three regions of the country. For each of 18 production sites, over a period of about three years, the CC collected and published on a quarterly basis, list prices, average prices and averages of the five lowest prices. According to Albaek et al. (1997, 430):

...following initial publication, average prices of the reported grades of concrete increased by 15-20 percent within less than a year as compared to annual inflation rates of a mere 1-2 percent. Furthermore, the data reveal that, at least locally, the prices converged significantly across the firms serving the same market.

On the basis of their empirical work Albaek et al. (1997, 441) concluded that:

...the evidence...indicates that the Danish Competition Council, by providing reliable price reporting services, has unwittingly assisted firms in reducing the intensity of competition and thereby allowed them to increase prices.

They added that on May 30, 1997, Denmark adopted new antitrust legislation in which "...the emphasis is no longer on the creation of market transparency."

4.3.3 *Special provisions related to oligopoly pricing found in the Japanese Antimonopoly Act*

Japan's written submission for the CLP's roundtable on Oligopoly described Section 18-2 of the Japanese *Antimonopoly Act* as follows:

In a particular field of business where the total annual price of products or services exceeds sixty billion yen, and where the combined market share of the three leading entrepreneurs exceeds seven tenths, if two or more entrepreneurs (including the largest one) raise prices by an identical or similar amount or percentage within a period of three months, the [Japanese Fair Trade Commission - JFTC] may ask these major entrepreneurs for a report indicating the reasons for such price increases in their products or services.²⁸

It also pointed out that the JFTC must provide an outline of these reports in its annual submission to the Diet, and went on to state:

It is expected that the provision concerning parallel price increases will enhance the transparency of price formation in oligopolistic industries, for the sake of the nation's citizens, encourage caution in the pricing decisions of entrepreneurs, and contribute towards the promotion of fair and free competition.

During the roundtable discussion, the CLP's Chairman questioned whether such provisions might have the unintended, counter-productive effect of facilitating oligopolistic co-ordination. A delegate from Japan doubted this would be the case, partly because the outline of the reports containing reasons for price increases is made public only after all pertinent procedures have been conducted by the JFTC, i.e. several months after the price increases have occurred.²⁹

4.3.4. *Public procurement rules requiring that bids be published*

A CLP roundtable on government procurement included some discussion of the impact of increased transparency on competition. The background paper noted that competition would probably be enhanced by not revealing the identity of the winning bidder and the terms and conditions of the winning contract.³⁰ It recognised, however, the need to make difficult tradeoffs between lowering the risks of collusion on the one hand, and ensuring fairness and discouraging corruption on the other.

4.4 *Facilitating practices*

There are a number of steps firms can take, either unilaterally or collectively (although not necessarily collusively), to facilitate anti-competitive co-ordination. Rees (1993, 35-37) discussed "facilitating devices" under the headings: information exchange, trade associations, price leadership, collaborative research and cross-licensing of patents, most-favoured-customer and meeting-competition clauses, resale price maintenance, basing point pricing, and common costing books. Referring to that list, Peeperkorn (1986, 5) noted that:

These devices all try to limit the influence of factors that destabilise co-operative outcomes or enhance the factors that support co-operative outcomes. This can be done by monitoring each other's behaviour thus making detection of free riding easier, by making the infliction of punishment better targeted, or by making it easier for firms to reach a consensus by reducing the effects of factors such as product heterogeneity, uncertainty about future cost, demand or capacity and technology change.³¹

Many facilitating practices exert their influence at least partly by enhancing price transparency. This is the aspect we will highlight in briefly examining three of the more commonly discussed facilitating practices.

4.4.1 *Most favoured nation clauses (MFN)*

An MFN is a contractually binding guarantee that a buyer or seller will grant its client the most favourable treatment afforded some reference group of clients. Such a clause has the effect of reducing, but not necessarily eliminating, a firm's incentive to engage in selective discounts.

The greater the cost of failing to honour an MFN and the easier it is for clients to monitor prices paid by the reference group, the more MFNs are likely to facilitate anti-competitive co-ordination. They do this partly by increasing price transparency. MFNs have these effects because they push firms offering the guarantees to replace selective with general discounting or no discounting at all. The two might amount to roughly the same thing because cheaters naturally prefer selective discounting to the more easily discovered general discounting option. Restricting them to general discounting might in practice mean there will be no cheating, i.e. no secret discounting. In addition, a move away from all forms of discounting, which MFN encourages, means that relatively easy to observe list prices will be equal to the generally more opaque transaction prices. Even in markets where list prices are not relied on, MFNs could still contribute to greater price transparency by granting rivals greater confidence in deducing general transactions prices based on just a few specific observations provided by some co-operative clients. In addition, clients receiving MFN guarantees have a strong self interest in monitoring transaction prices, and the more information clients have, the more likely is some of it to find its way to a discounter's rivals.

Although MFNs may generally imperil competition by discouraging secret discounting, they might have effects pushing in the opposite direction. The more widespread are MFNs in the market, the

more rivals will be unable to punish cheating with selective discounting. That would make punishment more expensive to administer, hence less likely, and that in turn translates into a higher probability that cheating will be profitable.³²

There are various ways in which MFNs might assist consumers, e.g. through providing insurance against competitors receiving better prices or by protecting sunk cost investments, but a discussion of these lies beyond the scope of this paper.³³ They are highly relevant, however, in designing policies towards MFNs. In specific, they mitigate in favour of a case by case approach that balances costs and benefits, rather than a strong across the board prohibition. The same applies to the other two facilitating practices we now look at.

4.4.2 *Meeting competition clauses (MCC)*

In their simplest form, an MCC obligates a firm to meet prices offered by competitors. To simplify the exposition, we will focus on sellers offering MCCs to buyers.

MCCs may have a greater potential to increase anti-competitive price transparency than MFNs. This is because MCCs encourage buyers to report secret discounting to firms potentially interested in punishing that behaviour. Such a result should not simply be assumed, however. Unless buyers have a strong incentive to patronise a particular seller they might simply go ahead and buy at a lower priced outlet rather than incur the time and expense of forcing a firm to honour its MCC. To really be effective in increasing anti-competitive price transparency, an MCC may have to be cast as an offer not merely to meet a competitor's price but to beat it by some significant margin and/or to reduce list prices to all buyers rather than simply for those informed of lower prices elsewhere.³⁴

In addition to altering price transparency, MCCs could have other important effects. They could increase output by facilitating efficient price discrimination, but they could also deter cheating by contractually obligating sellers to punish price discounting.³⁵ Moreover, used in conjunction with MFNs, MCCs could also have an anti-competitive effect by moving a market away from Bertrand price competition and towards Cournot quantity competition.³⁶

4.4.3 *Base point pricing (a.k.a. delivered pricing)*

Instead of allowing customers to pick up goods at the factory gate or to make their own delivery arrangements (i.e. f.o.b. pricing), firms using base point pricing sell a bundled product which includes a delivery charge. Moreover, the delivery charge is calculated as if the goods were shipped from the same base point used in price quotes by competing suppliers. Such a system might make it easier for rivals to observe one another's product prices because the delivery charge component of the bundled price can easily be calculated and deducted. Without base point pricing, it is arguably possible to disguise discounting as reduced delivery charges.

Despite its capacity to increase price transparency, a base point pricing system may or may not make co-ordination easier than if sellers relied on f.o.b. pricing. The debate concerning this, a matter beyond the scope of this paper, essentially turns on whether cheating is more easily discovered through observing quantity or price data.³⁷ It is also worth emphasising that base point pricing may be motivated by non-collusive considerations.³⁸

5. Conclusions

This paper began with some generalisations that can be recapped by referring to three possible scenarios. The first is where increased price transparency is confined to making it easier for buyers to make price comparisons. Buyers are likely to benefit in such situations. Juxtaposed to that are instances where sellers become better informed about their rivals' prices while buyers' information sets are unaffected. Under those circumstances, buyers are much less likely to benefit. The third scenario is where enhanced price transparency means better price information for both buyers and sellers. This is the situation competition authorities will probably encounter most frequently. It tends also to be the most difficult to analyse in terms of predicting effects on economic efficiency. Such complexity is increased when there are asymmetries not only between buyers and sellers but also within both groups, because this tends to have important effects on abilities of firms to price discriminate.

Any analysis of the efficiency effects of increased price transparency, which is somewhat broader than effects on buyers, should focus largely on how it might help create or facilitate the exercise of market power. There may well be cases where enhanced price transparency has important ramifications for the unilateral exercise of market power including the practice of price discrimination. More commonly, however, competition authorities will have to predict how changes in price transparency might impact on market power possessed by a group of firms, i.e. how it will affect the probability of anti-competitive co-ordination. In any event, a case by case approach is clearly called for, one that pays close attention to prevailing market conditions, and to the exact form that increased price transparency takes. Such an approach permits a balancing of the benefits and costs of enhanced price transparency, including an enquiry into whether the apparent benefits can be achieved at lower cost.

E-marketplaces might prove to be particularly challenging as regards determining the effects of increased price transparency. At both the analysis and remedies stages, it may be necessary to consider how the identity of an e-marketplace's owners could affect what information will be exchanged, to whom and when. It could also impact on what the information will be used for.

It has often been pointed out that the causes and effects of anti-competitive co-ordination are roughly similar whether or not it legally amounts to collusion. It is also generally appreciated that proving collusion is inherently difficult. Bringing those insights together, some economists have advocated that the war on anti-competitive co-ordination be conducted primarily by prohibiting practices that facilitate such co-ordination. Kühn and Vives (1995, 116-118) provide an interesting example of that approach in their "Recommended Code of Practice" for the application of European Union competition law. Their proposal comes down hard against the exchange of individual price and quantity data, but it does not endorse a *per se* prohibition, i.e. Article 81(3) has an important role to play. Kühn and Vives also recommend a tough approach to communications regarding future prices if these do not include maximum price commitments for buyers. On the other hand, their recommended code would permit the exchange of aggregated data through trade associations as long as there is no evidence of collusion in the industry. Some competition authorities might wish to qualify that by requiring the data to be historical rather than current in nature.

In some jurisdictions it might not be possible to prohibit the mere exchange of disaggregated price data or price intentions even if it is shown that such practices have a net anti-competitive effect. Instead, it may be necessary to argue that certain exchanges of sensitive information constitute good evidence that collusion is occurring. The same point applies to various other facilitating practices having price transparency enhancement effects such as base point pricing systems, and MFN and MCC clauses. The latter two facilitating practices could be still harder to attack on their own because they can arise through unilateral action. Even in that case, however, they might be open to prosecution as illegal invitations to collude.³⁹ In any event, facilitating practices are more suspect when adopted by many

competitors, especially if there is an agreement to do so. Regardless of the legal regime, it is well to remember that all facilitating practices can have "pro" as well as anti-competitive effects.

The consideration given in this paper to governmentally mandated increases in price transparency was quite limited in scope. It nevertheless suggests that competition advocacy may bear significant fruit in that domain.

We close with a short list of questions competition authorities might wish to keep in mind when enquiring into the effects of a certain degree of price transparency or of changes in it:

1. How likely is anti-competitive co-ordination in the market under investigation?
2. What is the apparent rationale for policies affecting price transparency? This will require an in-depth investigation into how buyers and sellers obtain information about prices in the particular market. It will also involve examining potential efficiency benefits of price transparency.
3. Can the putative benefits of an increase in price transparency be obtained by means less potentially harmful to competition? This is particularly pertinent in relation to exchanges of disaggregated price data.
4. Are price transparency enhancing policies being adopted unilaterally or through some kind of co-ordination among competitors?
5. If policies affecting price transparency were fully or partially prohibited, would firms find it relatively easy to substitute other ways of essentially doing the same thing? Would those alternatives involve more or less risk to competition than current price transparency policies?
6. If trade associations or electronic commerce sites are in effect being used to exchange price information among competitors, how aggregated and historical are these data? In addition, where trade associations are involved, are they verifying the data and what steps are being taken to ensure that disaggregated, current data are being withheld from all competitors?
7. To the extent concerns are focussed on buyers or sellers as a group, how much information do they have regarding prices, and are there systematic differences in timing as concerns when the two groups obtain such information and their ability to respond to it?

NOTES

1. Stiglitz (1989, 817)
2. See Ten Kate and Dircio (2000) for an analysis of the market making role of information exchange.
3. The proviso is necessary because price discrimination may or may not be efficiency enhancing, i.e. may or may not increase consumers' and producers' surplus taken together. See Varian (1989).
4. In the course of discussing U.S. merger review practice, Willig (1991, 292-293) defined co-ordinated effects as:

....actions of the merging firms that would be profitable for them as a result of the merger only if the changes are accompanied by alterations in the actions of the non-parties *that are motivated in part by fears of reprisals*. The leading example of co-ordinated effects is the elevation of prices charged by the merging firms, along with those charged by the non-parties, where the merger enables tacit collusion to become stable. Here, the price increases are profitable because deviation by a firm would likely trigger retaliatory price decreases. (emphasis added)
5. Baker (1999, 185), citing Porter (1980, 93-95), reports that business strategists are now teaching managers, "...how to facilitate coordination, albeit in ways calculated to avoid reaching what antitrust law would term an agreement, through practices that help firms achieve consensus or deter deviation such as price leadership, unilateral signaling announcements, selective advertising to discipline recalcitrant rivals, and standardization to simplify industry decision variables and facilitate the identification of a consensus...."
6. There could be at least one exception to this general rule. Consider a situation where sellers enjoy a degree of market power, and buyers are asymmetric in what they know about prices. Assume further that the better informed buyers are the ones best able to exert countervailing power against the sellers. Under those conditions, an increase in price transparency strictly for buyers that simultaneously reduces asymmetry in price information across buyers could be detrimental to individual and perhaps collective buyers' interests. This is because it might cause sellers to resist more strongly and effectively the countervailing power of the better informed buyers. See Hviid and Mollgaard (2000).
7. See the background paper contained in OECD (1999b).
8. This example is a modified version of one suggested by Hay (1989, 185-186).
9. It is true that the effects of increased price transparency for buyers boosts what cheaters might expect to gain by shaving prices. This effect should, however, be at least partially offset by how the increased price transparency makes cheaters more vulnerable to price retaliation by other stations.
10. Ten Kate and Dircio (2000, 26) have made the important observation that most aspects of what we have referred to as market conditions "...send parallel signals."

That is, those markets that are propitious to collusion are at the same time markets where information sharing is not very important to make the market work whereas markets where information sharing is essential for market making purposes do not lend themselves to collusion. Product differentiation is the exception to this general rule. The more differentiated the product the more difficult [collusion will tend to be] but it is rather in homogeneous product markets where information sharing is most desirable.
11. This point may not always be sufficiently well appreciated by the courts. See, for example, *Trade Practices Commission v Email Ltd & Anor* (1980) ATPR 40-172, a case described in OECD (1999b, 107-108).

12. Other potential offsetting factors include: 1) sellers could find it considerably easier to engage in various forms of customisation and price discrimination [see Ulph and Vulkan (2000)] making it harder for buyers in e-marketplaces to compare prices; 2) sellers could choose to block shopbots from having unrestrained access to their sites; 3) sellers could engage in various forms of obfuscation, e.g. they could offer low prices to attract prospective clients, disappoint them as regards warranties, delivery conditions etc., and then attempt to steer them to a "superior", higher priced product [see Ellison and Ellison (2001)]; and 4) buyers may have difficulty verifying price information and important seller and product attributes in e-marketplaces.
13. Varian (2000, 145-148) provides a good discussion of how shopbots could prove harmful rather than beneficial to consumers and provides some anecdotal evidence to support the notion that B2C rivals can quickly and frequently change their prices in response to each other's moves. Rey and Tirole (2000, 31) discuss the same point. See also Sauermann - <http://www.sauermann-online.de/uni/pricetransparency.htm>. Sauermann acknowledges that the prisoner's dilemma created by price transparency could be mitigated in on-line commerce because sellers could enjoy the ability to react faster than buyers. He goes on to state, however, that there seem to be few examples of on-line price matching and suggested four possible reasons for that: market transparency is incomplete and favours customers; firms are differentiating to avoid the prisoner's dilemma; markets are too highly fragmented for co-operation to take hold; and firms are not rationally managed - they are instead going for growth.
14. For a review of the causes of price dispersion across B2Cs, extent and causes, see Smith et al. (1999) and Brynjolfsson and Smith (2000). Incidentally, the later paper does indicate that prices of books and CDs, i.e. relatively homogeneous goods, are generally lower in B2Cs compared with traditional outlets. Brown and Goolsbee (2000) also show that the Internet price comparison sites appear to have lowered term life insurance prices.
15. Rule et al. (2000, 3) point out that buyers will be better able to co-ordinate their downstream behaviour if a B2B provides them with information about what each buys and the prices it pays for significant common inputs.
16. See, for example, Seabright (2000).
17. See Gillespie (1995, 12-13).
18. Kühn and Vives (1995, 86)
19. As cited by Seabright (2000, 14).
20. After considering the exchange of data relating to prices, quantities, costs and state of demand, Kühn (2001, 14) concluded that: "...information exchange can have significant collusive potential, but...exchange of prices and quantities is qualitatively of much greater importance given that these exchanges can reveal actions directly. Exchange of other information only improves the *interpretation* of observed market data." For more on this topic, see Kühn and Vives (1995, 42-57).
21. European Commission (1992, para. 37).
22. European Court of First Instance (1994, paras. 91 and 92, emphasis added). This judgment was upheld on appeal to the European Court of Justice - see T-35 (92) *John Deere Ltd. v. Commission* [1994] ECR II-957 (a decision rendered in 1998). See Seabright (2000, 18) for a description of what the European Commission eventually allowed in the way of information exchange among the tractor manufacturers.
23. The Spring 2001 meeting of the American Bar Association's Section of Antitrust Law held a panel discussion about how the Internet and new technologies have impacted on trade association activities with the possible result of heightened concern about co-operative interaction. One panellist was reported as outlining several concerns about virtual trade associations, namely: "information sharing; the posting of

surveys and statistical sharing; non-member access; exclusivity within the trade association; joint sales and purchasing; and standard setting activities." See Antitrust & Trade Regulation Report (2001, 329).

24. Firms may agree to share information but still have individual incentives, especially when engaged in anti-competitive co-ordination, to mis-inform each other. Verification could therefore increase considerably either the pro- or anti-competitive impact of the information exchange.
25. See, in OECD (2000, 25-26)
26. See Carlton and Perloff (1994, 608) for references to studies showing that advertising about price lowers the average price consumers pay for drugs and eyeglasses and also for legal and optometric services. They also note three studies showing that advertising may cause quality to fall in legal and optometric service markets.
27. See Carlton and Perloff (1994, 584-586) for a review of a 1974 experiment by the Canadian Food Price Review Board and a brief mention of similar U.S. experience.
28. OECD (1999b, 156)
29. Ibid., p. 260
30. See OECD (1999a, 21)
31. For more in-depth discussions of facilitating practices, see Salop (1986) and Hay (1989).
32. See Holt and Scheffman (1987, 187-188 & 195)
33. See Crocker and Lyon (1994) who argue that MFN's can be efficiency enhancing in certain circumstances. They also provide some supporting empirical work relating to the U.S. natural gas industry.
34. For more on this point, see Hviid and Shaffer (1999) and Raye (1994).
35. See Corts (1996) and Hviid and Shaffer (1999) for the view that MCCs are better viewed as a means of price discrimination than as an anti-competitive facilitating practice. For a critique of Corts, see Kaplan (2000).

Jain and Srivastava (2000) considered the view, usually favoured by theorists, that MCCs tend to raise prices, and the opposing trade press and general consumer views that MCCs are associated with enhanced competition. They concluded that the results predicted by either view are not robust to allowing for differentiated stores and asymmetrically informed consumers.
36. Holt and Scheffman (1987, 188) express this as follows:

...when firms choose *prices* noncooperatively, but have best-price provisions [i.e. MCCs and MFNs] in sales contracts, their effective strategies become analogous to Cournot strategies in which *quantities* are chosen. The intuition for this result is that the meet-or-release clause allows a discounter's rivals to maintain their sales by matching a discount, thereby making a Cournot assumption with respect to competitors' sales rational, and the most-favored-customer clause requires the discount to be offered to all existing customers.
37. See Carlton (1983).
38. See ibid., p. 65.

39. For more information about invitations to collude, as well as facilitating practices, See DeSanti and Nagata (1994).

*Annex***BRIEF ANALYSIS OF MARKETS, OTHER THAN OLIGOPOLY, WHERE THERE IS IMPERFECT INFORMATION, FIRMS ARE NOT PRICE TAKERS, AND THERE IS AN ABSENCE OF ANTI-COMPETITIVE CO-ORDINATION**

An extreme possibility is that there will be a monopolist or monopsonist in a market. In such a situation, the monopolist or monopsonist presumably already enjoys perfect price transparency in the sense of knowing all transaction prices in the market. Increased price transparency in those circumstances must mean better information for the side of the market exposed to the exercise of market power. Such increased price transparency would not necessarily alter existing market power. It could, however, make it more difficult to price discriminate by increasing the abilities of affected buyers or sellers to engage in offsetting arbitrage. Reduced price discrimination could certainly help a group of buyers paying higher prices than other buyers, or a group of sellers receiving lower prices than other sellers. It may or may not improve overall economic efficiency. Exploring that further is beyond the scope of this paper.

Another possibility is that there is a dominant firm that, if it had sufficient information, would set its output and prices taking account of what fringe firms are doing. If increased price transparency means that the dominant firms' clients become better informed, then the conclusions will be similar to those in the monopoly/monopsony case. If, however, enhanced price transparency also increases what the dominant firm knows, the extent of its power and the ability to exercise it (e.g. through price discrimination) could be affected. It is difficult to predict net effects on various actors without making further assumptions concerning market conditions and the nature of the increased price transparency.

Still another possibility is a market where sellers have some latitude over pricing because of product differentiation, i.e. monopolistic competition. This case is closely analogous to what was examined in the main text as regards pure competition. If increased price transparency is confined to improving buyers' abilities to make price comparisons, it should benefit them even more than in the perfectly competitive, homogeneous products case. This is because with heterogeneous goods, increased price transparency would permit buyers to make better product as well as seller choices.

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NOTE DE RÉFÉRENCE

UNE PLUS GRANDE TRANSPARENCE DES PRIX EST-ELLE BONNE OU MAUVAISE POUR LES ACHETEURS ?

par le Secrétariat

1. Introduction

La transparence des prix varie sous l'effet de multiples actions, privées et publiques, que les autorités de la concurrence auraient peut-être intérêt à évaluer. Ainsi, des concurrents peuvent décider de s'informer systématiquement de leurs prix courants et des gouvernements peuvent obliger les entreprises à divulguer les prix qu'elles facturent ou, à l'inverse, habiliter les organismes professionnels à restreindre la publicité des prix. Dans certains cas également, les autorités de la concurrence pourraient juger nécessaire d'examiner les clauses d'alignement sur la concurrence ou les systèmes de tarification avec point de référence, en raison de leurs effets sur la transparence des prix.

Dans le présent document, la notion de transparence des prix ne fait pas uniquement référence aux prix, mais renvoie également aux principaux éléments de toute politique de tarification, comme les rabais et les frais financiers. En outre, si nous évoquons parfois les prix catalogue, nous tenons d'emblée à les distinguer de ce que nous appelons les « prix des transactions », c'est-à-dire les prix réellement facturés.

L'une des façon d'envisager la transparence des prix consiste à se demander ce qu'il en coûte de découvrir les prix des transactions. Sous cet angle, il n'existe pas vraiment de niveau particulier de transparence des prix caractérisant l'ensemble du marché, sauf dans des situations extrêmes. On peut imaginer, par exemple, une situation de transparence parfaite sur marché où les coûts de recherche sont si bas que tous les participants connaissent instantanément tous les prix, ou à l'opposé, une absence totale de transparence, lorsque les coûts de recherche sont si élevés que les acheteurs et les vendeurs connaissent uniquement les prix des transactions qu'ils effectuent eux-mêmes individuellement. Entre ces deux extrêmes se situent les marchés du « monde réel » dans lesquels les acheteurs et les vendeurs individuels disposent d'informations différentes sur les prix et sont donc susceptibles de supporter des coûts différents pour en savoir plus.

Pour répondre brièvement à la question posée dans ce document, disons qu'une plus grande transparence des prix est en règle générale bonne pour les acheteurs *sauf* dans les cas où elle encourage nettement une coordination oligopolistique et anticoncurrentielle entre les vendeurs. Il paraît justifié, en outre, d'ajouter à cela cinq remarques générales :

- les échanges d'informations sur les prix entre concurrents sont d'autant moins susceptibles de nuire à la concurrence que les données sont anciennes et globales et qu'elles renvoient aux prix catalogue plutôt qu'aux prix des transactions ;
- un accroissement de la transparence des prix qui se limite à rendre les comparaisons de prix plus aisées pour les acheteurs a généralement pour effet d'avantager ces derniers ;

- permettre aux vendeurs d'en savoir plus sur les prix de leurs concurrents, tout en maintenant inchangé le niveau de transparence des prix offert aux acheteurs, est plus à même de nuire à ces derniers que de les aider ;
- les différences systématiques qui existent entre acheteurs et vendeurs en ce qui concerne le moment où ils sont informés d'un changement de prix et la rapidité avec laquelle ils sont capables d'y réagir peuvent être très importantes – en particulier, les acheteurs ont tendance à être désavantagés lorsque les vendeurs apprennent les baisses de prix de leurs concurrents et sont à même d'y réagir avant qu'ils ne puissent eux-mêmes profiter des prix antérieurs ;
- dans certaines conditions du marché, il peut être justifié d'interdire les accords de partage d'informations sur les prix ainsi que d'autres pratiques facilitant une interaction coordonnée, comme le recours aux clauses d'alignement sur la concurrence et de la nation la plus favorisée, en particulier si ces pratiques sont généralisées ou adoptées en application d'un accord entre concurrents.

Le présent document commence par examiner les coûts et les avantages de la transparence des prix. Il analyse ensuite les liens entre l'accroissement de cette transparence et la probabilité d'une coordination anticoncurrentielle, terme général employé ici pour désigner divers phénomènes tels que collusion tacite, parallélisme conscient, pilotage des prix et autres pratiques ayant les mêmes effets. L'exposé de quelques aspects concrets de la problématique complète la réflexion avant la présentation des conclusions.

2. Coûts et avantages d'une plus grande transparence des prix

2.1 Concurrence pure (concurrence parfaite moins information parfaite)

Dans une situation extrême où tous les acheteurs sont confrontés à des coûts de recherche prohibitifs, il est possible qu'il n'y ait pas de concurrence par les prix entre vendeurs. Chaque vendeur peut effectivement se trouver en situation de « monopole » vis-à-vis de sa clientèle et tenter de fixer ses prix au point d'équilibre entre produit marginal et coût marginal.

Les choses deviennent beaucoup plus compliquées lorsque l'on s'éloigne de ce cas de figure pour se demander ce qui se passerait, par exemple, si certains acheteurs étaient parfaitement informés (c'est-à-dire pour un coût nul) sur les prix, alors que d'autres auraient à supporter des coûts de recherche considérables pour parvenir au même résultat, ou si l'on imaginait quelque autre variante de ce scénario. Stiglitz (1989) s'est penché sur certains aspects de cette problématique en étudiant la façon dont les prédictions du modèle de concurrence parfaite varient lorsqu'on élimine l'hypothèse de l'information parfaite, y compris en matière de prix. Dans le cas des produits homogènes, Stiglitz observe que des coûts de recherche même minimes peuvent avoir des répercussions importantes, notamment :

1. Il peut ne pas y avoir d'équilibre.
2. Quand il y a équilibre, les prix peuvent être largement supérieurs à leur niveau concurrentiel (celui des coûts marginaux), et une augmentation du nombre des entreprises ne se traduit pas nécessairement par une baisse des prix.
3. L'équilibre peut aussi se caractériser par une distribution des prix.
4. Les courbes de demande peuvent être coudées¹.

Le premier point laisse entrevoir la possibilité d'une absence totale de transactions. Acheteurs et vendeurs se refusent à toute transaction entre eux tant qu'ils n'ont pas une certaine assurance que le prix est « correct », c'est-à-dire qu'ils ont affaire à des marchés suffisamment liquides². S'agissant du deuxième point, les prix peuvent être supérieurs aux niveaux concurrentiels du fait du pouvoir de marché que confère localement l'imperfection de l'information. Et si des entreprises plus nombreuses ne sont pas nécessairement associées à des prix plus bas, c'est peut-être parce que la multiplication du nombre d'entreprises et/ou de points de vente tend à accroître les coûts de recherche que les acheteurs doivent supporter pour trouver le vendeur pratiquant les prix les plus bas, ce qui risque du même coup de les rendre moins enclins à procéder à cette recherche. Or, lorsque les acheteurs sont moins disposés à chercher les prix les plus bas, les vendeurs sont naturellement moins disposés à se faire concurrence par ce biais-là. Le troisième point de Stiglitz est lié à l'idée que lorsque les acheteurs ne sont pas parfaitement informés, les vendeurs sont en mesure de procéder à une discrimination par les prix, en appliquant généralement des prix plus élevés quand les coûts de recherche sont également plus élevés. Quant à savoir exactement dans quelle mesure et pourquoi les courbes de demande peuvent être coudées, cela dépend d'hypothèses spécifiques concernant les acheteurs. A titre d'exemple, si les acheteurs se répartissent de façon claire et nette entre ceux qui se contentent de faire leurs courses au point de vente le plus proche et ceux qui cherchent les vendeurs pratiquant les prix les plus bas et se fournissent exclusivement chez eux, les courbes de demande seront sans doute assez inélastiques au-dessus des prix courants de chacun des vendeurs et beaucoup plus élastique au-dessous.

Pour résumer le cas de la concurrence « pure » (concurrence parfaite sans information parfaite), il apparaît qu'un accroissement assez sensible de la transparence des prix pourrait conduire à l'émergence de marchés là où il n'y en avait pas auparavant, ou du moins aucun pourvu de prix d'équilibre. Dans certaines circonstances, il pourrait aussi entraîner une baisse des prix et réduire l'incidence de la discrimination par les prix. Dans un scénario de concurrence pure, une plus grande transparence des prix est généralement bonne au moins pour les acheteurs qui supportent les coûts de recherche les plus élevés, mais elle ne contribue pas nécessairement à accroître l'efficacité économique³.

2.2 *Les entreprises ne sont pas parfaitement informées et ne subissent pas les prix du marché, mais il n'y a pas de coordination anticoncurrentielle entre elles*

Plusieurs cas de figure sont possibles dans cette situation. Trois d'entre eux – le monopole/monopsonne, l'entreprise dominante et la concurrence monopolistique – sont examinés en annexe. La seule généralisation que l'on puisse à l'évidence en tirer est que les acheteurs ont plus de chances d'être avantagés s'ils sont les principaux bénéficiaires de toute amélioration de la transparence des prix.

Dans la situation de l'oligopole (oligopsonne) sans coopération entre les parties, un petit nombre de vendeurs (acheteurs) reconnaissent leur interdépendance et fixent leurs prix et leur niveau de production en observant ce que font leurs rivaux. Ils ne sont toutefois pas engagés dans une coopération anticoncurrentielle, puisqu'il n'y a pas d'effets coordonnés⁴.

Les effets d'un accroissement de la transparence des prix dans le cas de l'oligopole sans coopération des parties ont été étudiés par Kühn et Vives (1995) et Kühn (2001). D'après ces chercheurs, ils pourraient prendre la forme de gains ou de perte d'efficacité *statique* selon que les vendeurs tendent à agir sur la production ou sur les prix, et selon la façon dont la transparence accrue des prix les aide à ajuster l'un ou l'autre paramètre en fonction de la situation de la demande. Il faudrait toutefois avoir une connaissance très précise des caractéristiques du secteur en cause pour pouvoir prédire à la fois la probabilité et l'ampleur des gains/pertes statiques éventuels. Cette nécessité de disposer d'informations aussi détaillées, peut-être même impossibles à réunir, amène Kühn et Vives (1995) à conclure leur analyse

du phénomène en recommandant que les responsables de la concurrence ne tiennent pas compte des effets statiques lorsqu'ils envisagent des interventions touchant aux échanges d'informations entre entreprises. La même conclusion s'impose probablement dans le cas de l'oligopsonie à caractère non coopératif.

2.3 *Oligopole avec possibilité de coordination anticoncurrentielle*

Une plus grande transparence des prix peut-elle avoir une incidence sur la probabilité d'une coordination anticoncurrentielle ? La meilleure façon d'aborder cette question consiste à essayer de voir comment un accroissement de la transparence des prix peut agir sur les incitations et les capacités des acheteurs et/ou vendeurs à coordonner une hausse des prix et à prendre des mesures pour détecter et dissuader toute « concurrence cachée »/ « tricherie » qui tendrait à rétablir la concurrence par les prix. Pour simplifier les choses, nous nous limiterons à partir d'ici au problème de la coordination entre vendeurs, non sans avoir toutefois noté auparavant que la coordination entre acheteurs entraîne presque par définition une amélioration de leur bien-être (à condition bien sûr de ne pas être sanctionnée par la législation de la concurrence).

La capacité des vendeurs à s'entendre sur un niveau mutuellement acceptable de prix supraconcurrentiels pourrait être sensiblement renforcée par un accroissement de la transparence des prix. En effet, comme le droit de la concurrence impose généralement de lourdes sanctions aux entreprises qui communiquent directement entre elles pour parvenir à un accord anticoncurrentiel, il est beaucoup plus sûr pour elles d'avoir recours à des ajustements interactifs⁵, dont l'efficacité dépend en fait largement du degré de transparence des prix.

Avec un nombre d'entreprises suffisamment restreint et des prix suffisamment transparents, un premier « accord » sur des prix anticoncurrentiels pourrait voir le jour de façon empirique, éventuellement dans le cadre d'un système de pilotage des prix comportant un ou plusieurs leaders. Le processus de coordination débiterait simplement lorsque l'une des entreprises augmenterait ses prix en attendant de voir si les autres suivent. Dans ce type de situation, les risques dépendent alors dans une certaine mesure du niveau de transparence des prix. Ils sont assez faibles lorsque les vendeurs peuvent s'informer rapidement et avec fiabilité des changements de prix, sans que les acheteurs puissent en faire autant. Dans ce cas, en effet, le leader n'aura pas longtemps à attendre pour voir si les autres le suivent, et il ne perdra guère de clients dans l'intervalle. On peut supposer que ces risques seraient encore moindres si les leaders pouvaient communiquer leurs intentions uniquement sous la forme d'annonces de changements de prix non contraignants (nous reviendrons sur ce point ci-après).

En plus de favoriser l'émergence d'un consensus anticoncurrentiel, une plus grande transparence des prix peut aussi contribuer au maintien de cet arrangement en aidant les entreprises à détecter et à punir plus aisément la concurrence cachée.

Plus les prix dépassent les niveaux concurrentiels, plus les vendeurs ont individuellement à gagner, au moins à court terme, à pratiquer des rabais en secret. C'est ce « dilemme du prisonnier » qui tend à compromettre toutes les tentatives de coordination oligopolistique, formelle (collusion explicite) ou de tout autre nature (collusion tacite, parallélisme conscient, pilotage des prix, etc.). Pour assurer la stabilité d'une coordination anticoncurrentielle, il faut que les entreprises parviennent à faire de la coopération la « stratégie dominante », autrement dit qu'elles trouvent un moyen crédible de détecter et punir la tricherie.

Les tricheurs potentiels ont des préférences marquées en ce qui concerne le degré et le type de transparence des prix qui peuvent exister sur le marché. Le tricheur voudrait, par exemple, que les acheteurs les plus importants pour lui soient instantanément informés de ses agissements, à l'insu de ses

rivaux. Il souhaiterait aussi, dans le cas où ses concurrents viendraient à suspecter une baisse occulte des prix, qu'il leur soit difficile de distinguer les effets de la tricherie des pertes subies à cause de mouvements inattendus de la demande. Il préférerait que les entreprises qui ont des soupçons et envisagent des représailles ne soient pas en mesure d'identifier les coupables ou soient incapables pour toute autre raison de cibler les mesures de rétorsion. Il faudrait alors que la punition prenne la forme d'une guerre générale des prix qui serait à la fois plus coûteuse et moins efficace qu'une riposte individualisée. Tout cela ne signifie pas pour autant que le type de transparence des prix qui conviendrait parfaitement aux tricheurs a toutes les chances d'exister dans la réalité. D'ailleurs, si tel était le cas, le problème de la coordination anticoncurrentielle ne se poserait sans doute même pas. Le but de ces remarques est plutôt de souligner la nécessité pour les autorités de la concurrence de bien examiner la forme que prend l'accroissement de la transparence des prix, lorsqu'elles cherchent à déterminer s'il risque ou non de faciliter la coordination anticoncurrentielle.

Nous n'avons jusqu'à présent rien dit de la façon dont une plus grande transparence des prix peut agir sur les barrières à l'entrée. Il est possible que l'amélioration de cette transparence ait aussi pour effet de rendre les nouveaux arrivants potentiels mieux à même d'évaluer la rentabilité de ceux qui sont déjà sur le marché. En outre, une plus grande transparence des prix peut réduire le risque auquel sont confrontés les nouveaux arrivants en leur permettant de se faire une meilleure idée des prix qu'ils sont susceptibles de recevoir pour leurs produits. Et si le risque est moins grand, il y a des chances pour que l'entrée se fasse de façon plus rapide et plus massive. D'autre part, l'accroissement de la transparence des prix pourrait aussi limiter ou même supprimer la phase de tâtonnements par laquelle les nouveaux entrants doivent passer pour mettre en place les prix qui maximiseront leurs profits. Tout cela tend à favoriser les acheteurs, qui seront ainsi moins longtemps exposés à d'éventuels prix supraconcurrentiels, tandis que les vendeurs seront généralement moins incités à rechercher une coordination anticoncurrentielle.

En résumé, une plus grande transparence des prix pour les acheteurs bénéficiera en règle générale à ces derniers, à moins qu'elle n'augmente simultanément la probabilité d'une coordination anticoncurrentielle du côté des vendeurs⁶. En tout état de cause, il est clair qu'il convient d'aborder la question au cas par cas, en étant très attentif à la fois aux conditions du marché et à la façon précise dont la transparence des prix est en train de s'améliorer ou s'améliorera.

3. Principaux facteurs agissant sur la relation entre accroissement de la transparence des prix et probabilité d'une coordination anticoncurrentielle

3.1 *Caractéristiques des marchés et des produits*

Plus les autres conditions du marché rendent la coordination anticoncurrentielle improbable, plus il y a de chances pour que l'amélioration de la transparence des prix joue en faveur des acheteurs et non à leur détriment. Diverses conditions peuvent décourager la coordination anticoncurrentielle, même si elles ne le font pas nécessairement, en particulier : barrières peu élevées à l'entrée ; grand nombre de vendeurs ; faible degré de concentration ; manque de transparence des quantités en jeu et des stratégies de commercialisation ; asymétries entre vendeurs et dans les offres de produits ; évolution rapide de la demande et des coûts ; achats en dents de scie ; présence d'un franc-tireur. Comme elles ont déjà été examinées lors d'une précédente table ronde consacrée aux oligopoles, on ne s'y attardera pas davantage ici⁷.

En guise d'exemple de la façon dont les conditions du marché peuvent agir sur la probabilité d'une coordination anticoncurrentielle, considérons le cas hypothétique de deux stations-service situées en face l'une de l'autre dans une petite ville isolée⁸. Supposons en outre qu'il n'y ait pas d'autres stations-

service dans un rayon de 100 kilomètres, qu'il soit impossible d'en ouvrir de nouvelles sur ce territoire et que les deux seuls vendeurs en présence affichent leurs prix de façon à ce qu'ils soient bien visibles, pour les automobilistes comme pour eux-mêmes, à l'entrée de leur station. Il y a de bonnes raisons de penser que les deux concurrents finiront tôt ou tard par appliquer des prix identiques correspondant à peu près à ceux d'un monopole. Le marché est très concentré, la demande est assez stable et prévisible, le produit est simple, homogène et acheté régulièrement en petites quantités, et les vendeurs sont informés des changements de prix avant la plupart des acheteurs, ce qui leur permet de s'aligner rapidement l'un sur l'autre. De plus, si l'une des stations-service proposait secrètement des rabais, l'autre s'apercevrait sans mal de la défection de ses clients. On peut aussi supposer que les clients « loyaux » informeraient vite leur fournisseur de ce qui est en train de se passer chez le concurrent. Bref, la tricherie serait quasiment impossible.

Outre qu'il souligne l'importance des conditions du marché dans l'évaluation de l'impact que peut avoir la transparence des prix, l'exemple hypothétique de la station-service illustre un autre point intéressant. Il est hautement improbable que l'affichage des prix – c'est-à-dire leur plus grande transparence – puisse réellement modifier le résultat prévu. A cet égard, toutefois, les choses seraient tout à fait différentes s'il y avait, disons, vingt stations-service au lieu de deux seulement dans notre exemple. En effet, avec ou sans prix affichés, les vendeurs pourraient encore assez aisément s'aligner les uns sur les autres en faisant simplement le tour des stations-service de façon régulière et en relevant les prix sur les pompes. On peut penser en tout cas qu'ils auraient plus intérêt que les acheteurs à procéder ainsi. Dans cette situation, l'affichage des prix avantagerait alors probablement les acheteurs, car il leur permettrait de faire plus facilement des comparaisons, sans que cela ne modifie guère la probabilité d'une coordination anticoncurrentielle⁹.

Pour dire les choses brièvement, les autorités de la concurrence devraient être d'autant plus préoccupées que les conditions du marché favorisent la coordination anticoncurrentielle et que la transparence des prix augmente le risque de voir se produire une telle coordination¹⁰. Elles devraient en règle générale l'être d'autant moins que l'accroissement de la transparence des prix a simplement pour effet de rapprocher le niveau d'information des acheteurs de celui des vendeurs.

3.2 Effets différentiels de diverses formes d'accroissement de la transparence des prix

Comme on vient de le voir, l'accroissement de la transparence des prix peut avoir des effets différents selon la forme qu'il prend et l'incidence qu'il a sur la façon dont les acheteurs et les vendeurs obtiennent normalement des informations sur les prix dans un marché donné. Il peut agir ou non sur les asymétries importantes qui existent dans ce que les groupes d'acheteurs et de vendeurs savent des prix et dans la rapidité avec laquelle ils réagissent aux changements. De même, il peut aller ou non jusqu'à permettre aux vendeurs de se faire part de leurs intentions en annonçant des changements de prix qui ne sont pas contraignants. En outre, certaines améliorations de la transparence des prix renforcent sensiblement la capacité des vendeurs à détecter une concurrence occulte et à en identifier le ou les responsables. Ces trois différences influent largement sur la façon dont la transparence des prix peut affecter la probabilité d'une coordination anticoncurrentielle.

3.2.1 Rapidité de réaction relative des acheteurs et des vendeurs, et commentaire au sujet des marchés électroniques

Dans l'exemple des stations-service, on s'en souviendra, plus la transparence des prix permet aux vendeurs de réagir plus rapidement que les acheteurs aux changements de prix, pire est en règle générale la situation du point de vue de la concurrence. C'est ce qu'il convient de garder présent à l'esprit lorsque l'on

s'intéresse à l'échange direct par les vendeurs de leurs listes de prix. Bien qu'il soit toujours possible d'obtenir les prix de la concurrence par l'intermédiaire de ses clients, sur certains marchés, un échange direct peut s'avérer déterminant, car il permet aux vendeurs de s'aligner sur les baisses de prix de leurs rivaux avant que les acheteurs ne puissent passer commande, et par conséquent de conserver les clients qui auraient pu être tentés de changer de fournisseur. C'est une pratique qui décourage la concurrence par les prix et qui fait aussi généralement du tort aux acheteurs¹¹. L'importance des échanges d'informations ne tient pas uniquement à ce que savent les concurrents, elle se mesure aussi en fonction du moment où ils obtiennent leurs renseignements.

La rapidité de réaction relative des acheteurs et des vendeurs pourrait jouer un rôle particulièrement important sur les nouveaux marchés électroniques, qu'il s'agisse du commerce grand public (B2C) ou du commerce interentreprises (B2B).

A première vue, on pourrait penser que le commerce électronique grand public offre un bon exemple de marché où une plus grande transparence des prix contribue à stimuler la concurrence. En effet, grâce à l'utilisation de moteurs de recherche automatisés, les consommateurs devraient en principe bénéficier de prix plus bas, de délais d'information plus courts, et par conséquent d'une concurrence accrue entre les vendeurs. Or il n'est pas sûr que les choses se passent exactement ainsi pour plusieurs raisons, dont la plus importante est que les vendeurs ont peut-être bien plus intérêt à supporter les coûts, aussi bien en temps qu'en argent, que suppose le recours répété aux divers outils de recherche¹². En outre, dès qu'ils sont avertis des baisses de prix de leurs concurrents, ils peuvent très vite et à peu de frais modifier leurs menus de prix en conséquence¹³.

Les études empiriques consacrées au commerce électronique grand public font apparaître une très grande dispersion des prix, y compris pour des produits apparemment homogènes¹⁴, ce qui cadre mal avec l'idée que les marchés électroniques présentent un degré élevé de transparence des prix. On notera toutefois que ces marchés sont encore peu développés et qu'en matière de paiement et de livraison, beaucoup de problèmes restent à régler. Une fois cette étape franchie, les avantages dont jouissent actuellement certains vendeurs, en termes de confiance et de marque, pourraient s'éroder, et la transparence aurait alors l'effet positif souhaité sur la concurrence en réduisant à la fois le niveau et la dispersion des prix. La probabilité de voir ce scénario se réaliser dépend sans doute en partie des caractéristiques générales du marché, et plus particulièrement du nombre de vendeurs en concurrence.

Si le commerce électronique interentreprises pose, en matière de transparence, les mêmes questions que celles que nous venons d'évoquer à propos du commerce électronique grand public, il est probable que l'asymétrie des informations sur les prix dont disposent les acheteurs et les vendeurs y est bien moins grande étant donné le degré de perfectionnement qui caractérise les intervenants. Toutefois, il y aurait peut-être de quoi s'inquiéter si certains sites étaient conçus de manière à engendrer automatiquement une certaine asymétrie d'information et permettaient ainsi à des acheteurs ou à des vendeurs d'en savoir plus que les autres sur les prix, les coûts ou le volume des transactions. Sur des sites de commerce appartenant à des opérateurs indépendants qui ont vraisemblablement tout intérêt à attirer le plus possible d'acheteurs et de vendeurs, et ne souhaitent sûrement pas être taxés de partialité, il y a sans doute peu de chances pour que cela se produise. Mais on ne peut pas en dire autant peut-être de ceux qui appartiennent à de gros acheteurs ou vendeurs, en particulier lorsque les clients désavantagés n'ont pas beaucoup d'autres sites valables vers lesquels se tourner. En tout état de cause, quel que soit l'opérateur, le risque est grand de voir les sites servir à faciliter la communication sur les prix et d'autres paramètres, au détriment de ceux qui n'y ont pas accès, à savoir les consommateurs finals¹⁵. La mise en place de pare-feu pourrait certes limiter ce risque, mais sans doute pas l'éliminer.

On a affirmé que l'avènement des marchés électroniques devrait s'accompagner d'une révision de la politique antitrust en matière d'échange d'informations¹⁶. Dans le passé, les autorités de la

concurrence pouvaient se fonder sur le contenu des informations pour savoir si elles étaient destinées principalement aux clients ou aux vendeurs concurrents, et cela leur permettait, le cas échéant, d'interdire certains échanges de renseignements. Les marchés électroniques rendent cette tâche infiniment plus difficile en raison du volume considérable des flux de données qui y circulent et de la possibilité d'empêcher tout contrôle au moyen du cryptage. En outre, même si l'on interdisait les échanges directs d'informations, il est probable que d'autres sites Internet seraient vite créés pour fournir un moyen de contourner l'interdiction. De fait, on voit mal la différence entre un échange direct de prix courants entre vendeurs et la mise en ligne des mêmes informations actualisées en permanence.

3.2.2 *Échange d'informations sur les prix futurs*

La section II analysait la transparence des prix essentiellement par référence au passé et au présent. Mais qu'en est-il en ce qui concerne les prix futurs ? Il est d'usage sur certains marchés que les vendeurs annoncent à l'avance les changements de prix qu'ils vont pratiquer, et l'on peut penser que c'est une bonne chose pour les consommateurs, puisqu'ils sont ainsi en mesure de mieux programmer leurs achats. Les annonces préalables de changements de prix peuvent aussi être un atout pour les consommateurs, au moins pris en tant que groupe, lorsqu'elles servent en fait à offrir des prix « promotionnels » aux clients les mieux informés. Aucun de ces avantages n'est à attendre, en revanche, si les annonces faites à l'avance s'adressent aux vendeurs plutôt qu'aux acheteurs, ou s'il n'y a pas d'engagement à appliquer les prix annoncés (autrement dit s'il est possible de les modifier avant qu'ils ne deviennent effectifs). Il serait même manifestement dangereux que les vendeurs puissent annoncer à leurs rivaux des changements de prix qu'ils ne seraient pas eux-mêmes tenus d'appliquer.

On peut envisager des situations dans lesquelles il n'est pas du tout évident de savoir à quel niveau un prix peut être mutuellement satisfaisant pour un groupe de vendeurs désireux de coordonner leur tarification. La communication directe peut résoudre ce problème, mais on est alors en présence d'un cas de collusion, condamné et sévèrement sanctionné par la loi. Le processus de relèvement général du niveau des prix par tâtonnements, évoqué précédemment, est une autre solution possible, mais il est loin d'être aussi efficace que l'annonce préalable de changements de prix non contraignants. En effet, un changement de prix effectif qui se trouve être en décalage par rapport à ce que font payer les concurrents risque d'entraîner un manque à gagner si ces derniers pratiquent des prix plus bas, ou de déclencher une guerre des prix dans le cas contraire. En revanche, il n'y a pas grand risque à annoncer un changement de prix qui peut toujours être annulé si les rivaux refusent de suivre, surtout si cette information circule uniquement entre les vendeurs.

Les annonces préalables de changements de prix non contraignants non seulement facilitent la mise en place et l'optimisation d'une coordination anticoncurrentielle, mais aussi permettent de la faire durer, car elles peuvent être utilisées comme une menace de punition contre les tricheurs récalcitrants. A l'évidence, ces menaces sont beaucoup moins coûteuses que les véritables baisses de prix, encore que dans certains cas cet avantage peut aussi devenir un inconvénient.

Les menaces de réductions de prix, et du reste toutes les annonces préalables de changements de prix non contraignants, sont un bon exemple de *cheap talk*, tel que le définissent Farrell et Rabin (1996, 116) : « ... des messages qui ne coûtent rien, n'engagent personne et sont invérifiables, mais qui peuvent influencer celui qui les écoute ». Dans l'optique de la théorie des jeux, le type de *cheap talk* le plus à même d'avoir un effet est celui qui a un caractère de « signal automatique » et qui témoigne d'un « engagement automatique ». Une entreprise qui annonce à l'avance un changement de prix non contraignant pour faire passer une menace de punition souhaite que cette menace soit prise au sérieux, même si elle n'a aucune intention de la mettre à exécution. En ce sens, la menace en question ne peut pas être interprétée comme un « signal automatique ». Elle ne témoigne pas non plus d'un « engagement automatique », puisque

l'entreprise dont elle émane n'a pas nécessairement intérêt à baisser ses prix si elle estime que le tricheur présumé a pris au sérieux la menace qui lui était adressée.

Sous un angle particulier, toutefois, les menaces de punition vont au-delà du simple message de type *cheap talk*, à savoir lorsqu'elles servent à faire savoir aux tricheurs qu'il ont été « pris ». Dans ce cas, le signal peut même être personnalisé au point de faire comprendre exactement sous quelle forme, à quel moment, de la part de quelles entreprises et sur quels sous-secteurs du marché une réparation est attendue. L'affaire United States Airline Tariff Publishing (ATP), portée devant les tribunaux par le Department of Justice et réglée par jugement convenu en mars 1994, illustre cette situation dans laquelle se sont trouvées mêlées huit des plus grandes compagnies aériennes des États-Unis. Elle montre aussi l'importance que revêtent plusieurs autres éléments liés à la transparence des prix, en particulier la possibilité pour les offreurs de réagir plus rapidement que les acheteurs. Gillespie (1995, 8-9) décrit l'affaire ATP comme suit :

Pour comprendre l'action du gouvernement dans cette affaire, il est utile de rappeler rapidement tout d'abord comment fonctionne le système ATP et l'aviation commerciale en général. Le système ATP est une base de données qui centralise tous les tarifs aériens et qui les communique d'une part aux compagnies aériennes membres pour leurs propres systèmes de réservation internes et leurs services de tarification, et d'autre part aux grands systèmes de réservation électronique dont se servent les agents de voyage. Lorsqu'elle modifie ses tarifs dans la base ATP, une compagnie peut ainsi répercuter l'information d'un seul coup sur tous les points de vente de ses billets. Le service n'est pas gratuit, car les compagnies aériennes payent une commission pour chaque changement de tarif pratiqué, mais le montant de cette commission est très faible par rapport aux enjeux financiers à la clé. Comme le système ATP actualise les données de tous les systèmes de réservation électronique une fois par jour, les compagnies sont très vite au courant de ce qui se passe et peuvent réagir en conséquence avec un décalage maximum de 24 heures. Du fait de cette possibilité d'alignement rapide des concurrents les uns sur les autres, en cas de changement de prix significatif, il est généralement peu intéressant de tricher étant donné ce que peut rapporter le maintien des tarifs concertés à un niveau élevé.

Selon le gouvernement, les compagnies aériennes utilisaient le système ATP non seulement pour publier leurs tarifs, mais aussi pour s'informer mutuellement sur des tarifs auxquels les consommateurs n'avaient pas accès. En effet, outre les prix des billets entre les diverses destinations, les compagnies pouvaient indiquer deux autres informations précisant la période pendant laquelle ces prix pouvaient être offerts aux clients : d'une part, la FTD (first ticket date), ou date de début de validité du tarif ; d'autre part, la LTD (last ticket date), ou date de fin de validité du tarif. (8-9)

Ces précisions étant apportées, Gillespie imagine ensuite comment les compagnies communiquaient entre elles, par le biais des annonces de tarifs, pour essayer de faire monter les prix, et comment le système ATP pouvait aussi servir à éliminer les tarifs réduits indésirables.

Un autre type de *cheap talk* entre compagnies concerne l'utilisation des LTD sur les tarifs courants pour éliminer les réductions indésirables. En ajoutant à un tarif existant une LTD à brève échéance (une LTD « courte »), une compagnie pouvait signifier à une autre qu'elle voulait voir ce tarif disparaître. Comme dans le cas des hausses de prix, si le transporteur visé ne retirait pas son offre à tarif réduit, le concurrent pouvait repousser la LTD de son propre tarif jusqu'à ce que toutes les compagnies s'alignent sur lui.(9)

D'autre part, l'annonce préalable de prix futurs par l'intermédiaire du système ATP pouvait être considérée dans certains cas comme une sorte de menace de punition, sous la forme d'une proposition de retrait réciproque de tarifs réduits existants ou prévus. En outre, les compagnies utilisaient apparemment un système d'"indicatifs" codé leur permettant d'établir des liens entre les divers marchés, de manière à rappeler aux concurrents les échanges de concessions recherchés.

De leur côté, les compagnies soutenaient que l'annonce préalable des changements de tarifs était un avantage pour les consommateurs, car elle leur permettait d'acheter des billets avant que les hausses de prix entrent en vigueur. Contre cet argument, il leur fut répondu, entre autres :

1. que les délais laissés aux acheteurs étaient très courts et la pratique tellement variable qu'elle ne pouvait en aucun cas constituer une véritable politique d'information préalable des consommateurs, et
2. que les dates de validité des tarifs changeaient fréquemment, de sorte que les consommateurs étaient parfois amenés à programmer leurs voyages plus tôt que cela n'aurait été en fait nécessaire, autrement dit que les LTD étaient souvent modifiées¹⁷.

L'affaire ATP s'est terminée par deux jugements convenus à peu près équivalents, le premier en décembre 1992 concernant deux compagnies, le second en mars 1994 concernant les six autres. Voici ce qu'écrit Gillespie à propos du dernier jugement et de ses conséquences espérées :

Il est interdit à toutes les compagnies assignées d'utiliser des dates de début de validité sur leurs tarifs et à ATP de communiquer des tarifs assortis de dates de début de validité. Cette disposition vise à éliminer le mécanisme qui permettait aux compagnies de se renseigner mutuellement, sans qu'il leur en coûte pratiquement rien, sur leurs futurs niveaux de tarifs. Sans les dates de début de validité, les tarifs aériens pourront être immédiatement proposés au public. Et lorsqu'une compagnie voudra augmenter ses tarifs, elle devra prendre le risque que les autres ne la suivent pas, ce qui fera monter le coût des négociations dans une activité qui se déploie sur plusieurs marchés.

Le jugement contient également une disposition analogue concernant les dates de fin de validité des tarifs. En dehors des offres promotionnelles publiées, les compagnies ne sont pas autorisées à utiliser les dates de fin de validité dans le système ATP. Comme dans le cas précédent, cette disposition vise à mettre fin à une forme de communication gratuite sur les tarifs réduits qui doivent être retirés du marché. Rien n'empêchera une compagnie aérienne de s'aligner sur un tarif réduit proposé sur ses propres marchés ou de proposer elle-même des tarifs réduits sur d'autres marchés. Mais, contrairement au passé, elle ne pourra plus désormais faire savoir, sans que cela lui coûte quoi que ce soit, que tel ou tel tarif réduit doit disparaître avant une certaine date, ou que ses propres tarifs réduits ne relèvent pas d'une tentative pour faire baisser les prix en général. (14)

Gillespie prend soin de noter, au sujet de l'affaire ATP, que l'interdiction d'un certain type de communication ne signifie pas nécessairement qu'il n'y aura pas de collusion, mais simplement que celle-ci sera plus difficile à mettre en place et à maintenir dans un contexte où le changement des conditions du marché impose la révision constante des « accords » passés.

Il est intéressant de noter que le Department of Justice a insisté pour interdire les FTD et restreindre l'utilisation des LTD, alors qu'il aurait pu simplement exiger de rendre ces dates contraignantes. En l'occurrence, les « négociations » présumées auraient sans doute été bien plus difficiles à mener sans la possibilité de modifier les FTD et les LTD, voire d'annuler purement et simplement les changements de tarifs annoncés. En outre, autoriser l'utilisation de FTD et de LTD contraignantes aurait

permis aux compagnies de proposer aux consommateurs de planifier leurs voyages de manière à éviter les hausses de prix annoncées.

Dans une autre affaire de transmission d'informations de type *cheap talk*, la Commission européenne a estimé qu'un grand nombre de producteurs de pâtes de bois avaient enfreint les dispositions de ce qui était alors l'article 85 (1) en se livrant à des pratiques collusoires en matière d'annonce et de fixation des prix des transactions, ainsi qu'à des échanges d'informations sur les prix. Toutefois, la Cour de justice des Communautés européennes a finalement rejeté les conclusions de la Commission en décidant que les annonces de prix et la tarification parallèle ne constituaient pas une preuve de collusion entre les entreprises. L'une des grandes différences par rapport à l'affaire ATP était que « ...il n'y avait en règle générale aucune révision des prix après les annonces publiées dans la presse spécialisée »¹⁸. En outre, les faits montraient que les acheteurs avaient fait pression sur les fabricants pour qu'ils annoncent leurs prix trois mois à l'avance, preuve qu'ils se servaient en fait de ces annonces pour établir leurs propres prévisions. Enfin, le nombre d'entreprises soupçonnées d'action coordonnée était également différent : huit dans l'affaire ATP, contre une cinquantaine dans celle des fabricants de pâtes de bois. Dans ses conclusions, la Cour de justice des Communautés européennes précise que les annonces de prix de ces fabricants :

... constituent en soi un comportement qui ne diminue pas les incertitudes de chaque entreprise quant à l'attitude future de ses concurrents. Au moment où chaque entreprise adopte ce comportement, elle ne peut pas savoir avec certitude quelle sera la conduite des autres dans l'avenir¹⁹.

L'affaire européenne des fabricants de pâtes de bois montre bien que si les annonces préalables de changements de prix peuvent effectivement faciliter la coordination, il est loin d'être prouvé qu'elles y aboutissent dans tous les cas. C'est pourquoi il faut toujours chercher à savoir si ce sont les acheteurs ou les vendeurs qui sont les mieux placés pour réagir à ces annonces, si les prix annoncés sont des prix fermes et définitifs ou s'ils sont fréquemment modifiés avant de devenir effectifs, et si les annonces sont synonymes de gains d'efficience pour les acheteurs.

3.2.3 *Degré d'agrégation, actualité et nature des informations échangées*

Une réduction brutale et inattendue des quantités vendues par la firme A pourrait être le signe d'une tricherie de la part de ses rivaux, mais elle pourrait aussi s'expliquer par de simples fluctuations de la demande dues par exemple à des changements de goût et de préférences. La firme A n'aurait aucun mal à distinguer entre ces deux causes si elle se trouvait dans une situation caractérisée par une très grande transparence des prix, autrement dit si elle disposait en permanence d'informations à jour sur les prix pratiqués par ses concurrents. Il lui serait un peu moins utile de connaître le niveau exact des ventes réalisées par chacun des autres fournisseurs, et bien moins utile encore d'avoir des données agrégées sur les prix ou les quantités et des informations relatives aux coûts, voire des renseignements tirés d'études de marché²⁰, à fortiori si ces données n'étaient pas d'actualité.

Moins les vendeurs sont capables de se procurer des informations à jour et détaillées en matière de prix ou de quantités, plus il leur faut de temps pour acquérir la certitude qu'il y a tricherie, et plus il devient difficile en même temps d'identifier les tricheurs. En fait, la probabilité d'une coordination anticoncurrentielle dépend peut-être en grande partie de cette difficulté d'identification, surtout lorsqu'il s'agit du seul obstacle à la mise au point d'une riposte personnalisée à la tricherie.

Compte tenu de ce qui précède, il semblerait normal que les autorités de la concurrence interdisent l'échange direct ou indirect d'informations détaillées et à jour en matière de prix ou de volumes.

Le degré d'agrégation et d'actualité des données qu'il y aurait lieu d'exiger pour que les échanges redeviennent possibles dépendrait probablement des conditions du marché, et notamment de la disponibilité d'autres informations de nature à renforcer la coordination. Une approche au cas par cas serait sans doute préférable à une interdiction pure et simple, car elle permettrait aux autorités non seulement d'évaluer les coûts et les avantages de l'échange de données sur les prix ou les quantités, mais aussi de déterminer, au regard des avantages allégués, si les entreprises concernées ne pourraient pas se contenter de se transmettre des informations moins sensibles du point de vue de la concurrence.

Une affaire récemment examinée dans l'Union européenne souligne les dangers inhérents à l'échange de données détaillées. Elle montre aussi que ce type d'échange peut être tout aussi nuisible pour la concurrence lorsqu'il porte sur les ventes que lorsqu'il porte sur les prix. Il s'agit en l'occurrence de la mise en place au Royaume-Uni, pour les membres de l'Agricultural Engineers Association Limited, association britannique des fabricants et importateurs de machines agricoles, d'un système d'échange d'informations concernant les nouvelles immatriculations de tracteurs sur le marché. Les renseignements communiqués étaient les suivants : nom du constructeur, marque, numéro de série, nom du vendeur et code postal de l'acheteur. Ils permettaient aux fournisseurs qui en bénéficiaient de surveiller les ventes individuelles de tracteurs effectuées par la plupart des concurrents.

La Commission européenne a interdit cet échange au motif qu'il constituait en soi une pratique contraire aux règles de la concurrence, autrement dit qu'il ne pouvait pas être considéré comme faisant lui-même partie d'un mécanisme anticoncurrentiel plus vaste. Selon elle :

... la grande transparence entre fournisseurs qui résulte de l'accord d'échange d'informations rend impossible tout effet de surprise et réduit le temps de réaction des autres fournisseurs, ce qui limite considérablement les avantages temporaires qu'un concurrent peut espérer tirer de son action. Toute initiative pouvant être immédiatement repérée grâce à l'augmentation du volume des ventes, les fournisseurs peuvent réagir aussitôt à la baisse des prix ou autre action commerciale décidée par l'un d'eux et réduire à néant les bénéfices que ce dernier comptait tirer de l'opération²¹.

Le Tribunal de première instance a confirmé la décision de la Commission, en précisant notamment :

... comme le soutiennent, à juste titre, [les constructeurs de tracteurs], la transparence entre les opérateurs économiques est, sur un marché véritablement concurrentiel, de nature à concourir à l'intensification de la concurrence entre les offreurs, dès lors que, dans une telle hypothèse, la circonstance qu'un opérateur économique tienne compte des informations dont il dispose pour adapter son comportement sur le marché n'est pas de nature, compte tenu du caractère atomisé de l'offre, à atténuer ou à supprimer, pour les autres opérateurs économiques, toute incertitude quant au caractère prévisible des comportements de ses concurrents. Le Tribunal estime, en revanche, que, comme le soutient cette fois la Commission, la généralisation, entre les principaux offreurs, d'un échange d'informations précises et selon une périodicité rapprochée concernant l'identification des véhicules immatriculés et le lieu de leur immatriculation, est de nature, *sur un marché oligopolistique fortement concentré ... et où, par suite, la concurrence est déjà fortement atténuée et l'échange d'informations facilité*, à altérer sensiblement la concurrence qui subsiste entre les opérateurs économiques. En effet, dans une telle hypothèse, la mise en commun régulière et rapprochée des informations relatives au fonctionnement du marché a pour effet de révéler périodiquement, à l'ensemble des concurrents, les positions sur le marché et les stratégies des différents concurrents.

Dans le paragraphe suivant, le Tribunal ajoute :

En effet, la mise à disposition de l'ensemble des offreurs d'une telle information ...rend d'autant plus prévisible, pour un opérateur donné, le comportement de ses concurrents, en atténuant ainsi ou en supprimant le degré d'incertitude sur le fonctionnement du marché qui, en l'absence d'un tel échange d'informations, eût subsisté²².

Les fabricants de tracteurs prétendaient que leur système d'échange d'informations était indispensable au suivi du personnel de vente. La Commission et le Tribunal de première instance ont tous deux rejeté cet argument, estimant que les avantages allégués auraient pu également être obtenus par l'échange de données plus agrégées et moins sensibles du point de vue de la concurrence.

4. Quelques aspects concrets de la problématique

4.1 *Les associations professionnelles*

Les marchés électroniques évoqués précédemment ne sont certainement pas le seul lieu où les entreprises peuvent échanger directement ou indirectement des informations, y compris des données sensibles sur les prix ou le volume des ventes. Les associations professionnelles, telles que celle dont il était question dans l'affaire des tracteurs au Royaume-Uni, jouent elles aussi, et depuis bien plus longtemps, ce rôle de relais. Une étude détaillée des effets concurrentiels et anticoncurrentiels que peuvent avoir les associations professionnelles sortirait du cadre du présent document, mais il convient de faire à cet égard quatre brèves remarques :

- les échanges d'informations par l'intermédiaire des associations professionnelles sont peut-être moins préjudiciables que les transferts directs de données sensibles, parce que l'intermédiation ralentit sans doute le processus et que des informations anciennes sont en principe moins dangereuses pour la concurrence que des informations à jour – cette situation est toutefois en train de changer, car les associations professionnelles et leurs membres ont de plus en plus recours au réseau Internet²³ ;
- le premier point peut souffrir une exception notable lorsque les associations professionnelles sont utilisées non seulement pour échanger des informations, mais aussi pour en vérifier le contenu²⁴ ;
- étant donné les effets anticoncurrentiels que peut avoir l'asymétrie dans la transparence des prix, il vaudrait mieux que les associations professionnelles communiquent aussi largement que possible toutes les informations dont elles disposent en matière de prix, en ayant recours à des moyens de diffusion ou de publication également accessibles par les acheteurs et les vendeurs ;
- si l'on admet que l'échange de données fiables sur les prix ne peut pas nuire à la concurrence et si ces données ne sont pas publiées par des organes publics, les services de la concurrence devraient en principe n'avoir aucune objection à ce que les associations professionnelles servent d'intermédiaires pour cet échange.

Le dernier point montre bien, toutefois, que la vigilance doit toujours être de mise. Comment, en effet, les autorités de la concurrence peuvent-elles avoir la certitude que les associations professionnelles ne serviront pas, volontairement ou involontairement, de canal de diffusion des données détaillées qu'elles

recueillent sur les entreprises pour préparer les échanges légitimes d'informations agrégées ? Certaines mesures de précaution sont faciles à imaginer, par exemple interdire aux entreprises de renseigner les associations professionnelles sur leurs prix courants, et s'assurer qu'il n'y a pas de partage ni d'échange de personnel entre une association donnée et chacun de ses membres. Mais il y en a d'autres que l'on ne peut pas connaître à l'avance, et qui varient sans doute selon les marchés.

L'échange de données sur les prix par l'intermédiaire d'une association professionnelle exige au moins, semble-t-il, un accord tacite entre les concurrents pour se tenir mutuellement informés de leurs comportements respectifs en la matière. C'est là une autre raison pour laquelle les autorités de la concurrence devraient peut-être s'intéresser à ces échanges, en particulier sur les marchés où le risque de coordination anticoncurrentielle est élevé. En revanche, rien ne laisse supposer l'existence de ce type d'accord tacite dans les formes ordinaires de la publicité des prix.

4.2 *La publicité des prix*

Informar les acheteurs des prix catalogue par le biais d'annonces publicitaires revient en fait à leur garantir un prix maximum jusqu'à une date connue d'avance ou jusqu'à nouvel avis. On voit d'autant plus mal comment cette pratique pourrait être contraire à la concurrence qu'elle a généralement pour effet d'accroître la transparence des prix aussi bien pour les acheteurs que pour les vendeurs. Sauf, évidemment, dans des situations rares où : a) il est plus facile et moins coûteux pour les vendeurs d'informer directement les acheteurs des prix courants qu'ils pratiquent, de sorte qu'annoncer ceux-ci n'a guère de sens au plan économique, et b) sans la publicité, il est extrêmement difficile pour les vendeurs de connaître les prix catalogue de leurs rivaux.

Malgré les avantages apparents de cette publicité, beaucoup d'associations professionnelles en ont restreint l'utilisation, en s'appuyant parfois à cet effet sur la réglementation²⁵. Ces restrictions sont toutefois de plus en plus contestées, notamment par les études empiriques qui montrent que la publicité des prix constitue un avantage pour les consommateurs²⁶.

4.3 *L'action des pouvoirs publics en faveur de la transparence des prix*

De nombreux gouvernements ont pris des mesures pour améliorer la transparence des prix, même s'il existe de bonnes raisons de penser que ces efforts ne sont pas toujours dans l'intérêt des consommateurs. En voici quelques exemples.

4.3.1 *Application du National Industrial Recovery Act aux États-Unis et expérience récente dans le secteur ferroviaire*

Au milieu des années 30, l'industrie américaine a négocié avec la National Recovery Administration (NRA) une série de codes de conduite qui ont probablement facilité la coordination anticoncurrentielle. La disposition la plus courante de ces codes, dont le contenu variait par ailleurs selon les secteurs, portait sur un régime de communication des prix que Krepps (1999, 892) décrit ainsi :

Le système de communication des prix obligeait les entreprises à déclarer leurs prix courants et futurs aux autorités de contrôle. Le nom de chaque vendeur était ainsi enregistré avec la liste de prix qu'il soumettait. En outre, les codes interdisaient de s'écarter des prix communiqués sans notification préalable aux autorités, et la NRA était habilitée à poursuivre les entreprises contre lesquelles des plaintes étaient déposées par les concurrents. Ce système a facilité les ententes sur

les prix en exposant les entreprises qui annonçaient des prix bas et en interdisant à celles qui annonçaient des prix élevés de s'en écarter. (sans référence)

Commentant les régressions effectuées au sujet de ce système, Krepps ajoute :

Une comparaison économétrique entre les secteurs selon qu'ils sont ou non pourvus de codes ne révèle aucune différence systématique dans l'évolution des marges entre les prix et les coûts au cours de la période d'application du National Industrial Recovery Act. Ce que les régressions montrent bien, en revanche, c'est que certaines pratiques, liées en l'occurrence aux systèmes de communication des prix, se sont traduites par une hausse des marges qui a perduré même après l'annulation des codes... Après l'abandon des dispositions législatives, l'impact sur les marges du système de communication des prix est resté particulièrement marqué dans les secteurs d'activité caractérisés par des niveaux de concentration intermédiaires. (893)

Une cinquantaine d'années plus tard, une autre initiative intéressante en matière de promotion de la transparence des prix par voie législative a vu le jour aux États-Unis, concernant uniquement cette fois le secteur ferroviaire. Fuller et al. (1990, 265) en résumant le principe et les effets comme suit :

Le Staggers Rail Act de 1980 autorisaient les compagnies de chemin de fer à établir des tarifs et à passer des contrats confidentiels avec les transporteurs de céréales. Des dispositions législatives plus récentes (1986) exigent la divulgation de certaines clauses de ces contrats. La présente étude montre que les tarifs ferroviaires dans la région des Plaines ont commencé à s'orienter à la hausse après l'adoption de ces dispositions. Ses conclusions indiquent que la divulgation des contrats et le recours accru à la publication des tarifs ont facilité la coordination des prix au sein d'un secteur oligopolistique comme celui des chemins de fer.

Une étude ultérieure de Schmitz et Fuller (1995) confirme cette conclusion. Voici ce que dit son résumé analytique :

La présente étude évalue l'impact des règles de divulgation des contrats de transport ferroviaire (PL99-509) sur les tarifs pratiqués pour le transport du maïs dans quatre grands corridors. Après l'adoption de ces règles, les tarifs ferroviaires ont augmenté dans les corridors qui ne sont pas en concurrence directe avec le transport fluvial, alors qu'ils ont diminué dans ceux qui subissent fortement cette concurrence. Nous sommes amenés à penser en conclusion que cette évolution des tarifs résulte peut-être d'une amélioration de l'information dans un secteur d'activité, celui du rail, caractérisé par une concentration très poussée. (97)

Il est intéressant de noter que ce sont apparemment les petits transporteurs, victimes selon eux d'un traitement discriminatoire de la part des compagnies ferroviaires, qui sont à l'origine d'une réglementation qui a eu pour résultat de généraliser l'usage des tarifs publiés. A cet égard, Schmitz et Fuller montrent non seulement que l'accroissement de la transparence des prix peut faciliter la coordination, mais que cela dépend aussi en grande partie d'autres conditions du marché. Ainsi, sur les itinéraires à forte concurrence intermodale, l'amélioration de la transparence des prix ne semble pas aller de pair avec la collusion.

Suite à la réflexion sur l'importance des conditions générales du marché, un certain nombre d'études canadiennes et américaines ont démontré que dans un marché caractérisé par un éventail de prix beaucoup plus large et sans doute aussi par un plus grand nombre de concurrents que ce que l'on peut observer dans le secteur du rail aux États-Unis, l'accroissement de la transparence des prix est apparemment un bien pour les consommateurs. En particulier, lorsque les pouvoirs publics recueillent et

diffusent les prix de détail des produits alimentaires pour aider les consommateurs à faire des comparaisons entre les distributeurs, on constate une baisse de ces prix²⁷.

4.3.2 *Cas du béton prémélangé au Danemark*

Étant donné l'importance conférée à la transparence du marché dans la loi sur la concurrence adoptée au Danemark en 1990, il était assez logique que le conseil danois de la concurrence décide d'agir sur ce front lorsqu'il a été alerté par des informations faisant état de rabais confidentiels individualisés chez les fabricants de béton prémélangé de trois régions du pays. C'est ainsi que pour chacun des 18 sites de production concernés, le conseil a recueilli et publié trimestriellement pendant trois ans environ, les prix catalogue, les prix moyens et les moyennes des cinq prix les plus bas observés. D'après Albaek et al. (1997, 430) :

...après les premières publications, les prix moyens des mélanges répertoriés ont augmenté de 15 à 20 pour cent en l'espace de moins d'une année, alors que l'inflation annuelle ne dépassait par un à deux pour cent. En outre, les données montrent que, localement au moins, les prix des entreprises desservant le même marché se sont nettement rapprochés.

Sur la base de leurs observations, Albaek et al. (1997, 441) concluent :

...les faits montrent que le conseil danois de la concurrence, en publiant des informations fiables sur les prix, a involontairement aidé les entreprises à réduire l'intensité de la concurrence et donc à augmenter leurs prix.

Ils ajoutent que le 30 mai 1997, le Danemark a adopté une nouvelle loi antitrust qui « ... ne met plus l'accent sur la promotion de la transparence du marché ».

4.3.3 *Dispositions spéciales de la loi antimonopole japonaise en matière de tarification oligopolistique*

La contribution écrite du Japon à la table ronde sur les oligopoles organisée par le CLP décrit comme suit la section 18-2 de la loi antimonopole en vigueur dans ce pays :

Dans un domaine d'activité particulier où le prix total annuel des produits ou des services dépasse soixante milliards de yen et où la part de marché combinée des trois principales entreprises dépasse sept dixièmes, si deux entreprises ou plus (y compris la plus grande) augmentent leurs prix d'un montant ou d'un pourcentage identique ou similaire au cours d'une période de trois mois, la [commission de la concurrence – JFTC] peut demander à ces grandes entreprises de lui remettre un rapport indiquant les raisons de ces augmentations de prix de leurs produits ou services²⁸.

Elle précise en outre que la JFTC est tenue de fournir un résumé de ces rapports dans sa soumission annuelle à la Diète, ajoutant :

Il est vraisemblable que la disposition concernant les hausses de prix parallèles améliorera la transparence de la formation des prix dans les secteurs oligopolistiques, pour le plus grand bien des citoyens, encouragera les chefs d'entreprise à faire preuve de prudence dans leurs décisions en matière de prix et contribuera à promouvoir le libre jeu et la loyauté de la concurrence.

Au cours de la discussion, le président du CLP avait demandé si de telles dispositions ne risquaient pas d'avoir l'effet, non voulu et contraire au but visé, de faciliter la coordination oligopolistique.

Un délégué du Japon avait répondu qu'il en doutait, notamment parce que le résumé des rapports expliquant les raisons des hausses de prix n'était rendu public qu'une fois toutes les procédures pertinentes menées à leur terme par la JFTC, c'est-à-dire plusieurs mois après les faits²⁹.

4.3.4 Règles de passation des marchés exigeant la publication des offres

Une table ronde du CLP consacrée aux marchés publics a permis d'aborder sous cet angle la question de la transparence et de ses effets sur la concurrence. La note de référence sur laquelle s'appuyait la discussion indique qu'il serait probablement bénéfique du point de vue de la concurrence de ne révéler ni l'identité de l'adjudicataire ni les clauses et les conditions du contrat attribué³⁰. Elle reconnaît toutefois la difficulté des compromis à trouver pour réduire les risques de collusion tout en garantissant l'équité des procédures et en décourageant la corruption.

4.4 Les pratiques de nature à faciliter la coordination

Il existe un certain nombre de mesures que les entreprises peuvent prendre, soit unilatéralement, soit collectivement (sans qu'il y ait nécessairement collusion), pour faciliter la coordination anticoncurrentielle. Rees (1993, 35-37) les classe sous diverses rubriques : échange d'informations, associations professionnelles, pilotage des prix, collaboration en matière de recherche et concession réciproque de licences de brevets, clauses du client le plus favorisé et d'alignement sur la concurrence, prix minimum de vente au détail, tarification avec point de référence, barèmes communs de calcul des coûts. A propos de cette liste, Peeperkorn (1986, 5) fait le commentaire suivant :

Toutes ces mesures visent à limiter l'influence des facteurs qui compromettent les résultats de la coopération ou à renforcer celle des facteurs qui les favorisent. Elles permettent aux concurrents de se surveiller mutuellement et par conséquent de détecter plus facilement les tricheurs, de mieux cibler les sanctions à infliger ou encore de s'entendre plus facilement en réduisant les effets de facteurs tels que l'hétérogénéité des produits, l'incertitude sur l'évolution des coûts, de la demande ou de la capacité de production et sur le changement technologique³¹.

Bon nombre des pratiques qui facilitent la coordination agissent au moins en partie en renforçant la transparence des prix. C'est cet aspect que nous voulons mettre en évidence en examinant brièvement trois de ces pratiques parmi les plus souvent étudiées.

4.4.1 Clause de la nation la plus favorisée (NPF)

Une clause NPF est une disposition contractuelle qui oblige juridiquement un vendeur ou un acheteur à accorder à chacun de ses clients le traitement le plus favorable dont il fait bénéficier un groupe pris pour référence. Elle a pour effet de réduire, mais pas nécessairement d'éliminer, les incitations à pratiquer des remises sélectives.

Plus le coût du non-respect de la clause NPF est élevé et plus il est facile pour les clients de surveiller les prix payés par le groupe de référence, plus les clauses NPF risquent de faciliter la coordination anticoncurrentielle. Ce processus s'opère en partie par un accroissement de la transparence des prix. En effet, les clauses NPF poussent les entreprises qui offrent ce type de garantie à remplacer les remises sélectives par des remises générales ou à ne plus pratiquer de remise du tout, ce qui revient sans doute à peu près au même, car les tricheurs préfèrent naturellement les remises sélectives aux remises générales, plus faciles à déceler. Limiter leur marge de manœuvre aux remises générales signifie donc concrètement qu'il n'y aura pas de tricherie, c'est-à-dire pas de remises secrètes. En outre, l'abandon

progressif de toute espèce de remise, encouragé par les clauses NPF, revient à faire correspondre les prix catalogue, assez faciles à observer, aux prix des transactions, généralement plus opaques. Même sur les marchés où l'on ne se fie pas aux prix catalogue, les clauses NPF peuvent contribuer à une plus grande transparence en permettant aux rivaux de déduire plus sûrement le niveau général des prix des transactions à partir de quelques observations spécifiques fournies par des clients coopératifs. En outre, les clients qui bénéficient des garanties NPF ont tout intérêt à surveiller les prix des transactions, et plus les clients sont informés, plus il y a de chances, en cas de remises, que l'information finisse par arriver aux oreilles des concurrents.

Même si, de façon générale, les clauses NPF constituent un danger pour la concurrence parce qu'elles découragent les remises secrètes, elles peuvent aussi avoir des effets opposés. En effet, plus elles sont d'usage courant sur le marché, plus elles empêchent les rivaux de punir la tricherie en pratiquant des remises sélectives. Les sanctions deviennent alors plus coûteuses à administrer, donc moins probables, et du coup la tricherie a de plus grandes chances d'être profitable³².

Les clauses NPF peuvent aider les consommateurs de diverses manières, par exemple en leur donnant l'assurance que d'autres ne bénéficieront pas de prix plus intéressants ou en protégeant les investissements irrécupérables. L'examen de ces avantages sortirait du cadre du présent document³³, mais il est très important cependant que toute mesure visant les clauses NPF en tienne compte. Ils inclinent en tout cas à penser qu'une approche équilibrée au cas par cas serait préférable à une solution radicale telle qu'une interdiction générale. On peut en dire autant des deux autres pratiques que nous allons voir maintenant.

4.4.2 *Clause d'alignement sur la concurrence*

Sous sa forme la plus simple, une clause d'alignement sur la concurrence oblige une entreprise à s'aligner sur les prix proposés par ses concurrents. Pour simplifier l'exposé, nous nous concentrerons sur le cas où ce sont les vendeurs qui proposent ce type de clause aux acheteurs.

Plus encore peut-être que les clauses NPF, les clauses d'alignement sur la concurrence peuvent accroître la transparence des prix d'une façon qui nuit à la concurrence, car elles encouragent les acheteurs, en cas de remises secrètes, à informer les entreprises qui ont en principe intérêt à punir cette pratique. Toutefois, ce résultat supposé n'est pas le seul possible. En effet, à moins que les acheteurs n'aient une raison particulière de s'approvisionner chez un vendeur donné, il est probable qu'ils iront tout simplement se fournir là où les prix sont les plus bas, plutôt que d'employer leur temps et leur argent à contraindre une entreprise à respecter ses engagements. Pour qu'une clause d'alignement sur la concurrence entraîne réellement un renforcement anticoncurrentiel de la transparence des prix, il faut sans doute qu'elle promette non pas simplement un alignement sur le prix d'un concurrent, mais une réduction supplémentaire assez importante par rapport à celui-ci et/ou une baisse des prix catalogue pour tous les acheteurs et pas seulement pour ceux qui ont découvert des prix plus bas ailleurs³⁴.

Outre leur incidence sur la transparence des prix, les clauses d'alignement sur la concurrence ont peut-être d'autres effets importants. Elles peuvent accroître la production en favorisant une discrimination efficace par les prix, mais elles peuvent aussi décourager la tricherie en obligeant par contrat les vendeurs à punir les remises³⁵. En outre, utilisées parallèlement aux clauses NPF, elles peuvent aussi avoir un effet anticoncurrentiel en éloignant le marché de la concurrence par les prix selon Bertrand au profit de la concurrence par les quantités selon Cournot³⁶.

4.4.3 *Tarification avec point de référence (ou système de prix livraison comprise)*

Au lieu de laisser les clients venir chercher leur marchandise à l'usine ou prendre leurs propres dispositions pour se faire livrer (et régler alors un prix fab), les entreprises qui ont recours au système du point de référence facturent un prix global comprenant les frais de livraison, et ces frais sont calculés comme si la marchandise était toujours expédiée du même lieu ou point de référence, également utilisé par les autres fournisseurs pour établir leurs prix. Un tel système facilite apparemment la surveillance mutuelle des prix de vente, puisqu'il est assez aisé pour les concurrents de calculer et de déduire du prix global les frais de livraison. S'il n'existait pas, on peut penser qu'il serait alors possible de déguiser les remises en les faisant passer pour une réduction des frais de port.

Bien qu'elle soit à même d'accroître la transparence des prix, il n'est pas certain que la tarification avec point de référence facilite davantage la coordination que l'utilisation des prix fab. En fait, cela dépend essentiellement de la question de savoir s'il est plus facile de déceler la tricherie en observant des quantités ou en observant des prix³⁷, mais nous n'entrerons pas dans ce débat ici. Signalons toutefois à ce propos que le système du point de référence peut aussi être motivé par des raisons qui n'ont rien à voir avec la recherche d'une collusion³⁸.

5. Conclusions

Nous avons amorcé cette réflexion en présentant un certain nombre de généralisations que l'on peut résumer à l'aide de trois scénarios. Premièrement, l'accroissement de la transparence des prix se limite à rendre les comparaisons de prix plus faciles pour les acheteurs : ce sont eux qui bénéficieront probablement de la situation. Deuxièmement, il y a des cas où les vendeurs ont la possibilité de mieux s'informer sur les prix de leurs concurrents, tandis que le niveau d'information des acheteurs reste inchangé : il est alors beaucoup plus improbable que les circonstances tournent à l'avantage de ces derniers. Dans le troisième scénario, enfin, l'amélioration de la transparence des prix va de pair avec une meilleure information des acheteurs comme des vendeurs. C'est la situation que les autorités de la concurrence rencontreront sans doute le plus souvent. C'est aussi celle que l'on a généralement le plus de mal à analyser du point de vue des effets qu'elle peut avoir sur l'efficacité économique. Les choses deviennent encore plus complexes lorsqu'il existe des asymétries non seulement entre acheteurs et vendeurs, mais aussi à l'intérieur de chacun des deux groupes, car cela tend à influencer largement sur la capacité des entreprises de procéder à une discrimination par les prix.

Toute analyse des effets d'un accroissement de la transparence des prix en termes d'efficacité, ce qui va un peu au-delà des simples effets sur les acheteurs, devrait s'intéresser de près à la question de savoir en quoi cet accroissement pourrait faciliter l'apparition ou l'exercice d'un pouvoir de marché. Il se peut très bien qu'une plus grande transparence des prix ait des retombées importantes en ce qui concerne la possibilité d'influer unilatéralement sur le marché, notamment en pratiquant une discrimination par les prix. Mais de façon plus générale, ce que les autorités de la concurrence devront essayer de prédire, c'est l'impact qu'une modification de la transparence des prix peut avoir sur la puissance commerciale que possède un groupe d'entreprises, c'est-à-dire son incidence sur la probabilité d'une coordination anticoncurrentielle. Il est clair à cet égard qu'il conviendra d'adopter une approche au cas par cas, en tenant compte tout particulièrement des conditions du marché et de la façon exacte dont s'accroît la transparence des prix. Cela permettra de bien évaluer les avantages et les coûts du phénomène, sans oublier de se demander en particulier si les avantages apparents ne pourraient pas être obtenus pour un moindre coût.

Les marchés électroniques risquent de poser des problèmes particulièrement difficiles à élucider en ce qui concerne les effets que pourrait y avoir un accroissement de la transparence des prix. Au niveau de l'analyse comme à celui des mesures de recours, il faudrait peut-être s'interroger sur les rapports entre

l'identité des propriétaires d'un site de commerce électronique et la nature des informations communiquées, leurs destinataires et le moment où ont lieu les échanges, sans oublier éventuellement l'usage auquel ils sont destinés.

On a souvent fait remarquer que les causes et les effets de la coordination anticoncurrentielle sont à peu près identiques, que l'on soit ou non en présence d'un véritable acte de collusion au sens juridique. De même, on estime généralement que la collusion est par nature difficile à prouver. Dans cette double perspective, certains économistes recommandent de combattre la coordination anticoncurrentielle en privilégiant l'interdiction des pratiques qui facilitent cette coordination. Kühn et Vives (1995, 116-118) présentent un exemple intéressant de cette approche dans le « code de bonne pratique » qu'ils proposent pour l'application du droit de la concurrence dans l'Union européenne. Ce projet réprime très sévèrement l'échange de données individuelles sur les prix et les quantités, mais il ne défend pas le principe de l'interdiction pure et simple, et laisse donc à l'article 81(3) un important rôle à jouer. Kühn et Vives préconisent aussi une grande sévérité en ce qui concerne les communications sur les prix futurs dès lors qu'elles ne sont pas assorties d'engagements de prix maximum en faveur des acheteurs. En revanche, leur code autoriserait l'échange de données agrégées par l'intermédiaire des associations professionnelles tant qu'il n'y a pas de preuve de collusion dans le secteur considéré. Certains responsables de la concurrence pourraient juger utile de limiter cette pratique en exigeant que les échanges portent sur des données rétrospectives et non sur des données courantes.

Dans certains pays où il n'est peut-être pas possible d'interdire le simple échange d'informations détaillées sur les prix ou la communication d'intentions dans ce domaine, même s'il est manifeste que ces pratiques ont un effet anticoncurrentiel, il faudrait alors probablement mettre en avant certains échanges de données sensibles pour bien montrer la réalité de la collusion. On pourrait en dire autant d'autres pratiques qui ont pour effet à la fois d'accroître la transparence des prix et de faciliter la coordination, telles que la tarification avec point de référence, les clauses NPF et les clauses d'alignement sur la concurrence. En fait, ces deux dernières dispositions risquent d'être encore plus difficiles à mettre en cause en tant que telles, puisqu'elles peuvent aussi être le résultat d'une action unilatérale. Elles devraient néanmoins pouvoir faire l'objet de poursuites en tant qu'invitations illégales à participer à une entente³⁹. Quoi qu'il en soit, toutes ces pratiques sont plus suspectes lorsqu'elles sont adoptées par un grand nombre de concurrents, surtout si elles prennent appui sur un accord. Toutefois, indépendamment des aspects juridiques du problème, il ne faut pas oublier que toutes les pratiques en question peuvent avoir des effets aussi bien favorables à la concurrence que défavorables.

Malgré sa portée très limitée, l'étude consacrée ici aux mesures prises par les pouvoirs publics pour accroître la transparence des prix laisse penser que la promotion de la concurrence pourrait avoir des retombées très positives dans ce domaine.

Nous présentons pour finir une courte liste de questions que les autorités de la concurrence jugeront peut-être utiles de se rappeler lorsqu'elles chercheront à évaluer les effets que peut avoir un niveau donné de transparence des prix ou toute modification de celui-ci :

1. Quelle est la probabilité d'occurrence d'une coordination anticoncurrentielle sur le marché étudié ?
2. Quelle est la raison d'être apparente des mesures qui ont une incidence sur la transparence des prix ? Cette question exige d'étudier en détail la façon dont les acheteurs et les vendeurs obtiennent des informations sur les prix sur le marché considéré, et d'examiner également les avantages potentiels de la transparence des prix du point de vue de l'efficacité.

3. Les avantages présumés d'un accroissement de la transparence des prix pourraient-ils être obtenus par des moyens peut-être moins nuisibles pour la concurrence ? Cette question est particulièrement pertinente en ce qui concerne les échanges de données détaillées sur les prix.
4. Les mesures de renforcement de la transparence des prix sont-elles adoptées de façon unilatérale ou par le biais d'une forme ou d'une autre de coordination entre concurrents ?
5. Si les mesures qui ont une incidence sur la transparence des prix étaient totalement ou en partie interdites, les entreprises pourraient-elles assez facilement les remplacer par d'autres moyens de parvenir grosso modo au même but ? Ces autres moyens comportent-ils davantage de risques pour la concurrence ou au contraire moins de risques que les mesures en vigueur ?
6. Si les associations professionnelles ou les sites de commerce électronique sont effectivement utilisés à des fins d'échange d'informations sur les prix de la concurrence, quel est le degré de détail et d'actualité de ces données ? En outre, lorsque des associations professionnelles jouent un rôle d'intermédiaire, vérifient-elles les données et quelles mesures prennent-elles pour s'assurer que les concurrents ne peuvent pas avoir accès à des données détaillées et parfaitement à jour ?
7. Dans la mesure où l'on s'intéresse plus particulièrement aux acheteurs ou aux vendeurs considérés en tant que groupe, de quel niveau d'information disposent-ils en ce qui concerne les prix, et y a-t-il des décalages systématiques entre les uns et les autres en ce qui concerne le moment où ils obtiennent les informations et la rapidité avec laquelle ils peuvent y réagir ?

NOTES

1. Stiglitz (1989, 817).
2. Voir Ten Kate et Dircio (2000) pour une analyse du rôle de l'échange d'informations dans la formation du marché.
3. Cette réserve doit être faite parce que la discrimination par les prix peut être ou non un facteur d'efficience, c'est-à-dire accroître ou non l'excédent des consommateurs et des producteurs pris globalement. Voir Varian (1989).
4. En examinant les pratiques de contrôle des fusions aux Etats-Unis, Willig (1991, 292-293) a défini ainsi les effets coordonnés :

... actions des entreprises parties à une fusion, qui ne sont rentables pour elles du fait de la fusion que si elles s'accompagnent, chez les entreprises non parties à la fusion, de changements de ligne de conduite *motivés en partie par la crainte de représailles*. L'exemple type des effets coordonnés est la hausse des prix pratiquée par les entreprises qui fusionnent et adoptée également dans la foulée par celles qui ne sont pas parties à la fusion, lorsque la fusion permet une stabilisation de la collusion tacite. Dans ce cas, les hausses de prix sont rentables parce que toute déviance de la part d'une entreprise déclencherait probablement des baisses de prix en représailles. (Les italiques ont été ajoutées.)
5. Baker (1999, 185), citant Porter (1980, 93-95), signale que les conseillers en stratégie d'entreprise enseignent maintenant aux cadres « ... comment faciliter la coordination, sans toutefois aller jusqu'à ce que la loi antitrust considérerait comme une entente, au moyen de pratiques de nature à favoriser un consensus ou à décourager les comportements déviants, telles que pilotage des prix, annonces unilatérales, publicité sélective visant à discipliner les concurrents récalcitrants et normalisation en vue de simplifier les variables de décision et de faciliter la formation d'un consensus ... »
6. Cette règle générale pourrait souffrir au moins une exception. Prenons une situation dans laquelle les vendeurs jouissent d'une certaine position de force sur le marché, tandis que les acheteurs se caractérisent par l'asymétrie des informations dont ils disposent sur les prix. Supposons en outre que les acheteurs les mieux informés sont ceux qui sont le plus en mesure d'exercer un pouvoir compensateur à l'encontre des vendeurs. Dans ces conditions, un accroissement de la transparence des prix qui se produirait uniquement du côté des acheteurs et qui réduirait de façon générale l'asymétrie de leurs informations sur les prix pourrait nuire à leurs intérêts individuels et peut-être même à leur intérêt collectif, car les vendeurs résisteraient peut-être alors de façon plus énergique et plus efficace au pouvoir compensateur des acheteurs les mieux informés. Voir Hviid et Mollgaard (2000).
7. Voir le document de référence présenté dans OCDE (1999b).
8. Cet exemple s'inspire de celui donné par Hay (1989, 186-186).
9. Il est vrai qu'une plus grande transparence des prix pour les acheteurs amplifie ce que les tricheurs pensent gagner en baissant leurs prix, mais cet effet devrait être compensé, au moins en partie, par le fait qu'elle les expose aussi davantage aux représailles des concurrents.
10. Ten Kate et Dircio (2000, 26) ont souligné un point important en faisant observer que la plupart des aspects de ce que nous avons appelé les conditions du marché « ... envoient des signaux parallèles ».
11. Ce point n'est peut-être pas toujours bien perçu par les tribunaux. Voir, par exemple, *Trade Practices Commission v Email Ltd & Anor* (1980) ATPR 40-172, affaire décrite dans OCDE (1999b, 107-108).

12. Les autres explications possibles sont les suivantes : 1) il est peut-être beaucoup plus facile pour les vendeurs de pratiquer diverses formes de personnalisation et de discrimination par les prix [voir Ulph et Vulkan (2000)] qui limitent les possibilités de comparaison sur les marchés électroniques ; 2) les vendeurs peuvent empêcher les outils de recherche d'accéder librement à leur site ; 3) les vendeurs peuvent mettre en place divers stratagèmes, par exemple proposer des prix bas pour attirer les clients et les décevoir ensuite par la qualité des garanties, des conditions de livraison, etc., afin de les inciter à se reporter sur des produits plus « haut de gamme » et plus coûteux [voir Ellison et Ellison (2001)] ; 4) les acheteurs peuvent avoir du mal à vérifier les informations relatives aux prix ainsi que certaines données importantes concernant les vendeurs et les produits.
13. Varian (2000, 145-148) montre très bien comment les outils de recherche pourraient finalement fonctionner plus au détriment des consommateurs qu'à leur avantage, et fournit quelques exemples à l'appui de l'idée que, sur le marché du commerce électronique interentreprises, les concurrents peuvent rapidement et fréquemment modifier leurs prix les uns par rapport aux autres. Rey et Tirole (2000, 31) étudient le même point. Voir également Sauermann – <http://www.sauermann-online.de/uni/pricetransparency.htm>. Sauermann reconnaît que le dilemme du prisonnier engendré par la transparence des prix pourrait perdre de son acuité avec le commerce en ligne, du fait de la capacité des vendeurs de réagir plus vite que les acheteurs. Cela dit, il fait aussi remarquer que les cas d'alignement des prix en ligne sont apparemment peu nombreux, et propose à cet égard quatre explications : la transparence du marché n'est pas parfaite et elle favorise les consommateurs ; les entreprises se différencient pour éviter le dilemme du prisonnier ; les marchés sont trop fragmentés pour que la coopération puisse s'imposer ; les entreprises ne sont pas gérées de façon rationnelle – elles cherchent avant tout la croissance.
14. Pour un examen des causes et de l'ampleur de la dispersion des prix dans le secteur du commerce électronique grand public, voir Smith et al. (1999) et Brynjolfsson et Smith (2000). On notera au passage, dans l'étude de ces deux derniers auteurs, que les prix des livres et des CD, produits relativement homogènes, sont généralement plus bas sur les sites de commerce électronique que chez les détaillants traditionnels. Brown et Goolsbee (2000) indiquent quant à eux que les sites comparatifs sur Internet semblent avoir fait baisser les prix dans le domaine de l'assurance-vie temporaire.
15. Rule et al. (2000, 3) font remarquer que les acheteurs seront mieux à même de coordonner leur comportement en aval si les sites de commerce électronique interentreprises leur fournissent des informations sur ce que chacun d'eux achète et sur le prix qu'il paye pour des biens de production également indispensables aux autres.
16. Voir, par exemple, Seabright (2000).
17. Voir Gillespie (1995, 12-13).
18. Kühn et Vives (1995, 86).
19. Citation empruntée à Seabright (2000, 14).
20. Après avoir examiné l'échange de données relatives aux prix, aux quantités, aux coûts et à l'état de la demande, Kühn (2001, 14) conclut que « ... l'échange d'informations offre des possibilités de collusion très importantes, mais ... la communication des prix et des quantités revêt au plan qualitatif un intérêt beaucoup plus grand, car elle révèle directement les actions des concurrents. Les autres informations échangées ne font qu'améliorer l'interprétation des données observées sur le marché ». Pour plus de détails à ce sujet, voir Kühn et Vives (1995, 42-57).
21. Commission européenne (1992, paragraphe 37).
22. Tribunal de première instance des Communautés européennes (1994, paragraphes 91 et 92, les italiques sont de l'auteur). Ce jugement a été confirmé en appel par la Cour de justice des Communautés européennes – voir T-35/92, John Deere Ltd./Commission [1994], Rec. p. II-957 (décision rendue en

1998). Voir Seabright (2000, 18) pour une description de ce que la Commission européenne a finalement décidé d'autoriser en matière d'échange d'informations entre les fabricants de tracteurs agricoles.

23. Lors d'un débat organisé par la section antitrust de l'American Bar Association, dans le cadre de sa réunion du printemps 2001, au sujet de l'incidence de l'Internet et des nouvelles technologies sur les activités des associations professionnelles, notamment en termes de risque accru d'interaction coordonnée, l'un des participants a évoqué plusieurs problèmes liés au fonctionnement des associations professionnelles virtuelles, à savoir : « mise en commun d'informations ; publication d'études et de données statistiques ; accès aux non-membres ; exclusivité au sein de l'association ; ventes et achats conjoints ; activités normatives ». Voir Antitrust & Trade Regulation Report (2001, 329).
24. Même si elles décident de partager certaines informations, les entreprises ont toujours des raisons individuelles, particulièrement lorsqu'elles coordonnent leur action, de s'entraîner mutuellement sur des fausses pistes. La vérification pourrait donc accroître considérablement les effets favorables ou défavorables des échanges d'informations sur la concurrence.
25. Voir OCDE (2000, 25-26).
26. Voir Carlton et Perloff (1994, 608) pour des références d'études montrant comment la publicité des prix a fait baisser le prix moyen payé par les consommateurs pour les médicaments et les lunettes, ainsi que pour les services des professions juridiques et des opticiens optométristes. Les auteurs font aussi état de trois études indiquant que ce type de publicité risque d'entraîner une baisse de qualité sur le marché des services juridiques et optométriques.
27. Voir dans Carlton et Perloff (1994, 584-586) le compte rendu d'une expérience réalisée en 1974 par la commission de surveillance des prix des produits alimentaires, ainsi qu'un bref renvoi à une initiative analogue aux États-Unis.
28. OCDE (1999b, 156).
29. *Ibid.*, p. 260.
30. Voir OCDE (1999a, 21).
31. Pour un examen plus approfondi de ces pratiques, voir Salop (1986) et Hay (1989).
32. Voir Holt et Scheffman (1987, 187-188 et 195).
33. Voir Crocker et Lyon (1994) qui estiment que les clauses NPF peuvent renforcer l'efficacité dans certaines circonstances, en s'appuyant sur des travaux concernant l'industrie du gaz naturel aux États-Unis.
34. Pour de plus amples explications sur ce point, voir Hviid et Shaffer (1999) et Raye (1994).
35. Voir Corts (1996) et Hviid et Shaffer (1999) selon lesquels les clauses d'alignement sur la concurrence constituent davantage un moyen de discrimination par les prix qu'une pratique facilitant une coordination anticoncurrentielle. Pour une critique de Corts, voir Kaplan (2000).

Jain et Srivastava (2000) étudient le point de vue, généralement défendu par les théoriciens, que les clauses d'alignement sur la concurrence tendent à faire monter les prix et, à l'opposé, celui de la presse spécialisée et du grand public selon lequel elles ont plutôt pour effet de stimuler la concurrence. D'après leurs conclusions, les prédictions des uns et des autres ne sont pas assez solides pour tenir compte de la différenciation des points de vente ni de l'information asymétrique des consommateurs.

36. Holt et Scheffman (1987, 188) expliquent la chose ainsi :

... lorsque les entreprises choisissent des *prix* sans qu'il y ait coopération entre elles, mais qu'elles sont liées par des dispositions contractuelles garantissant les prix de vente les plus bas [clauses NPF et clauses d'alignement sur la concurrence], leurs stratégies s'apparentent aux stratégies de Cournot dans lesquelles le choix porte sur des *quantités*. En l'occurrence, l'idée est que la clause « alignement ou non-obligation d'achat » permet aux rivaux de celui qui fait la remise de maintenir leurs ventes en s'alignant sur le prix réduit, faisant ainsi une hypothèse à la façon de Cournot sur la logique des concurrents, et que la clause du client le plus favorisé oblige à offrir la remise à tous les clients existants.

37. Voir Carlton (1983).

38. *Ibid.*, p. 65.

39. Pour de plus amples informations sur les invitations à caractère collusoire, ainsi que sur les pratiques de nature à faciliter la coordination, voir DeSanti et Nagata (1994).

Annexe

**BRÈVE ANALYSE DES MARCHÉS NON OLIGOPOLISTIQUES SUR LESQUELS
L'INFORMATION EST IMPARFAITE, LES ENTREPRISES ONT UNE INFLUENCE
SUR LES PRIX ET IL N'Y A PAS DE COORDINATION ANTICONCURRENTIELLE**

Premier cas de figure extrême : il existe une situation de monopole ou de monopsonne sur le marché. Le monopole ou le monopsonne bénéficient apparemment d'une totale transparence des prix en ce sens qu'ils connaissent tous les prix de toutes les transactions sur le marché. Dans ces conditions, tout accroissement de la transparence des prix signifie obligatoirement une amélioration de l'information pour la partie en position de faiblesse sur le marché. Il n'altère pas nécessairement le rapport des forces, mais il peut rendre plus difficile la discrimination par les prix en augmentant la capacité des acheteurs ou des vendeurs désavantagés de procéder à des arbitrages compensateurs. De fait, une réduction de la discrimination par les prix pourrait certainement aider un groupe d'acheteurs qui paye des prix plus élevés que les autres ou un groupe de vendeurs qui reçoit des prix plus bas que les autres. Elle pourrait améliorer ou non l'efficacité économique globale, mais il n'entre pas dans notre propos d'étudier cette question plus avant.

Deuxième cas de figure : il existe une entreprise dominante qui, si elle disposait d'informations suffisantes, fixerait sa production et ses prix en tenant compte de ce que font les entreprises marginales. Si un accroissement de la transparence des prix signifie une meilleure information des clients de l'entreprise dominante, le résultat est alors identique à celui du scénario précédent. Mais s'il a également pour effet d'améliorer le niveau d'information de l'entreprise dominante, cela peut modifier le pouvoir de marché dont elle dispose et sa capacité à l'exercer (au moyen de la discrimination par les prix). Il est difficile de prédire les effets nets de cette situation sur divers acteurs sans faire d'autres hypothèses concernant les conditions du marché et la forme que prend l'accroissement de la transparence des prix.

Troisième cas de figure : les vendeurs ont une certaine latitude pour fixer leurs prix du fait de la différenciation des produits ; on est en présence d'une concurrence monopolistique. Cette situation est très proche de celle de la concurrence pure examinée dans le corps du texte. Si l'accroissement de la transparence des prix a uniquement pour effet de donner aux acheteurs de meilleures possibilités de comparaison, il doit normalement les avantager encore plus que dans le cas de la concurrence parfaite avec des produits homogènes. En effet, lorsque les produits sont hétérogènes, l'amélioration de la transparence des prix permet aux acheteurs de mieux choisir à la fois les produits et les vendeurs.

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QUESTIONNAIRE SUBMITTED BY THE SECRETARIAT

[Editor's note - this questionnaire was used to structure some of the country submissions]

In what follows "price" includes consideration of discounts and terms easily reducible to price such as delivery and financing charges. Price transparency has to do with the price information various market actors enjoy. This information can vary in terms of accuracy, detail and age, and different market actors can have different information. Price information completeness can extend from perfect transparency where all market actors are costlessly and instantly informed about all actual transaction prices to a situation where no one has the information required to make price comparisons. Actions to improve price transparency refer to changes enhancing the ability of market participants to make price comparisons.

1. General Effects of Enhanced Price Transparency

Enhanced price transparency could cut two ways. On the one hand, it could promote competition by enabling consumers to compare prices offered by sellers. On the other hand, it could facilitate co-ordination by making it easier to arrive at higher prices and then to detect and punish deviation from those prices.

1. Please describe one or more actual situations in your jurisdiction where changes in prevailing levels of price transparency clearly resulted in changes in prices and/or the existing degree of competition.

2. Besides possibly increasing buyers' ability to comparison shop and sellers' ability to engage in anti-competitive co-ordination, what other pro- or anti-competitive effects might higher levels of price transparency have in a market? Please illustrate your remarks with actual situations.

2. Government Price Transparency Enhancement Policies

The accent in this section is on government policies affecting price transparency in various markets. Some of those may be enacted for unrelated reasons yet still have an important effect on competition.

1. What are the most important laws or regulations affecting price transparency in your jurisdiction?

2. In your jurisdiction, what are the reasons for and effects of governmentally mandated price labelling (including informing consumers of all related charges), and publication of suggested, list or actual transaction prices (e.g. mandatory listing of petrol prices on autoroutes, publication of winning bids in government procurement auctions, etc.)? If your competition authority has encouraged or criticised such requirements, what arguments were advanced and with what results?

3. How, if at all, does your competition statute make preserving and/or enhancing price transparency a specific objective? Please describe any provisions requiring the competition authority to take steps to enhance price transparency.
4. Certain statutorily based professional or other associations prohibit or restrict price advertising by their members. Please describe any actions your competition authority has taken in relation to such restrictions, or explain why no such steps have been taken. If a lack of action is owing to a legal exemption to competition law, has your competition authority sought to change that? What lessons have been learned concerning how to successfully remove such exemptions?

3. Private Price Transparency Enhancement Measures

In this section we focus on things market participants might do to alter prevailing degrees of price transparency. They will be referred to below as "transparency enhancers" which we define to include: direct and indirect exchange of price information among sellers and/or buyers including through trade, professional or consumer associations or electronic marketplaces; advertising prices; formulation and circulation of suggested or average prices by professional, industrial or consumer associations; various types of meeting competition clauses; "most favoured nation" clauses; base point or delivered pricing policies; and publishing price index formulae for differentiated or customised goods (e.g. one or more manufacturers could decide to publish the weights it would give to certain product characteristics when pricing electric motors).

1. Which, if any, transparency enhancers (feel free to expand the list) have raised concerns about significant anti-competitive effects in your jurisdiction?
2. What do you see as the principal pro- and anti-competitive effects of each of the various transparency enhancers? Please illustrate your answer with actual examples.
3. Under what circumstances, if at all, would your competition authority prohibit or require the use of various transparency enhancers? More specifically, what role would the following factors (please feel free to extend the list) play in decisions to prohibit or require such practices:
 - a. evidence of pro- or anti-competitive intent and/or effects;
 - b. general market conditions affecting the probability of successful co-ordination (e.g. degree of concentration; height of barriers to entry/expansion/exit; degree of product differentiation; lumpiness in order volumes; etc.);
 - c. degree to which one or more transparency enhancers are widespread in a relevant market;
 - d. evidence that one or more transparency enhancers were adopted by agreement with competitors, versus being unilaterally deployed;
 - e. evidence that one or more transparency enhancers are being used to support an anti-competitive agreement; and
 - f. in the case of direct or indirect exchange of price information, the degree to which such information is aggregated and not up to date.

4. In your jurisdiction, to what degree and under what particular circumstances is the presence of one or more transparency enhancers taken as circumstantial evidence of an anti-competitive agreement? Please illustrate your remarks with actual examples.
5. Please describe the results of any studies conducted in your jurisdiction on the incidence and effects (both pro- and anti-competitive) of comparative pricing search engines used in B2C or B2B electronic commerce.

4. Cases

Please describe any recent situations (including merger review) in which price transparency played a critical role in analysing pro- or anti-competitive effects and/or featured in remedial measures required or advocated by your competition authority.

QUESTIONNAIRE SOUMIS PAR LE SECRÉTARIAT

[Note du rédacteur - quelques soumissions écrites font référence à ce questionnaire]

Dans le texte qui suit, la notion de "prix" couvre également les rabais et les conditions assimilables au prix comme les frais de livraison et de financement. La transparence des prix s'entend de l'information sur les prix dont disposent les différents acteurs sur les marchés. Cette information peut être plus ou moins exacte, et elle peut varier selon l'acteur concerné. Le degré d'exhaustivité de l'information sur les prix va de la transparence parfaite, tous les acteurs étant alors informés sans coût et instantanément sur tous les prix effectifs des transactions, à l'absence totale de l'information nécessaire pour procéder à des comparaisons de prix. Les mesures destinées à améliorer la transparence des prix sont à considérer comme celles qui permettent aux acteurs de mieux comparer les prix.

1. Effets généraux d'une plus grande transparence des prix

Une plus grande transparence des prix peut avoir deux types d'effets. D'une part, elle peut favoriser la concurrence en permettant aux consommateurs de comparer les prix pratiqués par les vendeurs. D'autre part, elle peut faciliter la coordination parce qu'il est alors plus aisé de fixer des prix plus élevés et de détecter et sanctionner le non-respect de ces prix.

1. Veuillez décrire un ou plusieurs cas réels où, dans votre pays, une modification du niveau de transparence des prix a manifestement abouti à une modification des prix et/ou du degré de concurrence.

2. Outre que les acheteurs peuvent être mieux à même de comparer les prix et que les vendeurs peuvent être mieux à même de coordonner leur action de façon anticoncurrentielle, quels autres avantages, proconcurrentiels ou anticoncurrentiels, peut avoir une plus grande transparence des prix sur un marché ? Veuillez illustrer vos observations par des cas réels.

2. Mesures susceptibles d'être prises par les pouvoirs publics pour améliorer la transparence des prix

On s'attachera aux mesures émanant des pouvoirs publics qui influent sur la transparence des prix dans les différents marchés. Ces mesures peuvent être adoptées pour d'autres motifs tout en ayant une incidence marquée sur la concurrence.

1. Quelles sont les dispositions législatives ou réglementaires les plus importantes qui influent sur la transparence des prix dans votre pays ?
2. Dans votre pays, quelles sont les raisons et quels sont les effets de l'étiquetage obligatoire des prix (y compris l'information du consommateur sur tous les frais connexes) et de l'obligation de rendre publics les prix recommandés, les prix catalogue ou les prix effectifs des transactions (par exemple, affichage obligatoire des prix des carburants sur les autoroutes, obligation de rendre publiques les soumissions des attributaires des marchés publics en cas d'appel d'offres, etc.) ? Si votre autorité de la concurrence a œuvré en faveur

de ces dispositions ou les a critiquées, quels arguments ont été avancés et avec quel résultat ?

3. Comment votre loi sur la concurrence, si tant est qu'elle le fasse, assigne-t-elle l'objectif précis de préservation et/ou d'amélioration de la transparence des prix ? Veuillez commenter les éventuelles dispositions obligeant l'autorité de la concurrence à prendre des mesures pour améliorer la transparence des prix.
4. Certaines associations professionnelles ou autres soumises à des lois particulières interdisent ou limitent la publicité sur les prix de la part de leurs adhérents. Veuillez décrire les mesures qu'a éventuellement prises votre autorité de la concurrence à l'égard de ces restrictions, ou indiquer pourquoi elle n'a pas agi. Si l'absence de mesures tient à l'existence d'un régime dérogatoire au droit de la concurrence, votre autorité de la concurrence a-t-elle cherché à modifier ce régime ? Quels enseignements doit-on tirer quant à la meilleure façon de mettre fin à ces dérogations ?

3. Mesures susceptibles d'être prises par le secteur privé pour améliorer la transparence des prix

On s'attachera à tout ce que peuvent faire les acteurs du marché pour modifier le degré de transparence des prix. On utilisera ci-après l'expression "dispositif de transparence", qui couvre : l'échange direct et indirect d'informations sur les prix entre les vendeurs et/ou les acheteurs, y compris par le biais d'associations professionnelles, d'associations de consommateurs ou de marchés électroniques ; la publicité sur les prix ; l'établissement et la diffusion de prix recommandés ou de prix moyens par les associations professionnelles ou les associations de consommateurs ; les divers types de clauses d'alignement sur la concurrence ; les clauses "de la nation la plus favorisée" ; les prix avec point de parité ou rendu destination ; la diffusion de formules de calcul des prix pour les produits différenciés ou personnalisés (par exemple un ou plusieurs fabricants de moteurs électriques peuvent décider de rendre publique la pondération qu'ils accorderont à certaines caractéristiques du produit lorsqu'ils fixeront son prix).

1. Quels sont le cas échéant les dispositifs de transparence (n'hésitez pas à élargir la liste ci-dessus) qui ont suscité des préoccupations du point de vue des effets anticoncurrentiels qu'ils pouvaient avoir dans votre pays ?
2. Quels sont à votre avis les principaux effets proconcurrentiels et anticoncurrentiels de chacun des divers dispositifs de transparence ? Veuillez illustrer votre réponse par des cas réels.
3. Dans quelles circonstances, si tant est qu'elle le fasse, votre autorité de la concurrence interdirait-elle ou imposerait-elle l'utilisation de divers dispositifs de transparence ? Plus précisément, quel rôle joueraient les facteurs suivants (n'hésitez pas à élargir la liste ci-après) dans les décisions concernant l'interdiction ou l'utilisation obligatoire de ces dispositifs :
 - a. preuve d'une intention proconcurrentielle ou anticoncurrentielle et/ou d'effets proconcurrentiels ou anticoncurrentiels ;
 - b. situation générale du marché influant sur la probabilité de succès de mesures de coordination (par exemple, taux de concentration ; importance des barrières à l'entrée, à l'expansion ou à la sortie ; degré de différenciation des produits ; volume de commandes irrégulier ; etc.) ;

- c. diffusion plus ou moins large d'un ou de plusieurs dispositifs de transparence sur un marché considéré ;
 - d. éléments démontrant qu'un ou plusieurs dispositifs de transparence résultent d'un accord anticoncurrentiel ;
 - e. éléments démontrant qu'un ou plusieurs dispositifs de transparence sont utilisés à l'appui d'un accord anticoncurrentiel ;
 - f. dans le cas d'un échange direct ou indirect d'informations sur les prix, le degré auquel ces informations sont globales et ne sont pas à jour.
4. Dans votre pays, dans quelle mesure et dans quelles circonstances la présence d'un ou plusieurs dispositifs de transparence est-elle considérée comme l'indice de l'existence d'un accord anticoncurrentiel ? Veuillez illustrer vos observations par des cas réels.
5. Veuillez indiquer les résultats des études qui ont pu être réalisées dans votre pays sur la diffusion et les effets (proconcurrentiels et anticoncurrentiels) des moteurs de comparaison des prix utilisés dans le commerce électronique (entreprises/consommateurs ou entreprises/entreprises).

4. Cas pratiques

Veillez commenter tout cas récent (y compris dans le cadre de l'examen des fusions) où la transparence des prix a joué un rôle déterminant dans l'analyse des effets proconcurrentiels ou anticoncurrentiels et/ou a été l'un des éléments des mesures correctrices exigées ou préconisées par votre autorité de la concurrence.

AUSTRALIA

Introduction

Within Australia, the level of price transparency varies from industry to industry. In some cases, price information, market shares and other trading information is closely guarded by firms. In other cases, such information may be relatively transparent. The level of transparency may be the result of specific government regulation, agreements between market participants to introduce price transparency enhancers, or unilateral acts (sometimes referred to as facilitating arrangements or practices).

Greater transparency may promote competition, but in some cases it may also involve practices which facilitate actual or tacit collusion. In Australia agreements to adopt price transparency enhancers may be assessed under Australia's competition legislation, the *Trade Practices Act 1974* (the TPA). Some forms of unilateral conduct may however fall outside the ambit of the TPA. Under the TPA, the Australian Competition and Consumer Commission (the ACCC), the competition regulator, may authorise certain conduct on public benefit grounds, which provides parties with legal immunity for that conduct.

With the development of e-commerce generally, it is anticipated that the overall level of price transparency in markets will increase. In particular, B2B electronic marketplaces, shopping portals and comparison shopping measures (i.e. "shopbots") are likely to create quicker and more comprehensive access to price information by both buyers and competing sellers. Accordingly, Australia believes that it is timely to discuss the treatment of such practices under competition law, particularly in the context of the electronic communications environment.

The following comments address the specific issues raised in the Issues Paper.

1. General effects of enhanced price transparency

1.1 Please describe one or more actual situations in your jurisdiction where changes in prevailing levels of price transparency clearly resulted in changes in prices and/or the existing degree of competition.

There is very limited information available in Australia on this issue. Identifying clear examples of where changes in price transparency has been shown to have resulted in a significant change in competition and pricing behaviour (whether positive or negative) is somewhat problematic. This is because there are few cases where changes in price transparency occur in isolation to other events affecting competition. Accordingly, caution should be taken in imputing a strong causal link between greater or lesser levels of price transparency and competitive outcomes.

Examples in the Australian context include the introduction of greater price transparency in wholesale electricity prices via the development of the National Electricity Market (NEM). In that case, overall wholesale electricity prices have decreased under this new market structure. For example, in NSW and Victoria prices for business users have reduced by 25-30 per cent.¹ However, in this industry, prior to

the introduction of the new structure, there was no competition at all. Accordingly, while this indicates that competition may coexist with a higher level of price transparency, it does not reveal whether competition is as strong as it may be if the level of price transparency were different.

Australia would welcome the opportunity to discuss other jurisdiction's experiences in undertaking studies in this area.

1.2 *Besides possibly increasing buyers' ability to comparison shop and sellers' ability to engage in anti-competitive co-ordination, what other pro- or anti-competitive effects might higher levels of price transparency have in a market? Please illustrate your remarks with actual situations.*

1.2.1 *Pro-competitive effects*

- *Price transparency may signal opportunities for new entry.* In assessing the competitive implications of the introduction of the NEM, the ACCC took into account that price transparency would enable potential new entrants to make informed investment decisions. Access to such information was considered to be particularly relevant in a deregulating industry where there is no historic data for new entrants to access.
- *Price transparency may increase ability to detect discrimination and cross subsidisation.* These issues are more likely to be relevant in relation to wholesale markets characterised by high levels of market concentration and vertical integration.
- *Price transparency may reduce information asymmetry between competitors.* In markets where there are a small number of large players, they will have greater resources with which to obtain price information (particularly information regarding input costs) than smaller competitors. Introducing price transparency may enable smaller businesses to obtain the same benefits as larger firms enjoy. This issue was taken into account by the ACCC in assessing information disclosure requirements in the NEM where it was found that larger players had the resources necessary to derive the information, so restricting disclosure would only disadvantage smaller players. Also, in assessing a recent acquisition in the timber industry, the ACCC had some concerns that the acquisition would provide the acquirer with market power in the purchase of hardwood logs. The ACCC allowed the acquisition to proceed after obtaining undertakings, which included an obligation to make available the average price, received for export woodchips, and the average stumpage paid for hardwood pulp logs.²
- *Price transparency may assist in addressing issues of unequal bargaining power.* In industries where one side of the market consists of small, fragmented participants, and the other side is powerful and concentrated, smaller businesses will often try to redress the balance through information exchange in order to obtain benchmarks for negotiations. Under the TPA, the ACCC recently authorised an arrangement between chicken growers to jointly negotiate contracts with a processor. Although it may reduce competition between those growers, authorisation was granted on the basis that the agreement would provide growers with greater equality in the bargaining process.
- *Price transparency may enable regulators to detect collusion more easily.* As discussed above, in markets where price transparency is likely to result in collusion, it may be questioned whether collusion would occur by other means irrespective of the level of price

transparency. Price transparency may in fact provide more information about prices from which regulators may detect a potential pattern of collusion. However, it is still necessary to show that a collusive arrangement is in place. For example, in the retail petrol industry, the ACCC often receives complaints about retailers putting their prices up at the same time (usually before long weekends, public holidays etc). No action can be taken unless it can be shown that a retailer moved its price because of an actual arrangement rather than as a unilateral action.

- *Price transparency may enable smaller traders to attract more customers.* New services such as Internet search engines and comparison shopping services may enable a greater degree of price transparency, which may provide small traders with better opportunities to compete. However, small traders will still need to be able to “win” the business, and their price competitiveness may ultimately still depend on their physical size and economies of scope and scale.
- *Price transparency may encourage more non-price competition and innovation.* As prices converge, competitors will be looking to find new ways to differentiate themselves. This may result in better service, introduction of new products, or new production techniques to bring down prices further. It is also necessary to consider whether the price transparency mechanism used is one which encourages or discourages non-price competition. For example, a marketplace may actually create a greater degree of standardisation.

1.2.2 *Anti-competitive effects*

- *Greater price transparency in one market may result in greater likelihood of collusion and a reduction in price competition in downstream markets or spill over into other markets in which the parties participate.* If price transparency in an upstream market results in better knowledge about a competitor’s cost structure, this may encourage collusion to occur in downstream markets. This will depend on a number of factors including the proportion of costs that are known, the potential to substitute other inputs, and what other market forces are driving the parties (e.g. retail substitutes in the downstream market). For example, the ACCC has looked closely at a number of tolling arrangements, particularly in the concrete industry in order to determine whether the sharing of cost information and facilities would be likely to result in collusion at the customer level. In those cases, the ACCC did not find sufficient evidence of collusion at the customer level to take action.
- *Third party access/discrimination issues and increasing barriers to entry.* The mechanisms available to achieve price transparency are varied. Generally, mechanisms such as collection and analysis of data by industry associations and electronic portal services to disseminate information including airline computer reservation services (CRS), financial information services (Reuters, Bloomberg) and B2B Internet portals, will reduce search costs and increase the degree of price transparency. However, where the operations of such mechanisms requiring infrastructure investment are funded by industry, and industry participants hold an equitable interest in the information delivery mechanism, this may raise issues for new entrants or smaller players in the market. The ACCC has received complaints in relation to alleged discrimination against smaller airlines by the owners of CRS systems, vertically integrated with the large domestic carriers. Forms of discrimination vary from outright refusals to deal to more subtle issues such as positioning of fares on screen displays. In that instance, the ACCC has not been able to take action on the basis that it could not find that the owners had a sufficient degree of market power to breach the TPA. It is likely that similar issues may arise in relation to new Internet services such as B2B portals.

- *Increasing information asymmetry.* Mechanisms which grant certain market participants access to more timely information may provide an anti-competitive advantage over other competitors.
- *Incentive to engage in confusing or misleading practices.* Where price transparency does result in aggressive price competition, one of the “side effects” may be more pressure to engage in dubious business practices. For example, in the mobile phone and Internet Service Provider industries, which may be characterised as new industries with low entry barriers, limited sustainable product differentiation and a high level of aggressive price advertising, the ACCC has observed that the level of consumer complaints regarding misleading advertising is very high. In the longer term, loss of consumer confidence may have an anti-competitive effect in these industries.

2. Government price transparency enhancement policies

2.1 *What are the most important laws or regulations affecting price transparency in your jurisdiction?*

The *Trade Practices Act 1974* (TPA) is the primary law affecting price transparency in Australia.

Section 45 of the TPA prohibits contracts, arrangements or understandings which are likely to result in a substantial lessening of competition in a market. This section is used to assess arrangements (between competitors or non-competitors) to jointly develop facilitating practices, including arrangements to exchange price information. The ACCC may authorise such arrangements if the public benefit outweighs the anti-competitive detriment of the arrangement. Authorisation provides immunity for arrangements from legal challenges. The TPA does not define the concept of “public benefit” but it is to be interpreted broadly. Public benefits taken into account may include a wide range of factors, including efficiencies and pro-competitive effects.

Unilateral actions leading to parallel pricing or tacit collusion are not generally covered under the TPA. A unilateral act of resale price maintenance is prohibited, regardless of its effect on competition (s.48 of the TPA) and authorisation may be sought for this conduct. Currently, the ACCC is looking at the competitive impact of regular and widely known promotional policies.

Conduct of owners of information services could also fall within the prohibition on the misuse of market power (s. 46 of the TPA) if they refuse to deal or otherwise use the service to restrict competition.

2.2 *In your jurisdiction, what are the reasons for and effects of governmentally mandated price labelling (including informing consumers of all related charges), and publication of suggested, list or actual transaction prices (e.g. mandatory listing of petrol prices on autoroutes, publication of winning bids in government procurement auctions, etc)? If your competition authority has encouraged or criticised such requirements, what arguments were advanced and with what results?*

Price labelling is not mandatory in Australia, but consumer protection laws include measures to ensure that consumers may make informed choices in purchasing goods.

Part V of the TPA sets out the fair trading provisions. This includes the prohibition that suppliers of goods and services in trade or commerce must not engage in misleading or deceptive practices (s 52).

Businesses must also not make a false or misleading representation with respect to the price of goods or services (s 53(e)). Suppliers must state the full cash price of goods and services advertised – to ensure that consumers are not lured into buying goods and services without knowing the total purchase price (s53C). If suppliers advertise a particular price, they must offer the relevant goods and services at that price for a reasonable period in reasonable quantities, having regard to the nature of the market and the nature of the advertisement (s 56).

Under the existing health scheme, the Government publishes a price/benefits list for certain HealthCare items. In some areas, price information has been removed from the list in order to enable price competition to develop. For example, in 1999 the Department of Health and Aged Care determined that benefits payable for prostheses would no longer be set by the Commonwealth, but should be negotiated separately by health funds, hospitals and suppliers. The ACCC supports these initiatives.

Each of the States and Territories of Australia has legislation providing for the compulsory display of petrol prices. The size of boards and level of disclosure varies between States.

2.3 *How, if at all, does your competition statute make preserving and/or enhancing price transparency a specific objective? Please describe any provisions requiring the competition authority to take steps to enhance price transparency.*

The TPA is generally neutral on the issue of price transparency. However, it does enable the ACCC to enhance price transparency in relation to infrastructure industries where price regulation or monitoring may be incorporated within an access regime under Part IIIA or Part XIB & C (telecommunications) of the TPA, or under the Airports Act 1996. Also, under the *Prices Surveillance Act 1983 (PSA)*, the responsible Commonwealth Minister may direct the ACCC to undertake inquiries and monitor and report on prices in particular industries such as petrol or stevedoring for public policy reasons (s. 18 of the PSA).

These types of requirements occur where there is considered to be an overriding public benefit (e.g. monitoring waterfront reforms), and relate mainly to industries where there is a monopoly or near monopoly situation (hence collusion is unlikely to be a significant concern).

In most cases, the ACCC is provided with a certain degree of flexibility in terms of whether to disclose price information it may receive under a monitoring function. The ACCC's policy is not to publish individual data when this can be avoided.

The telecommunications regime in Part XIB & C of the TPA provides some clear checks on the disclosure of individual information. It requires the ACCC to weigh the public benefits against the competitive detriment before deciding whether to publicly disclose price information it has requested. Also, the arbitration process specifically does not enable the ACCC to publish the contents of a determination between parties – only that an arbitration determination has been reached – in order to protect commercial information including price.

2.4 *Certain statutorily based professional or other associations prohibit or restrict price advertising by their members. Please describe any actions your competition authority has taken in relation to such restrictions, or explain why no such steps have been taken. If a lack of action is owing to a legal exemption to competition law, has your competition authority sought to change that? What lessons have been learned concerning how to successfully remove such exemptions?*

The potential anti-competitive effects and direct consumer detriment which can arise due to restrictions on advertising of professional services is a serious concern to the ACCC. In its *Report to the Australian Senate on Anti-Competitive and other practices by health funds and providers in relation to private health insurance*, 30 June 2000, the ACCC stated that there is a particular need for price information to be more readily available to consumers. However, it does not condone the dissemination of price lists.

As a result of the National Competition Policy reforms, in many professions, disclosure of fee information has become a requirement of all ethical professionals. For instance, much State and Territory legislation regulating the legal profession requires legal practitioners to disclose costs to consumers, and failure to do so could be categorised as professional misconduct (e.g. *NSW Legal Profession Act 1987*).

The National Competition Policy reform package also enabled the ACCC to assess restrictive rules on advertising created by professional associations under the TPA which previously fell outside the scope of the TPA. The ACCC has had discussions with many associations on these issues and will continue to investigate any complaints about restrictions on advertising. At this time, no action has had to be taken.

The introduction of advertising into the professional sphere has not been without problems. There has been an increase in the number of concerns relating to subjective advertising claims (e.g. miracle cure advertising on the Internet). However, it is considered that this is not sufficient reason to restrict all forms of advertising, but does point to the need for strong consumer protection laws to be applied in industries moving from a non-competitive to a competitive environment.

3. Private price transparency enhancement measures

3.1 *Which, if any, transparency enhancers (feel free to expand the list) have raised concerns about significant anti-competitive effects in your jurisdiction?*

Some transparency enhancing measures such as the use of price boards outside petrol stations, recommended price lists circulated by associations, combined advertising rate cards and auction marketplaces have raised competition concerns.

3.2 *What do you see as the principle pro- and anti-competitive effects of each of the various transparency enhancers? Please illustrate your answer with actual examples?*

3.2.1 *Price boards and advertising prices*

The ACCC has considered the implications of prominent price board displays at retail petrol service stations on several occasions. Anecdotal evidence suggests that price boards are sometimes used as a way to signal to other retailers a proposed increase in prices. For example, a petrol station operator may

increase the board price, but not the actual pump price as a strategy to see if his competitors will follow. If competitors do not follow, the board price will be put back down again.

In the retail petrol industry, price boards are likely to afford greater risks for collusion to occur than other price advertising mechanisms. Board changes can be made easily throughout the day, the proximity of petrol stations to each other, ripple effects and links through multi-franchises enable signals to spread relatively quickly. The risks for the “signaller” that other participants will not respond are lower because, as in the example given above, a price board can be changed back easily to minimise losses. Other forms of advertising prices may be less likely to be used purely as signals because of the investment made in advertising campaigns and difficulties involved in changing advertised prices quickly.

Increased price display and advertising may also have a pro-competitive effect as price downturns can spread more quickly. Also, in the case of petrol boards it enables consumers to make more informed decisions.

To date, no action has been taken in relation to petrol boards as matters have focussed on investigating collusion at the wholesale level.

3.2.2 *Combined advertising*

In some industries, there is a practice of pooling resources in order to jointly advertise competing products. Participants in such ventures argue that this enables participants to reduce their advertising costs (freeing up their time and money to compete more vigorously against each other) and offer consumers the ability to compare prices more readily. In some cases, combined advertising may be used as a strategy to grow a market. For example, if a group of competing theme parks in a particular location decide to advertise a joint admission ticket in order to attract more tourists to that particular region.

Combined advertising can raise some competition issues. In Australia, the ACCC opposed a proposal by two radio stations to establish a combined advertising rate card on the basis that it involved price fixing or an arrangement to substantially lessen competition in a market. Subsequently, the Federal Court of Australia upheld the arrangement on the basis that on the facts it appeared that the participants would continue to establish their advertising rates separately (*Radio 2UE Sydney v Stereo FM* (1983) ATPR 40-367). However, there may be some fact situations where the development of a joint rate card may enable the parties to co-ordinate their pricing strategies.

3.2.3 *Recommended price lists*

Recommended price lists developed by industry associations or consumer groups are generally considered to raise competition concerns in Australia. These may be assessed as potential price fixing arrangements under the TPA (s 45A) or arrangements that are likely to result in a substantial lessening of competition in a market (s 45). The ACCC is more likely to invoke s 45A where there are associated rules which enable participants to discipline those who do not comply with the recommendation. In other cases, a substantial lessening of competition test will be applied. Such arrangements may lessen competition as they are generally formed with the intention that suppliers or buyers will adhere to the recommended prices, and in fact they are unlikely to price below (or in the case of buyers, above) recommended fees. This is because their competitors are unlikely to charge differently and consumers will believe that they are being dealt with fairly as long as they are charged the recommended price. For example, the ACCC rejected an application for authorisation of minimum fee scales for engineers (*Re Association of Consulting Engineers Australia*, 1979 4 TPR 114).

Nevertheless, the ACCC does recognise that some recommended price lists may have some efficiency and consumer welfare benefits, particularly where lists may assist small businesses by saving them valuable time and costs through providing them with information that helps them to compete.

3.2.4 Marketplaces

The establishment of open markets to trade certain types of products enables a greater level of price transparency than private sales mechanisms. This may enable participants to engage in conduct such as bid rigging. Also, the associated entry rules and operating rules for auctions may raise issues of discrimination, potential to stifle innovative product differentiation and impeding the development of alternative trading mechanisms.

Because marketplaces generally involve significant infrastructure investment, and once established, may attract network effects they usually attract efficiency arguments. Marketplaces may enable smaller firms to participate more fully in markets in order to achieve more efficient, competitive and dynamic pricing. For example, the ACCC has taken this into account in its determinations to authorise the operations of the Australian Stock Exchange and the Australian Wool Exchange (AWEX). In relation to the AWEX, the ACCC has recognised that the exchange may enhance efficiency by enabling buyers and sellers to avoid the cost of being concerned with machinery and procedural matters and instead to focus on the main price and service aspects of trading.

Nevertheless, where inappropriately structured, the characteristics of a market which make it efficient also provide opportunities for the owners to develop and exert market power. This is an issue currently being debated in the context of consortium B2B proposals.

3.2.5 Most Favoured Nation clauses/meeting competition clauses

Meeting competition clauses in advertising campaigns may provide competitors with information about each other's current prices relatively quickly. By effectively requiring competitors to meet prices, such clauses may reduce the ability and incentive of competitors to lower their prices, and therefore, increase incentives to directly or tacitly collude to keep prices high. Nevertheless, such clauses may have benefits for consumers who are better able to barter and may reduce their search costs.

Most Favoured Nation clauses have a similar impact of penalising a supplier for offering buyers different prices and therefore reducing the incentive to lower prices. Such actions reduce uncertainty about competitors' behaviour and thus increase the potential for direct or tacit collusion. This may have benefits for particular individual buyers. In some circumstances, it may reduce the ability to discriminate which may be pro-competitive in markets characterised by vertically integrated suppliers.

However, in markets where there is market power on the buyer side, buyers may use most favoured nation clauses to prevent other market participants undercutting their costs, in fact creating a form of price discrimination. For example, a similar issue arose in a recent case in Australia involving allegations of misuse of market power and other anti-competitive behaviour by a retailer in the bread industry. In that case, economic experts discussed the potential for most favoured nation practices to contribute to market power, but no finding has been made on that point as yet.

The ACCC will be looking at the implications of Most Favoured Nation clauses in the context of the grocery industry in Australia in a forthcoming inquiry into that industry.

3.3 *Under what circumstances, if at all, would your competition authority prohibit or require the use of various transparency enhancers? More specifically, what role would the following factors (please feel free to expand the list) play in decisions to prohibit or require such practices:*

As discussed above, the ACCC only requires or participates in transparency enhancing measures in limited circumstances, and mainly in conjunction with its role in the administration of access arrangements over infrastructure facilities.

In assessing whether to take action under the restrictive trade practices provisions of the TPA, the ACCC will look at each matter on a case by case basis, taking into consideration all of the factors mentioned and any other relevant considerations.

3.3.1 *Evidence of pro- or anti-competitive intent and/or effects*

Evidence of an anti-competitive intent would clearly be an important factor as an arrangement entered into for the purpose of substantially lessening competition is prohibited under the TPA. In relation to facilitating arrangements, evidence of a pro-competitive intent would be taken into account, but potential pro-competitive effects would need to be demonstrated to outweigh the potential competitive detriment in order to allow an arrangement to proceed. In relation to unilateral actions, evidence of a pro-competitive intent would reduce the likelihood of imputing that the actions mask an underlying facilitating arrangement.

Evidence of the actual competitive effects is particularly useful evidence in assessing the effects of facilitating arrangements, although in practice it may be difficult to isolate the effects of an arrangement in the context of other events occurring in a market. In relation to unilateral facilitating practices, evidence that a competitor has followed a unilateral signal may strengthen the implication that an implied agreement between competitors has been reached. The frequency with which such signals appear to have been followed will also be relevant. However, where conduct may still be explained by other commercial justifications (e.g. cost considerations, price leadership), such evidence of uniformity of pricing may not be sufficient to bring action.

3.3.2 *General market conditions affecting the probability of successful co-ordination (e.g. degree of concentration,; height of barriers to entry/expansion/exit; degree of product differentiation; lumpiness in order volumes; etc)*

Underlying market structure is the key element in determining the probability of co-ordination occurring and to what degree such practices are likely to be sustainable. In more concentrated markets, there is more likelihood of anti-competitive conduct occurring because arrangements are easier to co-ordinate and maintain between a smaller number of participants. The likelihood of participants “cheating” on a collusive arrangement is reduced, as there is less potential for new entrants to create uncertainty in the market. Other market factors such as product differentiation and underlying business imperatives will also impact upon the development and particularly the likely sustainability of collusive conduct. For example, where order volumes are lumpy, there may be greater incentives for competitors to break away from an arrangement in order to obtain a large order, where the advantages to such a strategy will not be competed away as quickly as in other markets.

The ACCC is more likely to be concerned in cases where there is a high degree of concentration and high barriers to entry. However, at the same time it recognises that as markets become more concentrated, participants can achieve the results of a collusive arrangement through unilateral conduct

more easily. As already noted, this form of conduct is more difficult to challenge under Australia's competition law.

3.3.3 Degree to which one or more transparency enhancers are widespread in a relevant market

Transparency enhancing mechanisms that involve the exchange of information between competitors but do not involve public disclosure to customers will generally raise a greater degree of concern because they do not deliver the same degree of pro-competitive benefits. In fact, except where demonstrable countervailing power arguments can be raised, it is difficult to see why such exchanges would occur unless there is an intention to create an anti-competitive arrangement.

Where there are a number of widespread transparency enhancers already available within a market, this may dilute the potential effects of a particular arrangement to increase price transparency. For example, if a group of competitors decide to develop a B2B marketplace, it is relevant to consider whether existing sources of information are available in that market and whether the marketplace significantly enhances the degree of transparency. Another factor to take into account is whether the measure in question increases price transparency to all competitors, or only to some. A B2B marketplace which is owned by some participants will enable those participants greater access to information than is available to others. This in itself may increase the level of competitive concern.

3.3.4 Evidence that one or more transparency enhancers were adopted by agreement with competitors, versus being unilaterally deployed

Unilateral decisions to develop a higher degree of transparency are unlikely to be challenged under existing Australian competition laws. Similarly, parallel pricing arising from such measures would be unlikely to be prohibited. However, any subsequent evidence that in fact such measures had been used to signal prices between competitors in furtherance of an underlying price fixing agreement may be used to challenge the underlying agreement.

Depending on the level of concentration and market structure, an agreement between competitors to adopt a particular price transparency mechanism could raise a higher risk of anti-competitive effects than unilateral conduct. This is because the development of the mechanism itself involves actual contact between the parties, joint decision making and ongoing monitoring (although in some cases, industry associations or equal buyer/seller representation may provide a way to keep competitors separate). Also, agreements could contain ancillary restraints on the parties' ability to use other price advertising mechanisms. This is more likely to arise when the type of measures introduced involve some infrastructure build, for example, an electronic marketplace.

3.3.5 In the case of direct or indirect exchange of price information, the degree to which such information is aggregated and not up to date

Degree of aggregation of price information is considered to be a relevant consideration by the ACCC in assessing the likely competitive effects of an information sharing arrangement. For example, the ACCC recently considered an authorisation application for an arrangement between five hospitals.³ The arrangement was to exchange fee related and non-fee related information and appoint a common agent to facilitate the exchange of aggregated data and assist in negotiations with health funds. It found that the aggregation of data and assurances that actual negotiations would remain separate, may limit the exercise of market power. However, it did require conditions that safeguards relating to the exchange of information be incorporated into the agreement, and that no information regarding current negotiations

between a health fund and a hospital may be exchanged. However, the ACCC refused a similar application because in all the circumstances, the public benefits did not appear to outweigh the potential anti-competitive effects of that arrangement.

The implications of the age of data will vary depending on the industry. Generally, the older the data, the less likely it is that disclosure will have an anti-competitive effect.

3.3.6 *Inclusiveness of price transparency enhancer*

The stability of collusion is also dependent on the participant's level of certainty regarding each other's behaviour. Some forms of price transparency enhancers will be more effective than others in reducing uncertainty and enabling parties to detect and discipline a member who cheats on the arrangement. For example, an arrangement to establish a marketplace to facilitate price transparency, which ties participants to minimum volume requirements, is more likely to promote collusion than one which does not compel the members to use the marketplace.

3.4 *In your jurisdiction, to what degree and under what particular circumstances is the presence of one or more transparency enhancers taken as circumstantial evidence of an anti-competitive agreement? Please illustrate your remarks with actual examples.*

To date, Australian courts have been reluctant to accept the presence of transparency enhancers as conclusive evidence of an anti-competitive agreement. The Courts are prepared to consider commercial justifications for alleged anti-competitive conduct.

For example, in the case of *TPC v Email* (1980) ATPR 40-172, the Federal Court of Australia held that two manufacturers of electricity meters could not be found to have entered into an "agreement" even though they issued identical price lists, submitted identical tenders which adhered to those price lists, sent each other copies of their price lists and notified each other of changes immediately. There was no direct evidence of communications or a "meeting of minds." Parallel pricing could, it was considered be explained by market forces.

In the case of *Radio 2UE Sydney v Stereo FM* (1983) ATPR 40-367 the Federal Court held that a combined advertising service by which two radio stations allowed advertisers to buy time on both stations with one telephone call did not amount to a price fixing arrangement. Although it would appear that the service could be used to exchange information and co-ordinate prices, the court held that there was not sufficient evidence of an arrangement to fix prices.

3.5 *Please describe the results of any studies conducted in your jurisdiction on the incidence and effects (both pro- and anti-competitive) of comparative pricing search engines used in B2C or B2B electronic commerce.*

To date, we are not aware of such studies being undertaken in Australia. However, this is an area where we believe that further discussion of the issues is merited.

Search engines may deliver a greater degree of price transparency to customers and competitors than ever before. However, the development of search engines may also introduce some new wrinkles in unilateral behaviour. With the development of such products, actual exchanges of price lists becomes superfluous, and time lags in obtaining competitor information may be significantly reduced in many industries, increasing the potential for collusion or tacit collusion to occur. Also, when operated as a

commercial product they raise issues of affordability of such services for smaller competitors. At the same time, businesses which attempt to “block” search engines from their sites may find themselves facing allegations of refusal to deal.

Australia would welcome the opportunity to discuss the experiences of other jurisdictions in this area.

4. Cases

4.1 *Please describe any recent situations (including merger review) in which price transparency played a critical role in analysing pro- or anti-competitive effects and/or featured in remedial measures required or advocated by your competition authority.*

4.1.1 *Electricity industry authorisations*

In 1996, the ACCC received an application for authorisation of the National Electricity Code and the National Electricity Market (NEM) established under that Code. The wholesale electricity pool provided for a relatively high degree of information disclosure, including publication of forecast information, market participants offers, actual capacity availability and scheduled load for the previous trading day.

The ACCC was concerned that:

“In the NEM individual price and quantity bids will be disclosed to market participants, and the potential for this information to be used in an anti-competitive manner cannot be dismissed. In simple terms, the proposed arrangements provide details of individual dispatch bids and offers, thus disclosing to competing generators any divergence from a tacitly agreed-to bidding strategy, enabling conforming generators to punish non-conforming generators.

In addition, participants are given access to sensitivity data and the methodology and standing data inputs into forecasts. This is powerful knowledge when coupled with the rebidding provisions as it can be used by generators to withhold or shift capacity in order to increase the spot price. The key to success of a capacity withholding strategy, in obtaining higher prices, is that a larger generator knows that a significant proportion of its capacity will be called upon regardless of the price of its bids.”

Nevertheless, the ACCC decided to approve the arrangements because of the potential pro-competitive effects of the arrangement, particularly the fact that if such information was not disclosed and rebidding was not allowed that the market was unlikely to achieve efficient pricing levels.

However, the ACCC imposed a condition on its authorisation of the Code, namely that provision be made for daily monitoring of the market. The National Electricity Code Administrator (NECA) has the role of monitoring and conducting inquiries into pool prices.

5. Concluding Remarks

Key issues arising in this area are:

- Australian laws actively encourage price transparency mechanisms such as advertising which enables consumers to make decisions, particularly in areas where there have been significant consumer protection issues which may arise in relation to developing and deregulating industries such as the health sector.
- Australian law does not encourage the types of price transparency mechanisms more likely to facilitate collusive practices, and may prohibit arrangements which are likely to result in a substantial lessening of competition. Such assessments are made under the TPA and involve consideration of pro-competitive as well as anti-competitive implications. Key considerations include whether the market structure itself is conducive to collusive conduct. Parties may seek authorisation of arrangements where they believe that the public benefits outweigh the competitive detriment. This mechanism has been used to authorise structures such as the Australian Stock Exchange and the Australian Wool Exchange.
- Difficulties arise in bringing enforcement action in relation to unilateral facilitating practices as it is difficult to show that any arrangement between competitors exists. Where the types of price transparency mechanisms used have some pro-competitive elements, it is very difficult to use unilateral actions as evidence of an underlying collusive arrangement. Nevertheless, unilateral acts may produce the same anti-competitive results as a collusive arrangement and the more concentrated and prone to collusion an industry is, the easier it is for unilateral actions to be effective.
- Some may question why it is useful to analyse facilitating conduct in a concentrated market, because if one mechanism is blocked, another will soon develop or the collusion will go “underground”. However, taking action may reduce the ease with which collusion may occur, and where the practice does not actually deliver greater price transparency to customers (e.g. a private information exchange between competitors) there is little benefit to be gained from allowing the practice to continue. Also, in cases involving the development of information services the mechanism may in fact be used to increase barriers to entry and maintain market power by enabling participants to exclude new entrants.
- While it is preferable to assess facilitating arrangements between competitors at the outset, proving that collusion is the likely result may be difficult as the analysis is dependant on analysing the conduct of parties in the context of the market, not just the written face of the agreement. In areas such as the development of B2B competitor consortiums this is a real issue as such projects have not been operating long enough for regulators to develop a good understanding of the technical capabilities of such systems or the potential pro-competitive benefits they are believed to deliver.

NOTES

1. Allan Asher, Deputy Chairman, ACCC, *The State of the Marketplace*, Speech delivered at the Electricity Supply Association Chief Executives Forum, July 2000.
2. See ACCC *not to Intervene in Purchase of North Forest Products by Gunns*, MR71/01, 3 April 2001.
3. See ACCC *Application for Authorisation of Interhospital agreement between Friendly Society Private Hospital Bundaberg, St Stephen's Private Hospital Maryborough, St Andrew's Private Hospital Toowoomba, St Andrew's War memorial Hospital Brisbane and the Wesley Hospital Brisbane*, 1 September 1999.

CANADA

PRICE TRANSPARENCY AND PRICE ACCURACY UNDER THE CANADIAN COMPETITION ACT

Price transparency has both promoted and constrained competition among firms in Canada. While it may enable consumers and businesses to find the best price in a timely fashion, such pricing may also aid collusion among competitors. The effects of price transparency have come to the attention of the Competition Bureau under the conspiracy (s. 45), bid rigging (s. 47), price maintenance (s. 61), abuse of dominance (s. 79), merger review (s. 92) and deceptive marketing practices (s. 74.01) provisions of the *Competition Act* (the “Act”), as well as in relation to the regulated conduct defence. This submission will address price transparency as it relates to conspiracy, bid rigging and price maintenance, criminal provisions under the Act, as well as to non-criminal provisions relating to deceptive marketing practices.

The Act does not require prices to be posted or marked. Provisions related to prices in the Act are mostly aimed at improving the accuracy of information conveyed to consumers, which in turn enables consumers to make informed purchasing decision and results, in the long term, in more competitive prices. Section 74.01 of the Act prohibits the making, or the permitting of the making, of any materially false or misleading representation, to the public, as to the ordinary selling price of a product, in any form whatever. The application of this provision would prohibit, for example, a retailer from advertising car tires on sale compared to their regular prices where the regular price is raised to justify the sale price. The rationale for this prohibition is that such a practice does not allow consumers to make an informed decision and often influences the consumer’s choice. Such a practice also gives other retailers a clear disadvantage, forcing them to change their prices (perhaps lower prices in the short term) and might cause them to exit the market in the long term if they can not survive this unfair marketing practices.

The Competition Bureau has seen the use of open or posted prices as a facilitating practice in a number of conspiracy cases. Two such cases resulting in convictions, *R. v. Armco et al.* (“*Armco*”), and *R. v. Canadian General Electric et al.* (the “*CGE Case*”), are described below. The conspiracy provisions of the Act, section 45, prohibits conspiracies, agreements or arrangements to lessen competition unduly in relation to the supply, manufacture or production of a product.

In *Armco*, manufacturers of corrugated metal culverts and related products made considerable efforts through their trade association, the Canadian Metal Pipe Institute (the “CMPI”), to eliminate competition in the market for metal culverts. These manufacturers were aware of the conspiracy provision in the Act and went to great lengths to arrive at an open price policy, which they believed would not violate the Act. The policy endorsed by the CMPI called for each member to publish its price list and circulate it to other members of the association. The advantage of this policy, price stability, was highlighted in a number of memoranda and reports distributed throughout the industry and in various speeches given to members of the CMPI.

Robertsteel was one of the first manufacturers to come out with a published price list, although the first published price list was not followed by many of the other members of the CMPI. In particular, Armco, one of the larger and more innovative firms in the industry, continued to offer discounts on large orders and lower prices for culverts it manufactured through a cheaper process. However, Robertsteel

published a second price list six months later which was adopted by all members of the CMPI. Tendering information obtained from buyers revealed that most bids for products to be supplied to them were identical and that Armco no longer offered discounts or lower prices.

In the *CGE Case*, published price lists for electric lamps and related products, termed the Large Lamp Plan, were introduced by Canadian General Electric (“CGE”). These lists were adopted by the only two other major suppliers of electric lamps in Canada, Canadian Westinghouse and Sylvania. After the introduction of the Large Lamp Plan by CGE, prices of large lamps appearing in the price schedules of CGE, Canadian Westinghouse and Sylvania were the same, with minor exceptions.

Price lists may also draw scrutiny under the Act’s price maintenance provision, which prohibits manufacturers, producers or suppliers from imposing retail prices on non-affiliated dealers of their products. Under section 61(3), a supplier is free to suggest a retail price for its product, however, it must be made clear to the person to whom the suggestion is made that he or she is under no obligation to accept the suggestion and would in no way suffer in his or her business relations with the person making the suggestion if the suggestion was not taken. Generally, a suggested retail price in Canada is accompanied by a statement such as “dealer may sell for less.”

When the Bureau provides information to interested parties concerning the bid-rigging provision of the Act, it often highlights the dangers to those issuing public tenders of making all the bids public. The Bureau warns that this practice could facilitate bidder collusion in that any deviation from the collusive arrangement would become readily evident once the bids are made public. This would serve to deter defections from the agreement and thus strengthen the collusive arrangement. If a buyer is required to make the bids public because of some other public interest concern, then the Bureau may recommend that the buyer not necessarily commit themselves to always taking the lowest bid. This would also serve to lessen the prospect of bidders reaching some collusive arrangement.

The regulated conduct defence (the “RCD”) could permit the use of published price lists for qualified regulatory bodies in Canada. RCD brings outside the scope of the Act, specific conduct or activity of a public regulatory authority that would otherwise be subject to the Act. It is based on the premise that where there is validly enacted federal or provincial legislation establishing a public regulatory authority and conferring on it in express terms the power to regulate an industry and take action that is clearly contrary to the federal antitrust legislation, such as the power to regulate and set prices, and that power is exercised by that body, the court should assume that the power is being exercised in the public interest.

CZECH REPUBLIC

The purpose and the aim of the Czech **Act on the Protection of Competition** is the protection of competition on the market of products and services against its elimination, restriction, other distortion or imperilment. Since price competition is considered a basic form of competition, price fixing agreements are one of the most serious distortions of competition rules. Therefore the Czech Act on the Protection of Competition expressly prohibits agreements on direct or indirect price fixing in first place of its provision on agreements distorting competition. The agreements capable to cause particularly negative impact on competition climate are represented by the agreements on price fixing among competitors – so called horizontal agreements. The same impact may have the provisions of professional associations in relation to the pricing policy of their members. In accordance with the theme of this contribution we would like to present several chosen cases dealt with by the Office for the Protection of Competition (hereinafter referred to as well as the Office), when the distortion of competition occurred, caused by publication of the price intentions by competitors or professional associations:

1. **Decision of agriculture primary producers co-operative to declare minimal purchase price for 1 kg of slaughter pigs live weight**

The Board of directors of the co-operative decided on **declaration of minimal purchase price**, which should have been required by the members of the co-operative from their purchasers for 1 kg of meat of slaughter pigs live weight. This declaration was realised by internal information addressed to the members of the co-operative as well as **through media**. The given case did not represent a sale by primary producers realised through the co-operative, which would have been regarded by the Office in the sense of the Council Regulation No. 26/1962, on Application of certain competition rules to the production and trade with agricultural products, but it was a case of sale realised individually by every single member of the co-operative. Overall market share of the co-operative members represented app. 30 per cent of the nation-wide market in 1999. All the co-operative members respected the declared minimum price. Anticompetitive character of the minimum price declaration was amplified by simultaneous appeal for blockade of pork meat supply for period up to 2 weeks in case of manufacturing establishments' refusal to respect the minimum price. The action of the co-operative resulted in unification of pricing policy of competitors in the area of agricultural primary production on at least app. one third of national market. It must be admitted, that there were expectations of pork meat prices' increase with regard to the ongoing on the market, but the declaration of the minimum price represented an impulse to immediate price increase without the same results achieved by gradual development of the market situation and on the basis of own business decision of every single competitor on given market. The action of the co-operative was assessed by the Office as a prohibited decision of business association distorting competition and the Office imposed a fine on the co-operative.

2. **Concerted practices of milk producers co-operatives at requiring minimum price for 1 litre of cow milk**

Six milk producer co-operatives engaged in concerted practices regarding raw cow milk supply to the dairies with **the requirement of the same minimum price for one litre of milk**. The Office has detected

that the milk producers co-operatives met at the conferences of professional and business associations, of which they were members and at those conferences they negotiated on prices. The negotiations also resulted in preparation of model contracts of purchase on sale of milk containing the same sale price for one litre, including all other extras and price discounts by the business association • eskomoravský svaz zem•d•lských dru•stev (Czech and Moravian union of agriculture co-operatives) for milk producers co-operatives. For the purpose of setting unified price of milk the business association also took elaboration of analysis regarding costs level of milk production from consultant companies and research institutes, which aim was to demonstrate validity of above mentioned required price. The issue of expense levels and setting a minimum price was **highlighted in the media by the milk producers co-operatives** during certain period and especially by business associations in the area of agricultural primary production with the aim to persuade processors and the public of the validity of the requirement for milk price increase. The Office in administrative proceeding concluded that if the calculation of minimum price of 1 litre of milk made by milk producers co-operatives was based on requirement of the price covering their own costs on its production, the final price must have been different proportionally to different costs, for the milk producers co-operatives did not demonstrate the same costs level. Jointly required price demonstrated, that setting it by the milk producers co-operatives was not based on individual calculation, but their intention was to increase the price with simultaneous exclusion of the price concurrence at least on the level of minimum price requirement. The Office assessed the action of milk producers co-operatives as concerted practices concerning prices and imposed a fine on each of respective co-operatives.

3. **Concerted practices of corrugated paperboard packages producers**

In 2000, the Office conducted administrative procedure against six undertakings producing corrugated paperboard packages on the basis of suspicion of concluding cartel agreement on prices or alternatively, of concerted practices. The Office in the administrative proceeding proved mutual contacts of the packages producers and their intention to **increase the prices of corrugated cardboard packages as of a certain date by 12-15 per cent**. Initiation of proceeding in this case was also preceded by highlighting the issue via media with ambition to justify the price increase on the ground of price increase of material input – paper. The price increase announced by media was substantiated by the producers in the course of the administrative proceeding by argumentation, that their intention was to **improve the transparency of their decision making towards their buyers and thereby enable them to prepare for the price increase with in sufficient advance**. The Office decided, that above mentioned producers breached the Act on the Protection of Competition, because they acted in concert with a common intention to increase prices in a range announced in the media. The decision of the Office did not enter into force so far, for the participants of the proceeding appealed against it.

4. **Resolution of agriculture business association on recommendation of minimum food wheat prices.**

The Board of directors of agriculture business association issued a resolution on recommendation of minimum food wheat prices. The Office first learned of this from media coverage. Information of the association resolution was spread by internal informational system of computer network, to which all the regional agriculture chambers and other member associations were connected, as well as through media, especially the press. In the course of the administrative proceeding it was subsequently found, that in the following period of two months the average wheat prices in comparison with the same period of preceding year increased app. by one fourth, so the recommendation of the association indeed negatively affected the price level. The Office assessed the price recommendation as prohibited, voided the decision of the business association, and imposed a fine. The decision was based on the fact that the price recommendation provided the recipients a concrete idea of how to price their wheat. It also represented an

effort by the association to co-ordinate commercial activities of its members, a serious matter given that the statute of the association imposed a duty on its members to follow resolutions and other provisions of the association authorities.

The latter mentioned case falls within the group of issues related to recommended prices. Administrative proceeding conducted in past years in the cases of recommended prices mainly referred to vertical agreements and professional or business associations. Assessment of the particular case by the Office is generally based on the policy that recommended prices are not prohibited provided they are non-binding price recommendations, and no form of pressure or influence towards maintaining the prices may be proved. Nevertheless in most cases dealt with by the Office certain forms of pressure to maintain the recommended prices (e.g. in the form of contractual sanctions for not following an agreement) or other forms of interference were proved. In such cases the contractual clauses on recommended prices were assessed as prohibited agreements and the Office imposed fines and duties to remedy the situation.

5. On the issue of agreements on mutual exchange of information:

Following activities may be considered agreements on mutual exchange of information:

- exchange of views or experiences
- joint market research
- joint elaboration of comparative studies of undertaking or industries
- joint preparation of statistics etc.

Agreements intended to acquire information, needed by various undertakings to determine future independent and free market action, to use joint consultant or research agency etc., mostly do not distort competition, distorting potential may, however, not be excluded. Investigation of the Office aimed to finding, whether the information exchange is capable to distort competition, is generally based on following considerations:

- market structure
- type of the information exchanged and
- frequency of information exchange

6. Market structure

Exchange of sensitive data on atomised market does not allow undertakings to predict or forecast the behaviour of all individual competitors, because of high level of fragmentation of the market. The most important magnitude in assessing the influence of agreements on exchange of information is represented by market concentration indicator. The market may be concentrated more or less in itself, or alternatively the number of participants of given agreement is covering substantial or not substantial part of market.

7. Types of exchanged information

7.1 *Aggregated data*

The analysis of influence of agreements on exchange of information on competition depends on the degree to which data are aggregated. From the viewpoint of competition the matter is the possibility to

identify sensitive data. Such identification may be represented by the possibility to distinguish given information for individual companies, which is sometimes allowed even by aggregated data. The data derived from the minimum of three entries may be considered aggregated.

7.2 *Statistics*

The second group of data, which may serve to exchange of information is represented by statistical entries (e.g. prices, production, territory specified in time). The essential point is whether the above mentioned data describe competition behaviour of individual competitors on the market.

7.3 *Individual data*

The third group of data refers to individual entries from individual undertakings as e.g. volume of production, revenues, customers and payment conditions. These data may be divided into four groups:

- prices, volume of production, sales, market share and customers
- costs and characteristics of demand
- capacity
- research and development

Prices may also include price changes, discounts, rebates etc. The entry *customers* includes list of customers as well as information on orders, that are relevant in this regard. In relation to capacity, information on investments may be identified, as well as on use of capacities. As regards research and development, it is not only a question of information on individual programmes, but also on results of this research, in which the other competitors are interested. This type of exchange of information is considered by the Office a restriction or distortion of competition. Exchange of individual entries not only allows the competitors to identify the type of trade strategy, but also serves or may serve as an instrument for enforcing a cartel agreement through facilitating the detection of cheating by individual members of the cartel.

8. *Frequency of exchange of information*

The age of the data may be divided into three categories:

- historical data older than one year
- actual data not older than one year
- data referring to the future

The Office in the course of assessing these agreements shall consider the age of information subject to the exchange and whether from this point of view it is or is not capable of distorting competition. Historical data is not regularly assessed as illegal. Frequency of exchange of information plays important part in assessing, whether this exchange distorts competition. It is quite simple to implicate according to detected frequency, whether provision of the most actual data has occurred and whether this way distorts present competition.

9. Forms of distorting competition by e-commerce:

- *price discrimination* – e-commerce may support price discrimination as a result of possibility to gather information on every customer (e.g. through “cookies” files) and in accordance with it may offer each customer different price ; competition authorities face the problem of detecting and proving such discrimination.
- *predatory price creation* - e-commerce makes proving use of predatory prices more difficult
- *vertical agreements* – major vertical integration of industry may be expected; the current most frequent complaint is that producers are refusing to supply Internet traders, thus favouring traditional outlets
- *refusal to grant access* - the case of e-commerce refers to the access to on-line markets (auctions, stock exchanges,...), access to portals and access to software applications
- *network dominance* – e-commerce generally rather decreases the barriers for access to the market, however, some of its characteristic may have just the opposite effect (e.g. sunk costs for ensuring the consumers fidelity are higher than in case of traditional ways of commerce as well as there is danger of easy and quick creation of dominant position of one subject as a result of network effects, first mover advantage and generally high dynamics of market).
- *horizontal agreements* – a problem may be represented by exchange of information facilitated by the existence of so called chat rooms within the framework of B2B – it is necessary to specify, which information may be transferred among the competitors, where creation of cartel itself is probably independent on e-commerce (communication is possible through e-mail as well as by telephone, it is more difficult not to leave clues), but it is possible to enable more thorough supervision over following the cartel agreement by its individual participants.

10. On the issue of price regulation by Civil Service authorities and local authorities:

Besides the Act on the Protection of Competition, which deals with the problems of prices from the competition point of view, the issue of prices is in the Czech Republic regulated by **the Act on prices**, which refers to application, regulation and control of prices of products and services for the domestic market, including prices of export goods. **In the event the market is endangered by the effects of competition restriction or when it is required by extraordinary market situation, the central authorities of Civil Service or other competent authorities may regulate the price creation according to the Act on prices (price regulation).**

Price regulation shall be deemed to mean determination or direct regulation of price level by price authorities on the level of central authorities of Civil Service (e.g. Ministry of Finance of CR, Czech Telecommunication Office, Regulatory Office for Energetics etc.) and by local authorities. The ways of price regulation include:

- **officially set prices** – prices of particular type of goods set by price authorities as maximal (e.g. electric energy, natural gas, etc.), fixed or minimum (e.g. milk, grain crops), or by local authorities as maximum (e.g. taxi service, communal waste disposal);
- **pragmatic price regulation** consists in setting the conditions by the price authorities for price conclusion (e.g. water charge and sewage charge, postal services, heat energy). The conditions are following:

- a) maximum extent of possible increase of price of goods in specified period, or
 - b) maximum proportion, in which it is possible to project to the price the price increase of goods in determined period, or
 - c) obligatory procedure in course of price creation of in the course of its calculation;
- **time-regulated prices** – prices of goods, for whose price increase the price authority settles:
 - a) minimum time advance for announcing considered price increase, or
 - b) minimum term, after whose expiration it is possible to realise intended price increase, or
 - c) time-limited prohibition of repeated price increase;
 - **price moratorium** – time limited prohibition of price increase over so far valid level on the market of given goods.

Last, on the issue of transparency and information on prices: the Office assumes, that it is necessary to distinguish between public and private transparency of the market. Public market transparency shall be deemed to mean the transparency for customer, while private market transparency shall be deemed to mean the transparency for undertakings. Public transparency is the basis for economic competition, because it allows the consumers to effectively compare products and services (e.g. by price, quality). This type of exchange of information therefore intensifies competition. On the contrary, private market transparency only intensifies market transparency for undertakings (e.g. price co-ordination occurs). This type of transparency negatively influences competition.

GERMANY

TRANSPARENCY AND PRICE INFORMATION DOES PUBLISHING PRICES AND TERMS FACILITATE COLLUSION OR HELP CONSUMERS?

1. Introduction

Based on the idea that a system of fair competition would enable enterprises to act flexibly and independently when pricing their products and services, German Law does not generally provide for statutory regulations on price transparency. As a matter of principle, market actors are free to "price" their products and services as they wish. Nevertheless there are certain exceptions to this rule, such as fixed prices for public transport and the services of specific professions (namely medical doctors, solicitors, architects etc.). At the retail level, offerors must observe three pieces of legislation in particular: The Act on Bonuses and Extras of 1932, the Act on Discounts of 1933 (both to be abolished in due course) and the Price Transparency Regulation of 1985 (as amended). Besides, the Act on Unfair Trade Practices makes misrepresentation of price information illicit. Furthermore, any enterprise is required to meet the provisions of the Act against restraints of competition that may require a certain degree of price transparency in cases of abuse of any dominant position as well.

2. General Effects of Enhanced Price Transparency

As indicated in the questionnaire enhanced price transparency may produce pro-competitive as well as anti-competitive effects. However, assessing such effects requires balancing the freedom of market actors to decide about their own market strategies as well as their pricing policies, and other legitimate interests.

2.1 Question 1

The implementation of the Act on Discounts is one example showing that legislation on price transparency has resulted in changes of prices and competition. The Act is deemed to have made discounts lose their meaningfulness as an instrument of the retail sector for attracting customers by granting retail price reductions. Price competition in this sector has largely been hampered, and a tendency has been observed towards rising prices as a consequence of legislation. After years of discussion, the Act on Discounts is likely to be abolished in due course as its provisions are now viewed as unnecessarily patronising to both consumers and retailers. It is likely that an increase in price competition will take place following abolition of this Act.

On the other hand, provisions based on statutory ordinances provide for a certain degree of transparency of retail prices that are subject to discounts. The relevant rules are to be found in the Price Transparency Regulation of 1985 (as amended). This Regulation, as its 1940 predecessor, is believed to have the pro-competitive effect of enabling consumers to compare retail prices and thus foster transparent and ideal market conditions. This Regulation provides, by and large, that retail prices for products and

services must include the VAT as well as storage and packaging costs, if any. Consumers are thus able to assess offers in the market more objectively.

2.2 Question 2

However, price transparency is not only to the benefit of consumers, but also to other actors on the same side of the market for enabling them to respond more quickly to the needs of price competition. Price transparency therefore encourages market developments and flexibility as well.

3. Government Price Transparency Enhancement Policies

3.2 Question 1

Above all, price transparency in Germany is guaranteed by the Price Transparency Regulation of 1985 (as amended). This applies to products and services offered to retail customers, and providers are obligated to show just the "final" (gross) prices customers actually have to pay. Special provisions govern sales of energy and financial services, hotel accommodation, services at petrol stations etc. Violation of the Price Transparency Regulation will be fined.

3.3 Questions 2 and 3

The objectives of the Regulation are to protect consumers and to promote competition in retail markets. For this reason, competition authorities have never criticised this requirement. It has to be noted, however, that the Federal Cartel Office (*Bundeskartellamt*) has no competence for investigations on account of any failure to comply with the Price Transparency Regulation or the Act against Unfair Trade Practices. Legal redress can only be sought from the civil courts. A need for competition authorities to enhance price transparency can only be derived from the provisions of the Act against Restraints of Competition applicable to abuse of dominant positions in specific markets.

3.4 Question 4

However, the statutory ordinance-based provisions on price transparency are only relevant for the retail sector, i.e. "consumers" and "final" customers, where exemptions can be found as well, especially in the form of fixed prices for public transport and the services of certain professions (namely medical doctors, solicitors, architects etc.). For the service they offer, price competition and advertising are deemed inappropriate. The benefits of price competition, transparency and competition are outweighed by other interests, e.g. the interest of the public in healthcare, a functioning legal system, etc.. Interests of this kind thus prevail over the positive effects of price transparency.

4. Private Price Transparency Enhancement Policies

Private-sector efforts for enhancing price transparency play only a minor role in Germany. Such efforts include, for instance, press articles on consumer goods prices based on comparative market research. Nonetheless, the most important institution making such publications was set up by the state as a publicly funded foundation (*Stiftung Warentest*).

Besides, any market information system, no matter whether it is based on traditional technology or – as more recently - on the Internet, must stay within the confines of the German cartel law and is therefore limited in scope.

HUNGARY

I. General effects of the enhanced price transparency

The experiences of the Hungarian competition law enforcement are relatively modest in the field of competition effects of the price transparency. In its point of view the competition effects vary case by case. Though no general conclusion can be drawn, it is obvious that on markets where the competition is strong, mainly the positive and efficiency effects of the transparent prices emerge, while on markets where the competition is more limited situations are more likely to exist where the price transparency can help even the co-ordinated price increase of the competitors. In addition to this, transparent prices may promote concerted practice and make it more difficult for the competition authorities to distinguish between concerted practice and parallel action.

2. Government price transparency enhancement policies

2.1 *Legal norms*

The most important Hungarian statutes to mention relating to price transparency are the following:

- 'Act No. CLV of 1997 on the Protection of the Consumers' says that the trader must inform the consumer about the prices and unit prices of goods, and about the prices of services. The price (fee) must be announced in the currency which is valid in Hungary. The detailed regulation – modifying two previous decrees – is contained in Decree No. 7 of 2001 on the Indication of the prices of goods getting to the trade and the services. The provisions of the decree are to be applied from 1 September 2001. According to the EU regulations, at the points of sale and in advertisements where the consumer prices are shown, also the unit prices must be indicated.
- Due to the modifications in 2000, 'Act No. LVIII of 1997 on Advertising Activities' contains rules on publishing special offers (including special price offers limited product range). Accordingly, special offers must tell the number of the product it relates to and the period of validity.
- 'Act No. CXII of 1996 on Credit Institutions and Financial Undertakings' and the regulation of the contents, the compulsory communication and the indication of the total credit fee and deposit interest rate in 'Act No. CLV of 1997 on the Protection of the Consumers', aim in the same way at informing consumers.

2.2 *Governmental actions*

Examples of the practical experiences of the governmentally supported price transparency and of the use of compulsory price labels that can be mentioned in the Hungarian practice, are the publishing petrol retail prices, the listing of the school-books that can be ordered by schools and the regulation of the tobacco product price indication.

On the homepage of the Ministry of Economy since summer of 2000, information have been shown about the international crude oil prices and the national petrol retail prices. Because of the price movements of the previous year, the idea of development of the energy price statistical system has been raised, so the Ministry of Economy asked for the opinion of the Office of Economic Competition (OEC) about the petrol price monitoring system, about its possible competition effects. The monitoring had two targets: to inform the consumers and to increase the competition between the petrol distributing companies.

The basic question from the competition point of view is whether such a monitoring system could help to create some kind of price cartel or not. The planned price monitoring system will probably make the market more transparent, not only for consumers but for the competitors as well. The competitors are likely to use the information received (without cost, from reliable source) very effectively for their own purposes, they can co-operate more easily with each other, they can agree with each other, even in order to limit competition. Moreover, the price following practice becomes easier even without agreement.

Though in general the publication of accurate and detailed price information and statistics may be problematic from a competition policy and competition law aspect as well, and it is inadvisable to support or to strengthen any kind of equalisation process, nevertheless, because the special features of the market in question, and the importance of informing the consumers, the OEC did not raise any objection against the planned, non discriminatory price monitoring and informing system. In every case it is the real conduct that is of importance, so the future conduct, possibly limiting competition, may raise competition policy concerns.

The experience drawn from the textbook-list case showed similar effects, namely the intention of undertakings to adjust their own prices to the others'. According to the Hungarian practice, the institutions of public education are provided with the list of textbooks, authorised for the following educational year, by the Ministry of Education at the beginning of each calendar year, displaying the selling prices, that the parents have to pay when the school decides to use a particular textbook. Some years ago, it was observed that after the publication of list-prices, the publishers tended to modify in large numbers their prices submitted to the Ministry referring to typing errors, however their effort to adjust their prices to the prices of competitors, both in positive and negative sense, was recognisable. After consultations with the Ministry, a system has been elaborated, which arranged that the undertakings submitted their offers at the same time, in this way the price transparency did not allow to some undertakings to make their offers later, reaching in this way an advantage over their competitors. In addition, except for obviously mistaken price communications, there is no possibility to correct the submitted list prices. The system was refined through a bill, recently discussed by the Parliament, by securing the possibility for undertakings to deviate from the list prices but prohibiting to exceed them. This solution would protect the consumers' interests against the raise of prices, on the other hand it would make possible a price-competition, in which the prices submitted would not be exceeded.

In 1998 a regulation concerning the retail prices of tobacco products came into force, which granted the right for producers and importers to determine retail prices. The reason for the modification was the harmonisation of tax law. At the same time, while the related EU directive allows resale price maintenance only in the form of price ceiling, which is a back step from the formerly liberalised tobacco prices, the Hungarian regulation went further by eliminating price competition on the retail level. The OEC

tried to intervene several times and opposed the price regulation introducing quasi-fixed retail prices. The OEC investigated agreements concluded by wholesalers and concentrations between wholesalers. Due to the new conditions, the tobacco industry became more transparent, producers can easier observe each other, can easier predict each other's reaction and it is easier to control retail prices. Given the oligopoly structure of the market and the transparent conditions, there is a good possibility that parallel behaviour (without formal agreement) will occur and will have similar effects as co-operation based on agreement. The possibilities of competition law to intervene are restricted, the price competition between retailers is eliminated. The OEC proposed annually the abolition of the fixed retail prices and the introduction of a price ceiling, serving as a basis for the tax payment, however by now without success. (It is to be noted that retailers invented several methods of evading the application of fixed prices (e.g. providing reimbursements), but the new regulation definitely makes more difficult to have price competition.).

2.3 *Professional organisations*

The OEC's standpoint concerning the behaviour of professional associations regarding advertisement of prices, and price transparency in general is the following:

Basically there are two types of professional organisations in Hungary:

- professional organisations created by acts (professional chambers), functioning with compulsory membership, and
- privately established professional organisations (associations) based on voluntary membership

Chambers comprise the totality of practitioners of certain professions. The number of members in chambers depends on the size of the market, and runs typically from a few hundred (patent agents, notaries, court bailiffs) up to several thousands, or ten thousands (advocates, doctors, architects). The markets of professional services, apart from exemptions like the territorial exclusivity of notaries regarding certain cases, are competitive, therefore consumers can freely choose between the different service providers. Therefore the publication of individual service prices, due to the above mentioned market structure, does not raise any competition policy concern. It should be mentioned that some of the chambers are legally authorised to publish recommended prices (engineers, architects) or recommended minimum prices (doctors, veterinary surgeons, bodyguards and property protectors). On the other hand, certain acts declare that the service price is subject to a free agreement (advocates, patent attorneys). The professional chambers typically made efforts to obtain wider spheres of authority (their main effort was to obtain the right to determine a compulsory minimum price). The strong powers of the Member State's professional chambers served as an example for these efforts. The OEC, within the scope of competition advocacy, strove to reduce the radius of this authorisation, by supporting the application of recommended prices, as the less anticompetitive price regulation. So far it succeeded in having these efforts rejected by the Parliament, which considered also the OEC's opinion. Recently some changes could be observed, since informing the consumers became a strong argument of the chambers. A compromise was reached lately (architects, engineers) in determining recommended prices together with the content of the connected service, however chambers renewed their efforts to strengthen their own powers concerning price regulation. Sometimes it is difficult to resist the pressure, since even today the chambers of Member States, regarded as an example possess wide range of regulatory powers. These professional lobbies have great respect in Hungary too, and MPs often feel sympathy towards them.

The OEC does not share the view that price advertisements containing lists of prices by the members of professional associations would be means of unfair competition in general. In the opinion of the OEC, knowledge of prices plays an important role in consumers' decision-making, and it cannot be

treated as a competition concern if competitors can get information about each others' prices on competitive markets. There is another aspect of theoretical character. Since to a greater or lesser extent, professional services have a confidential nature, information about prices has a more limited importance than in the case of other products. In spite of this fact it can be stated that the role of information about prices cannot be neglected when consumers make their decision about consumption of professional services.

In 1999-2000 the OEC investigated the Ethic Codes of 11 self-governing organisations (chambers, associations, product councils). Out of these there were very few having prohibitions on advertising (e.g. physicians) or special rules in connection with publishing or advertising prices (e.g. patent attorneys: making comparisons in the advertisements with professional services of competitors was prohibited, including the prohibition on comparing prices, or auditors: the chamber prohibited making service fees public by their members in advertisements). In the case of professional organisations investigated by the OEC every rule which prohibited making prices public in the advertisements (patent attorneys, auditors) was found to be an infringement and as such was prohibited by the OEC. However, in view of the psychologically defenceless position of "consumers" of physicians' services and the strongly confidential nature of this service the Ethic Code of the Chamber of Physicians got exemption. Since the Chamber of Physicians allows for its members advertisement to a very limited extent (publication of mere facts only) physicians cannot give information in their advertisement about the prices of their service either. Nevertheless, it does not exempt private physicians from the obligation to hang their price-list in the waiting room or on the scene where they provide the service.

3. Private Price Transparency Measures

Actually there had not been yet conducted any special study on the effects of the comparative pricing search engines or in general on the price transparency of the electronic commerce. The competition policy approach towards electronic commerce – as the market is in continuous change – is still developing in Hungary, and therefore it is only possible to give a general overview of the present situation.

With regard to electronic commerce between undertakings and consumers (B2C e-commerce), two decrees are in force: government decree – 17/1999. (II.5.) – on distance selling and a decree – 15/1989. (IX.7.) – of the Ministry of Commerce on certain commercial activities concerning – among others – the commercial activity of mail ordering. The distance selling decree contains rules which correspond to the rules of the relevant EU directive. Furthermore, the Act on Electronic Signature is before the Parliament, and it will assist the transactions concluded through the internet. Thereby, internet commerce in general could be escalated, too.

Regarding electronic commerce between undertakings (B2B e-commerce), the new forms of internet based business, which may raise antitrust concerns in the future (i.e. joint ventures, B2B exchanges), are also in an evolutionary stage.

The OEC has not yet decided in cases related directly to electronic commerce, though there were some consultations regarding price portal plans. However, since the competition policy approach towards e-commerce highly resembles the approach towards traditional businesses, the general practice of the OEC is used as a basis for the future cases.

Until April 2000 the OEC has neither received any notification or complaint concerning direct e-commerce markets, nor has it taken any ex officio action.

While implementing the Competition Act, the OEC assesses firstly the trend of prices and, secondly, the conditions under which consumers can acquire the relevant product. Price dispersion might

be different in relation to the different products or product groups, but the OEC has not so far received complaints making a grievance of price discrimination. With regard to the term 'same conditions', the legal and customary rules relating to mail ordering and distance selling services must be applied, since sales on the internet must be also regarded as distance selling.

Sometimes the press publishes news about plans which might raise some competition concerns (e.g. news about the planned development of a vertical B2B portal by a consulting firm, which would be established by producers and wholesalers of pharmaceuticals. In the framework of this portal the market players of the pharmaceutical industry would share information on stock and sales data in order to decrease substantial inventory costs in the first step, and to extend the co-operation to further fields later – like joint purchasing, offering excessive capacities for each other, however, concrete information is not available about the operation of this system).

With no practical experiences the issue of price transparency in the field of electronic commerce can be approached only theoretically, nevertheless it is generally acknowledged that on the present stage of development it would be a failure to precede the formation of internet-based commerce by a strict or lenient regulation, since openness, availability for everyone, shaping of new markets and innovation are essential features of this new phenomenon.

The OEC can impose conditions and obligations upon the undertakings in order to prevent the possible restrictive effects. When applying this alternative, measures that could deter undertakings from investment must be avoided, but it must be also secured that none of the B2B electronic market places restricts other competitors in their market actions. Consequently, it cannot be stated in general that the operator and participants of a B2B market place must be separated, though the eventual exclusive clauses would face close scrutiny. By assuring transparent operation and reducing exclusive clauses to the necessary level, the possibility of abuse may probably become limited. In other cases, by the application of rules relating to the abuse of dominant position, the OEC might be able to restrict the practices distorting competition.

The situation is different when a B2B portal is established by undertakings that are independent from each other.

The exchange of information between businesses can only be restricted by the competition authority if the risk of collusion is high, that is, only in a later stage when the Competition Act will have been infringed by the operation of B2B market places.

In order to reduce the foreseeable challenges (entry barriers for smaller firms, agreement on the fees of access to the market place, agreement on selling/purchase prices etc.), it would be helpful to elaborate a system of monitoring the market by the OEC. Instead of the prohibition of chatrooms – which can play a decisive role in collusive practices – it is more reasonable to determine the frames for their operation. The characteristics of the internet – and hereby that of e-commerce – let prognosticate that self-regulation will retain its importance also in the future. A code of conduct drawn up by the internet service providers would constitute an important element of this self-regulation.)

4. Cases

In Hungary it is getting more and more common that in respect of goods which can be measured by weight or volume shopkeepers indicate the unit prices as well. This makes the price comparison of goods and that of the shops easier. Although in some cases the widely interpreted and doubtfully applied price comparison results in consumer fraud when shopkeepers indicate their competitors' prices as well.

In December 2000 the OEC initiated two closely related proceedings against Tesco-Globál Áruházak Rt and against Auchan Magyarország Kft because of their allegedly misleading advertisements. The subject of the investigation was their fierce advertising campaign initiated against each other. The Competition Council did not take up a position on the parties behaviour between them, as the reparation of the injuries caused to each other did not fall in the competence of the OEC.

The OEC established that the use of throwaways and hoardings comparing goods sold by Auchan and Tesco, while the parties were not in a position to provide exact information about each other's prices, was suitable for misleading consumers.(Vj-209/2000, Vj-217/2000).

ITALY

Introduction

Firms often adopt conducts which, although not directly restricting competition, can nevertheless facilitate the maintenance of collusive behaviour or which can help to establish such behaviour. Such conducts can be very differentiated, and they include information exchanges, product standardisation, most favoured customer and price protection clauses. In particular, information exchanges can constitute a facilitating conduct, since they can reinforce or create collusion among the firms operating in the market, by creating a regime of price transparency.

These actions do not directly restrain competition, but they make it easier for the industry to reach an agreement on prices and output. In this respect, the anticompetitive effects of such conducts vary according to whether the market is conducive to collusion, whether most of the firms adhere to the conduct and whether net pro-competitive effects are to be excluded. Such agreements are evaluated by assessing how likely they are to facilitate collusive practices. Facilitating practices fall into two major categories: practices that make it easier to collude and practices that make it more difficult to cheat.

Exchange of detailed (i.e., not aggregated) information among producers of substitute products is a facilitating practice that can fall in both categories, according to the characteristics and the frequency of the exchange. Such sharing might make it easier to reach an agreement on price increases or output restrictions. Examples could be post-transaction price verification, costs and customer information compiled by trade associations, public or private announcements of future price increases. At the same time, detailed information exchange on individual transactions and on a frequent basis can be a practice which makes it more difficult to cheat, therefore reinforcing explicit cartel agreements.

Other practices can facilitate collusion. For instance, resale price maintenance, when followed by most market participants, increases market transparency and makes it easier both to organise a cartel and to maintain it, easily identifying possible cheaters.

1. Facilitating practices: information exchanges

In two cases price transparency, as produced by exchange of information among firms, has been held to have an anticompetitive object or effect.

1.1 *The Insurance case*

In 2000 the Italian Antitrust Authority has evaluated the impact of the exchange of information in the insurance sector.¹ The Authority found that such conduct, adopted by all the major insurance companies, favoured the maintenance of a collusive environment in which competition was severely weakened, to the disadvantage of consumers.

Since the liberalisation of the market for car insurance, insurance firms have established sophisticated collusive mechanisms aimed at exchanging detailed information on pricing. The exchange had been organised by an independent firm, which was collecting from each firm, and distributing to all competitors, all data regarding prices, discounts, contractual conditions, receipts and accidents. The information exchanged referred also to the firms' forecast regarding the future evolution of the key-variables for the determination of prices.

Since the information exchanged was highly sensitive, pertaining to all relevant commercial data, the facilitating practice did not fall within the sectoral exemption provided for by Regulation EC n. 3932/1992. Said regulation allows, in fact, co-operation among insurance firms, but for the exclusive purpose of estimating risks. To the contrary, exchanges of information regarding variables which influence the level of prices (commercial premiums) paid by contractors are not exempted.

More generally, exchange of information among competitors can increase efficiency of the market when it relates to variables affecting aggregate variables such as demand or cost conditions common to all firms. In the insurance context, such data provides the basis for calculating indicative risk premiums. In contrast, the anticompetitive effects flowing from exchange of information regarding strategic variables, such as prices or contractual conditions, are unquestioned.

Another relevant issue in the evaluation of the competitive effects of exchange of information is the degree of transparency that it creates on the market. As a general matter, transparency can be beneficial for competition when it is directed towards consumers, who can choose in a more informed way and can promptly react to price increases. In such circumstances, the positive effects arising from the exchange of information supersede the negative ones caused by the possibility of collusion among competitors. In contrast, when transparency is *only* among producers and does not benefit consumers, then it can only strengthen collusive behaviours, with a negative impact on competition and efficiency. This situation occurred in the *Insurance* case, since consumers were not put in the position to make comparisons among prices charged by various firms, while these received a complete set of information concerning all strategic variables of competitors' offers. The absence of an increase in transparency for consumers reinforced the illegality of exchange.

On the basis of these circumstances the Authority found that the creation of a single information circuit which, through a systematic and prolonged exchange of information among a large number of firms, allowed to significantly lower search costs and granted a mutual price transparency among firms, was essential for the creation of a collusive setting. Therefore, the exchange of information was considered to be in violation of the Competition Act and was sanctioned with a total fine of 361 million euros.

1.2 *The Music Producers case*

Different circumstances characterised the investigation, which the Authority completed in October 1997, into a number of Italian subsidiaries of the leading multinational recording companies (known as the "majors"), namely, Warner Music Italia Spa, Polygram Italia Srl, EMI Italiana Spa, BMG Ricordi Spa, Sony Music Entertainment Spa as well as Federazione Industria Musicale Italiana (FIMI).² The purpose of the investigation was to ascertain whether the majors had engaged in price-fixing conduct.

The relevant market, which was identified as the production and wholesaling of musical recordings in Italy, was highly concentrated: the majors controlled 76 percent of the whole market. As far as the conduct of individual companies was concerned, the investigation showed that all the price components charged to retailers were the same for every major recording company, even though their costs varied considerably.

The proceeding showed that the prices offered were virtually the same not because of the market structure, but as a result of systematic exchanges of information both through the FIMI and between the companies directly. In particular, the majors had exchanged information about prices charged to dealers, quantities and values of sales, the joint organisation of promotional events. The exchange of information was facilitated by the existence of frequent promotional events, which allowed periodic meetings among the majors.

Furthermore the investigation showed that in addition to co-ordinating their prices, the majors had also co-operated on other aspects of their commercial policy such as the acquisition of artists, procedures for using alternative distribution channels (newspaper stands or mail order) and relations with department stores.

The Authority found that these conducts were the result of a concerted practice aimed at restricting competition.

2. Facilitating practices: resale price maintenance

In gasoline distribution, a collusive agreement between oil companies regarded a concerted practice aimed at fixing the final price of gasoline, by the adoption of a common structure of schemes and contracts designed to eliminate the incentive of distributors to charge a price lower than the “recommended” one. In particular, the effective wholesale price of gasoline increased with the quantity purchased, strongly increasing the value of the price elasticity of demand that would make a finale price reduction profitable.

Such a practice, in an industry where final prices to consumers were effectively beyond the control of the - very few - producers and subject to sale decisions taken by a wide range of final distributors (around 24,000), allowed oil companies to maintain a mutual control on their pricing policies, and led to a very small variation in final prices. In that way, oil companies transformed the practice of recommending final prices, into a system of vertical price fixing which, by the way, was intended to be eliminated by the liberalisation of gasoline prices.

The anti-competitive effect of the adoption of an industry-wide vertical price fixing scheme is indicated by the artificial transparency in producers conducts that it generates. Vertical price fixing makes it easier to detect any deviation in a market characterised by a large number of small transactions, where, without that practice, it would have been impossible to obtain the same transparency. In the particular case of the Italian gasoline distribution market, such a scheme maintained and strengthened a collusive horizontal practice by oil producers where price competition among them was significantly reduced. As a consequence, the conduct of the oil companies was considered by the Autorità as a severe violation of the antitrust provisions against collusion and the oil companies were fined, in total, 249 million euros.

JAPAN

Introduction

If firms publicise their price level or if trade associations show the average price of their members, it could maintain the prices in the market at a certain level, thereby restraining competition. On the other hand, by ensuring transparency of price levels, it could promote price competition and thereby benefit consumers.

Which effect will prevail is presumed to depend on the market structure of the industry and actions to be taken by each firm. For instance, the anti-competitive effect might tend to prevail in industries where oligopolistic and co-operative activities have traditionally been observed, and where sellers share their internal information on prices only among themselves without publicizing it to buyers. On the other hand, if sellers and buyers share information on prices in competitive markets, it might tend to further intensify price competition.

In any case, it is difficult to discuss effects that price transparency will generally have on competition. It is therefore necessary to study the effects price transparency has on competition on a case-by-case basis. The JFTC has made decisions on the effects that price transparency has on each individual case in terms of competition policy.

I. Price Transparency on Public Procurement

In Japan, "a planned price" usually plays a part in tenders for public works contracts and other public procurement. If all the bidding prices exceed the planned price, the bidder offering the lowest bidding price cannot win the contract. In recent years, a growing number of local governments have come to publicise the planned price in advance of or after the tender, or to publicise the results of the tender.

Disclosure of planned prices following tenders and the results of tenders are believed to contribute to the transparency of the public procedure and appropriateness of pricing. It should be highly evaluated as far as that goes.

Disclosure of planned prices before tenders, too, has positive effects, such as increases in the transparency of bidding procedures and prevention of corruption such as leak of such prices by procurement officers. However, it has also been pointed out that it would keep bidding prices at a high level and could trigger bid-rigging. With these problems fully in mind, the JFTC is paying close attention to how tenders for public work projects are carried out.

1.1 Case 1

The JFTC conducted a survey in March 1999 on how construction associations have compiled price lists. The price lists refer to documents that carry the itemised prices of construction materials and

costs of construction. Of the 673 construction associations, 37 have compiled price lists because their customers asked for such lists that included the costs of construction works they ordered.

Some construction associations worked out the prices of construction materials by statistically calculating the prices offered by their member companies, while others simply quoted the prices from materials publicised by government organisations or non-public survey organisations.

Such practices could be deemed to constitute AMA violation because they could effectively prevent member companies from independently setting prices, depending on how the prices are shown. For example, it could be an AMA violation if a representative price is arbitrarily selected from among the price levels that have been statistically calculated, or if some of the prices that have been selected from publicised materials (and modified) are shown in a list.

Many of the price lists that were compiled by statistically calculating the prices of construction materials indicated only a single figure, such as the average of the prices provided by their member companies. Many of the lists that quoted figures from publicised materials showed only a single price for each construction material.

Such price lists give member companies of the construction associations their common standards for current or future prices by showing them specific price levels. Therefore, such lists could prevent member companies from independently setting prices and possibly constitute AMA violations.

The JFTC informed construction associations, which had compiled price lists possibly leading to AMA violations, of its interpretation of the AMA and pointed out which kinds of actions would violate the AMA. Furthermore, the JFTC urged the associations to abide by the AMA when and if they provide information on prices to their member companies. It also asked the Ministry of Construction (currently the Ministry of Land, Infrastructure and Transport) to notify relevant associations of the JFTC's interpretation of the AMA.

1.2 Case 2

In September 1998, the JFTC issued a warning against the photo-sensitised Materials Manufacturers Association (PSMA) which is comprised of the manufacturers of photographic film and paper that the exchange of information between its member companies could violate Section 8 (1) (i) or Section 3 of the AMA.

The PSMA on a monthly basis received information on the amount of production and shipment of all types of photographic film and paper in the previous month from its member companies, tabulated the information for each company and provided the list to all member companies. Furthermore, it kept the information strictly to its member companies.

The PSMA has not clarified how it started the exchange of such information between its member companies and why it kept the information to its members. It has continued the exchange of information for many years without proper reasons. Moreover, the photo film and printing paper market is an oligopolistic one, where companies tend to (tacitly) collude with each other. Therefore, the JFTC suspected that the exchange of information enabled PSMA member companies to know the amounts of their competitors' production and shipment of films and printing paper and predict each other's business activities, thereby helping them to limit their production and shipments and to reach tacit agreements or consensus on each member's production and shipment. If the association continues the exchange of such information between its member companies, it could lead to a restraint of competition.

The JFTC was not able to obtain sufficient evidence that the association effectively restrained competition in the market, but based on the above-mentioned findings, the JFTC warned the association not to continue the practice.

2. Price Transparency Enhancement Measures

In Japan, companies and trade associations are allowed to establish voluntary rules (fair competition codes) on labelling and other representations in order to prevent misleading representations that could obstruct fair competition (Section 10 of the Act against Unjustifiable Premiums and Misleading Representations). The JFTC approves fair competition codes if they are appropriate in ensuring fair competition, do not adversely affect the interests of consumers and relevant businesses and meet other requirements.

Some fair competition codes have clauses on indicating prices. For example, an automobile trade association's code stipulates that member companies must indicate the retail prices of their products. A real estate trade association's code requires its members to indicate the costs of maintenance in addition to the prices of properties themselves. Indication of prices is believed to play an important role in maintaining and promoting fair competition, as it clarifies the details of prices that are one of the most important factors in transaction terms and helps consumers to properly select products.

KOREA

Introduction

Price transparency is closely related to price information that various market participants encounter, which differs from one another in terms of accuracy, concreteness, the time of disclosure, etc. Each player thus has different price information. Enhancing price transparency implies improving market participants' ability to compare various prices available. As an extreme example, in a situation where price transparency does not exist, no one has the information necessary to compare prices. In the opposite situation of perfect price transparency, all participants in market know instantaneously actual transaction prices without costs.

Consumers can benefit from the increase in price transparency, as they can purchase easily goods at low prices thanks to the lowered transaction costs including search and contract costs. On the flip side, however, there is a possibility of increased cost in the overall economy, since price transparency facilitates collusion among competitors without an explicit agreement. In general, the belief that the increase in price transparency makes consumers better off led to the institutional development to foster price transparency in the off-line environment. However, the rapid proliferation of the Internet and advancement of the Information Technology(IT) industry which have dramatically improved price transparency, triggered the debate on whether price transparency has pro- or anti-competitive effects.

More specifically, in the off-line environment, legal institutions have been in place to enhance price transparency, such as Price Marking System and the Fair Labelling and Advertising Act (FLAA). Price Marking system (Notification by the MOCIE: Ministry of Commerce, Industry and Energy) aims to assist consumers' reasonable selection through the provision of accurate price information. The FLAA enacted by the Korea Fair Trade Commission (KFTC) bans false or misleading labelling and advertising on prices of goods and services. The above-mentioned off-line price disclosure requirements have been increasingly converged with the problem in the on-line environment, as the off-line requirements can be achieved on an on-going basis through on-line methods with the help of the rapid expansion and use of the Internet.

Turning to the on-line landscape, cyber shopping malls are sharply on the rise and newly emerging price search engines that enable users to make comparisons between prices offered in a related industry are playing an important role in enhancing price transparency. In addition, most producers and retailers are publishing their prices through the web-pages they operate. While on-line disclosure of price information has positive aspects as reviewed here, it also has negative sides.

1. Positive effects of enhanced price transparency through the Internet

The development of IT including the Internet and e-commerce allows a prompt exchange of information. As such, it makes the traditional market environment more efficient and competitive. In other words, new technologies are reducing the costs involved in searching for the best price, product and buyer/supplier, and thereby benefiting not just consumers but also producers. Price search engines, for example, expedite price competition among corporations.

2. Negative effects of enhanced price transparency through the Internet

Companies operating in the business to business (B2B) market can get hands on real-time information on all the transactions taking place in the market, such as buying/selling volume, buying/selling price and even confidential business information. Generally speaking, the exchange of information between suppliers in the B2B market makes co-ordination among competitors much easier. Consequently, prices can be set at supra-competitive levels. To be more concrete, as information on prices, production, cost and strategy-building can be shared in an inexpensive and speedy manner, competitors can not only enhance the possibility of collusion but also escape the monitoring of regulator with ease. This is achieved through inter-business signalling based on expectations about counterparts' volumes of production, prices and the IT technologies.

In what follows, we focus in turn on legal and institutional infrastructure regarding price disclosure, price transparency in relation to e-commerce, and case studies of collusion among domestic airlines and tire producers. The note concludes with observations on policy implications.

3. Korea's Legal Infrastructure in regard of price disclosure

3.1 Price marking system

Price marking system is designed to promote consumer protection and fair trade, by making it mandatory for producers, sellers and goods and services providers to mark the price of product or cost of service concerned. The aim of price marking system is to facilitate competition among enterprises, provide consumers with accurate price information and ultimately enable consumers to make informed choice, by requiring the posting of selling price at the retail level. This system is pursuant to the Notification issued by the MOCIE in accordance with Article 3 of the Price Stabilization Act and Article 10 of the Consumer Protection Act.

Recently, the Guidelines on Price Marking System were amended (July 2000) and the reason for the revision was that with only a small number of items subject to the ban on the posting of recommended consumer price and the requirement on the posting of unit price, the system had only limited effect in promoting rational choice by consumers and facilitating competition among competitors. The amendment expanded the number of items subject to the mandatory disclosure of unit price from 15 to 21, including salt, *ramyon*, paper diaper and other products that are difficult to make price comparisons based on the selling price alone because of diverse package sizes. Until then, only 12 items were subject to the prohibition on the posting of recommended consumer price. The revised Guidelines increased the number to 22, covering air conditioners, camcorders and cameras, among others, whose recommended prices had been set too high compared to their actual transaction prices, posing a risk of hampering consumers' rational decision-making. By doing so, the amendment is expected to help consumers make informed choices and promote competition among rivals.

3.2 Liberalisation and Publishing of Fees in Professional Services

In accordance with the "Omnibus Cartel Repeal Act" entered into effect in February 1999, the level of fees fixed by the associations of professionals has been abolished. As a result, consumers can be protected from paying unfair fees, with the provision of transparent price information. The KFTC, starting from the first half of 1999, with Korea National Council of Consumer Organizations, have performed a semi-annual survey on the status of fees of lawyers, Certified Public Accountants (CPAs) and six other groups of professionals, and notified the results to the relevant groups of consumers.

The survey shows, with varying degrees among professional services, an upward trend in the fees by the first half of 2000. However, the overall level of fees has been dropping since the latter half of 2000. It seems to be due to the fact that price competition arising from the elimination of the standard level of fees has heightened and price differentiation depending on the contents and quality of work is in process. A substantial number of consumers have been able to choose the most suitable professionals to their needs, as it became easier to obtain information on various levels of fees after the announcements of the KFTC surveys.

The Korea Fair Trade Commission has made strenuous efforts in announcing the results of the surveys and raising the public awareness on the removal of the standard fees of professional services. More concretely, as part of awareness-raising efforts, a press release was distributed; the fact was posted on the KFTC's web-site; and cooperation from cyber-consumer association was secured. In addition, related data were provided to the Korea Consumers Protection Board, consumer groups, and others that needed them, asking these organizations to place the information on their websites and make the data available to their members. Consequently, the overall awareness on the abolition of standard fees has increased; almost all the professionals are aware of it, and 66-92 percent of consumers responded that they know such fact (the range was 32-82 percent in the first survey).

4. Issues related to price transparency in e-marketplaces

4.1 Current Status of E-Commerce in Korea

E-commerce is expected to post more than 100 percent growth annually, building on the spread of the Internet.

* Projected growth of e-marketplace by the Wharton Center for Quantitative Finance of the U.S.

- Worldwide : \$77 billion ('98) • \$1 trillion (2003)
- Korea : \$350 million ('98) • \$9.6 billion (2003)

* Forecast on the Number of Internet Users

	'94	'95	'98	Nov. '99
Worldwide (in million)	-	16	147.8	230
Korea (in thousand)	138	366	3 103	6 823

In the case of Korea, the number of Internet users that indicates the growth potential of e-commerce is on the sharp rise. However, it lacks physical infrastructure, as shown by the number of Internet hosts, nor, as proportion of e-commerce to GDP reveals, is e-commerce active in the country.

Status of e-commerce by country (as of '98)

	Number of Internet hosts per the population of 10 million	Proportion of E-commerce to GDP (%)
the United States	87.15	0.831
Japan	11.03	0.149
Germany	14.90	0.151
Korea	4.22	0.092
Chinese Taipei	16.71	0.121
Singapore	13.45	0.297

4.2 Positive Aspects of Increased Price Transparency through the Internet

Price transparency is fostered on-line either by i) off-line producers and retailers' use of the Internet to publish their price information or by ii) the growth of related development on-line. As for the latter, there are cyber shopping malls and price search engines that facilitate price comparisons in a given industry. The rapid spread of the Internet and the sharp rise in its use by consumers have substantially increased price transparency in the on-line environment.

4.2.1 Cyber Shopping Mall and Price Search Engine

As the Internet technology is actively utilized in commerce, on-line distribution is witnessing a rapid development, posing a threat to its traditional, off-line counterpart. In Korea, the first cyber shopping mall was put into operation by Dacom and Lotte back in the late 1996. Since then, business to consumer e-commerce has been evolving in various forms, thanks to the establishment of virtual shopping malls by conglomerates and the increase in Internet start-up companies. The foundation for the e-marketplace was laid in 1998, through the active entries and exits of market players. The growth has been accelerating since 1999. As of Jan. 2000, there were more than 1,500 cyber shopping malls operating in Korea. Price search engines, which can enhance price transparency, refer to the web sites that can find the lowest prices available after users type in the product specifications and models that they want. There are roughly 40 of them in operation.

4.2.2 Comparative Survey on Off-line and On-line Prices of Electronics by the Korea Consumer Protection Board

During the period of 20 Nov. to 2 Dec. 2000, the Board carried out a survey on the list prices posted by the sellers of electronic goods located in Seoul and by Internet shopping malls. According to the survey, off-line stores' comparative index on average selling price was 102.6, indicating that off-line prices were set higher than those of on-line stores. While the figure was 93.4 in 1998, it increased to 104.5 in 2000. In other words, on-line prices, which were 6.6 more expensive than their off-line counterparts two years ago, were 4.5 lower than the levels offered off-line in 2000. Among the 15 models found to be the lowest in prices, 11 were offered by on-line shopping malls.

The survey implies that products traded on-line are beneficial to consumers, being offered at low prices thanks to the reduction in transaction costs. However, there are still obstacles to buying goods and services via the Internet. Even though on-line purchases have comparative advantages such as the decrease in the time and energy spent during shopping, they also place some psychological burden on buyers, such as the inability to see the products in person, the problem of trustworthiness of shopping malls, and the burden of making advance payments.

4.2.3 Procurement

Public procurement refers to the procedure of purchasing and handling properties and entering into construction contracts required by public institutions.

Current Status of Procurement Industry in Korea

(in million USD) Project	Domestic Procurement	Foreign Procurement	Construction Contract	procurement and release of property and stockpile	Total	Compared to previous year (%)
'97	3 974	545	6 974	277	11 771	13.0
'98	3 332	347	7 021	1 018	11 720	•0.4
'99	3 608	371	6 595	531	11 107	•5.2
2000	4 432	428	7 981	407	13 250	10.0
2001 (planned)	5 204	424	9 252	539	15 420	26.2

* Source : Public Procurement Service, as of March 2001

Procurement businesses should reconcile the need to secure transparency and the need to curb anti-competitive behaviors. As such, it basically requires a transparent procedure to remove possible suspicions about favoritism. However, too much emphasis on transparency can facilitate collusion and other anti-competitive practices. Recent improvements made in Korea concerning public procurement procedure include the establishment of a electronic procurement system covering 340,000 bids per year. The system allows for bidding on construction and supplies procurement contracts.

It is expected have the following effects. By permitting real-time procurement through the Internet and progress checks at every level of the procedure, it boosts the transparency and fairness in bidding. The simplified bidding procedure also makes it easy to submit bids, reducing the possibility of unfair business conducts such as collusion. In order to prevent collusive acts in the public procurement market, unnecessary entry barriers should be lowered to make it difficult to forecast on the bidding and to raise the collusion cost with the increased number of bidders. Electronic procurement using the Internet has a less likelihood of conspiracy, with the disclosure of related information on-line.

4.2.4 *Negative Aspects of Increased Price Transparency through the Internet*

4.2.4.1 The problem of monopsony by joint purchasing

From the perspective of efficiency, inter-company alliances can make firms involved more efficient and bring down the costs of suppliers dealing with them. The merged firm can save contract and transaction costs based on mass orders. This results in increased efficiency, which in turn leads to improvement of general welfare. However, if the price cut results not from efficiency but from the enhanced monopsony, it is caused by the deliberate reduction of demand on production factors to drive down the price. Such coordination among enterprises that increase monopsony power can limit the price and quantity of production factors, dragging down the overall level of welfare.

Thus, it is necessary to analyze the change in production volume in order to determine whether the price reduction stems from the pro-competitive effect (enhanced efficiency in the B2B marketplace) or from the anti-competitive effect (the result of monopsony). Establishing the unfairness from monopsony requires the analysis of coordinators' market shares in the end product market. This is because when companies involved hold high market shares not only in the production factor market but also in the end product market, their change in sale-related decisions can have an impact on consumers.

4.2.5 *Elements that affect the possibility of collusion in the B2B marketplace*

First, with regard to the market structure, *ceteris paribus*, the greater the market share in the B2B market, the higher the likelihood of anti-competitiveness through information sharing.

Second, concerning the subjects of information sharing, the possibility of anti-competitiveness increase if competitors exchange information.

Third, with respect to the contents of information shared, exchanging information on price, production, cost, business strategy and others closely related to competition can lead to increased anti-competitiveness. In addition, communicating information relating to the present or future rather than to the past enhances the likelihood of anti-competitive coordination.

Fourth is the possibility of acquiring the same information in other places than the B2B market. Sharing information available only in the B2B marketplace makes anti-competitive conducts more likely. Thus, this exclusive transaction increases the possibility of collusive arrangement through the information exchange.

5. Case Study

5.1. *Investigation into Airline Tariff Fixing*

5.1.1 *Possibility of Collusion*

Characteristics of the airline industry such as the high transparency of tariffs and homogeneous service makes the industry prone to collusion. According to a survey on "factors in choosing an airline in making a reservation of domestic flight", 56 percent of respondents chose flights that fitted their schedules rather than those that offered attractive fees. Future fare changes are disseminated through computer reservation systems (CRSs), which enhances price transparency. This enables carriers to more easily

collude to raise price without an explicit agreement. If one airline announces a fare increase through the CRS to take effect in the future, others customarily follow suit, and hence prices increase. As of March 2001, it was estimated that Asiana Airlines will benefit from a maximum of \$16.5 million in revenue increase if it decided to freeze its fares. On the other hand, a 12.3 percent price rise would result in the annual revenue increase of \$30.84 million.

5.1.1 Overview of the Case

Korea's two major carriers, Asiana Airlines and Korean Air, announced their plan to raise fares of domestic routes on 13 Oct. and 18 Oct. 1999, respectively. A complaint was filed with the Commission that two airlines were suspected of engaging in collusion, as the price increases were similar in nature. As legal ground for the determination of fares of domestic flights, Article 117 of the Aviation Act stipulates that "any regular air transportation business covering domestic air routes, when intending to determine or alter fares or rates ... shall publish such determination or alteration at least 20 days in advance ". The amendment of the Aviation Act in Feb. 1999, which went into effect on 6 Aug. 1999, fully liberalized the determination of fares on domestic air routes, which had so far been subject to the filing with the regulator.

Details of the Fare Increases by Two Airlines

	Oct 1999		March 2001	
	Increase	Effective Date	Increase	Effective Date
Korean Air	19.7%	18 Oct. '99	12.1%	20 March 2001
Asiana Airlines	19.7%	13 Oct. '99	12.3%	2 April 2001

After the announcements, fares applied to 16 out of 17 routes shared by these two carriers converged. Both airlines also increased children's fares from 50 percent to 75 percent of the adult rate.

Internal documents showed that Asiana Airlines made constant efforts since the early 1999 to realize the price hike. No circumstantial evidence was found to establish the fact that Asiana Airlines exchanged information with Korean Air prior to determining the level of price raise and the structure of pricing. Korean Air, which was not well-positioned to lead the price increase following a series of air accidents, watched closely the fare increase announced by Asiana Airlines. Right after its rival announced the fare increase, it set and implemented a matching fare increase for competing routes. The investigation revealed no circumstantial evidence that the airline communicated information or carried on conversations with Asiana Airlines.

In this case, there is no evidence of explicit and direct communication between the two airlines concerned prior to the fare increases. However, the circumstance indicates that they might presumably have reached a tacit agreement or understanding. Nevertheless, it is difficult to apply the presumption clause, given the fact that the court renders a strict interpretation of the presumption clause and bases its judgment on evidence.

5.2 *Investigation into Price Fixing of Tire Manufacturers*

5.2.1 *Market Structure*

Until 1980s, there were four players in the domestic tire market. However, in 1990s, they were consolidated and merged into Hankook Tire Co. (Hankook), Kumho Tires (Kumho), and Woosung Tires (Woosung). As of 1996, Kumho and Hankook dominated the oligopolistic domestic market, holding the market shares of 50.5 percent and 41.2 percent, respectively. The Reasons for the entrenched oligopolistic structure are as follows: While there were no institutional and policy barriers regulating the entry into the tire manufacturing market, the need for a huge sum of capital to make the initial facility investments and establish the distribution network can act as a structural entry barrier. Prices increased step-by-step since the 1980s, which pointed to a possible tacit, though not an express, collusion among competitors that enjoyed oligopolistic status for a long period of time.

5.2.2 *Details of Offence*

The Guidelines on Price Marking System (Notification issued by the MOCIE) require tire manufactures to label and post wholesale price and retail price. In fact, however, this system was operating in such a way that consumers rarely recognized its existence. Producers posted large label of recommended consumer price that was not legally binding. This misled the consumers that the recommended consumer price was the base price and thus they were offered a huge discount. On 1 March 1995, the three tire makers raised the prices of their products simultaneously by the same ratio, citing the price hike of crude rubber and their deteriorating financial standing. In Sep. 1996, Hankook and Kumho again increased the prices by the same ratio, saying that the move was necessary to address the price asymmetry among three specifications.

5.2.3 *Corrective measure undertaken : No illegality found*

It was difficult to take corrective action in this case, in spite of the strong suspicion of collusive behavior in the oligopolistic tire market which had a relatively high price transparency due to the Price Marking System. The case was closed because there was no explicit evidentiary matters that could support the existence of the price-fixing agreement.

5.3 *Comparison of rulings at home and abroad*

Ruling on the Collusion of Seven Cement Manufacturers (Korea's Higher Court, 2000)

The court concluded that "when there exists an act apparently falling under the prohibited acts pursuant to Article 19, Paragraph 5 of the Monopoly Regulation and Fair Trade Act (MRFTA), the "existence of concerted act" can be inferred, even in the absence of an express agreement among defendants, that can be subject to the regulation of the MRFTA, and when the party claiming that such presumably concerted act is undue can prove the "substantial anti-competitiveness" thereof in the given area of trade, then the concerted act is presumed to be undue, and the enterprises concerned that want to avoid the branding of undue concerted act should bring light to the circumstance which can support that the above uniform conduct is not a concerted act based on an agreement among them and thereby rebut such a presumption.

The U.S. court, in the Coordinated Pretrial Proceedings in Petroleum products Antitrust Litigation (9th Circuit Court, 1990), reasoned in a similar way.

The court concluded that it is necessary to "consider whether, on the evidence presented, it is possible to infer conspiracy and whether such inference deters significant pro-competitive effect", adding that "the plaintiff must come forward with sufficiently unambiguous evidence that does not have the effect of deterring significant pro-competitive conduct." It also ruled that "where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgement if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial pro-competitive behavior."

The rule of reason applies to determine whether the exchange of information on price, etc. by trade associations consisting of competitors violates Section 1 of the Sherman Act or not, with the following factors taken into account. Details of the information exchanged (including the information on individual future prices and average past transaction prices with certain clients), market share of participants, the existence of special circumstance justifying such an act of information exchange and the effects thereof, the pattern of communication (whether the information is disseminated or published outside or not), etc.

The European Court of Justice (ECJ) applied similar reasoning in the Wood Pulp Case (1993).

The Court ruled that in order to establish concertation based not on direct but on indirect and circumstantial evidence, such circumstantial evidence should constitute "a firm, precise and consistent body of evidence of prior concertation". It added that "in determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct", revealing a similar line of logic.

5.4 *Differences*

5.4.1 *Korea-U.S.*

Unlike the U.S. courts in inferring conscious parallelism, which has developed as a case law, Korea's Higher Court made the presumption of an undue concerted act easier in order to interpret the provision of the positive law in a non-contradictory way. However, it also set forth the conditions for excluding and overruling the presumption of undue concerted act. While making the presumption easy by excluding various circumstances put forward by defendants, the court also "required sufficient evidence to overrule the presumption", ending up with a similar conclusion to the rulings of the U.S. courts which have established strict criteria for permitting the inference of conspiracy.

5.4.2 *Korea-EU*

Korea's Higher Court allowed the presumption of undue concerted act pursuant to Article 19, Paragraph 5 of the MRFTA. It also permitted the presumption to be overruled when the defendants prove that the act concerned was an independent management decision. On the other hand, the ECJ made it difficult to presume the existence of concertation in the first place, placing a heavier initial burden of proof on the Commission of the European Communities. By saying that the proof of concertation is furnished only when concertation constitutes the only plausible explanation for such conduct, it seems that the Court in general requires a heavy burden of proof on the part of the Commission.

6. Policy Implications

As can be seen from above, increased price transparency brings benefit to consumers by allowing them to make broad price comparisons. However, it is also true that detecting collusion becomes increasingly difficult particularly in oligopolistic markets in cyberspace, since such conspiracy can take place without an express agreement.

6.1 *Evolution of the Provisions on Parallel Price Increase*

The MRFTA, when it was first enacted in Dec. 1980, provided for a separate provision on parallel price increase of oligopolists (Article 4) instead of regulating it as abuse of market dominance (Article 3). When two or more enterprises that are not market dominant enterprises with market shares of 50 percent or more raise the price of identical or similar product or service by the identical or similar amount or rate within three months, the reasons therefor can be filed with the KFTC. When such conduct is deemed undue, corrective actions such as an order of price reduction are undertaken.

* Scope of Parallel Price Increase (Article 7 of the Enforcement Decree of the MRFTA)

"Similar amount or rate" as stipulated under Article 4 of the Act refers to the amount or rate of parallel price increase whose difference [with the amount or rate of the price increase by the first market dominant enterprise] will not prompt the customer movement and which is 20 percent or less of the amount or rate of the price increase by the first market dominant enterprise.

This provision was dropped in the first amendment of the MRFTA in 1986, as parallel price raise was deemed as a price abuse of market dominant enterprise, and was transferred to the Enforcement Decree. However, this clause was deleted in the 1987 revision of the Enforcement Decree. In 1986, a presumption clause of undue concerted act was introduced, which also covered the parallel price raise. Under the current law, parallel conduct and proof of substantial anti-competitiveness are necessary to presume a conspiracy.

However, in practice, additional elements are factored in. The Guidelines on Presumption of Concerted Act provides four additional elements to presume an agreement;

- i) when there is evidence of direct or indirect communication or exchange of information;
- ii) when it is deemed that such conduct, when carried out individually, goes against the interest of each enterprise concerned and must be jointly carried out to bring benefits to enterprises concerned;
- iii) when the parallel conduct cannot be explained as a result of market condition;
- iv) when the parallel conduct is impossible to occur without an agreement given the market structure concerned

6.1.1 *Ways for Improvement*

The Current MRFTA confines the scope of undue concerted acts to 8 conducts specifically set forth thereunder. Since the types of collusion are expected to increase, however, the current exhaustive clause should be changed to comprehensive one in order to make the regulation of collusion more effective. It is also necessary to establish the legal principles applied to the regulation of concerted act and define the scope of law enforcement through notifications and adjudications. In addition, there are no ground provisions under the current law for regulating attempts of collusion or facilitating practices, which increases the incentives of corporations to take advantage of prior price publishing in cyberspace to let

competitors know about planned price change and encourage co-ordination. It is possible to curb tacit collusion by setting forth and actively utilizing legal provisions for prohibiting facilitating practices or requests for collusion which allow for secret coordination among companies.

Using economic analysis and evidence in uncovering and proving collusion constitutes a key element in enhancing the effectiveness of competition authority's regulatory efforts. This requires comprehensive collection and analysis of documents and data on industry trends, changes in price and profit ratio, past behaviors, etc. Also, in the case of oligopoly and duopoly, receiving real-time price information through price transparency from enterprises and thereby preventing the harms of cartels in advance could be considered.

MEXICO

1. General Effects of enhanced Price Transparency

The Federal Law of Economic Competition (LFCE) forbids in all cases agreements among competitors having the object or effect to fix, increase, or manipulate sales prices of goods and services, or to exchange information with the same effect or object. In terms of the LFCE, there is no exception to this prohibition since this type of practice is deemed to always harm competition processes.

The Federal Competition Commission (CFC) has considered that the publication of price information or the creation of databases may contribute to enhance purchase and sales decision making, improving market arbitrage and reducing transaction costs to suppliers. From the consumer's point of view, price publishing helps reduce search costs and provides elements for purchase decisions.

Notwithstanding, price transparency systems may also produce negative effects on competition by facilitating collusive agreements among competitors. For these agreements to be sustainable several conditions must be present, among them³ the existence of a mechanism that allows monitoring compliance. If prices are published or publicly registered a firm cannot modify its prices without its competitors awareness, and therefore such practices also conform a mechanism of control in support of collusion. Thus, although in general terms, price transparency may constitute a mechanism basically aimed at promoting competition and at providing consumers with improved information to decide between several providers and products, still care must be taken that price information exchange mechanisms do not violate the LFCE.

1.1 Case Illustrations

During its eight years of work, the CFC has analysed cases where the mechanisms implemented by agents to enhance price transparency may facilitate unreasonable collusive agreements. In general terms, and as will be analysed further on in this document, they correspond to mechanisms designed and/or implemented by industry chambers or associations aimed at providing price transparency to its members. The majority of cases included public information mechanisms, i.e., the general public had access to the compiled information.

One of the most important efforts undertaken by the CFC since its creation has been the promotion of a competition culture and attempts to make clear to industry and commerce chambers and associations what are the appropriate limits regarding price transparency enhancement measures.

One of the first cases addressed by the CFC on this matter concerned the market for laundries in which the sector chamber and association engaged in price transparency oriented actions, which resulted in price fixing.

Case 1. Laundries and dry cleaners⁴

CASE DESCRIPTION.- The CFC initiated an investigation into the laundry and dry cleaning industry, on the basis of a significant parallelism observed in the rates charged by several competing firms. Following the enquiry it was decided that the National Laundry Chamber (*Cámara Nacional de la Industria de Lavanderías, AC, - Canalava*) and the National Association of Professional Cleaning Industrials, (*Asociación Nacional de Industriales de Limpieza Profesional, AC, - Anilpe*) elaborated, sold and distributed among its members, card prints showing rates and prices firms should charge.

Likewise, it was proved that the observed parallelism was a direct consequence of information exchange among competitors, aimed at fixing rates, accomplished through the referred associations.

IMPACT ON PRICE TRANSPARENCY.- Although the case refers to the public display of price lists in laundry establishments, the relevant point is that the chamber and the sector association were used as a means for information exchange and price fixing among competitors. Prices fixed by the associations were compulsory.

CFC DECISION.- The CFC found *Canalava, Anilpe* and certain laundries guilty of infringing the LFCE by engaging in price collusion and therefore imposed sanctions and ordered the agents involved to cease the practice. It also ordered them to inform its members of this decision and to remove the card prints with prices and rates, thereby allowing each member to set its own prices.

1.2 Competition law provisions

The LFCE forbids absolute and relative monopolistic practices. Absolute monopolistic practices are collusive acts by competitors to fix prices, production or auction bids. In order to prove their existence the CFC only needs to demonstrate the practice effectively occurred, no determination of substantial market power is required since it is deemed these acts always harm competition and are therefore forbidden *per se*.

Following Article 9-I of the LFCE, **information exchange** is also explicitly forbidden as an absolute practice, whenever the object or effect of the exchange is to fix, increase or manipulate prices. Not only are price fixing agreements prohibited but also information exchange with that intention.

Relative practices include vertical restrictions and abuse of substantial market power, i.e. practices carried out by an agent with substantial market power in the relevant market having the object or effect of unduly displacing another agent in the market or to substantially impede its access to it.

Unlike absolute practices, in order to demonstrate the commission of a relative practice the alleged responsible party must be found to have substantial market power in the relevant market, and the practice must be carried out regarding goods and services included in the defined relevant market.

As to absolute practices, article 5 of the Regulations to the LFCE set out as probative elements of these practices instructions or recommendations issued by business chambers or associations to its members, with the object or effect to establish, fix or suggest sales prices.

Regarding price transparency, the above mentioned competition provisions forbid direct or indirect information exchange among competitors concerning their prices so as to prevent their fixing, increasing, agreeing or manipulating sales or purchase prices, since these acts are expressly against the LFCE and its Regulations. Therefore, any act relative to price transparency having as a background, object

or effect, collusion among competitors, either through chambers, associations or groups is forbidden in Mexico.

Although price transparency is considered, in general terms, as a mechanism essentially aimed at promoting competition by providing consumers additional information to choose among different suppliers and goods, care should be taken to ensure that it does not violate the LFCE.

2. Government Price Transparency Enhancement Policies

2.1 *Main laws or regulations affecting price transparency in Mexico*

The Federal Law for Consumer Protection (LFPC) sets out the legal framework for price disclosure for the benefit of consumers. In addition, some sector laws establish price publishing mechanisms which also affect price transparency.

2.2 *Federal Law for Consumer Protection*

The LFPC took effect on February 5, 1976, introducing for the first time the concept of protection of consumer interests and creating specialised enforcement bodies in this sphere: the National Consumer Institute and the Consumer Protection Procuring Agency (PROFECO). The latter is a decentralised social service organism, constituted as an independent legal entity empowered and with administrative authority to promote and protect consumer interests.

In 1992 the LFPC was amended to concentrate related functions in PROFECO, such as: orientation and advice; reception, processing and conciliation of complaints and demands; issuance of administrative decisions; register of adherence contracts; verification and monitoring of official Mexican standards, weighs and measures; handbooks and guarantees as well as authorised prices established or agreed with the Secretariat of Economy; information and consumer orientation; and corrective advertising.

2.3 *Provisions on price disclosure*

1. The LFPC is aimed at promoting and protecting consumer rights and securing legal certainty and equity in the relations established among suppliers and consumers, recognising certain basic principles in consumer relationships.

Labour contracts as well as bank, credit, securities, bonds, insurance and deposit services and those relating to pension funds are exempted from the LFPC.

Basic principles for consumer protection established in the LFPC are *informing* on the adequate consumption of products and services that warrants *freedom to choose* and equity in contracts, as well as *clear and adequate information* on different products and services, which correctly specifies quantity, features, composition, quality and price.

PROFECO is empowered by the LFPC to compile, **elaborate** and publish objective information in order to provide consumers with better information regarding goods and services available in the marketplace. These provisions are the legal support to PROFECO's price publishing policy which is aimed at enhancing price transparency.

2. PROFECO publishes through a magazine and its internet site several price lists which include: cleaning devices, basic food products, household appliances; fruits and vegetables; fish and seafood and building materials. These lists are not exhaustive, as only two references are published for each item: the name of the store offering the cheapest price and that offering the most expensive price.

In addition, the consumer magazine publishes seasonal price lists on given goods, such as school materials (September) and toys (Christmas season)⁵.

3. As to price information provided by traders or service suppliers, the LFPC indicates that information or advertisements spread by any means must be true, verifiable and must not include misleading texts, dialogues, images or descriptions that may cause confusion or inexact appreciations.

Likewise, the LFPC sets out that any establishments providing services must publicly show in clearly legible characters the prices for its main services. As to prices charged for the rest of the services, they must always be available to the public.

2.4 Other Laws

In general, the prices of goods and services in Mexico are set by market forces, except for a few exceptions foreseen in certain laws and regulations, described as follows:

1. Article 7 of the LFCE establishes that maximum prices can be set for goods and services defined as *needed for the national economy* or as *popular consumption goods*. Only the President of Mexico is empowered to determine which goods and services are subject to such price control. In turn, the Secretary of Economy (SE), will determine the corresponding maximum prices. The agency responsible for the inspection and surveillance of maximum prices determined pursuant to this article is PROFECO, in coordination with the SE.

2. In this regard, Article 8 of the LFPC establishes that providers must observe prices and rates agreed, fixed, established, registered or authorised by the SE or any other federal agency, in terms of the corresponding legislation. Sanctions may be imposed on companies selling goods or services at prices above the maximum authorised.

Among PROFECO's powers are those to survey and verify compliance with prices agreed, fixed, established, registered or authorised by SE and to co-ordinate with other legally empowered agencies price inspection in order to effectively protect consumer interests and to avoid duplication of functions.

3. Sector specific regulations. Some sector specific laws and regulations impose on service providers the obligation to register their prices before the regulatory agencies, before applying them. Sectors such as natural gas, railroads, airport services, telephony, among others, are subject to such requirements. Price registration is aimed at consumer's benefit.

4. Specific regulation.- On the other hand, certain professional activities are subject to specific regulation, such as notary public. This activity is regulated by each federal entity. In Mexico City, the Law of Notary for the Federal District applies. This law establishes notary functions as a kind of professional exercise of Law, authorising the notary to attest on behalf of the government and imposing necessary conditions for its correct and unbiased implementation.

Notaries obtain no wage from government, private or public entities, thus their clients must pay for the requested services. Therefore, notaries have the right to obtain from their clients a fee for their services, according to the official rate register and to the expenses caused by each case.

2.5 *Reasons for and effects of governmentally mandated price labelling and publication of suggested, list or actual transaction prices.*

a) **Price transparency fostered by PROFECO.** Publication of mandated price labelling or suggested prices by PROFECO has not led to collusion (at least, there is no evidence in that sense). The goal has always been to enhance transparency for the benefit of consumers, by reducing search costs and by providing additional elements to improve consumption decisions. These systems do not represent significant challenges to competition, given that:

- Newspaper price publications only include maximum and minimum prices, and therefore its use for a collusive agreement is limited.
- Whenever all prices are published (thereby enhancing consumer transparency) information frequency is sporadic, thereby making collusion and the use of such information as a monitoring or control device to ensure compliance with the agreement difficult.
- Price publication has occurred in sectors having atomised market structures and low entry barriers where a collusive agreement would unlikely succeed.

b) **Price transparency regarding State-owned Enterprises.** In Mexico authorities also publish prices charged for services rendered through state-owned enterprises. In most cases, services are exclusively provided by the government and as a consequence competition cannot be affected by collusion. Price publishing seeks transparency as regards the operation of these enterprises and to generate timely and reliable information for consumers.

c) **Price registration.** Providers of services such as natural gas transportation and distribution, telephony, airport and seaport services are subject to compulsory price registration. Price registers concerning goods and services subject to economic regulation or to the legal requirement of registration have sought to ensure compliance with economic regulation and to create databases in order to provide consumers with precise information. For example, in telephony this register allows the regulatory agency to verify that conditions such as unbundling requirements are complied with.

In certain sectors the publishing of price registers has resulted in pro and anticompetitive effects. Publication of registered prices has worked as benchmarking between enterprises, producing favourable market effects, whenever a reduction in firms' transaction and learning costs ensue.

However, on other occasions, service suppliers have tried to use this information as a control mechanism to facilitate collusion. The oligopolistic market structure of certain activities has created incentives for that behaviour. In telephony, for example, carriers sought to establish long distance prices estimated as multiples of the interconnection fee; the price register was intended as a control regarding effective application of this agreement. This proceeding was subject to consultation with the CFC before its application, and its implementation was rejected because of its anticompetitive effects.

Notwithstanding, in most cases the register has proved to promote a strong price competition among carriers, as well as transparency, as suppliers may rapidly respond to discount packages or any promotion offered by their competitors.

d) **Recommendations issued by industry or business chambers or associations.** In these cases results have not always been favourable to competition. Price related recommendations or suggestions have been issued, with the purpose of favouring consumers and companies by providing guidance as to market prices, thereby reducing their learning or transaction costs. Industry or business chambers or associations have issued recommendations regarding cost mechanisms for price determination or even specific prices to be charged for a given service. In most cases information is public and has been compiled, processed, stored and published by the directive boards of the referred organisations.

Occasionally, the resulting effect of actions taken by chambers or associations on price transparency matters has been collusion among suppliers. In fact, one of the most relevant tasks carried out by the CFC during its first years on the promotion of a competition culture was focused on imposing discipline on these organisations in order to prevent collusive practices sanctioned by the LFCE.

Since it started its work, the CFC has objected to price transparency generating mechanisms which *de facto* reduce competition or whenever they were foreseen to have the effect of reducing price competition. As mentioned above, LFCE article 9 sets out a *per se* prohibition of agreements among competitors having the object or effect to fix, increase, concentrate or manipulate prices, or to exchange information with this purpose or effect. The 1998 Regulations to the LFCE (issued 5 years after the LFCE's enactment) set out specifications regarding the prohibition of the above mentioned agreements, based on the experience obtained by the CFC in its first years enforcement experience. The Regulations particularly point out as indications of the existence of a collusive practice, the instructions or recommendations issued by industrial and business chambers or associations for their members, aimed at carrying out conduct foreseen in LFCE article 9.

A case regarding associations or chambers' price recommendations, occurred in trucking⁶.

Case 2. National Trucking Chamber.

The CFC carried out an ex-officio investigation regarding a collusive agreement presumably committed by the Cámara Nacional de Autotransporte de Carga (the National Trucking Chamber, or CANACAR). This involved an agreement among the Chamber's members to fix prices applicable to trucking services.

The practice arose from a reference price guide which CANACAR had written and distributed among its members for negotiations between users and teamsters. The document specifically established minimum prices for freight services, which the CFC considered as negative for competition as it constituted a collusive practice prohibited *per se*.

The arrangement to fix prices constituted a violation of Article 9-I of the LFCE, and therefore, the CFC resolved to impose a fine on CANACAR for participating in the aforementioned absolute monopolistic practice on behalf of its members.

Likewise, the CFC ordered CANACAR to undertake the following measures:

- To abstain from publishing and distributing the aforementioned price guide and to withdraw those copies in circulation among its members.
- To refrain from issuing or distributing any kind of guide, pamphlet or bulletin with the aim of fixing prices or minimum costs for the services provided by its members.
- To desist from establishing pricing policies to determine minimum conditions for contracts of trucking services.

Case 2. National Trucking Chamber (cont'd)

Another case involving CANACAR, was its consultation regarding the design of a cost accounting program for its members, with the aim to avoid any possible anti-competitive aspects involved in its methodology and application. The proposal included the dissemination of a costing method.

The publication and application of road transport costing methods that took into account elements such as the importance of variable costs, the heterogeneity of the vehicle fleet and the conditions of the nation's roads could lead to greater efficiency in road transport operations. In this case, the CFC stated that the publication of costing methods was not an infringement of the LFCE by itself. However, the CFC warned CANACAR that the methodology should be strictly illustrative in nature, to avoid at all times the possibility that its cost examples would serve to fix service prices.

3. Private Price Transparency Enhancement Measures

Concern about the anticompetitive effects arising from price transparency mechanisms has been mainly related to public mechanisms, i.e., systems generating price information which is made available to all competitors or even to the public in general. The LFCE forbids not only collusive agreements but also the exchange of information pursuing price fixing or manipulation⁷. Therefore the use of private information exchange mechanisms pursuing transparency in prices becomes questionable from the CFC point of view and thus is carefully scrutinised in every case.

The CFC received a request from the *Unión Nacional de Avicultores* (National Poultry Farmers Union) to determine whether an information method related to the statistics system of prices for poultry published in Intranet would violate the LFCE. This is one of the few consultations or cases which have been received related to a private price transparency measure. The CFC decided to authorise the creation and implementation of the proposed mechanism of price transparency as it could contribute to the efficient operation of relevant markets.

Case 3. *Unión Nacional de Avicultores (UNA)*, National Poultry Farmers Union

CASE DESCRIPTION . *UNA* presented a consultation before the CFC requesting its opinion about an information system about the behaviour of the national poultry market, which would provide a tool for investment projects, planning and development of enterprises, identifying more productive regions and increasing trade efficiency.

The access to the information would be through a password assigned to poultry enterprises. Each company would have access to its own data and to the weighted average prices, but would not be able to see the prices of its competitors. The database would be updated with statistical data of the poultry markets at a regional level.

This procedure would be first implemented in Mexico City and expanded later to other states and regions. The mechanism comprised information on producer and consumer prices (including wholesale and retail prices).

No sanctions were foreseen for enterprises which would not provide data nor to those which would not effectively follow registered prices in a transaction.

According to the consultation elements, the proposed system would be operated and managed by a group of economic agents being competitors themselves and not by an authority as in a trusteeship.

Case 3. *Unión Nacional de Avicultores (UNA), National Poultry Farmers Union (cont'd)*

IMPACT ON PRICE TRANSPARENCY.- The mechanism to display prices would enhance market arbitrage.

IMPACT ON COMPETITION.- Poultry markets are not concentrated, in fact production is highly dispersed (more than 150 companies are engaged in poultry activities, using different technologies, production and distribution systems). In market structures with such characteristics suppliers can rarely enter into or successfully implement collusive agreements.

The mechanism did not include confidentiality policies regarding information (prices by enterprise included in the database) so as to prevent its diffusion or utilisation.

CFC's RESOLUTION.- The CFC resolved that the implementation of the price transparency system proposed by *UNA*, would not violate the LFCE. Nevertheless, the CFC required *UNA* to establish mechanisms to guarantee the information veracity collected by the poultry producers, as well as its confidentiality, in order to avoid its utilisation for anticompetitive purposes.

In the aforementioned case, the CFC considered that the system was proposed to establish reference prices to enhance production activities of poultry farmers. If specific information of each producer could be made available to other suppliers, collusive practices could be carried out. Therefore, the information exchange was the most important element of concern and thus the CFC suggested the establishment of restrictions aimed to enhance confidentiality by ensuring different competitors do not have access to the identity and specific data of other producers.

For its resolution the CFC also took into account the fact that no sanctions were imposed on those not providing data or leaving the system (costs were not applicable for entering the system), and that the markets affected by this private price transparency mechanism have an atomised structure and low barriers to entry.

4. Other Practical Cases

Case 4. Customs Brokers Association from Cancún, AC⁸ (AAAC)

CASE DESCRIPTION . The CFC initiated its investigation for presumed horizontal anticompetitive practices made by the AAAC, due to the possible establishment of fees agreed among the association members for the provision of services.

In Mexico, deregulation in customs included the establishment of clear and non-discriminatory rules for granting permits⁹ and services provision. Customs brokers were free to negotiate their fees. Notwithstanding, the AAAC subscribed an agreement with the aim of implementing a price fixing mechanism based on the uniform fees system used before deregulation took place. The agreement foresaw sanctions for those brokers not complying with the established conditions.

IMPACT ON PRICE TRANSPARENCY. The goal of the AAAC was to promote a scheme which would allow clients to acquire services at a uniform price. However, the CFC sanctions and challenges such conduct due to the damage that price collusion among competitors causes to competition and to the society.

Case 4. Customs Brokers Association from Cancún, AC¹⁰ (AAAC) (cont'd)

Customs brokers services are compulsory for importers and exporters and thus the adverse effects of this agreement cannot be avoided, damaging foreign trade.

CFC DECISION. The Plenary of the CFC decided to sanction the AAAC, and ordered it to stop such practice and reverse the agreement. The AAAC was also required to inform all its members about this resolution, so that each agent would set its own rates freely.

Case 5. *Asociación Mexicana de Agentes de Carga*¹¹, the Mexican Cargo Association (AMAC)

CASE DESCRIPTION. The CFC started an investigation for possible horizontal anticompetitive practices in services provision of maritime cargo disposal. During the investigation period, the CFC found similar indications of anticompetitive conduct regarding air cargo handling at the Mexico City airport, which triggered a second investigation. In both procedures, the Mexican Cargo Association appeared as the presumed offender. As to air cargo handling, the AMAC communicated to its members the rate to be charged for their services. It issued afterwards a new statement recommending its members to charge a fixed amount per ton or cubic meter of maritime cargo.

The price fixing agreement regarding air cargo handling announced in the statement was previous to the entry into force of the LFCE but the aforementioned price agreement was maintained even after the LFCE entered into force.

On the other hand, the recommendation regarding maritime cargo handling rates represented a violation to the LFCE.

IMPACT ON PRICE TRANSPARENCY. The issuance of a statement by an association might seem to enhance price transparency. Nevertheless, this conduct is preceded by a price collusion, through which competitors offer their services at the same price using the association as a means for implementing such conduct.

COMPETITION IMPACT. The price agreement to homogenise rates of services for air cargo handling established in the statement issued by AMAC did not attract a sanction because it was issued before the LFCE's entry into force. However, the maintenance of the agreement after the LFCE's entry into force constitutes a horizontal anticompetitive practice.

Additionally, the price agreement for maritime cargo constitutes a violation to the LFCE.

CFC DECISION. The CFC decided to impose sanctions on the AMAC corresponding to the violations made regarding maritime and air cargo handling. It also ordered AMAC to suppress the horizontal anticompetitive practices, to cancel agreements and statements and to inform its associates about the risks of not complying with the aforementioned requirements.

NOTES

1. Decision *RC Auto*, July 28, 2000, in *Bollettino*. n. 30/2000.
2. Decision *Vendomusica-case discografiche multinazionali-Federazione Industria Musicale Italiana*, October 9, 1997, in *Bollettino* n. 41/1997.
3. The paper by A. Ten Kate and Ma. C. Dircio, "Information Exchange, Market Making and Collusion" (available upon request at atenkate@cfc.gob.mx) identifies other factors that facilitate a collusive agreement's success: market structure; the type of product; the organisation of the system that provides price transparency, the private or public nature of that system. The authors conclude that information exchange mechanisms among competitors represent less risks to competition when they are implemented in markets having low concentration and no entry barriers; involving differentiated products and with highly volatile or speculative market conditions; with information that is aggregate and publicly available; and when the system is operated by an independent party.
4. Annual Report 1993-1994, pg. 35
5. This information is also published in the newspapers.
6. Trucking was strongly protected until the early 90's, when a deregulation process began which eliminated entry barriers and price controls. Teamsters have faced certain problems in adapting to a competitive environment.
7. The FLEC does not forbid exchange of information as regards production or market segmentation, but only the collusive acts on this regard.
8. CFC's Annual Report, 1995-1996, pages 70-71.
9. Register or patent granted by the authority to provide customs services.
10. CFC's Annual Report, 1995-1996, pages 70-71.
11. CFC's Annual Report, 1995-1996, pages 66-67

NORWAY

1. General remarks

Increased price transparency may have both procompetitive and anticompetitive effects. Competition will be stimulated when consumers are well informed and able to compare prices. It is also more likely that an undertaking will profit from breaking out of an explicit or tacit collusion when this can be recognised by the consumers. Both of these effects enhance competition.

Increased price transparency may restrict competition by facilitating explicit or tacit collusion among companies. Observability and credibility of the relevant information are critical conditions for collusion to take place.

If the prices in a market become more easily accessible to both consumers and undertakings, the net effect on competition is ambiguous. To the extent that it becomes more easily accessible only to undertakings, competition may be hampered.

A coherent policy on price transparency should take this ambiguity into account. The Norwegian Competition Authority (NCA) undertakes certain measures to increase price transparency on the demand side. On the supply side the role of the NCA is among other things that of enforcing a prohibition on price collusion. This prohibition may also encompass *exchange of information between undertakings* (see the case description in section 3).

2. Government Price Transparency Enhancement Mechanisms

1. Under Section 2 of the Competition Act, the NCA is assigned with the task of enhancing transparency in the markets. Based on the understanding that the well functioning of markets relies on consumers being sufficiently informed about prices, the NCA conducts price surveys, establishes mandatory standards for price labelling and controls whether sufficient price information actually is provided.

2.1 Price surveys

The price surveys are typically conducted within sectors of the economy where the Authority sees a specific need to inform customers about substantial price differences. The trend has been towards nation-wide surveys, particularly in sectors that have been liberalised.

The NCA also maintains a public database containing the electricity prices offered by *all* suppliers in the Norwegian market. The database is updated weekly.

2.2 Price labelling

Section 4-1 of the competition act specifies price information *obligations of undertakings*:

“Undertakings which sell goods retail to consumers shall, as far as practically possible, provide information on prices so that they can be easily seen by customers. The same applies to the sale of services to consumers.”

The NCA has issued specific provisions concerning price information on goods and services. The provision regarding *goods* (amended as of 1 January 2000 to comply with EC directives) states that goods must, as far as practically possible, be labelled with a *sales price* and a *unit price*. The implementation of this provision has high priority. A relatively extensive information strategy has been set out, focusing on the grocery retailing. The information strategy has been followed up by control activities.

The provision regarding price information related to services was implemented on 27 November 1997. The NCA has adopted several provisions concerning specific types of services, such as hotel and restaurant services, dental services, medical services and funeral services.

2.3 Other measures

The NCA enforces the Norwegian Credit Purchases Act. The act imposes on undertakings that integrate credit offers in their advertising, an obligation to state the annual percentage rate of the credit (an interest rate measure stating the true costs of the credit). The NCA undertook more than 300 controls in 2000. More than 250 ended with the Authority demanding some kind of action on the part of the companies to bring their practises in compliance with the requirements set out in the law.

Norway has implemented all relevant EC directives concerning price transparency.

3. Private Price Transparency Enhancing Policies/Cases

On the supply side, the role of the NCA concerning price transparency is that of enforcing the prohibition set out in Section 3-1 of the Competition Act:

“Two or more undertakings must not, in connection with the sale of goods or services by agreement or concerted practices, or by any other conduct liable to influence competition, fix or seek to influence prices, mark-ups or discounts except for normal cash discounts.”

Hence, three conditions must be satisfied for actions to violate these prohibitions:

- i) There has to be a *co-operation* of some kind.
- ii) One must, through this co-operation, *fix or seek to influence prices*
- iii) The co-operation must be *liable to influence competition*.

The more interesting questions concerning price transparency is related to condition number two: The law does not apply solely to types of co-operation that fixes prices directly. It also applies to co-operation concerning *parameters that are liable to influence prices*. With respect to price transparency, the exchange of market information between suppliers is an important issue. In such cases one has to assess whether the particular exchange of the information concerned is liable to influence prices.

Generally, exchange of information about *future prices* can influence prices by helping the colluding companies to reach the terms of co-ordination. Exchange of *historical prices* may facilitate

explicit or tacit collusion by facilitating detection and punishment of deviations. To what extent knowledge of historical prices is liable to influence price setting behaviour, depends on

- whether the data are aggregated or individual,
- how detailed the data are,
- how frequently the data are distributed,
- how up-dated the data are,
- whether the data are distributed solely to the members of the group – or also to outsiders,
- the purpose of the exchange of information and
- how often the parties in the market meet.

Case n° 1: Exchange of information between hotels

A group of hotels located in the same region agrees to exchange information about average prices and coverage (share of beds being sold pr. night). They report the data to one member of the group on a daily basis. This member provides the rest of the group with the complete set of information – also on a daily basis. Hence, with a time lag of one day, all the members of the exchange receive information about average prices and coverage for each member.

There is no evidence of collusion beyond the mere exchange of information. The Competition Authority therefore considers whether the exchange of information, *as such*, can be regarded as a type of collusion forbidden under Section § 3-1 of Norwegian Competition Act.

The NCA assesses whether the exchange of information about average prices and coverage between hotels located within a certain area will reduce the member's independence with respect to the setting of prices. It is taken into account that the information exchanged is sufficiently detailed, frequent and up-dated to serve as a tool in a process of co-ordinating prices.

Case n° 2: The Association of Meat Processing Companies (AMPC)

The private companies within the Norwegian meat-processing sector (butchering, cutting, preparation for sale), are organised in the AMPC (about 250 companies). The largest company in the Norwegian market is Norwegian Meat – which is a co-operative and, hence, not a member of AMPC. Norwegian Meat has certain regulatory powers, based on yearly negotiations with the government and the farmers' organisations.

The NCA has turned down an application from AMPC for an exemption to co-operate with Norwegian Meat in preparing *lists on recommended prices of cut meat* and to distribute this information to its members. The NCA has also turned down an application from AMPC in which it asked the NCA to instruct Norwegian Meat to distribute *lists of prices on cut meat* to AMPC.

The NCA is handling a case concerning the AMPC's practice of making available to its members a list of Norwegian Meat's prices on *butchered meat*. At the same time the Authority is looking at AMPC's practice of publishing price information and other market information on their home pages on Internet. As a result of these measures, the total amount of information being available to the members of AMPC, on a frequent and up-dated basis, would be:

- Norwegian Meat's prices on butchered meat.
- The members and Norwegian Meat's prices on cut meat.
- Other types of market information, such as total amount of meat being sold in the market, meat in stock, assessments of future import, production and sale.

The information concerned will, according to the parties, be up-dated as soon as new information is at hand. Hence, the parties to the exchange of information will obtain detailed and up-dated information about parameters liable to influence the price setting behaviour of the companies.

Case n° 3: Internet related Issues – Unilateral vs. Co-operative Action

Information exchange over the Internet may facilitate collusion by increasing observability. On the other hand, the Internet provides a cheap and easy-to-use means of making information available. This may benefit consumers.

Contrary to co-operative actions, *unilateral actions to provide price information* do not fall within the scope of the Norwegian Competition Act. However, present browser technology and hyperlinking makes it an easy task to collect information on the Internet. This may blur the distinction between unilateral and co-operative actions.

Making information about for example future and historical prices available on an Internet site may *per se* be regarded as a unilateral action. If, for example, the twenty largest companies in a market, however, publish such information on their home pages, it is a very easy task for any of the companies to collect this information and compile private lists. This would give the companies the same information value as if the information has been collected by one company or a trade union and published exclusively to these companies.

On the other side, it would be equally easy to consumer organisations to collect the same information. Access to such information may however be restricted to a group of companies through the use of *login* and *password* procedures. Such actions may be regarded as co-operative. Hence, a case may be raised for making *password protection* a criterion to be taken into account when distinguishing unilateral and co-operative action on the Internet.

SWEDEN

WHEN IS TRANSPARENCY GOOD FOR COMPETITION?

Abstract: The research question that we are concerned with in this paper is: Will competition increase if information sharing among firms is prohibited? The paper includes a brief introduction to the economic theories concerning information sharing in an oligopoly setting. Furthermore, two empirical cases from the economic literature is presented and to some extent analysed. Finally a Swedish court case concerning the gasoline market is presented and analysed. In this market the price transparency is very high in one part of the market, while it is less transparent in the other. The question posed in the court case was whether an increase in the information sharing on sales volume would hurt competition. The conclusion is that when discussing if price transparency should be allowed to increase, it is necessary to consider the institutional and structural setting of the specific market. Further, it is argued that the case of increasing the information on sales volumes may have as detrimental effects on competition as increasing price transparency in certain markets.

Introduction

The implications for antitrust of the possibilities among firms to share information were discussed as early as in the 1950s and 1960s. As Philips (1988) puts it: "The embarrassing conclusion was that market transparency among competitors does not promote competition but instead makes tacit collusion among oligopolists easier".

Yet, consumer's councils in several industrialised countries tend to promote schemes to make prices more transparent and to engage in publication of comparative price lists.¹ Competition authorities on the other hand are generally worried about any sharing or dispersion of information that may facilitate collusion, be that implicit or explicit, among firms.

²The EU view on price transparency seems to be ambiguous. On the one hand Kühn and Vives (1995) reaches the conclusion that the European Commission has regarded price transparency through price pre-announcements as harmful to competition. In the Wood Pulp Case firms violated EC antitrust law by colluding on prices and by exchanging prices between firms. According to the Commission, markets were only artificially transparent when prices were announced in advance. On the other hand it is argued that increased transparency is good for the consumers, e.g. leads to lower prices.

It is interesting to highlight the argument that more information should lead towards a more competitive market. Perfect information is one of the criteria for perfect competition. Unfortunately, we argue in this paper that, in reality we will never experience a market that fulfils all the requirements for perfect competition.³ Thus it is reasonable to ask the questions: If we want to increase competition and hence social welfare (or more often consumer surplus), what policy actions are needed in this market? Can there be reasons to rank the criteria for perfect competition, in order to understand which most increase/decrease competition? Can it be the case that competition will increase if information sharing among firms is prohibited? The first question is of such a general nature that the answer is accordingly general, and mostly theoretical. The second question, though, is of direct interest to competition

authorities. Assume that more competition is wanted in a market. Is it possible to achieve this by changing solely one of the structural conditions in this market?⁴ Although the two first questions are of great interest, for reasons of analytical consistency, this paper will foremost concentrate on a third one, i.e., what and how much information sharing should be allowed in a specific market.

The following section briefly reviews the literature, first some of the theoretical literature and then some of empirical findings. Then we present a case concerning the Swedish gasoline market, which was dealt with in the Swedish courts in the late 1990s. Finally, some tentative conclusions are drawn.

1. A review of the relevant literature

1.1 Theory

In many economic settings, the possibility of making efficient agreements (whether implicit or explicit) is limited by the presence of imperfect monitoring: some agents cannot observe perfectly the actions of others. Often the economic problem of interest is modelled as involving the indefinite repetition of some fixed strategic situation.

When firms in an oligopoly market co-ordinate their actions despite the lack of an explicit cartel agreement, the resulting co-ordination is sometimes referred to as *tacit collusion*. In our examples below, firms acting in the different markets may, if they acted in a co-ordinated manner, increase their profits by choosing a price closer to the monopoly price than would be the case if they set the price equal to marginal cost. The latter is the original prediction of Bertrand.

Novshek and Sonnenschein (1982), Clarke (1983) and Vives (1984) pioneered theoretical research on information sharing. Since then, numerous contributions on this topic have appeared. While the models analysed vary along several dimensions their basic structure is the same. We failed to find a general theory regarding the incentives of firms to share private information. Instead the results tend to depend on the specific assumptions made, e.g. whether information is private or public and the specific functional form of cost or profit functions, and how many competitors are present in the studied market.

Consider a market that is best characterised as a Cournot oligopoly, i.e. the decision variable is quantities of substitute goods. Is there an incentive to share information and how does it affect the degree of competition? If the firms cannot enter a non-exclusionary agreement on information sharing, that is, revealed information “goes public”, is there an equilibrium? Novshek and Sonnenschein (1982), Clarke (1983), Vives (1984) and Gal-Or (1985) have shown that in equilibrium firms will not share information. In contrast, Shapiro (1986) has shown that in a market with uncertainty about private costs, firms completely reveal information in the equilibrium. This contrast has been attributed to the difference between common value parameters such as the demand intercept and private value parameters such as the firm’s marginal cost.⁵

Further, Vives (1984), shows that in a duopoly with differentiated products and demand uncertainty, a change from substitutes to complements or from Cournot to Bertrand yields opposite results as to the incentive to share information. Gal-Or (1985) only finds a difference between Cournot and Bertrand. Finally Sakai (1985) finds that firms always share information, whether they act in a Cournot or Bertrand market or the products are substitutes or complements.

Kirby (1988) examines the incentives for firms in an oligopoly setting to share information about an unknown demand parameter. She finds that depending on the cost function one may find equilibrium in which information sharing occurs. The results of her welfare analysis are consistent with the fact that

government agencies often provide industry statistics. She suggests the interpretation that the government agencies are forcing information sharing for the benefit of the consumers when producers are unwilling to do the sharing through a trade association.

A provocative thought is that in those cases when trade associations collect data, information sharing may be harmful to consumers and when government agencies conduct the information collection and dissemination, this is beneficial for the consumers.

Jin (1994) studies information sharing through sales reports in Cournot and Bertrand duopolies with common demand uncertainty. He finds that information sharing via sales reports decrease consumer surplus and social welfare in a Cournot industry.

The inconclusive results from the theoretical studies above made Raith (1996) propose a general model for information sharing in an oligopoly. He claims that his model encompasses virtually all models in the existing literature on information sharing. This model, however theoretically appealing, remains to be tested empirically.

Nilsson (2000) examines the effects of search costs on prices in a Bertrand duopoly. It is shown that if the search costs are lowered, the expected price goes down in a one shot game. However in a repeated game, under some conditions, it may be easier to sustain collusion the lower the search cost. In other words increased transparency can facilitate collusion even if the sellers are unaffected. A transitory improvement of price transparency unambiguously leads to lower prices. Hence the model provides theoretical support for the price publication practices of consumers' councils.

2. Empirical applications

The two cases presented below represent what may happen when one increases prices and quantity information, respectively, in a market. In the first case study we will see an effect on prices when the transparency of prices was increased. The second case represents a discussion on what may happen to competition when an individual company's sales volume is made accessible to competitors.

In October 1993 the Danish antitrust authority, the Competition Council, decided to gather and regularly publish statistics on transaction prices of individual firms for two grades of ready-mixed concrete in three regions in Denmark.⁶ The intervention by the Competition Council was based on the belief that this market was characterised by some market imperfections through its oligopoly structure. The Competition Council proposed that increased market transparency was a remedy for this.

The product under consideration was ready-mixed concrete. Depending on how cement, gravel, sand and water are mixed, the strengths and time for the mixture to harden, vary. Different grades are imperfect substitutes. Concrete can only be kept in a mixer lorry for about two hours after the mixing, unless additives that delay hardening are mixed in. It can thus be concluded that a supplier serves only a limited geographic area (Albæk, S., P. Møllgaard and P. B. Overgaard (1997)).

The concentration in the ready-mixed concrete industry in Denmark was high, as reported by Albæk et al. (1997). They mention a nation-wide four-firm concentration ratio (CR_4) of 57 per cent. It should be noted that the distribution and transport technology makes the relevant market smaller than the country as a whole. In the article it is suggested that a radius of 20 km could be an appropriate delineation.

Price-setting in this industry *ex ante* the intervention was characterised on the one hand by rigid and publicly posted prices and on the other hand by secret price-cutting in individual deals. To increase competition in this industry, the Danish Competition Council thus decided to publish samples of the prices

and individual contracts, partly revealing existing discounts, roughly every three months. Albæk et al. (1997) shows a subsequent significant increase in the prices of the grades that the Competition Council chose to publish. This increase was matched neither by corresponding increases in the average of the concrete value for all grades, nor by increases in the price of cement.

Albæk et al. (1997, p. 441) conclude as follows: “We believe that the evidence in this paper indicates that the Danish Competition Council by providing reliable price reporting services, has unwittingly assisted firms in reducing the intensity of competition and thereby allowed them to increase prices. Hence this paper suggests that the potential for improved information flows to conflict with the efficient performance of markets is more than an artefact, as some antitrust practitioners may be inclined to argue.”

One may conjecture from the case above that if the possibilities of entry had been better, the increase in price due to better information on prices charged, may have led to an increase in the number of firms. Thus, before making the market more transparent it may be useful to investigate the possibilities of entry.

Further, we would argue that the same effects that were achieved by increasing price transparency could have been achieved by increasing the information on sales volumes.⁷ Since this would be an indirect channel to price information the timing is probably more important. Thus, the theory predicts that tacit collusion in a repeated game with imperfect information breaks down if the information is received very fast or very slow.⁸ In the former case because the amount of information will be very small, the possibility to defect increases more than the possibility to detect defection. In the latter case it breaks down due to the long time that passes before cheating is detected. Whether the timing leads to a decrease in competition is ultimately an empirical question. Our opinion is that antitrust practitioners should be wary of agreements that make it easy to quickly detect any marketing practices that increases individual firms markets share, thus making it easy to punish cheating before the profits from cheating can be reaped.

In the UK Agricultural Tractor Registration Exchange case before the European Commission (Decision of the Commission Feb.17, 1992), a company collected some tractor suppliers' sales data in England and distributed them among the tractor suppliers.⁹ The Commission prohibited the information exchange. This was the first time the Commission prohibited an information exchange that did not consist of price information. In this case the members received information on sales volume and market shares of individual firms. The data were further disaggregated into details such as models sold, product and group of products, geographic areas, daily and monthly sales. The data were available on a yearly, quarterly, monthly and even on a daily basis. In its decision the Commission specifically noted the oligopolistic market structure, the high entry barriers, and the limited import competition. Further, the nature of the information was important. Exact information on sales and market shares is usually considered a business secret, not to be revealed to, or shared with, competitors. The resulting increase in transparency threatened to destroy the hidden competition that may exist between the actors in this market. The information can be used to immediately counter any measure a competitor undertakes to increase its market share, for example by giving secret discounts. The result, as the Commission noted, is that fewer such actions will take place. The Commission also stated what kind of information sharing it would accept: A yearly exchange of old data on individual firms' sales; further, data on an aggregated level, so that sales of individual firms could not be identified.

The heart of the matter in the UK tractor case is that the possibility to detect collusion on prices in an oligopoly does not only depend on direct information on prices, but may be facilitated instead by information sharing on sales volume as well. Thus, the incentives to cut prices (secretly) were probably affected in the same way as in the case of the Danish concrete case.

3. Charging a trade association¹⁰

In a decision on the 7th of March 1995, the Swedish Competition Authority refused the Swedish Petroleum Products Trade Association's (Svenska Petroleuminstitutet, hereinafter abbreviated SPI) request for an exemption for an information sharing agreement among its members. The agreement consisted of sharing information on monthly sales and market shares in the markets for gasoline for motor vehicles, diesel fuel, and heating oil. The sharing of these statistics meant that the members were informed about each other's sales in the respective markets on a monthly basis. This gave the firms information on both aggregate and detailed firm data concerning the development of demand, within two weeks from the reporting of the data. One could argue that the anti-competitive impact of such an information sharing agreement is weakened by incentives firms have to falsely report their market results. In this case, however, the Swedish Bureau of Statistics was acting as a quality controlling entity, thus severely reducing the possibilities for the companies to falsify their reporting.

The Swedish Competition Authority's decision was later appealed to the Stockholm City Court, which did not uphold the Authority's decision.¹¹ The final court of appeal, i.e. the Market Court, subsequently rejected the Swedish Competition Authority's appeal of that decision.¹² A description of the market and the Competition Authority's arguments for preventing the information sharing and, finally, the courts' motivation for not upholding the decision of the Swedish Competition Authority are presented below.

The largest companies in the Swedish gasoline market are (abbreviations used in this paper follows in parenthesis) Preem Petroleum AB (Preem), Svenska Shell AB (Shell), Svenska Statoil AB (Statoil), OK-Q8 AB (OK-Q8),¹³ Norsk Hydro Olje Ab (Hydro) and Conoco Jet AB (Jet).

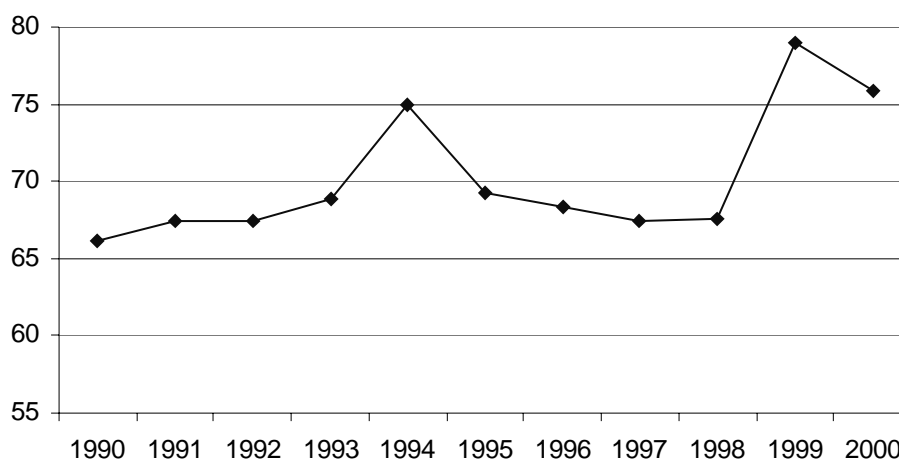
Multinational oil companies own all of these companies. It should be safe to conclude that the objectives and financial strengths of these companies do not differ significantly. Table 1 shows the market shares of the firms in the Swedish gasoline market. All are members of the SPI. As can be seen, the largest actors are OK-Q8, Statoil, Shell, Hydro and Preem. The challenger is Jet who specialises in distributing gasoline through a chain of automated filling stations. The volume sold in the gasoline market has declined somewhat, from 5630 000 m³ in 1990 to 5373 000 m³ in 2000. The CR4 in this market is 75.8 and the Herfindahl index is 1790.¹⁴ It is convenient for our purposes to divide the market into two parts, private consumers and companies. The larger buyers share is approximately 25 per cent of the gasoline market.

Table 1: Market shares in the Swedish gasoline market, year 2000

<i>Company</i>	<i>%</i>	<i>Volume in 1000 m3</i>
Hydro	12,3	663
Jet	9,5	508
OK-Q8	25,7	1380
Preem	10,9	583
Shell	14,4	774
Statoil	23,4	1257
Others	3,9	208
Sum	100,1	5373

Made from data obtained at the SPI (www.spi.se), 2001.

It is of interest to note the development of the CR4 in this market set out in the following figure:



[Underlining data were obtained from the SPI (www.spi.se), 2001.]

As the figure shows, market shares changed drastically on two occasions. Both can be explained by a merger/acquisition. In 1994 the company later called Preem got hold of the last 50 per cent of Texaco, an acquisition which started in 1989. In 1999, OK ekonomiska förening and Kuwait Petroleum Svenska AB merged into OK-Q8 AB. In addition to these changes, Hydro took two per cent of the market between 1990 and 1995 and Jet took almost three per cent of the market between 1990 and 2000. Statoil and Shell lost market shares during this period.

Entry into the gasoline market in Sweden requires good distribution channels. Entry also requires storage facilities fairly close to the outlets. The larger actors in the Swedish market have an agreement to share some of these facilities. Thus, one may assume that they have no interest in letting entrants be part of this agreement. Further, a network of outlets and means to transport the gasoline from the depots to the outlets and large customers is needed. One example of the problems this can cause is Jet's difficulties to establish itself in Norway. In 1999, Jet was denied deliveries from depots in Norway and thus has to ship gasoline from its depots in Sweden. In fact, five years after its entry into Norway Jet still had a market share lower than one per cent in the Norwegian market for gasoline.¹⁵

The conclusion is that for someone to enter this market and effectively compete requires huge financial resources. The existence of economies of scale may initially be a cost disadvantage for any entrant trying to build up its own capacity. Because the existing capacity seems to cover market needs at current prices, recovery of financial resources spent on building new capacity is unlikely in the near future.

The product (gasoline) is best characterised as homogenous. The chemical mix is virtually the same between the competitors, and changes very slowly. Product differentiation is mainly based on differences in the services surrounding the use of gasoline, geographical location and accessibility (e.g. opening hours of the outlet). In the short run the prospects for substitution from gasoline to something else is low.

The gasoline market is often characterised as Bertrand competition, i.e. the strategic variable is price. The price is well known to consumers and competitors. If one firm lowers price to gain market shares it has to be able to supply the demanded quantities so current capacity is an important constraint. An alternative description may be as a market in which the firms first "choose" capacity, and then compete on

prices. The equilibrium then reached is under certain conditions the same as under Cournot competition.¹⁶ The number of outlets is one important parameter for competition in this market.

The companies advertise gasoline prices in press releases and on signs at individual stations. Discounts on the advertised price are common and are given for example to companies that have separate agreements with the seller or through membership cards. The larger buyers thus regularly conduct negotiations with the sellers to establish the discounts. Information about the size of these discounts is not readily available to other consumers or to competitors. This opens up the possibilities for secret price-cutting.

2. Important determinants of the price of gasoline are the price of the raw material, taxes and other fees. The firms' costs of supplying gasoline are largely decided independently and outside the firms' control. The conclusion is that the larger actors in the Swedish market all face the same costs (assuming that they all enjoy the same economies of scale). With the exception of Jet, who has only automated stations, the level of service is probably equivalent among the larger competitors.

Given the above institutional factors, the Swedish Competition Authority claimed that the sharing of sales reports constituted an obstacle to competition in the gasoline market. The basis for *tacit collusion* rests shakily on the possibility of detecting cheating (see Stigler 1964 for one of the first discussions on this). The quicker¹⁷ individual firms that increase their market shares by offering large discounts are detected and punished by other participants in the collusive agreement, the lower are the incentives for cheating, implying an equilibrium farther from the efficient outcome than if no information sharing would have occurred.

Since there are no legal sanctions against anyone defecting from a tacit agreement, the sanctions must instead be credible threats, for example a price war. The information needed to detect a cheater may be sales data. If, for example firm A's sales volume declines this may be a result of two things. Either a competitor, firm B for example, has increased its market share or aggregate demand has decreased. Reasonably fresh sales data would help firm A to distinguish between those possibilities and to retaliate quickly against B if that is appropriate.

All the prerequisites for tacit collusion to work are present in the SPI information sharing case. Albach et al. (1996) list these as:

- the number of competitors is small
- the number of entries is small
- the change in production technology is small or slow
- the differences (between firms) in costs are small
- the companies' structures and interests coincide
- the companies' time preferences coincide
- the price-cutting is easy to detect
- the uncertainty of demand is small

In the SPI-case: the market is highly concentrated; the entry and exit barriers are high; the market shares are fairly stable over time;¹⁸ the possibility to substitute the products is low; and the product is homogenous.¹⁹ The Swedish Competition Authority claimed that through the information sharing agreement, it was possible for the participants to draw conclusions about rivals' marketing activities.

In the first court decision, the court claimed that aggressive marketing requires that firms' actions become known to buyers. Because of this, these actions also become known to competitors. Thus sharing the information on sales volume does not add anything to the information on prices that the company already had.²⁰

The higher court said, “[R]egarding other concerned products the price cannot be considered as well known. The investigation supports the SPI’s argument, that also these prices become known to the competitor in other and faster ways than through the information sharing. Even other marketing actions than price setting can be assumed to become known to all competitors almost immediately. As the Stockholm City Court found the [effect of the] means of competing normally used are discovered by the other members in the trade association before the changes in the sales volumes become known. However, the statistical information may give the management guidance as to the effects of certain actions [...]”²¹ On the grounds that the information sharing was not detrimental to competition in an appreciable way, the Competition Authority’s appeal was dismissed.

In the light of the decision taken by the European Commission in the UK tractor case the two Swedish court decisions are interesting. *Ex post* the Swedish Competition Authority needs to evaluate whether a better investigation, perhaps including some quantitative analysis may have produced a favourable result. Two important elements were basically missing from the investigation done by the Swedish Competition Authority. First, the focus should have been on the part of the market which was less transparent, i.e. where secret discounts were given to certain customers. Second, the investigation lacked a description of how the information on changing market shares can be used to detect aggressive market activities.

4. Conclusions

This paper sets out to answer the question: Can it be the case that competition will increase if information sharing among firms is prohibited? The hypothesis put forward is that tacit collusion may be harder to sustain when price transparency decreases (given certain structural and institutional settings) but exactly the same effect may result from information sharing on sales volumes.

In the Swedish SPI information sharing case the Swedish Competition Authority claimed that information sharing on individual firm sales volume may be as harmful to competition as information sharing on prices. The case was lost in the Swedish courts, likely due to a failure by the Competition Authority to investigate the case properly. Two important elements were missing. First, there should have been a focus on what was going on in the less transparent part of the Swedish gasoline market. In that part of the market some competition on prices existed. Second, the Swedish Competition Authority failed to explain what information on changing market shares conveys about individual firm activities in the less transparent market. The lesson to be learned is the need to better connect information sharing on volumes with effects on prices. This will remain an empirical question, to be tackled in each case.

In the light of the above described cases and the brief introduction to the economic literature on the subject treated in this paper, some implications for antitrust policy can be drawn. It should be mentioned that these are tentative conclusions, and that ultimately more empirical support for them would be desirable.

First, communication between firms that is private and that concerns individual sales volume and prices should be prohibited. It is hard to see any potential welfare gains from such communication. As suggested by Kühn (1997), if the information is public and especially if it includes some commitment towards the consumer, there may be some welfare gains.

Second, any exchange between firms on individual demand and cost data should be considered as having the potential to favour collusive outcomes.

Third, annual exchanges of aggregated data should be allowed. The potential for collusive use of such information is small, and the welfare gains are likely to be higher than is the case for more frequent exchanges of disaggregated data.

A natural step in the area of information sharing on prices and quantities would be to empirically investigate existing information sharing agreements, e.g. through different trade associations, and their likely effect upon competition, in the light of the theoretical and empirical advances discussed in this paper.

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NOTES

1. See for example Ministry of The Interior (1990) on the importance of increasing the price information to consumers.
2. The material in this paragraph is taken from Nilsson (2000).
3. These are (Carlton and Perloff, 1994): Homogenous good, perfect information, price taking behavior among buyers and sellers, no transaction costs, no externalities, free entry and exit.
4. We will partly discuss this when we discuss the "Danish Concrete case" below. We will then see that by increasing information on prices without affecting the level of entry barriers, we rather move further away from the perfect competition equilibrium that we wanted to achieve.
5. Raith (1996) claims that since the results for the private value models hold even if the correlation approach unity, making the situation equivalent to a common value model, this interpretation is inconsistent with the models. The argument he makes is that the only way that this could be consistent is with a profit function that is discontinuous in the underlying parameters.
6. The Danish case is built on the work by Albæk, S., P. Møllgaard and P. B. Overgaard (1996), Albæk, S., P. Møllgaard and P. B. Overgaard (1997) and Møllgaard, P and P. B. Overgaard (2000).
7. This conclusion is supported by Kühn (1997).
8. Segendorff (1999) p. 4.
9. The information on this case is taken from Albach, Jin and Schenk (1996).
10. We are grateful to Mats Bergman, former Chief Economist at the Swedish Competition Authority for help with the material.
11. Decision number Ä 8-38-95, dated 1998-12-08. Stockholm City Court. (In Swedish).
12. Decision number Dnr A 35/98, dated 1999-10-26. Market Court. (In Swedish).
13. OK-Q8 was formed in Januari 1999 following a merger of part of the OK ekonomiska förening and Kuwait Petroleum Svenska AB.
14. All numbers used in the calculations and elsewhere in this section, were obtained from SPI, www.spi.se.
15. This information was taken from the Swedish Competition Authority's market description as presented in court, see Decision number Dnr A 35/98, dated 1999-10-26. Marknadsdomstolen. (In Swedish).
16. Kreps, D. M. & J. A. Scheinkman (1983).
17. How fast is fast is a discussion with the same attributes as the discussion on when is a cost fixed. The two sides in the SPI-case had different views on this. Even if they could agree that the statistics was reported fast, the defendant claimed (see Ellingsen 1995) that this probably destroyed the possibility for tacit collusion. The argument (building on Abreu et al, 1991) is that when the implicit cartel is able to supervise the "agreement" only in an imperfect manner, increasing how rapid information is given also increases the occasions to defect. In its answer to this argument, the Swedish Competition Authority pointed out that there were few incentives for the firms to agree to anything that would not lead to higher profits for all the

participants. Thus it was argued, the firms would set the length between the reports in such a manner as to facilitate collusion, otherwise the incentive to participate would be lost.

18. This is more often a result of, than a prerequisite for collusion.
19. Also: "Scott (1991) shows that multi-market contact is important. Large conglomerates may be potential rivals in a number of markets simultaneously. They can communicate about all these markets at once. It is potentially more costly to deviate from a cartel agreement in one because it risks destroying all cartel agreements. To the degree multi-market contact is important, the degree of concentration in a single may be misleading (Carlton and Perloff 1994 p.188). Note that most of the significant actors in the Swedish gasoline market are found competing in other markets as well. This may be added as further support for the possibility of tacit collusion.
20. Decision number Ä 8-38-95, dated 1998-12-08. Stockholms Tingsrätt. (In Swedish).
21. Our translation from Decision number Dnr A 35/98, dated 1999-10-26. Marknadsdomstolen. (In Swedish).
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SUISSE

Introduction

La présente contribution s'inscrit dans le cadre de la table ronde sur "la transparence et l'information sur les prix: est-ce que la publication des prix et autres tarifs facilite la collusion ou aide les consommateurs?" Elle expose, à l'aide d'exemples concrets, les différentes interventions que les autorités suisses de la concurrence ont menées ces dernières années à l'égard de mesures privées et publiques en matière de transparence sur les prix. La première partie se concentre sur les recommandations de prix des associations professionnelles. La seconde partie traite de l'importance de la transparence dans l'analyse de la dominance collective. La troisième partie est consacrée aux interventions des autorités de la concurrence dans le processus législatif visant à améliorer la transparence sur les prix. La quatrième partie tire quelques enseignements.

1. Interventions des autorités de la concurrence à propos de mesures prises par les associations professionnelles pour augmenter la transparence sur les prix: l'exemple des recommandations de prix

1.1 Fondements

En Suisse, la vie associative professionnelle est encore très présente tant au niveau local, régional, cantonal que national. Nombreuses sont les associations, unions, fédérations, sociétés, groupements, chambres de commerce et autres confréries réunissant les professionnels d'un corps de métier ou d'une branche d'activité. Leur organisation est souvent calquée sur le système fédéraliste suisse, comprenant les associations cantonales réunies sous l'égide d'une association faitière. Traditionnellement, elles ont pour compétence statutaire d'édicter, à l'attention de leurs membres, des listes de prix et autres tarifs indicatifs.

A première vue, ces listes de prix peuvent être utiles non seulement aux professionnels de la branche en question, mais aussi aux acheteurs et consommateurs de biens ou services concernés. En effet, ces tarifs permettent aux premiers de connaître le prix à facturer. Ils donnent aux seconds la possibilité de comparer les prix recommandés avec ceux qui sont effectivement pratiqués.

Au regard du droit suisse de la concurrence, les recommandations de prix *sont des accords en matière de concurrence* au sens de l'art. 4 al. 1 de la loi sur les cartels (LCart¹) dans la mesure où ils constituent des conventions adoptées par leurs membres la plupart du temps lors des assemblées générales. Elles doivent être interprétées comme l'expression fidèle de la volonté de ses membres de coordonner leur comportement sur le marché. En décidant à la majorité de l'augmentation ou non des tarifs, les membres des associations professionnelles s'accordent directement sur le prix des prestations qu'ils s'engagent à facturer à leurs clients. Le fait que ces tarifs soient ensuite diffusés par le biais de l'association sous forme de tarifs *conseillés* – et donnent ainsi l'impression qu'ils constituent une décision unilatérale de celle-ci - a pour effet de les qualifier de conventions sans force obligatoire.

Selon l'art. 5 LCart², les accords en matières de concurrence sont illicites 1) s'ils suppriment la concurrence ou 2) s'ils l'affectent notablement sans être justifiés par des motifs d'efficacité économique. S'agissant du 1^{er} cas de figure, la loi présume que la concurrence est supprimée lorsque des entreprises concurrentes s'entendent sur certains paramètres concurrentiels, tels que le prix (art. 5 al. 3 LCart). Cette présomption peut toutefois être renversée lorsque la concurrence interne ou externe existe malgré l'accord. Quant au 2^{ème} cas de figure, la justification est double. L'accord doit non seulement être nécessaire pour atteindre l'efficacité économique, mais aussi ne pas donner aux entreprises concernées la possibilité de supprimer la concurrence efficace.

L'appréciation des recommandations de prix par les autorités de la concurrence est donc délicate. Elle dépend essentiellement de l'accueil que les membres des associations réserveront aux recommandations de prix. Si toute la branche applique les recommandations, la concurrence sera supprimée et les recommandations seront déclarées illicites. Si elles ne sont pratiquement pas suivies, elles n'affecteront pas notablement la concurrence. Entre ces deux extrêmes, il y a encore place pour une large palette de situations. L'analyse de cas concrets illustrera la façon dont les autorités suisses de la concurrence ont appréhendé cette problématique.

1.2 *Analyse de cas concrets*

Tarifs des associations des professionnels de l'immobilier.³ Le secrétariat de la Comco [Commission de la concurrence] a ouvert plusieurs enquêtes préalables concernant les tarifs recommandés de certaines associations professionnelles sur le marché immobilier, en particulier la gérance d'immeubles et le courtage immobilier. Les résultats de ses investigations ont démontré que lesdits tarifs constituaient bel et bien des accords en matière de concurrence. Cependant, ils n'affectaient pas notablement la concurrence compte tenu non seulement de la forte concurrence actuelle (état général du marché, nombre élevé de concurrents, excellente substituabilité des services et disparité élevée des tarifs), mais aussi de l'importante concurrence potentielle sur le marché (faibles barrières à l'entrée, nouveaux entrants sur le marché).

Tarifs de l'association suisse des traducteurs, terminologues et interprètes (ASTTI).⁴ Les statuts de l'ASTTI contenaient des tarifs minimum servant de base pour le calcul des honoraires liés aux traductions. Le secrétariat de la Comco a ouvert une enquête préalable pour examiner dans quelle mesure ces tarifs limitaient la concurrence sur les marchés des traducteurs, terminologues et interprètes. Au cours de la procédure, l'ASTTI a décidé de supprimer tout tarif minimum, permettant ainsi de clore l'enquête préalable sans suite.

Tarifs recommandés des moniteurs auto-école de l'AFEC.⁵ Le 4 novembre 1998, l'association des écoles de circulation du canton de Fribourg (AFEC) a émis des tarifs conseillés pour les leçons de conduite, valables dès le 1^{er} janvier 1999. Selon les statuts de l'AFEC, les moniteurs devaient afficher la liste de prix dans leurs locaux et la transmettre à leurs élèves. L'enquête a démontré que le tarif pour les *cours de sensibilisation au trafic* était suivi par environ 77 *pour cent* des moniteurs offrant cette prestation dans le canton de Fribourg. Le tarif pour les *cours de conduite auto* (Fr. 80.-/50 min.) était appliqué par environ 44 *pour cent* de tous les moniteurs enseignant les cours de conduite auto dans ce canton. Le tarif pour les *cours de conduite camion* (sans remorque: Fr. 140.-/ 50 min.) était respecté par 76 *pour cent* de l'ensemble des moniteurs offrant cette prestation dans ledit canton. Par conséquent, la Comco a constaté que les tarifs conseillés de l'AFEC pour les cours de base pour élèves motocyclistes, pour les cours de sensibilisation au trafic ainsi que pour les leçons de conduite auto (cat. B, y compris casco) et camion (cat. C) étaient des accords illicites. Elle a interdit aux membres actifs de l'AFEC de s'entendre sur les tarifs et d'utiliser l'ancienne liste des tarifs de l'AFEC dans l'exercice de leur activité professionnelle.

Prix des journaux tessinois.⁶ Le 12 octobre 1998, les trois quotidiens du canton du Tessin (Corriere del Ticino, Regione et Giornale del Popolo) réunis dans l'association ATEG ont informé leurs lecteurs que l'abonnement 1999 pour chacun des quotidiens augmenterait de 10 CHF, passant ainsi de 260 à 270 CHF. Le prix de vente aux kiosques est par contre resté inchangé (1.70 francs). Depuis de nombreuses années, le prix d'abonnement et le prix de vente aux kiosques des trois quotidiens est exactement le même. Les parts de marché, calculées en tirages, sont restées quasiment inchangées: Corriere del Ticino (39 pour cent), la Regione (28 pour cent) et le Giornale del Popolo (33 pour cent). Sur la base de ces faits, le secrétariat de la Comco a estimé qu'il existait un accord sur les prix au sens de l'article 5 alinéa 3 LCart. Les parties ont alors convenu de conclure un accord à l'amiable⁷ par lequel elles se sont engagées à ne pas se communiquer des informations concernant les prix avant la publication de ces derniers et à renoncer à la fixation commune ainsi qu'à la publication commune des prix. En respectant l'accord à l'amiable, les parties ont supprimé l'état de fait qui aurait pu constituer un accord illicite au sens de l'article 5 LCart. L'enquête a été close sans examen au fond du comportement des parties à la lumière de la loi sur les cartels.

Recommandations de prix des associations de cafetiers-restaurateurs.⁸ A la fin novembre 1998, le secrétariat de la Comco a appris par la presse que cinq associations cantonales romandes de cafetiers-restaurateurs avaient émis à l'attention de leurs membres des recommandations de prix pour certaines boissons servies couramment dans la restauration. Pour justifier la hausse des prix des boissons, les associations ont invoqué différents arguments (hausse de la TVA de un pour cent au 1^{er} janvier 1999, stagnation des prix depuis plusieurs années, hausse des salaires, réponse aux besoins exprimés par les restaurateurs). Le secrétariat a conclu à des indices selon lesquels ces recommandations auraient produit un effet de nivellement des prix vers le haut, ce qui aurait pu constituer un accord illicite au sens de l'article 5 LCart. La hausse généralisée des prix excédait celle de la TVA. Le 16 décembre 1999, lors d'un entretien entre des représentants du secrétariat et ceux de Gastrosuisse, les parties ont présenté un projet d'accord à l'amiable par lequel elles s'engageaient à ne plus émettre à l'avenir de recommandations de prix que ce soit de manière explicite ou implicite, de manière directe ou indirecte, par écrit, par oral ou par tout autre moyen. En respectant l'accord à l'amiable, les parties ont supprimé l'état de fait qui aurait pu constituer un accord illicite au sens de l'article 5 LCart. L'enquête au sens de l'article 27 a dès lors été close sans examen définitif du comportement des parties à la lumière de la loi sur les cartels. La Commission de la concurrence a approuvé l'accord à l'amiable en imposant aux cinq associations concernées de le communiquer à leurs membres.

Sanphar.⁹ L'Association Sanphar réglementait l'ordre des marges et des rabais en matière de distribution des médicaments en Suisse, ainsi que les conditions imposées aux grossistes de l'association. Les prix, rabais et autres marges étaient fixés dans un tableau qui faisait l'objet d'une publication (cf. annexe 1). Le 7 juin 2000, la Comco a décidé d'interdire ces accords car ils affectaient notablement la concurrence. En matière de prix (marges et rabais), l'accord Sanphar s'appliquait à trois niveaux. Premièrement, les importateurs et les producteurs de médicaments s'entendaient pour n'octroyer aux grossistes que des rabais se situant dans une fourchette de plus ou moins deux pour cent du prix *ex factory*. Deuxièmement, les grossistes ne pouvaient octroyer à leurs clients des rabais dépassant la marge des grossistes-Sanphar. Troisièmement, les pharmaciens, les droguistes et les médecins dispensants devaient fixer leurs marges selon un pourcentage ou une somme déterminée en fonction des prix de vente finaux des médicaments. Quant aux conditions appliquées aux grossistes, l'accord Sanphar réglementait la gamme minimale de produits et de clients dont devaient disposer les grossistes qui désiraient profiter de conditions d'achat avantageuses auprès d'un producteur ou d'un importateur. Les conditions fixées par cet accord constituaient des barrières à l'entrée sur le marché de nouveaux grossistes pouvant concurrencer les entreprises déjà établies.

2. **Importance de la transparence du marché dans l'étude de la dominance collective**

La transparence du marché est aussi un des indicateurs servant à mesurer la capacité des entreprises à dominer collectivement un marché.¹⁰ Selon la théorie des jeux, la transparence est un élément important permettant aux entreprises concurrentes d'adopter et de maintenir durablement un comportement collusoire ou parallèle sur le marché. En effet, lorsque les tarifs sont transparents, les entreprises peuvent plus facilement surveiller le comportement de leurs concurrents. Il suffit que cette transparence soit complétée par un mécanisme d'échanges périodiques d'informations sur les quantités vendues durant une certaine période pour que chaque entreprise puisse suivre en permanence l'évolution des ventes de ses concurrents et adapter son propre comportement en conséquence.

Dans le cadre du contrôle des opérations de concentrations, la Comco a eu l'occasion de se pencher à plusieurs reprises sur la problématique de la transparence des prix d'entreprises en position dominante collective. Lors de l'examen de la concentration des sociétés de révision **Price Waterhouse/STG-Cooper & Lybrand**¹¹, la Comco s'est demandée si l'opération en question créait ou renforçait une position dominante collective. Elle a répondu par la négative dans la mesure où les produits offerts par les entreprises actives sur le marché de la révision sont plutôt hétérogènes, ce qui conduit en général à rendre le marché moins transparent. En effet, les mandats de révision contiennent une palette de prestations individuelles spécifiques aux besoins des clients. Lors d'un appel d'offres, les entreprises rendent leur offre attractive en proposant des services sur mesure. Le contenu et le prix définitif du mandat de révision ne sont pas connus des concurrents. C'est pourquoi, il est difficile de comparer les produits d'une société de révision par rapport à une autre. S'il en allait autrement et que le service de révision était un bien homogène, il ne serait pas nécessaire de présenter des dossiers de candidatures volumineux, de mener plusieurs rondes de discussion avec les adjudicateurs ou de dépenser des centaines de milliers de francs pour participer à un appel d'offres.

La Comco a également analysé l'influence de la transparence du marché sur la dominance collective lors de la fusion des deux grandes **banques suisses UBS/SBS**.¹² Bien qu'elle ait considéré le marché des crédits commerciaux inférieurs à 2 millions comme transparent, la Comco n'a finalement pas tranché la question de la création ou du renforcement d'une dominance collective dans la mesure où les charges imposées à l'UBS permettaient d'exclure ce risque.

3. **Interventions des autorités de la concurrence dans le processus législatif visant à améliorer la transparence sur les prix**

3.1 *Ordonnance sur l'indication des prix*

La Suisse a adopté le 11 décembre 1978 une ordonnance sur l'indication des prix (OIP)¹³ qui vise à assurer une indication claire des prix, permettant de les comparer et d'éviter que l'acheteur ne soit induit en erreur. Cette ordonnance améliore la transparence sur les prix : 1) pour les marchandises offertes aux consommateurs, 2) pour les actes juridiques conclus par des consommateurs tels que les ventes par acomptes ou le leasing, 3) pour certaines prestations de services (p.ex. coiffeurs, garagistes, restaurateurs, taxis, agences de voyages) et 4) pour la publicité s'adressant aux consommateurs.

Selon l'ancienne version de l'OIP, pouvaient émettre des listes de prix non seulement les producteurs, les importateurs et les grossistes, mais aussi les associations professionnelles. Cette dernière possibilité ont conduits certaines branches à en adopter. Ainsi, l'association suisse des agences de voyages avait établi une liste de prix relatifs aux frais demandés aux clients pour la constitution du dossier et pour la réservation de voyage de dernière minute. Ces listes constituaient en fait des accords de prix au sens de la LCart qui limitaient la concurrence entre les agences de voyage. Les autorités de la concurrence sont

intervenues pour demander la modification de l'OIP de façon à éviter que cette ordonnance donne l'impression que les listes de prix des associations ne sont pas problématiques du point de vue de la concurrence. En effet, les listes de prix émises par les producteurs, les importateurs ou les grossistes peuvent être bénéfiques aux consommateurs car elles leur permettent de mieux comparer les produits et les services. Par contre, de telles listes augmentent fortement le risque de collusion lorsqu'elles sont émises par des associations professionnelles. Dans ce dernier cas, elles correspondent à des accords horizontaux sur les prix entre entreprises concurrentes. La Comco a donc demandé la suppression des dispositions litigieuses. Elle a insisté sur le fait que les listes de prix ne peuvent être qu'indicatives et que les prix doivent être fixés de façon indépendante par les entreprises elles-mêmes.¹⁴

3.2 *Communication sur les aides de calcul*

Il est courant qu'une organisation professionnelle fournisse à ses membres des aides de calcul et de gestion. Celles-ci sont tolérables lorsqu'elles permettent à l'utilisateur de calculer ou d'évaluer de façon autonome les coûts de son produit en vue de la fixation du prix de vente. Les schémas de calcul peuvent aussi être utiles aux consommateurs lorsqu'ils leur permettent de prévoir le prix des biens ou des prestations qu'ils désirent obtenir. Toutefois, les aides de calcul peuvent avoir une influence néfaste sur la concurrence lorsqu'ils prennent la forme de tarifs applicables à toutes les entreprises d'une branche indépendamment de leur propre structure de prix de revient.

Dans ce domaine, le droit suisse de la concurrence prévoit que la Comco peut, par voie de communication, fixer les conditions auxquelles des accords en matière de concurrence (p.ex. les accords concernant l'utilisation de schémas de calcul), sont en règle générale réputés justifiés par des motifs d'efficacité économique (art. 6 al. 1 let. b LCart).

La Comco a précisé la notion de "schéma de calcul" dans sa Communication "conditions d'admissibilité, conformément à la Loi sur les cartels, d'accords sur l'utilisation de schémas de calcul" du 4 mai 1998 (ci-après: Communication, cf. annexe 2)¹⁵. Selon l'art. 2 de cette Communication, "les schémas de calcul sont des indications générales et des bases de calcul standardisées qui permettent aux utilisateurs de calculer ou d'évaluer les coûts de leurs produits ou de leurs services en vue de la détermination ou de l'évaluation de leurs prix de vente". Tel est le cas lorsque les schémas de calcul 1) sont limités aux données et formules servant à calculer les coûts, 2) servent à échanger des connaissances et des compétences en matière de calcul des coûts, 3) laissent aux parties la liberté de déterminer les conditions de prestation, de livraison, d'achat (prix d'achat, rabais) et 4) ne contiennent pas d'échanges d'informations qui donnent des renseignements sur le comportement effectif des entreprises lors de l'établissement d'offres ou de la détermination des prix finaux et des conditions (art. 3 Communication).

Les autorités de la concurrence se sont penchées à plusieurs reprises sur la problématique des aides de calcul et leurs effets sur la concurrence:

- Tout d'abord, le secrétariat de la Comco a clos une enquête préalable qu'il avait ouvert à l'encontre des aides de calcul utilisées par les membres de l'Association suisse des opticiens (ASO).¹⁶ Bien que les schémas de calcul en cause aient été illustrés par des exemples chiffrés précis permettant de calculer le prix de vente final, le secrétariat de la Comco n'a pas constaté de suppression de la concurrence efficace dans la mesure où ils n'étaient suivis par les opticiens que dans une faible proportion. En raison de la liberté laissée aux utilisateurs, des grandes différences de prix sur le marché suisse et du niveau général de prix comparable à celui de l'Allemagne ou de l'Autriche, l'autorité de la concurrence a estimé que les aides de calcul de l'ASO n'affectaient pas la concurrence de façon notable. Cette appréciation était aussi corroborée par le faible risque d'uniformisation des prix, étant donné que les aides de

calcul étaient peu suivies. De plus, l'ASO ne diffusait pas de listes générales de prix. Au contraire, elle encourageait vivement ses membres à adapter les aides de calcul de façon personnelle. Le secrétariat a cependant émis une réserve à propos de l'exemple de prix forfaitaire fourni par ces aides de calcul dans la mesure où il pouvait être considéré comme un élément indépendant du schéma de calcul, dont la loi présume qu'il entraîne la suppression de la concurrence efficace (art. 5 al. 3 LCart).

- Ensuite, la Comco a traité cette problématique dans l'enquête sur les tarifs recommandés des moniteurs de conduite de AFEC (cf. ci-dessus)¹⁷. Dans ce cas, certains moniteurs auto-école ont tenté de justifier leurs accords de prix en relevant que les tarifs conseillés de l'AFEC leur fournissaient une aide de calcul. A leur avis, une telle aide leur donnait les moyens d'élaborer leur tarif. La question qui s'est alors posée était de savoir si les tarifs conseillés de l'AFEC pouvaient constituer une sorte de schéma de calcul (art. 6 al. 1 let. b i.f. LCart). Dans le cas d'espèce, la diffusion de tarifs recommandés a incité les membres de l'AFEC à aligner leurs tarifs, abstraction faite de leur prix de revient. Une telle méthode a dissuadé les entreprises dont les prix de revient étaient les plus bas de baisser leurs prix, procurant ainsi un avantage artificiel aux entreprises maîtrisant moins leurs coûts de production.¹⁸ En se référant à des prix de vente, les recommandations de prix de l'AFEC ne donnaient pas aux entreprises des simples indications facilitant le calcul autonome de leurs propres structures de prix de revient. Elles ne constituaient donc pas des schémas de calcul au sens de l'art. 2 de ladite Communication.
- Enfin, la Comco a récemment accepté un accord amiable avec la Chambre genevoise d'étanchéité et de l'asphaltage (CGE).¹⁹ Cette association avait émis une liste de prix qu'elle éditait sous forme d'une "série de prix, travaux en régie et au mètre". Dès lors que les membres de la CGE s'engageaient à ne plus éditer à l'avenir de telle liste de prix, la question de l'illicéité de celle-ci a été laissée ouverte. Toutefois, il a été relevé que la liste de prix en question ne pouvait pas être considérée comme une aide de calcul au sens de la Communication. Elle constituait en fait un accord illicite dans la mesure où elle était effectivement suivie par les membres de la CGE.

3.3 *Prises de position des autorités de la concurrence sur des actes législatifs visant à augmenter la transparence sur les prix*

Une tâche essentielle des autorités de la concurrence consiste à intervenir dans le processus législatif lorsque des actes normatifs cantonaux ou fédéraux sont contraires à la concurrence. Elle le fait en formulant des recommandations (art. 45 LCart) et des préavis (art. 46 LCart). Il convient d'illustrer ici par quelques exemples les applications de ces prérogatives pour mesurer l'influence de ses interventions sur la législation en matière de transparence et d'information sur les prix.

Suppression des tarifs étatiques pour les honoraires des avocats. La Comco est intervenue à plusieurs reprises pour demander aux autorités législatives de supprimer ou de ne pas introduire de tarifs étatiques pour les prestations des avocats. Premièrement, elle a demandé que la nouvelle loi fédérale sur la libre circulation des avocats en Suisse (c'est-à-dire d'un canton à l'autre) ne contiennent aucune disposition instituant un régime de recommandations cantonales en matière d'honoraires.²⁰ Deuxièmement, elle a demandé que soient supprimées les dispositions étatiques fixant les dépens dus par la partie qui succombe pour les frais causés à la partie adverse par le litige. En effet, l'expérience démontre que ces tarifs servent aussi de référence pour le calcul des honoraires des avocats pour les affaires non seulement judiciaires, mais aussi extrajudiciaires.²¹ Troisièmement, elle est aussi intervenue pour demander de supprimer les dispositions légales par lesquelles le juge fixe le montant définitif des honoraires que les avocats sont en droit de demander à leurs clients.²²

Introduction de la publicité pour les professionnels de la santé dans les lois cantonales sur la santé publique. La Comco a aussi encouragé les autorités de plusieurs cantons²³ de permettre aux professionnels de la santé de faire de la publicité. En effet, les restrictions cantonales à la liberté de faire de la publicité sont valables pour tous les professionnels de la santé sans distinction, limitant ainsi la concurrence au détriment des patients. Cette absence de concurrence favorise en général les intérêts des prestataires bien implantés, aux dépens des patients et des praticiens moins importants ou établis de moins longue date. L'autorisation de la publicité réduirait l'"asymétrie de l'information"²⁴ existant entre le patient et le professionnel de la santé, favoriserait l'efficacité et l'innovation²⁵ et permettrait aux (nouveaux) prestataires de soins de se faire connaître et d'entrer plus facilement sur le marché. La Comco n'a pas retenu l'argument selon lequel la libéralisation de la publicité favoriserait obligatoirement une surconsommation de prestations médicales et, partant, une augmentation incontrôlée des coûts de la santé.²⁶ Il est faux de croire que la publicité se focaliserait uniquement sur de simples comparaisons de prix, chassant les professionnels les plus aptes dans leur art au profit des seuls gestionnaires. Le marché de la santé est un domaine où la qualité joue un rôle plus important que les prix encore largement prescrits par l'État. Cette qualité est du reste mieux assurée par les normes garantissant un certain standard de qualité que par des limitations de la publicité. Par ailleurs, les risques de dérive sont limités non seulement par la loi fédérale sur la concurrence déloyale qui permet de réprimer la publicité trompeuse ou mensongère, mais aussi par le secret médical qui évite que les professionnels de la santé fassent de la publicité " personnalisée ".

4. Enseignements

En guise de conclusions, nous tirons deux types d'enseignement. Le premier a trait aux mesures privées visant à améliorer la transparence sur les prix, en particulier les recommandations de prix des associations professionnelles. Le second touche aux effets de l'intervention étatique dans la promotion de la transparence sur les prix.

4.1 *Effets des recommandations de prix émises par les associations professionnelles*

Les cas examinés par les autorités suisses de la concurrence démontrent que les recommandations de prix émises par les associations professionnelles ont généralement des **effets néfastes sur la concurrence** dans la mesure où elles :

- *affectent notablement, voire suppriment la concurrence efficace* sur le marché. C'est le cas lorsque la recommandation est suivie par la plupart des membres de l'association, influence le comportement des non-membres ou entraîne une hausse généralisée du niveau des prix. En effet, la pratique horizontale d'élaboration et de diffusion des tarifs conseillés est une activité régulière et constante de nombreuses associations professionnelles.²⁷ Comme cette activité dure généralement depuis de nombreuses années, la fixation de prix même simplement recommandés affecte le jeu de la concurrence dans la mesure où elle permet à tous les acteurs du marché de prévoir avec un degré raisonnable de certitude quelle sera la politique de prix poursuivie par les concurrents. Cette pratique est donc particulièrement nuisible lorsqu'elle influence le comportement concurrentiel non seulement des membres de l'association concernée, mais aussi des éventuelles entreprises qui n'en font pas partie.
- *n'augmentent ni l'intensité de la concurrence sur la qualité ni l'innovation des produits.* On pourrait croire que les entreprises qui fixent des prix se feront concurrence sur d'autres paramètres concurrentiels, par exemple la qualité et l'innovation. En fait le risque est tout autre. Comme le prix est habituellement aussi un signal de la qualité d'un produit, son

uniformisation par la transparence n'incite pas les fabricants à améliorer la qualité ou à innover, ce qui diminue finalement le choix à disposition de l'acheteur.

De plus, au regard des cas examinés, les recommandations de prix émises par les associations professionnelles ne sont **généralement pas été très utiles pour les consommateurs** dans la mesure où elles :

- *n'améliorent pas systématiquement la transparence du marché.* On pourrait croire que des prix clairement affichés diminuent les coûts de recherche des acheteurs dans la mesure où la transparence sur les prix leur évitent de perdre du temps à trouver des produits meilleur marché. Cela ne se vérifie pas pour les produits hétérogènes. Dans ce cas, si les prix sont rendus uniformes par les recommandations de prix, les acheteurs choisiront en fonction de la qualité des produits. Ils passeront alors leur temps à apprécier les différentes composantes de la qualité des produits. Cette comparaison de qualité ne sera pas plus facile que la comparaison des prix. Elle engendrera des coûts élevés.
- *n'améliorent pas forcément la prévisibilité des coûts.* Dans le domaine des services, il est difficile de savoir à l'avance combien coûtera le prix définitif d'une prestation d'avocat ou d'architecte. Afficher un prix à l'heure ne permettra alors pas à l'acheteur de prévoir le coût de la facture finale. En effet, le coût de la prestation est déterminé par la quantité, la complexité des travaux à effectuer multiplié par le coût horaire. L'acheteur pourra difficilement faire un budget sur la base du tarif-horaire de son prestataire. De plus, en raison de l'asymétrie de l'information, le vendeur peut influencer le volume de prestations dont à besoin l'acheteur. Cela s'est vérifié dans le cas des moniteurs de conduite de l'AFEC (cf. ci-dessus) où la plupart des élèves conducteurs prennent des leçons de conduite auprès d'un moniteur avant de passer leur permis (90 pour cent) car ils ne connaissent pas les exigences des examinateurs cantonaux. Ne pouvant que difficilement estimer eux-mêmes le moment à partir duquel ils sont prêts à passer l'examen de conduite, les élèves-conducteurs se fient à l'appréciation de leur moniteur. Celui-ci peut ainsi influencer le nombre d'heures de conduite nécessaires à la préparation de leurs élèves.
- *ne protègent pas l'acheteur des prix surfacts.* On pourrait croire que les recommandations de prix évitent aux acheteurs de payer des prix surévalués puisque tous les offreurs exigent le même prix. En réalité, l'uniformisation des prix poussent les offreurs à diminuer la qualité de leur produit. Les acheteurs paieront finalement un prix surfact par rapport à la qualité offerte.

4.2 Promotion de la transparence par voie législative

En légiférant, l'État peut améliorer ou diminuer la transparence des prix sur le marché. Il est donc important que son action se fasse au profit de la concurrence et des consommateurs.

Lorsqu'il veut permettre aux consommateurs de mieux comparer les prix en améliorant la transparence des prix, l'État ne doit pas simultanément augmenter les risques de collusion. Pour parer à cet écueil, il doit éviter de donner aux entreprises les moyens de mieux s'entendre sur les prix. Une base légale fixant uniquement l'obligation et la manière d'indiquer les prix permet aux acheteurs de les comparer sans être induit en erreur. Une fois les bases de comparaison harmonisées, le consommateur doit faire l'effort de comparer les prix des biens et prestations offertes sur le marché. Ce travail ne doit pas être facilité par des dispositions légales permettant à toutes les entreprises d'une branche de s'entendre sur les prix (cf. supra ch. 15 s).

S'il entend protéger le consommateur, l'État doit éviter d'adopter des dispositions qui pourraient nuire à la transparence du marché. S'il le fait, il risque de le maintenir dans une trop grande ignorance,

accentuant ainsi l'asymétrie d'information qui peut le séparer de son cocontractant. Ainsi, doit-il donner la possibilité aux entreprises de se faire connaître des consommateurs en autorisant plus largement la publicité, même dans des domaines aussi sensibles que les professions de la santé.

NOTES

1. Art. 4 al. 1 LCart : "*Par accords en matière de concurrence, on entend les conventions avec ou sans force obligatoire ainsi que les pratiques concertées d'entreprises occupant des échelons du marché identiques ou différents, dans la mesure où elles visent ou entraînent une restriction de la concurrence*".
2. Art.5 LCart :
 - al. 1 : "*Les accords qui affectent de manière notable la concurrence sur le marché de certains biens et services et qui ne sont pas justifiés par des motifs d'efficacité économique, ainsi que tous ceux qui conduisent à la suppression de la concurrence efficace, sont illicites.*
 - al. 2 : *Un accord est réputé justifié par des motifs d'efficacité économique :*
 - a. *lorsqu'il est nécessaire pour réduire les coûts de production ou de distribution, pour améliorer des produits ou des procédés de fabrication, pour promouvoir la recherche ou la diffusion de connaissances techniques ou professionnelles, ou pour exploiter plus rationnellement des ressources ; et*
 - b. *lorsque cet accord ne permettra en aucune façon aux entreprises concernées de supprimer la concurrence efficace.*
 - al. 3 : *Sont présumés entraîner la suppression de la concurrence efficace dans la mesure où ils réunissent des entreprises effectivement ou potentiellement concurrentes, les accords :*
 - a. *qui fixent directement ou indirectement des prix ;*
 - b. *qui restreignent des quantités de biens ou de services à produire, à acheter ou à fournir ;*
 - c. *qui opèrent une répartition géographique des marchés ou une répartition en fonction des partenaires commerciaux. "*
3. Revue "Droit et politique de la concurrence" (DPC) 1998/2, p. 185 ss et 189 ss.
4. DPC 1998/2, p. 203 ss.
5. DPC 2000/2, p. 167 ss. Le recours interjeté par l'AFEC a été récemment rejeté par la Commission de recours (Décision du 12 mars 2001, DPC 2001/1, p. 200 ss).
6. DPC 2000/1, p. 16 ss.
7. Selon l'art. 29 LCart, "*si le secrétariat de la Comco considère qu'une restriction à la concurrence est illicite, il peut proposer aux entreprises concernées un accord amiable portant sur les modalités de la suppression de la restriction. L'accord amiable requiert la forme écrite et doit être approuvé par la Comco.*"
8. DPC 2000/1, p. 25 ss.
9. DPC 2000/3, p. 320 ss.
10. Mini-Roundtable on Oligopoly. Note by Switzerland, DAF/CLP, WD(99)1. Cf. aussi P. Gugler, Principaux indicateurs de dominance collective dans le cadre du contrôle préventif des concentrations, RDAI 1998/8, p. 919 ss.

11. DPC 1998/2, p. 242 ss, 244 s.
12. DPC 1998/2, p. 309 ss, 311.
13. RS 942.211.
14. RO 1999 1637
15. DPC 1998/2, p. 354 ss.
16. DPC 1997/2, p. 146.
17. PC 2000/2, p. 167 ss.
18. R. von Büren: Politique de la concurrence 1999, La Vie économique 10/1999, p. 24 s.
19. DPC 2001/1, p. 110 ss.
20. DPC 1997/3, p. 388 et 1997/4, p. 579 s.
21. DPC 1997/4, p. 582 s. et DPC 1998/1, p. 30 s.
22. DPC 1999/4, p. 616 s.
23. Dans le canton de Vaud (DPC 2000/1, p. 97 ss) et le canton de Fribourg (DPC 2000/4, p. 685 ss).
24. D.W. Carlton / J.M. Perloff: *Modern Industrial Organization*, 2ème éd., Berkeley / New York 1994, p. 554 ss, 558 s et 606 ss.
25. Cf. L. Benham: *The Effect of Advertising on the Price of Eyeglasses*, 15 Journal of Law and Economics 1972, p. 337 ss. Lire aussi R.Bond / J.Kwoka / J.Phelan / I.Whitten: *Effects of Restrictions of Advertising and Commercial Practice in the Professions: the Case of Optometry*, Bureau of Economics of the Federal Trade Commission, Washington D.C. 1980.
26. Plusieurs études économétriques ont démontré que l'instauration d'une concurrence plus grande dans plusieurs secteurs des soins de la santé, a entraîné une baisse des prix et des coûts, sans sacrifier la qualité des soins (N. Liang / J. Ogur: *Restrictions on Dental Auxiliaries*, 1987).
27. Cf. P. Ducrey, Application de la loi sur les cartels aux recommandations de prix émises par des associations, *in*: Revue de l'Avocat, 9/2000, p. 6 ss.

*Annexe 1***Règlement Sanphar: annexe 1 : ordre des marges avec zones tampons****Champ d'application selon le chiffre 1.2.1 du Règlement***a) Ordre des marges valable en général*

Echelon	Prix public en Fr.	Part Du fabricant en % du PP	Marges			
			Grossiste en %		Commerce spécialisé en % du PP	Médecins dispensants en % du PP
			du PACS	du PP		
1	0.00-19.95	53.125 %	15 %	9.375 %	37.5 %	33 %
ZT 1	20.00-21.25	Fr. 10.63-11.88	Fr. 1.87		Fr. 7.50	Fr. 6.60
2	21.30-99.95	55.847 %	13.75 %	8.903 %	35.25 %	30.5 %
ZT 2	100.00-113.70	Fr. 55.85-69.55	Fr. 8.90		Fr. 35.25	Fr. 30.50
3	113.75-199.95	60.720 %	12 %	8.28 %	31 %	26.5 %
ZT 3	200.00-229.60	Fr. 121.44-151.04	Fr. 16.56		Fr. 62.00	Fr. 53.00
4	229.65-299.95	64.97 %	11 %	8.03 %	27 %	23.5 %
ZT 4	300.00-352.15	Fr. 194.91-247.06	Fr. 24.09		Fr. 81.00	Fr. 70.50
5	352.20-399.95	68.915 %	10.5 %	8.085 %	23 %	19.5 %
ZT 5	400.00-484.20	Fr. 275.66-359.86	Fr. 32.34		Fr. 92.00	Fr. 78.00
6	484.25-499.95	72.9 %	10 %	8.1 %	19 %	15.5 %
ZT 6	500.00-633.35	Fr. 364.50-497.85	Fr. 40.50		Fr. 95.00	Fr. 77.50
7	633.40 et plus	> 76.925 %	Fr. 51.00		Fr. 95.00	Fr. 77.50

A l'intérieur des zones tampons (ZT), les taux de marges usuels en pourcentage du commerce de gros et de détails et des médecins dispensants sont remplacés par les montants indiqués (abréviations : PACS= prix d'achat commerce spécialisé ; PP= prix public hors TVA).

b) *Ordre des marges spécial pour les génériques*

Echelon	Prix public en Fr.	Part du fabricant en % du PP	Marges			
			Grossiste en %		Commerce spécialisé en % du PP	Médecins dispensants en % du PP
			du PACS	vom PP		
1	0.00-19.95	46.325 %	15 %	8.175 %	45.5 %	41 %
ZT 1	20.00-21.55	Fr. 9.26-10.81	Fr. 1.64		Fr. 9.10	Fr. 8.20
2	21.60-99.95	49.809 %	13.75 %	7.941 %	42.25 %	37.5 %
ZT 2	100.00-114.20	Fr. 49.81-64.01	Fr. 7.94		Fr. 42.25	Fr. 37.50
3	114.25-199.95	55.44 %	12 %	7.56 %	37 %	32.5 %
4	200.00 et plus	60.52 %	11 %	7.48 %	32 %	Fr. 28.5

A l'intérieur des zones tampons (ZT), les taux de marges usuels en % du commerce de gros et de détail et des médecins dispensants sont remplacés par les montants fixes indiqués. En aucun cas, la marge du grossiste ne peut être supérieure à Fr. 51.-, celle du commerce de détail supérieure à Fr. 95.- et celle des médecins supérieure à Fr. 77.50.

Annexe 2

Communication “conditions d’admissibilité, conformément à la Loi sur les cartels, d’accords sur l’utilisation de schémas de calcul”(DPC 1998/2, p. 354 ss)

Décision de la Commission de la concurrence du 4 mai 1998

La Commission de la concurrence

considérant ce qui suit:

- Selon l’article 6 LCart, la Commission de la concurrence peut, par voie de communications, fixer les conditions auxquelles des accords en matière de concurrence sont en règle générale réputés justifiés par des motifs d’efficacité économique au sens de l’article 5 alinéa 2 lettre a LCart. Les accords de spécialisation et de rationalisation, y compris les accords y relatifs concernant l’utilisation de schémas de calcul, sont expressément mentionnés (article 6 alinéa 1 lettre b LCart).
- La Commission de la concurrence a été confrontée à plusieurs reprises à la question de l’admissibilité, conformément à la Loi sur les cartels, de l’utilisation de schémas de calcul élaborés par des associations économiques et professionnelles ainsi que des tiers.
- En utilisant des schémas de calcul, les entreprises concurrentes peuvent former leurs prix de manière consciemment ou inconsciemment concertée.
- Par ailleurs, les associations économiques ou les organisations d’une même branche peuvent, par la mise à disposition de schémas de calcul, négocier, encourager ou même imposer un accord sur les prix, direct ou indirect, entre leurs membres.
- L’utilisation de schémas de calcul peut ainsi correspondre à un accord au sens de l’article 4 alinéa 1 LCart, que ce soit avec ou sans l’intervention d’associations économiques ou d’organisations d’une même branche. Le caractère obligatoire ou non de la convention sur l’utilisation de schémas de calcul n’est pas déterminante, puisque les conventions avec ou sans force obligatoire ainsi que les pratiques concertées valent comme accords selon l’article 4 alinéa 1 LCart.
- Les milieux intéressés ont exprimé un intérêt manifeste pour une clarification par la Commission de la concurrence de l’admissibilité, conformément à la Loi sur les cartels, des accords sur l’utilisation de schémas de calcul.
- La Commission de la concurrence peut faire par voie de communication uniquement des déclarations explicatives de principe, susceptibles de servir de fil conducteur lors d’enquêtes selon l’article 27 LCart. La présente communication a un caractère général et s’applique à tous les secteurs de l’économie. Elle concerne les accords sur l’utilisation de schémas de calcul et non sur les schémas de calcul en tant que tels. Une décision concrète relative à un cas particulier reste dès lors toujours réservée.
- La présente communication étant représentative de l’état actuel de la pratique dans le domaine des schémas de calcul, il n’est pas exclu qu’elle soit, au besoin, adaptée à l’évolution de la jurisprudence.

émet

selon l’article 6 de la Loi fédérale sur les cartels et autres restrictions à la concurrence (LCart), la présente communication:

A. Champ d'application

Article premier

La présente communication concerne les accords, au sens de l'article 4 alinéa 1 LCart, passés entre entreprises d'un même échelon du marché, en vue de l'utilisation de schémas de calcul, y compris les interventions correspondantes des associations d'une même branche ou de tiers, pour autant que ces accords affectent de manière notable la concurrence (article 5 alinéa 1 LCart).

B. Définition

Art. 2

Les schémas de calcul sont des indications générales et des bases de calcul standardisées qui permettent aux utilisateurs de calculer ou d'évaluer les coûts de leurs produits ou de leurs services en vue de la détermination ou de l'évaluation de leurs prix de vente.

C. Règles

Art. 3

Les accords (au sens de l'article premier) entre entreprises d'un même échelon du marché sur l'utilisation de schémas de calcul, ainsi que les interventions correspondantes des associations d'une même branche ou de tiers peuvent être justifiés par des motifs d'efficacité économique lorsque,

- a) le contenu des schémas de calcul est limité aux données et formules servant à calculer les coûts ou à déterminer les prix,
- b) ces accords servent à échanger entre les parties des connaissances et des compétences en matière de calcul des coûts,
- c) ils laissent aux parties la liberté de déterminer les conditions des prestations ou de livraison et les prix d'achat, ainsi que d'accorder des rabais et autres réductions de prix et
- d) ils ne contiennent pas d'échanges d'informations qui puissent donner des renseignements sur le comportement effectif des parties à l'accord lors de l'établissement d'offres, respectivement lors de la détermination des prix finaux et des conditions.

Art. 4

Les accords (au sens de l'article premier) sur l'utilisation de schémas de calcul ne peuvent en règle générale pas être réputés justifiés par des motifs d'efficacité économique lorsque

- a) ils imposent ou proposent aux parties, pour déterminer leurs propres coûts, des montants forfaitaires et des pourcentages forfaitaires concernant le décompte des frais généraux ou d'autres coûts supplémentaires,
- b) ils imposent ou proposent aux parties des marges, des rabais, d'autres éléments de prix ou des prix finaux, ou

- c) ils permettent de renseigner les parties à l'accord sur le comportement effectif de leurs concurrents, en particulier lors de l'établissement d'offres ainsi que de la détermination des prix finaux et des conditions.

D. Publication de la présente communication

Art. 5

La présente communication sera publiée dans la Feuille fédérale (art. 6 al. 3 LCart).

UNITED STATES

Executive Summary

The United States antitrust agencies, the Federal Trade Commission (“FTC”) and the Antitrust Division of the U.S. Department of Justice (“DOJ”), do not follow a set policy with regard to price transparency but analyse price transparency issues on a case-by-case basis. Price transparency can serve to increase or decrease competition and can yield efficiencies. Thus the agencies must attempt to balance any procompetitive and anticompetitive effects of changes in price transparency induced by their actions.

This submission describes matters in which the FTC and DOJ have encountered price transparency issues. These matters include cases dealing with: business-to-business (B2B) electronic exchanges, “most-favoured-nation” (MFN) clauses, trade associations and price advertising restrictions, invitations to collude through price sharing, bid depositories, reference prices, and regulatory evasion. Two price-fixing cases brought by the DOJ—one involving the Airline Tariff Publishing Company and eight major domestic U.S. airlines, and the other against the Ivy League universities and the Massachusetts Institute of Technology (MIT)—are then discussed in greater detail. This collection of diverse contexts in which price transparency has been encountered illustrates that price transparency may have different effects in different settings.

Introduction

The United States antitrust agencies have encountered many price transparency issues while enforcing the antitrust laws and formulating antitrust policy. In general, the agencies do not follow a set policy with regard to price transparency but analyse price transparency issues on a case-by-case basis. Sometimes price transparency can increase competition by reducing consumers’ search costs, allowing better comparisons among diverse products, facilitating entry or spurring innovation. In addition, price transparency may decrease production costs, foster beneficial collaboration, facilitate “benchmarking” or lead to other efficiencies. In other situations, however, price transparency may decrease competition by helping firms monitor defections from a collusive agreement and punish defectors. Thus the agencies must attempt to balance any procompetitive and anticompetitive effects of changes in price transparency induced by their actions.

The agencies’ actions in different contexts have served both to increase and to decrease price transparency. The agencies have acted to increase price transparency in particular market circumstances where it appeared that transparency helped consumers to be informed or was otherwise important to the maintenance of competition. Agency actions increasing transparency include: 1) challenging trade associations’ limitations on truthful, non-deceptive advertising or boycotts of publications advertising low prices; 2) challenging transactions that would increase the ability to manipulate a reference or benchmark price; and 3) challenging transactions that would hinder the ability of a regulator to observe input prices. On the other hand, the agencies have acted to decrease price transparency in other circumstances where it was thought that the increased risk of collusion or other threats to competition outweighed any benefits. Agency actions decreasing transparency include: 1) challenging certain MFN clauses; 2) challenging trade associations’ use of reference schedules to maintain prices; 3) prosecuting invitations to collude through

price sharing; and 4) challenging bid depositories. In addition, the agencies have dealt with price transparency on policy questions such as issues arising from the increasing prevalence of B2B electronic marketplaces.

Section 2 of the submission describes some matters in which the FTC has encountered issues of price transparency.¹ Section 3 describes transparency issues in two price-fixing cases brought by the DOJ, one involving the Ivy League universities and MIT, and the other against the Airline Tariff Publishing Company and eight major domestic U.S. airlines.

FEDERAL TRADE COMMISSION CASES AND POLICY

The FTC has encountered price transparency issues in policy debates and enforcement of the antitrust laws. One important policy debate has been on the formulation of antitrust policy toward B2B electronic exchanges. Computerised exchanges have the ability to organise and disseminate information widely and thus could increase price transparency. The FTC has sought to develop an antitrust policy under which B2Bs' increased information sharing and price transparency will be able to benefit consumers without reducing competition. Trade associations can work to increase or decrease price transparency. The FTC has issued complaints against health care associations, automobile and farm equipment dealers, and a music industry group alleging restrictions on price advertising. The FTC has also issued complaints alleging that trade associations in the health care industry and an interpreters' association were increasing prices by working to enforce adherence to some price reference. MFN clauses can serve to increase price transparency but can also reduce competition. The FTC has challenged MFN clauses in pharmacy networks and the petrochemical industry, but included an MFN clause in the consent agreement resolving a recent merger involving broadband access. Price sharing among competitors can increase price transparency and production efficiency, but also may be an invitation to collude. The FTC has issued complaints against price sharing between competitors in the linerboard, bearing, and zipper industries. Bid depositories can increase price transparency by forcing uniformity among subcontractors' bids to general contractors. The FTC issued a complaint in the electrical industry alleging that the bid depository reduced competition among subcontractors. The FTC has also sought a divestiture in a merger that threatened to increase the ability to manipulate an important price benchmark in the oil industry and entered into a consent agreement with a joint venture that threatened to decrease the transparency of input prices to a regulated electric utility. Each of these matters is discussed below.

1. Business-to-business (B2B) issues

B2Bs are business-to-business electronic market places using the Internet. Currently, B2Bs are estimated to handle billions of dollars in transactions, and they have been predicted to transform the way business is conducted in the twenty-first century. Given the potential economic importance of B2Bs and the ability of computerised marketplaces to control, organise, and disseminate information, B2Bs could have dramatic effects on competition and price transparency. To analyse the potential impacts of B2Bs, the Federal Trade Commission organised a workshop on June 29-30, 2000,² published a staff report,³ and held a further workshop on May 7-8, 2001. The price transparency that B2Bs promote could prove either procompetitive or anticompetitive. B2Bs could reduce buyers' search costs, enabling buyers to find more suppliers able to meet their needs and allowing buyers to draw comparisons between diverse product and price offerings. B2Bs could also help suppliers find more potential customers, in some instances effectively creating new markets for selling hard-to-place goods such as used capital equipment or goods susceptible to expiration. B2Bs can also reduce administrative costs and maverick purchasing costs while increasing joint purchasing, systems integration, and other procompetitive collaborations. All these potential efficiencies must be weighed against the anticompetitive potential of B2Bs.

Participants in the FTC workshops identified five factors relevant to whether information-sharing agreements are likely to raise antitrust concerns: 1) whether the market being served is susceptible to collusion since this susceptibility would likely be exacerbated in an electronic marketplace because of increased price transparency, speed of interaction, and potential information sharing; 2) whether the parties sharing information in the B2B are competitors; 3) the type of information being shared—although sharing of price information would likely raise concern, sharing of other information, e.g., information on direct input purchases, might also raise concerns; 4) the speed of the information sharing;⁴ 5) whether the information is already available to the participants. These five factors can be used to assess whether a B2B is likely to facilitate collusion among the participants.

The first B2B venture reviewed by the Commission, named Covisint, was in the automotive industry supply chain. Covisint would provide assistance in product design, supply chain management, and procurement functions performed by auto manufacturers and their direct and indirect suppliers. The venture was formed by five competing automotive manufacturers and two information technology firms.⁵ After analysing the venture, the Commission closed the investigation in September 2000 but issued a letter to the parties stating:

Because Covisint is in the early stages of its development and has not yet adopted bylaws, operating rules, or terms for participant access, because it is not yet operational, and in particular because it represents such a large share of the automobile market, we cannot say that implementation of the Covisint venture will not cause competitive concerns.⁶

The Commission reserved the right to take further action in the future as the venture becomes more developed if further action is warranted.⁷

2. Trade associations and price advertising restrictions

Trade associations can increase price transparency by facilitating the exchange of information among members and by enforcing standards in advertising. The Commission has brought several cases where trade associations have instead acted to limit competition among their members by either (i) placing limits on the truthful, non-deceptive advertising of members, (ii) boycotting publications that accept low price advertisements, or (iii) enforcing minimum advertised price (MAP) agreements. In these cases eliminating advertising restrictions, the Commission acted on the belief that increased price transparency in this context would result in more informed consumers and more efficient market transactions.

3. Limits on truthful, non-deceptive price advertising

Standardisation of advertising by members of a trade association may improve price transparency for consumers thereby allowing consumers to better compare prices. However, the Commission has found that the potential for anticompetitive effects can outweigh these benefits and has challenged a number of trade associations and state boards that have sought to limit certain forms of truthful, non-deceptive price advertising. In 1994, the Commission issued a complaint alleging that the Arizona Automobile Dealers Association (AADA) agreed with its member dealerships to restrict non-deceptive comparative and discount advertising and advertising concerning the terms and availability of consumer credit. For example, the complaint challenged certain sections of AADA's Standards for Advertising Motor Vehicles which, among other things, prohibited members from advertising that prices are equal to or lower than a competitor's, or are the lowest; that the advertiser will match or beat any price; or that the advertiser will offer compensation if it cannot offer an equal or lower price. The complaint was settled with a consent agreement prohibiting the alleged conduct.⁸

In 1993, the Commission issued a complaint against California Dental Association (CDA). CDA's 19,000 members comprise 75 percent of the dentists in the state. According to the complaint, CDA's rules prohibited certain valuable categories of price advertising (including advertising of across-the-board discounts for seniors or others, and statements such as "care at reasonable prices"), and representations about the quality of dental services (such as "special treatment for nervous patients").⁹ The case eventually went to the U.S. Supreme Court on the issue of the proper application of the rule of reason; the Court remanded the case to the Ninth Circuit Court of Appeals. The Court of Appeals ultimately ruled against the Commission, finding, from the existing record, that procompetitive benefits of the rules outweighed their anticompetitive harm. In 2001, the Commission decided, for various reasons, not to seek further review in the Supreme Court and dismissed the complaint.¹⁰

The Commission also has brought a number of cases against state boards that maintained various rules against truthful, non-deceptive advertisements about fees and services. The most recent such complaint was against the Texas Board of Chiropractic Examiners in 1992. The Board was the sole licensing authority under Texas law for the approximately 1,600 licensed chiropractors in Texas. The complaint charged the Board with preventing consumers from obtaining information about the chiropractors' fees, services, and products, thereby depriving consumers of the benefits of vigorous competition among chiropractors.¹¹ The Board agreed to a consent order against the practices.¹² The Commission issued similar complaints against the Massachusetts Board of Registration in Optometry¹³ and the Wyoming State Board of Chiropractic Examiners.¹⁴

4. Boycotts of organisations publicising low prices

The Commission has brought several cases against trade associations for boycotting organisations that were publishing low prices. In these cases, the Commission has alleged that the restricted advertising and resultant decrease in price transparency were harmful to consumers. In 1995, the Commission issued a complaint against the Santa Clara County Motor Car Dealers Association. The Association had approximately 47 members, constituting about 50 percent of the new automobile and truck dealers in Santa Clara County. In May 1994, the San Jose Mercury News published an article telling consumers how to analyse new car factory invoices so that they could be better negotiators when buying cars. The complaint alleges that after the article was published, Association members agreed to cancel and withhold their advertising from the paper. A consent agreement was reached prohibiting the Association from carrying out, participating in, inducing, or assisting any boycott.¹⁵

In 1998, the Commission issued a complaint against Fair Allocation System, Incorporated (FAS). FAS was an organisation of twenty-five automobile dealerships from five Northwest states that was formed to address dealer concerns about an automobile dealership, Dave Smith Motors, which was attracting customers from around the Northwest. Dave Smith Motors offered "no-haggle" pricing, a system that offered new automobiles to all customers at firm, but low, predetermined prices. In addition, Smith was among the first dealers to market automobiles on the Internet. According to the complaint, because of their concerns, the members of FAS collectively threatened to boycott Chrysler to force it to limit sales to car dealers that sell cars at low prices and via a new and innovative channel—the Internet.¹⁶ A consent agreement was reached with FAS prohibiting the alleged practices.¹⁷

In 1998, the Commission accepted a consent agreement from Fastline Publications, Inc. and Mid-America Equipment Retailers Association. Fastline publishes picture buying guides for new and used farm equipment which are mailed free to farmers and ranchers in over 40 states. Mid-America is a trade association whose membership comprises about 90 percent of the farm equipment dealers in Kentucky and Indiana. In early 1991, several Kentucky farm equipment dealers complained to Fastline about dealers advertising prices, including discount prices, for new farm equipment in the Fastline Kentucky Farm

Edition. In protest, several dealers withheld their advertising from this guide until Fastline agreed not to publish advertisements that included prices for new farm equipment. In early 1992, Fastline was invited to the annual meeting of the Kentucky Retailers Association, during which several retailers expressed their dislike for renewed price advertising and threatened to withdraw or otherwise cancel their advertisements in the Fastline Kentucky Farm Edition if Fastline continued to publish advertisements that included prices for new equipment. Fastline acquiesced again and stopped accepting advertisements that included prices for new equipment. A consent agreement was reached prohibiting the advertising restrictions.¹⁸

5. Minimum advertised price agreements

Minimum advertised price (MAP) agreements serve to increase price transparency since each firm knows that no other firm will be advertising a price lower than the agreed upon minimum price. However, MAP agreements also decrease price transparency to consumers to the extent that a firm might be willing to accept a price lower than the minimum advertised price but is not allowed to publicise the lower price. In 2000, the Commission accepted consent orders from the five largest distributors of pre-recorded music in the United States accounting for approximately 85 percent of the industry's \$13.7 billion in domestic sales.¹⁹ The complaints allege that the five companies adopted significantly stricter MAP provisions for their co-operative advertising programs between late 1995 and 1996. Under the new MAP provisions, retailers seeking any co-operative advertising funds were required to observe the distributors' minimum advertised prices in all media advertisements, even in advertisements funded solely by the retailers. Retailers seeking any co-operative funds were also required to adhere to the distributors' minimum advertised prices on all in-store signs and displays, regardless of whether the distributor had contributed anything to their cost. The complaints further alleged that by defining advertising broadly enough to include all in-store displays and signs, the MAP policies effectively precluded many retailers from communicating prices below MAP to their customers. The consent orders require all of the distributors to discontinue their MAP programs in their entirety for a period of seven years.²⁰

6. Trade associations and prices based on some reference schedule

In addition to advertising restrictions, trade associations may also attempt to reduce competition among their members by attempting to fix prices around some reference schedule. Prices based on a trade association's fee schedules or codes may serve to make prices more transparent. However, in some circumstances the Commission has challenged such practices as facilitating collusion, arguing that the risk of anticompetitive effects outweighed any procompetitive benefits. In challenging trade associations' attempts to enforce collusive reference pricing arrangements, the Commission has acted to benefit consumers by decreasing price transparency.²¹

In 2000, the Commission accepted a consent to settle a complaint against the Wisconsin Chiropractic Association, (WCA), whose members comprise a substantial majority of the licensed chiropractors in Wisconsin. In 1997, the federal government and private insurance companies began accepting four new codes for chiropractic manipulations. The new chiropractic manipulative treatment (CMT) codes reflected more detailed or precise descriptions of the manipulation services and allowed chiropractors, like osteopathic physicians, to bill based on the number of body regions adjusted. According to the complaint, shortly after the new CMT codes were announced, the WCA and its executive director, Mr. Leonard, conducted training seminars on the new codes for members and urged chiropractors not to make any decisions on their fees under the new codes before attending one of these meetings. During the meetings, Mr. Leonard told the chiropractors that the new CMT codes provided them with a unique opportunity to increase their fees.²² After the new codes took effect, Mr. Leonard surveyed member pricing in certain localities, and reported back to members that chiropractors in these areas had

succeeded in raising reimbursement levels.²³ The consent order was designed to prevent the illegal concerted action alleged in the complaint.²⁴

In 1994, the Commission issued a complaint against the International Association of Conference Interpreters (known by its French acronym, AIIC). AIIC is a voluntary professional association of interpreters with 2,500 members from 68 countries who perform interpretation services at multi-lingual conferences or other high-level meetings. The complaint alleges that AIIC's fee schedules, work rules, and other restrictions violated federal antitrust laws. Administrative Law Judge Timony upheld the charges in a July 1996 decision.²⁵ Judge Timony noted that members were paid AIIC's minimum daily rate 90 percent of the time from 1988 to 1991. Judge Timony found that the effect of many of the rules was to make price undercutting easier to detect. For example, rules requiring that travel expenses and per diem payments be stated separately on contracts for interpretation would make cheating on them and on the minimum daily price easier to see, as would the requirement that fees be paid on an indivisible daily basis because it makes rates more standardised and comparable.²⁶ AIIC appealed Judge Timony's decision to the full Commission which upheld most of these charges in 1997 but dismissed certain charges against Association rules governing work-day length, interpreter team size, and other non-price-related factors.²⁷

The Commission's views on relative value scales have evolved over time. Relative value scales are lists of assigned numerical values for various medical and surgical services for the purpose of comparing the value of different services. One potential use of these scales is to construct fee schedules. In the 1970's, the Commission issued a number of consent orders regarding relative value scales. Although relative values scales can increase price transparency, the Commission issued an advisory opinion to the American Society of Internal Medicine in 1985 stating that its proposal to develop and distribute a relative value scale would likely have anticompetitive effects if implemented.²⁸ With the growth of managed care, however, and the increased use of relative value scales by such managers, the Commission has modified or set aside some of these orders so as to give associations more freedom in discussing relative value scales with third-party payers, governmental entities, and their own members, while continuing to caution against entering horizontal price agreements on the basis of such scales.²⁹

7. Most favoured nation clauses

A "most-favoured-nation" (MFN) clause may serve to increase price transparency by increasing buyers' incentives to monitor prices paid by other buyers.³⁰ However, it may also decrease competition by reducing a seller's incentive to offer selective discounts. In 1996, the Commission challenged the use of an MFN clause by RxCare of Tennessee, Inc. RxCare was the leading pharmacy network in Tennessee, including over 95 percent of all chain and independent pharmacies in the state. RxCare pharmacies filled prescriptions for patients covered by managed care organisations and were reimbursed for the medications at agreed-upon rates. The MFN clause at issue required that, if a pharmacy in the RxCare network accepted a reimbursement rate from any other third-party payer that was lower than the RxCare rate, the pharmacy had to accept that lower rate for all RxCare care business in which it participated. Because RxCare represented such a large portion of their business, most pharmacies in Tennessee would have found it unprofitable to offer any discounts below the RxCare rate if the MFN clause forced them to accept the lower rates on all of their RxCare business. The consent agreement prohibited RxCare from maintaining or enforcing an MFN clause and allowed the Commission to monitor compliance.^{31, 32}

The FTC also challenged the use of an MFN clause in the *Ethyl* case (1979-1985)³³ against four manufacturers of lead-based antiknock compounds.³⁴ Ethyl and Dupont were the primary users of MFN clauses that specified that any discount offered off the uniform delivered list price must be granted to any customer. The MFN clauses allegedly reduced competition between the four manufacturers since any discount offered to any customer would have to be offered to all customers and would therefore be less

profitable and would also be more likely to be observed by the other three competitors. The FTC ultimately lost the case in the Second Circuit where the complaint and order were vacated because the Court found that the Commission did not meet the heavy evidentiary standard.³⁵

Recently, however, the Commission required an MFN clause as part of the AOL Time Warner consent agreement. AOL is the nation's largest internet service provider (ISP) and Time Warner controls a cable television system servicing about 20 percent of U.S. cable households. The consent agreement contained provisions designed to ensure access to Time Warner's cable system by requiring AOL Time Warner to make available eventually at least three non-affiliated cable broadband ISP service on Time Warner's cable system. Time Warner is required to include in alternative cable broadband ISP service agreements an MFN clause designed to prevent discrimination by AOL Time Warner against non-affiliated ISP's.^{36,37}

8. Invitation to collude through price sharing

Sharing of price information can make prices more transparent. However, the Commission has become concerned when the sharing of price information may have been used as an invitation to collude. In 1998, the Commission issued a complaint against Stone Container Corporation, the largest manufacturer of linerboard in the United States. The complaint alleges that during 1993 Stone Container announced a \$30 per ton price increase for all grades of linerboard, to take effect the following March. As of March 1993, several major linerboard manufacturers had failed to announce an equivalent price move, and Stone Container was forced to withdraw its price increase. Stone Container concluded that its proposed price increase had failed to garner the requisite competitor support because Stone Container and other firms in the industry held excess inventory. Stone Container tried to reduce excess inventory by suspending production (taking costly "downtime") at its mills, and simultaneously arranging to purchase excess inventory from several of its competitors. Stone Container then conducted a telephone survey of major U.S. linerboard manufacturers, asking competitors how much linerboard was available for purchase and at what price. Stone Container also communicated a desire for higher prices to competitors through public statements and direct private conversations. Stone Container entered into a consent agreement prohibiting the alleged conduct.^{38,39}

In 1993, the Commission charged AE Clevite, Inc., an Ann Arbor, Michigan manufacturer of locomotive engine bearings, with inviting a competitor to fix prices. J.P. Industries (Clevite) and the Austrian firm Miba Gleitlager AG together manufactured more than 95 percent of the locomotive engine bearings sold in the U.S. During a conversation, a J.P. Industries official allegedly told a Miba executive that the prices at which Miba sold locomotive engine bearings in the United States aftermarket were lower than those of J.P. Industries, and "as a result, they were ruining the marketplace." Miba allegedly responded that it was not the firm's intention to undercut J.P. Industries' prices, and J.P. Industries followed up by faxing to Miba comparative price lists for locomotive engine bearings it sold in the United States aftermarket. The FTC charged that this conduct constituted an implicit invitation for Miba to refrain from competition. The complaint was settled with a consent agreement prohibiting the alleged conduct.⁴⁰

In 1993, the Commission issued a complaint against YKK (U.S.A.) Inc., the country's largest zipper manufacturer, after an attorney for YKK sent letters to its chief competitor, Talon, Inc., accusing Talon of unfair and predatory sales tactics in its sales of zippers and related products and urging Talon to cease offering free zipper-installation equipment to its customers.⁴¹ Also in 1992, the Commission charged Quality Trailer Products Corporation, which manufactures, sells, and distributes axles and products used in making them, with inviting American Marine Industries (AMI), a competitor, to fix prices. During a visit, Quality Trailer representatives allegedly told AMI that AMI's prices for certain axle products were too low and promised not to sell certain axle products below a certain price.⁴²

9. Bid depositories

A bid depository is a mechanism whereby subcontractors all submit bids to a depository from which general contractors then select subcontractors when preparing a bid for a prime contract. Bid depositories reduce search costs for a general contractor and increase price transparency since each subcontractor is quoting a single price for the project. However, bid depositories also can serve to reduce competition among subcontractors. In 1984, the Commission issued a complaint against a bid depository, Electrical Bid Registration Service of Memphis Inc., set up by electrical subcontractors. According to the complaint, the registry had a deadline for electrical subcontractors' registering of bids and prohibited electrical subcontractors from offering a lower price after the deadline both before and after the award of the prime contract. The registry then required general contractors who accepted the delivery of registered bids to agree that they would not award an electrical subcontract to any firm that did not have a bid registered with the Registry, and that all such awards would be at the price contained in the registered bid. An administrative law judge issued an order banning these practices and the Commission accepted the decision on appeal.⁴³

10. Price discovery, and reference prices

In industries subject to much price volatility, contracts often refer to some readily observable benchmark price, e.g., a NYMEX futures contract price or a posted gasoline rack price. If these reference prices become subject to manipulation, their transparency is reduced and the markets relying upon them function less efficiently. In 2000, the Commission issued a complaint against two merging oil companies: BP Amoco and the Atlantic Richfield Company (ARCO). According to the complaint, the proposed merger would concentrate control of over 43 percent of storage capacity, 49 percent of pipeline delivery capacity, and 95 percent of the trading services in Cushing, Oklahoma. Since Cushing is the specified delivery point for the NYMEX crude oil futures contract, a firm that controls such substantial assets in Cushing would be able to manipulate the NYMEX crude oil futures market and hence to manipulate this important reference price. This threat of manipulation would have ripple effects throughout the oil industry. The Commission's concern was remedied by a divestiture of assets in Cushing.⁴⁴

11. Regulatory Evasion

Regulators rely upon the transparency of prices to evaluate the prudence of input purchases. When prices are highly volatile and there are no reliable benchmark prices, regulators must rely upon the efforts of the regulated company to ensure that costs are prudently incurred. In 2001, the Commission issued a complaint about a joint venture called Entergy-Koch, LP between Entergy Corporation and Koch Industries, Inc. Entergy is engaged in the generation, transmission, and distribution of electricity, and Koch markets natural gas, natural gas transportation, chemicals, petroleum products, minerals, and financial services. According to the complaint, Entergy is permitted, subject to review, to recover 100 percent of the cost of natural gas transportation purchased for its natural gas and electric utilities by passing on this cost directly to ratepayers. The complaint alleges that once Entergy shares in the profits of Koch's Gulf South natural gas pipeline, it will become willing to pay inflated gas costs to its subsidiary, thereby evading regulation. The consent agreement increased the transparency of the market by requiring Entergy to post on its website every request for proposal (RFP) for gas purchases.⁴⁵

DEPARTMENT OF JUSTICE: ILLUSTRATIVE PRICE TRANSPARENCY CASES ⁴⁶

DOJ has encountered price transparency issues in a number of cases. Price transparency can be especially important in price-fixing cases since it can facilitate a collusive agreement. Two price-fixing cases brought by the DOJ—one involving the Airline Tariff Publishing Company (ATP) and eight major domestic U.S. airlines, and the other against the Ivy League universities and MIT—are discussed below. The discussion was prepared by a DOJ economist and contains a general discussion of a broad range of issues encountered in these cases, his opinions on the cases and citations to the relevant literatures.

1. U.S. v. Airline Tariff Publishing Company (ATP)

1.1 Conscious Parallelism or Collusive Information Exchange?

Collusive information exchange presents challenges for analysing liability and designing relief. The difficulty is that any consciously parallel conduct by an oligopoly looks like an agreement: one firm raises price, the others respond with greater or lesser price increases, and eventually the industry reaches a common understanding. How is that different from an explicit agreement to fix prices reached through a conversation in a smoke-filled room?

The courts' resolution of this dilemma has been to look for "plus factors" such as secret communications between the firms, before concluding that consciously parallel conduct constitutes an unlawful agreement to fix prices.⁴⁷ Then-FTC Bureau of Economics Director Jonathan Baker interprets this as a screen that prohibits a particular process of reaching agreement -- namely, negotiation and exchange of assurances:

[T]he legal idea of "agreement" does not describe a result or equilibrium, but one particular process of reaching supracompetitive marketplace outcomes -- what may be termed the "forbidden process" of negotiation and exchange of assurances. The forbidden process consists of behaviour that can be enjoined. Thus, if the oligopoly reaches a high price equilibrium through the forbidden process that the law calls an agreement, Sherman Act Section 1 has been violated. If the same result were reached through leader-follower behaviour, no agreement on price will be found.⁴⁸

Baker identifies three economic indicators that could help courts infer the forbidden process of negotiation and exchange of assurances:

First, firm behaviour might be more complex than would be plausible if the outcomes had been reached absent the forbidden process Second, the inference of agreement would be strengthened if the explanations offered by the parties about the putative legitimate business purposes are weak or even pretextual Third, the inference of agreement would be strengthened if the rivals had an opportunity to communicate, and strengthened even more if their conduct includes overt communications spurring immediate responses even if those communications constitute "cheap talk."⁴⁹

1.2 Cheap Talk in U.S. v. (ATP)

"Cheap talk" is communication that doesn't commit firms to a course of action -- for example, announcing a future price increase, but leaving open the option to rescind or revise it before it takes

effect.⁵⁰ 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.

Cheap talk figured prominently in *U.S. v. ATP*.⁵¹ ATP, a joint venture owned by the major airlines, collects fare information from the airlines, and distributes it daily to all the airlines and to the major computer reservation systems (CRSs) that serve travel agents. This arrangement is an efficient instrument for cheap talk:

Airlines are charged a fee for each change, so that changes are not absolutely costless, but the fees for any change are very small relative to the revenues involved. Since ATP updates all CRSs once a day, airlines can quickly observe and respond to each other's fares using this system, with (at most) a one day lag. Since any significant price movement can be quickly matched by competitors, the potential benefits from cheating on any collusive price are usually small relative to the advantages of maintaining a high price.⁵²

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

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

Several airlines communicated their agreement to this proposal by also filing to eliminate the fares altogether, but one dissenting airline proposed instead to increase the junk fares by ten dollars each way. One of the airlines supporting the first proposal expressed its dissatisfaction with this counterproposal by briefly lowering the junk fares by ten dollars each way in the markets very important to the dissenting airline, using a last ticket date only a few days away. However, when some of the other airlines began to match the counterproposal to increase fares by ten dollars (instead of eliminate them), the punishing airline withdrew the lower fares immediately (before the last ticket date on the fares) and also filed to increase fares by ten dollars. At that point, another airline proposed yet a third alternative -- to increase the junk fares by twenty dollars each way. Throughout the negotiation process, the airlines continuously altered first ticket dates [the first date of sale for a fare] of the proposed increases, and kept scorecards of which airlines were supporting which proposal, with what first ticket date, until they had reached a consensus. Eventually, all the airlines agreed to the third proposal, and the twenty dollar increase went into effect. (One airline estimated that the increase would generate an additional \$7 million/month for that airline alone.)⁵³

2. Remedies in U.S. v. ATP

Complex negotiations like this satisfy the courts' test for an illegal agreement to fix prices. The Justice Department obtained consent decrees from all airlines and ATP. The basic provisions in the consent decree prohibit the use of first ticket dates and (except for advertised promotions) last ticket dates on any of their fares:

Without first ticket dates, airline fares will become available for sale immediately. An airline wanting to increase its fares will have to take some risk that the other airlines will not follow a price increase, and this change will increase the cost of negotiating a multimarket trade. . . .

With the exception of last ticket dates used in advertised promotions, the airlines are not permitted to use last ticket dates in ATP. . . . An airline can still match a discount fare placed in its own markets, and can still add discount fares in other markets. Unlike before, however, that airline will not be able to costlessly indicate that the discounts should be removed by a certain date, or that its own discount fares are not part of an attempt to lower fares in general.⁵⁴

These provisions were not expected to eliminate tacit collusion in the airline industry.⁵⁵ But without this instrument for communication, collusion should be considerably more difficult and less effective:

By limiting the ability of the airlines to engage in extensive price negotiations, the government contends that the airlines will find it more difficult to co-ordinate on more collusive outcomes in the future. Whether the decree actually will have this effect remains to be seen, but as co-ordination becomes more costly, it seems unlikely that the airlines will be able to engage in extensive negotiations that link together dozens or hundreds of markets. Multimarket contact may still be present, but without the ability to easily define the terms of an agreement, firms may not be able to exploit their cross-market linkages as fully as before the entry of the consent decree.⁵⁶

3. U.S. v. Brown University, et al.⁵⁷

3.1 *The Ivy League Presidents Share Prospective Tuition Increases*

Colleges and universities announce their tuition increases once a year, during the first quarter of the calendar year. In the course of an investigation by DOJ, it was learned that the college presidents of MIT and the Ivy League were exchanging prospective tuition increases during their winter budget-planning process, before the public announcements. One remarkable document spells out the collusive intent behind these exchanges:

Brown administrators are offhand about the process that leads to this similarity in charges among close competitors. Vice President Bohen describes it as "an informal swapping of intentions" among Ivy officials involved with budget and financial matters. "Our desire is to keep the price close to our competition so that applicants don't have to decide between schools on the basis of finances."⁵⁸

Other documents, containing tables of projected tuition and salary increases for MIT and the Ivies, confirm the collective decision-making, and even the awareness of suspect dealings:

Below are the notes I didn't take on the financial expectations at each of our institutions.⁵⁹

It is, I think, useful to look at the proposed tuition and salary levels in the light of our own tentative decisions.⁶⁰

When I told them that we were considering salary heights of 8 percent-8½ percent and tuition increases not far off from that number, there was an audible gasp. The other Presidents felt that it was not possible to increase tuition at a rate that far above the CPI and that some of the pressure on faculty salaries was self-induced to serve the faculty's interest. . . . In view of the above information, we will need to rethink our proposed salary and tuition scheduled increases and to do so rather promptly.⁶¹

Might it be that the only effect of sharing prospective prices is to make prices more uniform and transparent, but not any higher on average? That seems implausible. Our normal, instinctive assumption is that eliminating price competition raises price. The purpose of this discussion is to identify several strands of economic literature that support this assumption. In our view, sharing prospective price does help firms achieve a collusive price level.⁶²

3.2 *Swift Detection Fosters Collusion*

Illegal cartels cannot enforce their agreements in court. Consequently, the agreements must be self-enforcing: each cartel member, acting in its independent self-interest, must choose to abide by the terms of the agreement. Cheating is deterred by the fear of detection and swift retaliation, since prospective cheaters have to trade off the short-term gains from cheating against the long-term loss of cartel profits:

This leads us to one of the most important conclusions with genuine policy implications that comes out of oligopoly theory If industry behaviour permits each oligopolist to rapidly and surely observe rival defections, the scope for . . . collusion is great.⁶³

By reporting their prospective prices, the colleges assured *instant retaliation*. Bhaskar models this by letting Firm A and Firm B take turns announcing and revising their prospective price.⁶⁴ When one firm chooses not to change its price, the sequence of price announcements stops, and the product is sold at the prices finally announced. Given these assumptions, Bhaskar shows that the unique equilibrium outcome is collusion: one firm announces the price that maximises joint profits, and the other firm matches.

Models like this have two important implications for analysis of the colleges' tuition-sharing activities: 1) iterated exchange of prospective tuition is likely to lead to a collusive outcome; and 2) both downward and upward revision of prospective tuition estimates are consistent with a collusive outcome. In summary, when Harvard reports its intention to charge \$17,100 for tuition, fees, and room and board in 1987-88, and Yale reports its intention to charge \$17,020, it is superfluous to add, "I'll charge \$17,100 if you'll charge \$17,020" or "I'll agree to charge \$17,100 if you'll agree to charge \$17,020." Their actions say this already. Their actions pronounce the agreement.

The swapping of intentions on tuition increases is "cheap talk" -- nonbinding, nonverifiable communication that helps consensus-minded individuals achieve a profitable equilibrium.⁶⁵ Its effectiveness relies on colluding participants wanting to co-operate rather than cheat. Reputation models offer some support for this commonplace assumption; in these models, honesty pays if participants foresee the possibility of a long, profitable relationship, and the Ivy overlap agreement had operated for 35 years.⁶⁶

⁶⁷ Additional support comes from "the many experiments that show that collusion is likely to be sustained in long but finite games."⁶⁸

To avoid relying too heavily on relationships, longstanding cartels may develop detailed rules and procedures to prevent misunderstanding, resolve disputes, and ensure rapid detection.⁶⁹ In the Ivy cartel, these transparency-enhancing rules and procedures were aimed at tuition discounts -- i.e., financial aid.

3.2.2 *Financial Aid Agreements Enhance Cartel Profit and Stability*

Price discrimination on the basis of income and wealth ("need-based financial aid") enhances cartel profits, but imposes extra demands on transparency to ensure uniformity and deter cheating. The cartel established a "needs analysis methodology" for calculating the tuition discount.⁷⁰ Then, before aid offers went out, they shared information on proposed offers to individual students, identified those for whom differing interpretations led to substantial disparities, and met to resolve the differences.

Cartel profits could be enhanced further by discriminating on the basis of other attributes ("merit aid") -- for example, by academic ability and talent (top students have competing options and enhance university prestige), applicants' residence (students prefer less distant colleges), and ethnic background (competition is intense for high-ability African-American students) -- but this would have added another layer of complexity to the Ivy Methodology and procedures for ensuring transparency, and thus they decided to prohibit merit aid.

Moreover, there was another compelling reason for the Ivies' decision to prohibit merit aid. Cartel stability is greatly enhanced if fringe competitors adopt similar pricing strategies, and if financial aid administrators are motivated to comply willingly with the cartel rules. This was allegedly accomplished by nurturing a value system in which price discrimination is not just profitable, but it is the right and moral thing to do. The vocabulary of college pricing is strongly coloured to support that: tuition discounts are "financial aid," net price is "family contribution," discrimination on the basis of income and wealth is "need-based aid," etc.⁷¹

But what is the moral justification for a ban on merit aid -- especially the agreement not to compete for minority students? Relying on the image of tuition discounts as charitable aid, college administrators claim that there is a fixed pool of financial aid, so that more aid for non-needy students means less aid for needy students. This has a superficial plausibility, since most people are accustomed to thinking of scholarships endowed through private contributions. But college administrators know that private contributions fall well short of the total amount budgeted for tuition discounts, and the difference is just a line item in the general university budget:

Included in the [MIT] General budget are three major categories of expense: instruction and unsponsored research expense, joint expenses (those that support both instruction and research, and the unrestricted portion of scholarships).⁷²

For MIT in Fiscal 1990, undergraduate student financial aid totalled \$13.9 million from gifts or income on gifts, and \$9.5 million from the General budget. The \$9.5 million from the General budget is less than one percent of the Fiscal 1990 MIT operating budget of \$1.1 billion.⁷³

This argument against merit aid still persists today. However, its force has been undermined by public acceptance of the vocabulary of "tuition discounts" in the wake of the DOJ case, and unsystematic discounting in the form of merit aid has expanded greatly among non-Ivy colleges (with no diminution of need-based aid).

These complex arrangements -- the Ivy Methodology, the spring meetings to negotiate uniform offers to individual students, the moral exhortations to nurture compliance from cartel members and even

non-cartel members -- illustrate the role that price transparency plays in a complex, longstanding cartel. It is one of an array of strategies that economise on trust, so that cartel members don't act selfishly in their own self-interest. Complex conspiracies impose great demands for price transparency; and legal constraints on price transparency make it more difficult to sustain complex conspiracies.

Conclusion

Price transparency can increase competition by reducing consumers' search costs, allowing better comparisons among diverse products, facilitating entry, or spurring innovation. In other situations, price transparency may decrease competition by helping firms monitor defections from a collusive agreement and punish defectors. In addition, price transparency may decrease production costs, foster beneficial collaboration, facilitate "benchmarking" or lead to other efficiencies. In enforcing the antitrust laws, the United States antitrust agencies' actions will thus have various effects on price transparency depending on the context. The agencies' actions have served both to increase and to decrease price transparency. Price transparency has been increased by the agencies' actions when transparency served to increase competition and benefit consumers. However, price transparency has been decreased by the agencies' actions when its benefits were outweighed by the risk that transparency would threaten competition by facilitating collusion.

NOTES

1. See James L. Langenfeld and Louis Silvia "The Federal Trade Commission's Horizontal Restraint Cases: An Economic Perspective," *Antitrust Law Journal* 61:3 (1993) pp. 653-697, for a complete survey of earlier cases involving horizontal restraints.
2. Materials from the workshop are available at www.ftc.gov/bc/b2b/index.htm.
3. "Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces," October 2000.
4. An additional consideration is whether the shared information is received by competitors before it is received by buyers.
5. The five automotive manufacturers are General Motors Corp., Ford Motor Co., DaimlerChrysler AG, Renault SA, and Nissan Motor Co. Ltd.; the two information technology firms are Commerce One, Inc. and Oracle Corporation. The five auto manufacturers account for roughly one-half of worldwide auto production.
6. Commission letter to parties closing the Covisint investigation Sept. 11, 2000.
7. *Covisint, Inc.*, FTC File No. 001 0127 (Sept. 11, 2000) (press release).
8. *Arizona Automobile Dealers Association*, C-3497 (Feb. 25, 1994) (press release).
9. *California Dental Association*, C-9259 (July 25, 1995) (press release).
10. *California Dental Association*, C-9259 (Feb. 15, 2001) (press release).
11. *Texas Board of Chiropractic Examiners*, C-3379 (April 29, 1992) (press release).
12. See 115 F.T.C. 470 (1992).
13. *Massachusetts Board of Registration in Optometry*, FTC File No. D. 9195 (July 2, 1986) (press release), litigated, order issued, 110 F.T.C. 549 (1988).
14. *Wyoming State Board of Registration in Podiatry*, C-3176, 107 F.T.C. 19 (1986) (consent order).
15. *Santa Clara County Motor Car Dealers Association*, C-3630 (Aug. 1, 1995) (press release).
16. Specifically, FAS threatened to refuse to sell certain Chrysler vehicles and to limit the warranty service they would provide to particular customers unless Chrysler changed its allocation system so as to disadvantage dealers that sold large quantities of vehicles outside of their local geographic areas.
17. *Fair Allocation System, Incorporated*, C-3832 (Aug. 5, 1998) (press release).
18. *Fastline Publications, Inc.*, C-3819 (May 11, 1998) (press release).
19. The five distributors are Sony Music Distribution, Universal Music & Video Distribution, BMG Distribution, Warner-Elektra-Atlantic Corporation and EMI Music Distribution.
20. *Concerning the Market for Prerecorded Music in the United States*, FTC File No. 971 0070 (C-3971 to C-3975) (May 10, 2000) (Analysis to Aid Public Comment).

21. The Commission has successfully demonstrated that the trade associations have raised prices by using these techniques even though most of the industries in question would not seem susceptible to collusion, i.e., the industries are not concentrated and are not characterized by repeated interactions.
22. Mr. Leonard advised members that it was important that the new codes for chiropractic manipulation were priced properly, and that the WCA's view was that proper pricing was at the same level that osteopathic physicians billed for spinal manipulation services. He provided detailed data on current osteopathic pricing, and encouraged chiropractors to raise their prices to the osteopathic levels.
23. Mr. Leonard regularly provided fee surveys to the WCA's members. At times, these fee surveys reflected insufficiently aggregated data, thus effectively identifying current prices by individual chiropractic offices.
24. *Wisconsin Chiropractic Association C-3943* (March 7, 2000) (Analysis to Aid Public Comment).
25. According to Judge Timony, AIIC set minimum daily rates to be charged by members, required that all interpreters at a conference be paid the same daily rate regardless of skill or experience differences, specified the length of the working day and the number of interpreters to be hired at a conference, and required payment for travel expenses, per diem, canceled events, rest days and non-working days when the interpreter was away from his or her mandated professional address. AIIC rules also have restricted members' use of portable equipment; barred commissions to intermediaries, package fees, exclusive arrangements, moonlighting for permanently-employed interpreters, and the use of comparative advertising and trade names; required members to have a professional address and to give three months' notice before changing it; required charges for the recording of interpretation services and imposed limits on charitable work.
26. *International Association of Conference Interpreters*, FTC Docket No. 9270 (July 31, 1996) (press release).
27. *International Association of Conference Interpreters*, FTC Docket No. 9270 (March 14, 1997) (press release).
28. *American Society of Internal Medicine*, 105 F.T.C. 505 (April 24, 1985) (press release).
29. Consent orders were issued in *American College of Obstetricians & Gynecologists*, 88 F.T.C. 955 (1976) (consent order), *modified*, 104 F.T.C. 524 (1984); *American Academy of Orthopaedic Surgeons*, 88 F.T.C. 968 (1976) (consent order), *modified*, 105 F.T.C. 248 (1985), *order set aside*, 119 F.T.C. 609 (1995); *American College of Radiology*, 89 F.T.C. 144 (1977) (consent order), *modified*, 113 F.T.C. 280 (1990); *Minnesota Medical Association*, 90 F.T.C. 337 (1977) (consent order); and *California Medical Association*, 93 F.T.C. 519 (1979) (consent order), *modified* 105 F.T.C. 277 (1985), *order set aside*, 120 F.T.C. 858 (1995).
30. MFN clauses are contract provisions that specify that a seller will not make an offer to a third party without also making at least as favorable an offer available to the holder of the MFN clause.
31. *RxCare of Tennessee, Inc. C-3664* (Jan. 19, 1996) (press release).
32. Commissioner Azcuenaga issued a concurring statement "to emphasize that this order does not call into question the general lawfulness of most favored nation clauses."
33. For discussions of this case see George Hay "Practices That Facilitate Cooperation: The *Ethyl* Case," in Kwoka and White, *The Antitrust Revolution* (1989), and Michael Vita, "Fifteen Years After Ethyl: The Past and Future of Facilitating Practices," *Antitrust Law Journal* 68:991-1005 (2001).
34. The four manufacturers were Ethyl Corporation, E.I. du Pont de Nemours, and Company, PPG Industries, Inc., and Nalco Chemical Company.

35. Two other aspects of this case, advance price notices and uniform delivered pricing, also raise important price transparency issues. See Hay (1989) and Vita (2001), *supra* n. 33.
36. The MFN clause requires that if AOL executes a cable broadband ISP service agreement with another cable company, AOL Time Warner must provide the FTC's monitor trustee with a copy of the cable company agreement, give notice of the execution of the cable company agreement to each non-affiliated ISP that is a party to an alternative cable broadband ISP service agreement, and give the non-affiliated ISP's an opportunity to opt in to the same rates and terms secured by AOL in the cable company agreement.
37. *America Online, Inc., and Time Warner Inc.* C-3989 (Dec. 14, 2000) (press release).
38. The agreement prohibits Stone Container from requesting, suggesting, urging, or advocating that any manufacturer or seller of linerboard raise, fix, or stabilize prices or price levels. The agreement also prohibits Stone Container from entering into, adhering to, or maintaining any combination, conspiracy, agreement, understanding, plan or program with any manufacturer or seller of linerboard to fix, raise, establish, maintain, or stabilize prices or price levels.
39. *Stone Container Corporation*, C-3806 (Feb. 25, 1998) (Analysis to Aid Public Comment).
40. *AE Clevite, Inc.*, C-3429 (March 24, 1993) (press release).
41. *YKK (U.S.A.) Inc.*, C-3445 (March 25, 1993) (press release).
42. *Quality Trailer Products Corporation*, C-3403 (Aug. 11, 1992) (press release).
43. *Electrical Bid Registration Service of Memphis Inc.*, FTC Docket No. 9183 (Feb. 20, 1986) (press release).
44. *BP Amoco p.l.c. and Atlantic Richfield Company*, C-3938 (April 13, 2000) (Analysis to Aid Public Comment).
45. *Entergy Corporation and Entergy-Koch LP*, C-3998, (Jan. 31, 2001) (Analysis to Aid Public Comment).
46. All information reported in this section is in the public record.
47. "With rare exception, the courts have been very clear that mere parallelism, including interdependent conscious parallelism cannot support a conspiracy finding unless there are additional or 'plus' factors." Phillip E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶1434a. Boston: Little, Brown and Company (1986).
48. Jonathan Baker, "Identifying Horizontal Price Fixing in the Marketplace," 65 *Antitrust Law Journal* 41 at 48 (1996). Carlton *et al.* argue that information exchanges should not be subject to a rule of per se illegality "because communication can have ambiguous effects, and because our experience with certain forms of communication is limited." Dennis W. Carlton, Robert H. Gertner, and Andrew M. Rosenfield, "Communication Among Competitors: Game Theory and Antitrust," 5 *George Mason Law Review* 423 at 439 (Spring 1997).
49. *Ibid.*, pp. 50-51.
50. Joseph Farrell and Matthew Rabin, "Cheap Talk," 10 *Journal of Economic Perspectives* 103 (Summer 1996).
51. *United States v. Airline Tariff Publishing*, Civil Action No. 92-2854, (D.D.C. filed Dec. 21, 1992).

52. William Gillespie, "Cheap Talk, Price Announcement, and Collusive Coordination," EAG 95-3, Discussion Paper, Economic Analysis Group, Antitrust Division, U.S. Department of Justice (9/25/95). See also Severin Borenstein, "Rapid Price Communication and coordination: The Airline Tariff Publishing Case (1994)," chapter 13 in John E. Kwoka, Jr. and Lawrence J. White (eds.), *The Antitrust Revolution: Economics, Competition, and Policy*, 3rd ed. (1999).
53. U.S. v. ATP, United States' Response to Public Comments, April 8, 1993, p. 17, quoted in Gillespie, *op. cit.*, p. 11.
54. Gillespie, *op. cit.*, p. 14.
55. "For example, future fares could be tested out on a few seats. The fares could go into effect immediately, but be limited to only a few seats. The fares would be extended to all seats only if rivals signal that they will go along with such a general fare increase by matching their rival's fare on the few seat basket. Because this alternative is so good a substitute (from a cooperative pricing perspective) for preannouncement, a ban on preannouncement would only be effective if this alternative were also banned. However, a ban on this alternative may be very costly, because fares limited to a few seats are often efficient and the regulatory costs to enforce the ban may be large. Furthermore, there may be other alternatives, which allow the initial equilibrium to be reestablished." Carlton *et al.*, *op. cit.*, 439.
56. Gillespie, *op. cit.*, p. 16.
57. The major focus of the Ivy League investigation was on collusive arrangements for the discounted price (tuition minus financial aid). It resulted in consent decrees from the eight Ivy League Universities (U.S. v. Brown University, *et al.*, 1991 WL 536896 (E.D. Pa.)), a favorable verdict against MIT in district court (805 F. Supp. 288 (E.D. Pa. 1992)), an appeals court remand to the district court to consider procompetitive and social welfare justifications for price-fixing (5 F.3d 658 (3d Cir. 1993)), and a final settlement with MIT in December 1993.
58. Trial Exh. #197: Anne Diffily, "The Higher and Higher Cost of Higher Education," 88 *Brown Alumni Monthly* 26 (October 1987).
59. Trial Exh. #14: 1980 Ivy Presidents' Meeting (12/16/80).
60. Trial Exh. #20: November 1985 Ivy Presidents' Meeting (11/27/85).
61. Trial Exh. #21: November 1986 Ivy Presidents' Meeting (12/5/86).
62. The models cited in this section all assume profit maximization. This is a reasonable assumption for nonprofit colleges and universities, for these reasons:
 - (1) "Nonprofits" may legally make profits, and may accumulate wealth in physical assets and endowments. Their nonprofit status means only that they may not distribute profits to individuals who exercise control, such as directors and trustees.
 - (2) Trial evidence and economic theory suggest that colleges maximize profits on undergraduate education in order to subsidize graduate education and research: "There was unanimous agreement that tuition is subsidizing research. . . . However, some participants felt that we should not be concerned with controlling tuition, since the higher the rates, the more applications seem to increase." [Trial Exh. 128: Harvard University letter describing a July 1988 meeting of the Little Eleven colleges (attendees included Harvard, Yale, Princeton, Cornell, Columbia, Brown, Penn, MIT, Chicago, USC, MIT, Stanford, Johns Hopkins, Rochester) (7/19/88)]. Similarly, in support of a profit-maximization model of university behavior, Estelle James concludes: "Contrary to the popular belief that all students are being subsidized to an ever-increasing degree -- a belief that is based on cost data unadjusted for product mix [graduate/undergraduate and research/teaching] -- it turns out that the teaching of undergraduates is currently a highly profitable activity at private universities." [Estelle James, "Product Mix and Cost Disaggregation: A Reinterpretation

- of the Economics of Higher Education," 13 *The Journal of Human Resources* 157 at 179 (Spring 1978); cf. Estelle James and Susan Rose Ackerman, *The Nonprofit Enterprise in Market Economics*, p. 46 (1986)].
63. Carl Shapiro, "Theories of Oligopoly Behavior," in R. Schmalensee and R.D. Willig (eds.), *Handbook of Industrial Organization*, vol. I, p. 364 (1989).
 64. V. Bhaskar, "Quick Responses in Duopoly Ensure Monopoly Pricing," 29 *Economic Letters* 103 (1989). See also V. Bhaskar, "The Kinked Demand Curve: A Game-Theoretic Approach," 6 *International Journal of Industrial Organization* 373 (1988); Robert H. Gertner, "The Role of Firm Asymmetries for Tacit Collusion in Markets with Immediate Competitive Responses," working paper, Graduate School of Business, University of Chicago (April 1993); Robert M. Anderson, "Quick-Response Equilibrium," IP-323, Center for Research in Management, University of California at Berkeley (May 1984); Ehud Kalai and Mark A. Satterthwaite, "The Kinked Demand Curve, Facilitating Practices, and Oligopolistic Competition," Discussion Paper No. 677, The Center for Mathematical Studies in Economics and Management Science, Northwestern University (February 1986).
 65. Joseph Farrell and Matthew Rabin, "Cheap Talk," 10 *Journal of Economic Perspectives* 103 (Summer 1996).
 66. Robert J. Aumann and Sylvain Sorin, "Cooperation and Bounded Recall," 1 *Games and Economic Behavior* 5 (1989); Robert Wilson, "Reputations in Games and markets," in Alvin Roth (ed.), *Game Theoretic Models of Bargaining with Incomplete Information* (1985).
 67. According to Trial Exh. #44a, "The overlap agreement began in 1955 when the Financial Aid Directors of Amherst, Bowdoin, Dartmouth, Harvard, Wesleyan and Williams began meeting prior to the mid-April notification deadline in an effort to agree on family contributions to be expected and the consequent aid awards. The purpose of this effort has been to ensure that students who are admitted to two or more of the institutions can make their choice independent of the financial consequences; in other words, we agree not to compete with each other on the basis of differential cost of attending a given institution. Later in the 1950s a separate Ivy League overlap was formed, though Harvard and Dartmouth generously agreed to be full partners in both groups. . . . On the average, the overlap group's expectations of parental contribution are at least \$1,000 greater than the CSS [College Scholarship Service, the financial aid arm of the College Entrance Examination Board]."
 68. Jean Tirole, *The Theory of Industrial Organization*, p. 260 (1989).
 69. The Sugar Institute cartel (1927-36) is an excellent example. See David Genesove and Wallace P. Mullin, "Rules, Communication and Collusion: Narrative Evidence from the Sugar Institute Case," <http://web.mit.edu/levitsky/www/mullinupdate.pdf>, undated (C. 2001)
 70. 805 F. Supp. 288 at 293 (E.D.Pa.1992).
 71. The Sugar Institute cartel, facing a similar principal-agent problem, embraced a legalistic imagery of evidence and precedents. (Genesove and Mullin, *op.cit.*). The Ivies' moralistic approach had the compelling advantage of securing willing cooperation even from non-cartel colleges and universities, who would otherwise have been strongly motivated to undercut the cartel.
 72. Trial Exh. 138: Report to the MIT Executive Committee on the Financial Results of operations for Fiscal 1990, p. 10 (8/29/90).
 73. Trial Exh. 138, pp. 4,10,15.

UNITED KINGDOM

The aim of this paper is to outline the issues the Office of Fair Trading (OFT) faces when addressing the trade-off that sometimes arises with measures to increase price transparency. The trade-off is between increased price transparency being *pro-competitive* through better-informed consumers making more effective choices and it being *anti-competitive*, such as by facilitating collusion between suppliers.

1. General Effects of Enhanced Price Transparency

In a market economy, the price mechanism acts as a communication system.¹ Relative price movements co-ordinate the decision making of buyers and sellers who each have differing and incomplete information. Prices signal to consumers what offers best value for money and to producers what is most profitable to supply. Increased price transparency can make markets operate more efficiently through better informed consumers and more efficient producers.

Price transparency raises the alertness of consumers to the relative merits of different suppliers' products in the market. For consumers, an increase in the quality and quantity of price information available to them reduces the search costs involved in successfully selecting the product that best meets their requirements at the lowest price. More informed choices, therefore, not only benefit the consumer but also raise competitive pressures by favouring those suppliers who are most effective in meeting consumers' requirements.

Greater price transparency can also enhance competition by promoting entry into the market by efficient suppliers and exit by inefficient incumbents. For example, potential entrants can better gauge ex ante whether excess profits are being earned by incumbents and ultimately whether they can efficiently enter the market to compete away those profits.

On the other hand, increasing the availability of transparent price information, while aiding consumers, may also make it easier for suppliers to collude.² Specifically, a trade-off between helping consumers and inadvertently helping suppliers to collude may emerge where the industry has certain characteristics.

As always, the spectrum of possible collusion ranges from a hard-core cartel to tacit collusion. Hard-core cartels are where firms explicitly collude by formally agreeing to: fix prices, share markets, abide by quotas, bid rigging, or a combination of these. Tacit collusion occurs where firms adopt parallel behaviour that appears anti-competitive, but without evidence of explicit agreement.

Conditions likely to increase the likelihood of anti-competitive collusion for a given level of price transparency include:

- ***Homogeneous products:*** Increased price transparency, by making rival suppliers goods more comparable, increases the scope for cartelisation. Empirically, cartels are most prevalent with low product differentiation.³ The less differentiated are suppliers' products, the easier it

is for consumers and rival suppliers to compare prices and so the easier it is for the latter to agree prices (or to tacitly collude).

- **Barriers to entry:** Collusion between suppliers can become more viable with increased price transparency with significant absolute and strategic barriers to entry, which a cartel can enhance with exclusionary behaviour.⁴
- **Trade associations:** These sometimes publish members' prices or give guidance on pricing to their members, which increases price transparency. However, these practices run the risk of facilitating collusion.
- **Cost commonality:** Where cartel members have very similar cost structures, increased price transparency will be more acutely effective in policing the cartel: if prices are seen to fall and costs do not, the cartel member is cheating.
- **Highly concentrated:** While there are greater additional profits to be had for suppliers from colluding on prices in less concentrated industries, those industries that have few suppliers with relatively high market shares are more prone to cartelisation. With fewer members, the volume of information needed to police the cartel is less, which makes it more sustainable. Indeed, when price information becomes more readily available in less concentrated industries, a cartel becomes easier to establish and sustain there too.
- **Resale Price Maintenance (RPM):** RPM occurs where a producer specifies the resale price of their product, commonly a minimum or a maximum price. This type of vertical restraint makes for a high degree of retail price uniformity across a product brand and may facilitate horizontal collusion.

1.1 Cartels

Given these industry characteristics, increased price transparency can aid the establishment and sustainability of hard-core cartels:

- For suppliers to pursue a cartel, they must believe that it will boost joint profits and that it will be sustainable. However, to ensure their stability, cartels must police against individual members pricing below the agreed price and expanding their output.⁵
- Once a cartel agreement is in place, the individual member faces an ex post optimality problem because although the agreement raises joint profits, the individual member can now maximise its own profits by reneging on it, undercutting the remainder of the cartel. The deviant member has to balance higher profits against the probability of the rest of the cartel detecting and punishing their cheating.
- It follows that increased price transparency can make cartels more sustainable because cheating by cartel members is more easily detected and therefore more quickly punished the more transparent are prices.

1.2 *Tacit Collusion*

Even where there is no formal cartel, tacit collusion or price leadership could still occur with firms using the published prices as norms or by following the trends set by movements in the prices of the market leader. These forms of anti-competitive behaviour could emerge, even with low barriers to entry (for example due to the menu costs of changing price lists, advertising, etc). Tacit collusion seems more likely when there is little or no difference between transaction and list prices because when consumers can strike a deal at significantly below the list price, the additional profits from tacitly colluding on observable list prices are eroded.

An interesting example of a practice that is ostensibly competitive, but could have some adverse effects is where suppliers have price promises to 'match the lowest price'. While this is a form of price competition that may work in favour of consumers who shop around, it could lead to tacit price collusion because customers inform suppliers of the prices of their rivals, increasing price transparency for the supplier. This could contribute to price monitoring within a cartel or better targeting of anti-competitive conduct by a dominant undertaking or cartel. Moreover, promises to match lower prices could discourage price cuts in the first place.

In general, the types of price transparency measure that are more likely to be anti-competitive are those involving gathering price information for centralised publication. Transparency of prices at the point of sale and to a lesser extent in advertising is less likely to have anti-competitive consequences because although price information is transparent, it remains dispersed. With centralised sources of price information, firms can more readily collude because the cost of gathering the necessary data is very small. Dispersed price information has much higher search costs and so makes effective collusion more difficult.

2. **Government Price Transparency Enhancement Policies**

In the UK, the paradox that measures designed to increase price transparency can both help consumers and facilitate collusion between suppliers is recognised in government policy. Measures to enhance price transparency arise mainly under consumer protection legislation. In competition law, the potential anti-competitive effects of forms of increased price transparency are mainly covered by the Chapter I prohibition of the Competition Act 1998.⁶ The aim of competition policy is to ensure effective competition in markets. Price transparency is not seen as an end in itself. Imposing price transparency as a remedy would only be considered in a competition investigation where it is commensurate with the aim of maintaining effective competition.

In consumer protection, under Section 4 of the Prices Act 1974 the Secretary of State for Trade and Industry can make Orders (that is, secondary legislation) regulating the way prices of consumer goods and services are marked and indicated. In July 1999, the Department of Trade and Industry (DTI) published its Consumer White Paper 'Modern Markets: Confident Consumers'. In this, the Government recognised the importance of price transparency and comparability and undertook to improve price information requirements by March 2000.

The most recent statutory instrument that sets out pricing requirements for products that are for sale by traders to consumers was the Price Marking Order 1999. The aim is to provide price transparency for consumers. Traders are obliged to indicate unit prices for one kilogram, one litre, one metre, one square metre, and one cubic metre of a product, except for products whose unit price is specified in the Order.⁷ Unit prices must be given in Sterling and inclusive of Value Added Tax (VAT) and all other taxes, so the price displayed is what the consumer pays. So that the consumer can be clear about prices before committing to a purchase, prices must be: unambiguous, easily identifiable, and clearly legible; placed in

proximity to the product; and placed so that the consumer can see them without seeking assistance. Prices must also take account of any changes in the rates and coverage of VAT and other taxes. Any postage, packing or delivery charges shall be unambiguous, easily identifiable, and clearly legible. Further Price Marking Orders include those covering: petrol, food and drink on premises, and pre-packed milk in vending machines.

In the UK, sectoral regulators such as Office of Telecommunications (OFTEL) and Office of Gas and Electricity Markets (OFGEM) facilitate price transparency and the comparability of prices to help consumers and thereby promote competition. An electricity or telephone bill has a number of elements and a focal price can be misleading. For example, with a telephone bill there is line rental, plus local, national, and different international call rates and a consumer needs to reconcile all of these with their usage pattern to choose the service that is best for them. OFTEL and OFGEM provide on the Internet comparisons of the prices of different suppliers, based on a range of usage patterns.⁸ This allows consumers to compare them.

Chapter I of the Competition Act 1998 ('the Act') prohibits agreements which prevent, restrict or distort competition and may affect trade within the UK. The Act prohibits price-fixing agreements and prohibits information-sharing agreements where they have an appreciable effect on competition. This includes agreements that involve exchange of information on prices that may lead to price co-ordination and therefore elimination of competition between suppliers. Price information relates not only to prices charged, but also to the elements of a pricing policy, such as discounts, costs, terms of trade, and rates and dates of change. In addition, agreements on non-price information include those that restrict the amount, nature, or form of advertising. Where the restrictions imposed by an agreement on advertising have an appreciable effect on competition it infringes the Act. Agreements reducing price advertising will reduce price transparency where advertising has concentrated on price because it will reduce the availability of price information. On the other hand, if an agreement is indispensable to tackling misleading price advertising, price transparency is likely to be improved to the benefit of the consumer.

In competition policy, in markets where prices and other supply conditions are regulated, price transparency is essential in ensuring that the regulation can be maintained. Publication of prices allows competition authorities to compare prices or price formulae (for example RPI-X) agreed *ex ante* with prices observed *ex post*.

A further area where price transparency has been an issue in UK competition policy has been in the professions. Under Schedule 4 of the Competition Act 1998, professional services have been entitled to request that their professional rules receive an exclusion from the Chapter I prohibition on agreements. The exclusion applies only to those rules notified to, and designated by the Secretary of State for Trade and Industry. To date, no notifications have been made.

The OFT has recently undertaken a review of competition in the legal, accountancy and architecture professions in England and Wales. Its findings were published on 7 March 2001 as *Competition in Professions: A Report by the Director General of Fair Trading*.⁹ The aim of the review was to identify restrictions, whether arising from law, professional rule, or other source, which has the effect of preventing, restricting or distorting competition in the professions. Some of the restrictions identified are likely to be anti-competitive either by limiting or increasing price transparency.

Restrictions that limit price transparency for consumers and are thereby likely to restrict competition include:

- Prohibition of comparative fee advertising by the Law Society and the Institute of Chartered Accountants in England and Wales (ICAEW) in the legal and accountancy professions respectively.
- Barristers are prohibited from making direct comparisons with other barristers and from referring to their success rates.

The following restrictions may increase price transparency for consumers by making ‘the going rate’ more readily identifiable, but are likely to lead to tacit collusion:

- The Royal Institution of British Architects (RIBA) issues non-mandatory guidance to architects on the fees they should charge.
- Similarly, the Law Society has issued fee guidance, in particular in relation to probate.

The OFT’s view is that the professions should be fully subject to competition law and restrictions on competition unjustified by economic efficiency and consumer benefits should be removed. In response to the report, Stephen Byers, the Secretary of State for Trade and Industry, announced that the Competition Act 1998 would apply fully to the professions and that consultation will take place on the restrictions identified by the OFT (that is, Schedule 4 of the Competition Act would go).

3. Private Price Transparency Enhancement Measures

The majority of the information relating to this issue has been given above. This section therefore concentrates on the competition consequences of e-commerce increasing price transparency.

On 31 August 2000, the OFT published an economics discussion paper, *E-Commerce and its Implications for Competition Policy*.¹⁰ The aim of the research was to examine whether the existing tools of competition policy need adapting to deal with e-commerce. Among the report’s findings was that comparative pricing search engines help buyers in the search and selection process. Buyers with access to the Internet, can potentially access all suppliers, irrespective of their location and at any time of day very rapidly and at low cost. This increases the choice for buyers, whilst reducing search and switching costs. This improves price transparency by allowing buyers to form rapid judgements about the position of different suppliers, which raises competitive pressures by favouring the suppliers that are most effective in meeting the requirements of consumers. Some websites increase buyer power by acting as an intermediary in forming buyer groups (for example in the UK, letsbuyit.com).

One of the most widely held competition concerns relating to e-commerce is that it may facilitate collusion between suppliers, increasing its incidence and sustainability. In particular, the report suggested that comparative pricing search engines could potentially be anti-competitive. Such search engines could facilitate tacit collusion on prices and would allow cartel members to co-ordinate their prices and to observe cheating more readily. Cheating could also be more readily punished because prices can be changed quickly in retaliation and menu costs are low. Comparative pricing search engines could increase the incidence of collusion by the e-commerce segment of transactions acting as a vehicle for collusion between suppliers across all marketing channels. On the other hand, collusion may be difficult on the Internet because of the ease with which messages can be detected by the authorities (for example in chat rooms). Collusion may also be hindered by the greater contact between buyers, allowing them to more readily detect collusion and inform the competition authorities.

The trade-off between increased price transparency and risks of collusion need to be considered on a case by case basis. A number of areas will require careful monitoring and in some cases detailed application of competition law may require some adjustment. However, software could make collusion extremely difficult to detect.

Using the Internet to ameliorate competition problems has already been considered in a number of cases. The Competition Commission considered requiring the posting of price information on the Internet as a remedy in their recent investigation into UK supermarkets.¹¹ Published in October 2000 (following a complex monopoly reference), their report found supermarkets to be 'price flexing': setting retail prices across different stores in different geographical areas in light of local competitive conditions, rather than simply variation in costs. One remedy the Competition Commission considered was requiring each supermarket chain to publish maximum prices or highest and lowest prices on the Internet to improve price transparency for consumers. It was however dismissed as "inappropriate and bringing about problems disproportionate to the adverse effects" it would seek to tackle. The main reason for rejecting the proposed remedy was that the data requirements placed on supermarkets would be large and would disadvantage some chains. Also, survey evidence suggested that consumers felt they already had sufficient price information.

4. Cases

Cases where measures to increase price transparency has been prescribed as remedies by the UK competition authorities are relatively uncommon and so little exists empirically to ascertain the effects it has had. Increased price transparency has been put forward as a remedy in a number of instances, to help raise the buyer power of consumers, but has often not been adopted due to the potential for collusion presented by it. Below are some instances of where price transparency has been a factor:

- i) In 1993, the Monopolies and Mergers Commission (MMC, now the Competition Commission) investigated the supply of animal waste in Great Britain. This found that England and Wales to be one market and Scotland to be a separate market, due to little cross-border competition. The MMC found a monopoly situation in England and Wales in favour of Prosper De Mulder Ltd (PDM) and certain subsidiary and related companies. A monopoly situation was also found in Scotland in favour of William Forrest & Son (Paisley) Ltd (Forrest) and its ultimate holding company Hillside Holdings plc (Hillside). The main issues of public interest raised by the dominance of PDM and Forrest were with their pricing policies. PDM's competitors alleged that PDM was engaging in predatory pricing. Forrest was found to have engaged in discriminatory pricing, which squeezed out its two smaller competitors and thereby restricted competition. Both PDM and Forrest subsequently entered into undertakings to publish in the *Meat Trades Journal*, on a weekly basis, prices paid or charges made for the collection of animal waste. In seeking greater price transparency, collusion would not have been a great issue because the gains to be had from it are limited by the fact that both PDM and Forrest were found to be dominant, meaning incentives to collude with smaller competitors are low.
- ii) In 1996, the MMC investigated the possible acquisition by Robert Wiseman Dairies plc (Wiseman) of Scottish Pride Holdings plc (Scottish Pride). The merger was cleared subject to Wiseman providing behavioural undertakings. In Scotland, the merger made Wiseman the purchaser of nearly half of all raw milk and gave it nearly 80 per cent of wholesale sales of fresh processed milk. The MMC concluded that Wiseman's dominant market position were the merger to go ahead, would allow it to raise prices excessively. Therefore, among the undertakings entered into was one of price transparency: that Wiseman provides the Director

General of Fair Trading with the average price, the highest price and the lowest price charged by Wiseman to each customer group for the supply of milk. Since Wiseman was found to be dominant and the price information is not publicly published, facilitating collusion would have been less of a concern because the gains from collusion are more limited for an already dominant firm.

iii) In 2000, a merger between subsidiaries of Sylvan International Ltd and Locker Group plc producing drums for the packaging and transport of electrical and telecommunications cable and wire raised public interest concerns and was subsequently blocked by Ministers.¹² The joint venture would have had market shares ranging from 84 per cent in timber drums to 93 per cent in small steel drums, leaving but a few small competitors. In their report on the merger, the Competition Commission found that smaller customers lacked the information to make informed choices between suppliers and also that the lack of price transparency contributed to the potential for the merged company to undertake predatory pricing to force smaller suppliers out of the market. Although the Competition Commission recommended that the merger be blocked, two of its members had suggested remedies that involved price transparency. Drum prices are difficult for customers to compare because drum specification requirements differ from customer to customer. To increase buyer power, it was proposed that on a website the merged company give information on its raw material costs or more comprehensive information on unit prices, size and specification of drums, and the size of the order. However, the Director General of Fair Trading advised the Secretary of State for Trade and Industry against this behavioural remedy:

- The Director General took the view that price transparency undertakings could help to facilitate collusion (tacit if not explicit). The risk of collusion was hard to gauge, but could not be discounted, especially since the willingness and ability of the smaller competitors to expand to compete with the merged company was uncertain (even though the Competition Commission cite that there are few economies of scale).
- The Competition Commission acknowledged that publication of too detailed price information could enable customers to be identified, particularly with non-standard drum sizes. Customer consent would be required to publish all price information, which the Director General viewed as possibly rendering the remedy ineffective because not all customers are likely to give their consent.

NOTES

1. See Hayek, F.A. (1945), 'The Use of Knowledge in Society', *American Economic Review*, Vol. 35, No. 4, pp. 519-530.
2. That intervention by competition authorities to improve price transparency can be counterproductive in a market dominated by a few suppliers with significant barriers to entry was demonstrated in the case of ready-mixed concrete in Denmark. See Albæk, S., Mollgaard, P., and Overgaard, P.B. (1997), 'Government-Assisted Oligopoly Co-ordination? A Concrete Case', *Journal of Industrial Economics*, Vol. 45, No.4, pp. 429-443.
3. See: Hay, G.A. and Kelley, D. (1974), 'An Empirical Survey of Price Fixing Conspiracies' *Journal of Law and Economics*, Vol. 17, pp. 13-38; Asch, P. and Seneca, J.J. (1975), 'Characteristics of Collusive Firms', *Journal of Industrial Economics*, Vol. 23, No. 3, pp. 223-37; and Griffin, J.M. (1989), 'Previous Cartel Experience: Any Lesson for OPEC?', in L.R. Klein and J. Marquez (eds.), *Economics in Theory and Practice: An Eclectic Approach*, pp. 179-206, Dordrecht: Kluwer Academic Publishers.
4. Absolute advantages include intellectual property rights, essential facilities, and regulation. Strategic (or first-mover) advantages: include sunk costs, economies of scale and access to finance.
5. This free-rider problem can also exist with suppliers on the fringe of the industry not party to the agreement undercutting the price agreed by the cartel members.
6. For further information, see the following Competition Act 1998 guidelines, (http://www.offt.gov.uk/html/comp-act/technical_guidelines/index.htm): OFT 401, *The Chapter I Prohibition*, (March 1999); and OFT 408, *Trade Association, Professions and Self-Regulating Bodies*, (March 1999).
7. These are too numerous to list here, but are set out in the Statutory Instrument available at: <http://www.legislation.hmsso.gov.uk/stat.htm>.
8. For further details see <http://www.phonebills.org.uk> (endorsed by OFTEL) and <http://www.ofgem.gov.uk/customers/index.htm>.
9. See <http://www.offt.gov.uk/html/rsearch/reports/oft328.htm>. The review was undertaken under the Fair Trading Act 1973. The Chancellor of the Exchequer in his 2000 Budget set out the terms of reference of the review (see <http://www.hm-treasury.gov.uk/budget2000/fsbr/chap3.htm>).
10. See <http://www.offt.gov.uk/html/rsearch/reports/oft308.htm>
11. See Competition Commission (2000), *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom*, Cm 4842, The Stationery Office. See <http://www.competition-commission.org.uk/reports/446.htm>.
12. See Competition Commission (2000), *Sylvan International Ltd and Locker Group plc: A report on the merger situation*, November, Cm 4883, The Stationery Office. See <http://www.competition-commission.org.uk/reports/sylvan1.htm> and <http://www.offt.gov.uk/html/mergers/mergers-advice.htm>.

EUROPEAN COMMISSION

Introduction

In its past decisions and practice the Commission has clearly recognised that price transparency can have restrictive as well as positive effects on competition.

The Commission looks very carefully at the so-called open price system practice, by which companies exchange information relating to their own prices, either directly or through a trade association, even where the prices communicated are not actual prices applied individually but are averages calculated by entire markets. Such exchanges are often characterised as *private transparency*; mechanisms put in place by private market actors to create an artificial degree of transparency on the market. The effect can be to replace market competition with practical co-operation.

In some circumstances, price transparency *may* benefit competition on the market. Depending on the circumstances, public, non-provider initiated surveys may not raise competitive concerns and enabling consumers to compare the prices of different products and services might even intensify competition. Such pro-competitive, public price transparency (or transparency for consumers), enabling consumers to compare the prices of different products and services *across Member States of the EU*, is also useful for strengthening the Internal Market.

This paper aims to clarify the Commission's approach towards price transparency. The first section examines how EC anti-trust policy treats *transparency between private market actors*. Firstly, the wider issue of exchange of information of varying sensitivity between private undertakings is examined in the context of Article 81. Secondly, the significance of price transparency in the Commission's merger decisions is explained. The second section will examine *EU legislation designed to enhance price transparency with the aim of market integration and consumer protection*.

1. Private Price Transparency

1.1 Approach towards market transparency under Article 81 of the EC Treaty

It is a relatively common practice in most organizations and trade associations, which regard it as a good means of increasing market transparency and knowledge and, hence, of enabling firms to fine-tune supply to demand, reduce costs and avoid risky industrial strategy choices. Thus firms are supposed to take more rational decisions when they have accurate estimates of the market on which they operate: they can identify consumer needs more clearly and organize their production and investment more efficiently by avoiding unnecessarily costly over- or underproduction.

However, some systems for the exchange of information may be aimed at or result in the significant reduction of the uncertainty which each participant should feel about the attitude of his competitors - in breach of the principle whereby all operators must independently determine the policy which they intend to follow on the market. This is especially the case when competitors

exchange individual data relating to current or future prices or price elements (including not only prices as such but also price factors such as rebates, discounts or any price changes or the time of such price changes). This may be illegal *per se* and expose participating companies to sanctions.

Acknowledging the competing advantages and disadvantages of market transparency, it falls to the Commission to identify the pro- and anti-competitive effects of individual information exchange systems, to balance these against each other, and then to conclude whether the exchange is permitted under Article 81 of the EC Treaty. The following section examines how the Commission undertakes this task.

1.1.1 *Information Exchange as a Facilitating Mechanism for Collusion*

It must be stated at the outset that where an information exchange system is used to facilitate collusion between undertakings, such as joint price fixing, it is established by Commission practice and case-law that the exchange of information is also caught by the prohibition in Article 81(1) as an integral part of that anti-competitive practice.

The following examples serve to illustrate this.

In its *Cartonboard*¹ judgement, the CFI agreed with the Commission that an information exchange system would infringe Article 81 where its effects were to support an anti-competitive cartel agreement. In this case, producers of Cartonboard created an information exchange system enabling each to maintain its market share and to facilitate price-fixing and co-ordination of production. The *Fides* Information Exchange system facilitated a rapid distribution of details of production, sales figures and market statistics. Most of this information was broken down on a country by country basis and it showed the total value of the orders of the participating producers. The fact that each producer was identifiable from the information allowed for individual market shares to be monitored on a regular basis. However, the CFI also held that the Commission was obliged to identify the existence of an agreement and to explain how the information exchanged supported this².

In the *Cement Cartel*³ case, the Commission held that a cartel between *Cembureau* (an association of associations in the European cement industry), eight national associations and thirty-three producers had engaged in market sharing between Member States⁴. The Commission prohibited an exchange system between Cement producers, which had the object of supporting the market sharing. Sensitive price information and sales figures were exchanged which allowed competing members from other countries to align their own prices if they entered those markets. Individualised data on different producers had also been exchanged, allowing members to monitor each other's market shares. The Court upheld the Commission's finding that the exchange was used to support an anti-competitive agreement:

“...one of the objectives assigned to the system for the periodic exchanges of price information had been to ensure the implementation of the Cembureau agreement adopted at those meetings. The fact that the system had been in place well before the adoption of the Cembureau agreement did not preclude the Commission from finding without the need to show that a change had taken place in the way that system functioned that, from the moment when the Cembureau agreement had been adopted, one of the functions of such periodic exchanges of price information was to facilitate the implementation of that agreement.”⁵

In its *Steel Beams*⁶ Decision, the Commission found that a number of Steel Beam producers had instituted a monitoring system to make transparent orders and deliveries for each individual supplier and Member State. The producers also aligned prices in order to stem flows in inter-state trade. The information exchange system in this case served to support the cartel arrangements that existed between undertakings, ensuring that no cartel member could “cheat” on the others. The Commission found this to

be a serious restriction of Article 65(1) of the European Coal and Steel Treaty (the equivalent provision to Article 81(1)).

The Court of First Instance affirmed the Commission's decision. It held:

“Where an undertaking reveals to its competitors - during one of a series of regular meetings at which most of them are present - what its future market conduct will be in regard to prices, calling on them to adopt the same conduct, and thus acts with the express intention of influencing their future competitive activities, and where that undertaking can reasonably count on its competitors complying in large measure with that request or, at least, on their bearing it in mind when deciding on their own commercial policy, the undertakings in question are in those circumstances substituting practical co-operation between themselves for the risks of normal competition under the Treaty, and such conduct must be classified as a concerted practice within the meaning of Article 65(1) thereof.”

Undertakings also engage in a concerted practice within the meaning of that provision where they actually take part in a scheme designed to eliminate uncertainty as to their future market conduct and necessarily implying that each of them takes into account the information obtained from its competitors. It is not necessary, therefore, to demonstrate that such exchanges of information led to a specific result or were put into effect on the market in question.”⁷

1.1.2 *Information Exchange as Such*

For situations where information is exchanged between undertakings without there being any direct evidence of other collusive conduct that is caught by Article 81(1), the first guidance for the assessment of such exchange of information schemes under the EC anti-trust rules was provided in 1968. In that year, the Commission published a Notice concerning agreements decisions and concerted practices in the field of co-operation between enterprises. It included a chapter laying down the following general principles with respect to exchanges of information, either directly between enterprises or within trade associations:

- The joint preparation of statistics and comparative studies of undertakings or industries is, in principle, lawful.
- Agreements the object of which is to compile data needed by the enterprises in order to determine freely and independently their market behaviour do not, in principle, have their object or effect a restriction of competition ;
- Any communication of data that causes an undertaking to adopt a decision on the basis of competitor's decisions is likely to restrict competition, unless such information is within the public domain. This is in particular the case where the information is accompanied by concrete recommendations or conclusions the form of which suggests that certain competing firms will act in a similar manner on the relevant market.
- The Commission added that it would be especially vigilant with regard to oligopolistic markets for homogeneous products.

It was the Seventh Report on Competition Policy (1977) which established further guidelines for the Commission's approach to voluntary exchanges of information. It explains that the distinction between good and bad information exchange systems can be made only on a case-by-case

basis in the light of all the features of each agreement, having regard in particular to the **structure of the market** and **the nature of the information exchanged**.

In an oligopolistic market, greater transparency strengthens the interdependence of firms and reduces the intensity of competition. If it is improved for the benefit of suppliers only, transparency deprives customers of the possibility of taking advantage of the residual "hidden competition".

In general, an information exchange system will be prohibited when its effect is to replace the normal risks of competition by practical co-operation or at least when it allows competitors to observe each others' market strategies and to react accordingly. This will be the case where current or future information is of a highly sensitive and individualised nature relating to competitors' activities and strategies. This would also be the case, for instance, in mature and highly concentrated markets where the information exchange heightens the market transparency to the point where any attempt at independent, pro-competitive behaviour would be exposed to retaliatory measures by competitors, who can easily determine its origin. Paragraph 7 of the Summary of the CFI judgement in *Fiataagri* reflects this position:

“An agreement creating an information exchange system which does not concern prices and does not underpin any other anti-competitive arrangement is likely, on a truly competitive market, to lead to the intensification of competition between suppliers, since the fact that a trader takes into account information made available to him in order to adjust his conduct on the market is not likely, having regard to the atomised nature of the supply, to reduce or remove for the other traders any uncertainty about the foreseeable nature of its competitors' conduct. On the other hand, general use, as between the major suppliers, of exchanges of precise information at short intervals is, on a highly concentrated oligopolistic market on which competition is already greatly reduced and exchange of information facilitated, likely to impair considerably the competition which exists between traders. In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all competitors the market positions and strategies of the various individual competitors.”⁸

To determine whether or not a system of information exchange infringes EC Competition Law, the Commission will focus its analysis:

- (i) On the characteristics of the information exchange itself:
 - Nature and type of information exchanged;
 - Level of aggregation of information;
 - Period to which information relates and frequency of exchange;
 - Institutional structure of the system (collection by one of the participating firms, by a trade association or by a completely independent organisation).
- (ii) On the structural characteristics of the market on which exchange takes place

The Commission's *UK Tractors* decision⁹ demonstrates the application of these principles. In this case, seven of the eight of the largest UK Tractor Producers were involved in an information exchange system which freely made available to its members certain figures relating to the UK Tractors Market. The Commission objected to the circulation of disaggregated figures identifying the volume of retail sales and market shares of each individual member of the Exchange with detailed breakdowns by model, by product groups, and by geographic areas.

It found that “The information is made available for time periods broken down by year (calendar year, fiscal year, rolling year), year to date, quarter and month, and in respect of total United Kingdom retail sales the figures are even available on a daily basis. This therefore permits each member to follow the sales performance and market penetration of each participating competitor on a yearly, quarterly, monthly and daily basis in respect of all the products, specific products and within the smallest geographic areas.”¹⁰

There was high concentration on the supply-side of the market in this case. The United Kingdom market was dominated by four suppliers who together held some 76 to 77 % of the market. The Commission was also highly cognisant of the fact that high barriers of entry existed in the form of brand loyalty and the requirement of a dense distribution and sales network. It was noted that the information exchange itself constituted a barrier to entry because it permitted established suppliers to recognise immediately any new market penetration or increase in sales by non-members and then to react and defend their market positions¹¹. In addition, the demand on the UK Tractors Market was widely dispersed¹². Because demand transferability in this market was very low this weakened the competitive pressure from the demand side and therefore reinforced the economic strength of the incumbent suppliers on the market.

Finally, the Commission found that there was little product differentiation in the UK market for tractors, insofar as the tractors all fulfilled the same functions and were compatible with all other agricultural machines to be attached to a tractor¹³. The homogeneity of the product restricted the possibility of competition on quality. As the price of the vehicles were decisive in the consumer’s choice of tractor, it became more important to protect this element of competition.

In conclusion, the agreement to exchange precise information at short intervals, identifying registered vehicles and the place of their registration on a highly concentrated market, was considered as being liable to create a degree of transparency that would restrict genuine competition and stifle competitive initiative.

The CFI and the ECJ upheld the Commission’s finding that the exchange of individualised information would lead competitors to take appropriate reactionary measures, and that the threat of detection and punishment would discourage even genuinely competitive undertakings from trying to increase their market share¹⁴.

It was also held in this case that a high level of market transparency allows incumbent operators to foreclose the market to new entrants, regardless of whether these become members of the exchange or not. In the first scenario, the system exposed new initiatives to acquire market share, leaving the new entrant open to retaliatory measures by established undertakings. In the second scenario, there was an inequality of arms, insofar as the new undertaking lacked the detailed market information enjoyed by established undertakings¹⁵.

1.1.3 Sector-specific provisions for the exemption of information exchanges: Commission Block Exemption in the Insurance Sector

Certain Commission Block Exemption Regulations mediate between the pro and anti-competitive effects of transparency mechanisms between undertakings. In the field of insurance, for instance, the Commission has employed a policy of exemptions to article 81(1) which has subsequently led to Block Exemption Regulation 3932/92¹⁶, authorising some forms of information exchanges between insurers.

The insurance sector is dependent on statistical information to such a degree that it is necessary for firms to exchange information. The Block Exemption focuses, *inter alia*, on two particular areas in which the exchange of information between undertakings is necessary: statistical information exchange for the calculation of indicative risk premiums (Title II) and standard policy conditions (Title III).

Title II grants the benefit of the Block Exemption to agreements on calculation of the average cost of risk cover (pure premiums) or the establishment and distribution of mortality tables¹⁷. Information exchanged must be limited to information concerning risk premiums, that is the amount needed to cover the risk alone. Information exchange on commercial premiums (that is, the end price to consumers that incorporates the risk premium, plus an element to cover the administrative costs of the insurer plus a profit margin) is not allowed¹⁸. The grouping of statistics into categories must be the minimal grouping that is compatible with having a meaningful statistical base in each risk category. Such exchange of statistics is essential to permit new entry to the market, since a new insurer otherwise has no way of knowing how to price risks. Title II also allows undertakings to organise studies on the frequency or scale of claims, provided these are of a general nature.

Individual insurers must not be identifiable. Since the statistics are pre-grouped into categories, no information about any specified insurance policy can be identified either¹⁹.

Title III grants the Block Exemption to standard non-binding policy conditions²⁰. This is linked to Title II, since any statistics exchanged necessarily have to relate to a specific insurance policy. The standard policies exempted here are nominal policies on the basis of which the risk premiums are calculated. They do not necessarily correspond (and usually do not correspond) to any specific policy of any specific insurer. Again, market entry is facilitated by such standard policies, since a new insurer without much experience can at least offer the standard product at the standard risk premium, for an initial period. All it has to calculate is how much to add for its administrative cost and profit margin.

1.2 Approach towards Price Transparency in Merger Policy

1.2.1 Case examples

Price transparency has been an important element of the Commission's approach to the analysis of collective dominant positions in many merger cases. Merger Control shares the same priority as other areas of Competition Policy, in so far as it aims to prevent market conditions which facilitate tacit co-ordination between undertakings, albeit from an *ex ante* analysis.

In its submission to the OECD Round Table on Oligopoly in May 1999 the Commission stated that "market transparency is normally deemed to be a necessary condition for oligopolistic dominance, since the members of the oligopoly will not otherwise be able to detect and punish "unfair" competitive behaviour".

This principle was applied in the Commission's decision on the *Enso/Stora* Merger:

"In *Enso/Stora*, the oligopoly issue concerned the markets for newsprint and magazine paper. The merging parties: Enso of Finland and Stora of Sweden, together constituting the largest integrated paper and board group in the world were two of only six significant suppliers of newsprint (accounting together for around three-quarters of total capacity) in the EEA market.

The combined group would become the largest of these. The market structure in magazine paper was only slightly less concentrated. The Commission's detailed investigation found that these markets displayed many of the characteristics of an anticompetitive oligopoly low demand growth, concentrated supply side, homogeneous products, mature technology, high entry barriers, similar cost structures. The merger would significantly increase the level of concentration in both markets. *However, the Commission also found that other key oligopoly characteristics were not present: in particular, there was no market transparency information on prices and quantities*

supplied was not readily available to competitors, and indeed there were secret discounts. Moreover there was evidence that customers principally, large publishing groups could exercise a measure of countervailing power. Accordingly the Commission concluded that this aspect of the merger would not lead to the creation or strengthening of a dominant position which would significantly impede competition in the common market or a substantial part of it."²¹ (Emphasis Added)

Although the parameters, which are important for market transparency, differ from market to market, price is obviously such a parameter in many markets. However, in some cases other parameters may be more important. In *MCI WorldCom/Sprint*²² the tacit co-ordination investigated was not on directly on prices but rather in the form of market sharing by bids. Market transparency therefore related to who won in a bidding market.

The Court of First Instance (CFI) in its *Gencor* decision confirmed the importance of price transparency in collective dominance cases.²³ The CFI said "price transparency is a fundamental factor in determining the level of market transparency where there is an oligopoly. By means of the price mechanism, the members of an oligopoly can, in particular, immediately discern the decisions of other members of the oligopoly to alter the *status quo* by increasing their market share and they may take such retaliatory measures as may be necessary in order to frustrate actions of that kind".²⁴ In *Gencor*, both Gencor and the CFI agreed with the Commission's analysis that the market for platinum was characterised by high price transparency.

Also in other cases, high price transparency has been an undisputed fact of a market in which a collective dominant position would be created or strengthened as a result of a merger. In *Exxon/Mobil*²⁵, the market for motor fuel retailing was analysed in several countries. The Commission found that this market was characterised by full transparency, in so far as it was a retail market where pump prices were publicly known. In fact, price transparency was readily assessable not only at the marketing level, but at all levels of trade. The Commission argued that in motor fuel retailing the transparency was such that it made any form of cheating of the players on the market impossible. The full transparency was one important element that supported the Commission's finding of the creation or strengthening of a collective dominant position in the markets concerned.

The degree of price transparency is, however, often a contested issue in a merger investigation concerned with collective dominance. In the *Time Warner/EMI* case²⁶, the Commission investigated the issue of collective dominance with respect to the market for music recording. Records are in some regards highly differentiated products, whereas in other regards they are to a large extent standardised. In a sense every record is unique and records are imperfect substitutes for each other. However, from the point of view of pricing and distribution, records are highly standardised products as the major record companies have in fact very few price categories. Every record company uses the published price to dealers (PPD) as a basis for their pricing. All record companies operate with a limited range of PPD's such as deluxe, full price, midrange and budget. Records are distributed in the same way and almost all have a certain range of tracks. The Commission therefore argued during the investigation that a high degree of standardisation existed in the pricing and format of the records, which would make tacit co-ordination on prices easier. The existing price structure for records had basically been in place for years although using different pricing structures would have been obvious ways to compete in this market in view of the nature of the product. The Commission's investigation showed that the PPDs were completely transparent and that the PPD was a good benchmark for prices charged to retailers, because there was an incentive for record companies to offer as little discounts as possible. The reason for this was that the royalties paid to artists were tied to the PPD and not the net realised price paid by retailers. The Commission therefore considered that the PPD contained meaningful information about the pricing in the market. Furthermore, the majors also used the same structure of discounts and had a clear idea of each other's discount policy, as shown by internal

documents of the parties obtained by the Commission during its investigation. Contrary to what the merging parties argued, the Commission therefore considered that there was sufficient price transparency in the music recording market that a collective dominant position of *Time Warner/EMI* and three other major record companies would be created by the merger.

1.2.2 Remedial measures

Price transparency featured in a remedial measure in the merger case *Danish Crown/Vestjyske Slagterier*.²⁷ The Commission found that the merger as notified would lead to a duopolistic dominant position of *Danish Crown/Vestjyske Slagterier* and *Steff-Houlberg* on the Danish market for fresh pork meat sold through supermarkets. Two aspects of price transparency were discussed. First, the slaughterhouses bought live pigs from farmers at the same price through a national price quotation system. Each week a price committee fixed a price per kilo, which according to the agreement had to be paid by the four major co-operative slaughterhouses²⁸ to their members. Second, the weekly price quotation meetings based the price to the farmers on the basis of the actual sales prices obtained by the co-operatives. Every week, each company reported the prices obtained for the main cuts. It would thus not be possible to start on any large scale a confidential rebate policy on the Danish market as this would immediately be detected by the major rivals via the weekly price quotation meetings.

One of the remedies, which allowed the Commission to clear the merger, was the abolition of the pig quotation system. The Commission found that this would mean more scope for price competition, since the co-operative slaughterhouses would have more flexibility in their pricing to the farmers, and that the market could become less transparent.

2. EU legislation designed to enhance price transparency with the aim of market integration or consumer protection

Transparency is key to the maintenance of a single European Market. If consumers are to choose between products or services from different member states they must be aware of the differentials in the prices offered by competing undertakings. Likewise, if an undertaking in one Member State is contemplating entering the market in another member state, it needs to be aware of the conditions in that market.

The creation of a Single European Currency is an integral part of this process. The differences in prices for competing goods across Member States may not be apparent where the prices are expressed in different national currencies. The increased transparency of the Euro will lead to increased competition. However, as the Commission has pointed out in its 1998 Annual Report on Competition Policy, this in turn could induce firms to engage in anti-competitive defensive measures:

“...increased price transparency will create further incentives for parallel trade, but will also increase the temptation for companies to create new obstacles to arbitrage. Similarly, new competitive threats arising from EMU may induce incumbents to enter into vertical or horizontal agreements with the object of foreclosing rivals' markets, or alternatively to seek state aid. Finally, in the longer run, the expected increase in mergers and acquisitions could create oligopolies in some industries. Companies in these industries could be tempted to reduce the competitive pressure either by engaging in tacit collusion or by forming cartels. This will be made easier as the increased price transparency will facilitate the monitoring of competitors' prices. It will also be more difficult to deviate from agreed prices and hide this fact behind exchange rate fluctuations.”²⁹

2.2 *Liberalisation in utilities markets*

Utilities Industries have for a long time been characterised as sectors fragmented along national lines in which formerly nationalised monopolies controlled and supplied services considered essential to the public interest (e.g. telecommunications, gas, electricity, railroads, post). Supply of such services required the use of infrastructure networks, which had been built by the State or under State concessions and were thought to constitute natural monopolies. On this basis, the introduction of competition as well the development of an internal market in these sectors requires to a large extent new suppliers and end-users gain third party access to existing infrastructure.

The Commission's programme has concentrated on areas where liberalisation has been particularly important in the interests of strengthening the internal market, as well as encouraging efficiency and economic growth. The telecommunications and energy sectors offer two examples of liberalisation programmes in which increased price transparency has been important to reaching those goals.

2.2.1 *Energy*

In the energy sector, a first step towards price transparency was made by Council Directive 90/377/EEC³⁰ which requires Member States to take the steps necessary to ensure that undertakings which supply gas or electricity to industrial end-users (as defined in Annexes I and II to the Directive), communicate to the Statistical Office of the EC (SOEC) in a certain form:

- (1) the prices and terms of sale of gas and electricity to industrial end-users;
- (2) the price systems in use;
- (3) the breakdown of consumers and the corresponding volumes by category of consumption to ensure that these categories are representative of the national level.

The information under (1) and (2) will be sent to the SOEC twice a year so that it can publish the prices of electricity and gas for industrial users in the different Member States each May and November. The information under (3) will be sent to the SOEC and the competent authorities of the Member States every two years but will not be published.

2.2.1.1 With regard to access to the transmission system, the **internal electricity market directive** distinguishes between negotiated third party access (TPA), regulated TPA and the single buyer system.

Concerning negotiated and regulated TPA, Article 17 of the internal electricity market directive foresees (underlining added):

1. *In the case of negotiated access to the system, Member States shall take the necessary measures for electricity producers and, where Member States authorise their existence, supply undertakings and eligible customers either inside or outside the territory covered by the system to be able to negotiate access to the system so as to conclude supply contracts with each other on the basis of voluntary commercial agreements.*
2. *Where an eligible customer is connected to the distribution system, access to the system must be the subject of negotiation with the relevant distribution system operator and, if necessary, with the transmission system operator concerned.*

3. *To promote transparency and facilitate negotiations for access to the system, system operators must publish, in the first year following implementation of this Directive, an indicative range of prices for use of the transmission and distribution systems. As far as possible, the indicative prices published for subsequent years should be based on the average price agreed in negotiations in the previous 12-month period.*
4. *Member States may also opt for a regulated system of access procedure, giving eligible customers a right of access, on the basis of published tariffs for the use of transmission and distribution systems, that is at least equivalent, in terms of access to the system, to the other procedures for access referred to in this Chapter.*

Concerning the single buyer system, Article 18 foresees (underlining added):
“ 1. *In the case of the single buyer procedure, Member States shall designate a legal person to be the single buyer within the territory covered by the system operator. Member States shall take the necessary measures for:*

(i) the publication of a non-discriminatory tariff for the use of the transmission and distribution system; ... ”

2.2.1.2 With regard to access to the transmission system, the **internal gas market directive** distinguishes between negotiated and regulated TPA.

As regards negotiated TPA, Article 15(2) obliges Member States to require natural gas undertakings to publish their main commercial conditions for the use of the system within the first year following implementation of this Directive and on an annual basis every year thereafter.

According to Article 16, regulated TPA takes place on the basis of natural gas undertakings and eligible customers having either inside or outside the territory covered by the interconnected system a right of access to the system, on the basis of published tariffs and/or other terms and obligations for use of that system.

2.2.2 *Telecommunications*

2.2.2.1 Transparency obligations imposed on incumbent operators to facilitate interconnection by entrants

A first set of transparency obligations relates to the wholesale conditions applied by dominant operators. They aim to prevent abusive behaviour such as discriminatory pricing. It should be noted that besides quite generally phrased transparency obligations regarding retail tariffs for consumers, the transparency obligations in the Community directives only apply to operators with significant market power (dominance). These are asymmetric obligations: new entrants are not obliged to publish their tariffs in order not to foster anti-competitive practices and to exclude distortive effects on competition.

a) Interconnection

Article 4a of Commission Directive 90/388/EEC as amended by Directive 96/19/EC of 13 March 1996, states ;

- "1. Without prejudice to future harmonization of the national interconnection regimes by the European Parliament and the Council in the framework of ONP, Member States shall ensure that the telecommunications organizations provide interconnection to their voice telephony service and their public switched telecommunications network to other undertakings authorized to provide such services or networks, on non-discriminatory, proportional and transparent terms, which are based on objective criteria.
2. Member States shall ensure in particular that the telecommunications organizations publish, no later than 1 July 1997, the terms and conditions for interconnection to the basic functional components of their voice telephony service and their public switched telecommunications networks, including the interconnection points and the interfaces offered according to market needs.

This justification for this obligation at recital (13) of the Directive shows how transparency was instrumental to the opening up of telecom markets. Interconnection is essentially a matter of negotiation between incumbent Public Telecommunication Operators and new service providers seeking network access. Initially, the new service providers would suffer from an imbalance of bargaining power in negotiations. Although a harmonised regulatory framework for interconnection would remedy this, establishing the framework would take time. During this period, it was unlikely that market entry would take place, as PTOs were likely to attempt to benefit from their position of relative strength and negotiations would be beset by disagreements over connection terms and charges. In order to overcome such difficulties, it was therefore essential for Member States to ensure that, no later than 6 months before the determined date of liberalisation, PTOs publish standard terms and conditions for interconnection to the voice telephony networks.

Recital 14 of the Directive also stated that during the time period necessary to ensure market entry, the cost accounting system implemented had to identify clearly the cost elements of interconnection, in order to ensure that new entrants on the network are charged prices that were fair and non-discriminatory.

These requirements were subsequently harmonised by

Article 6 of Directive 97/33/EC [of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), OJ L 199, 26/07/1997 p. 32] requires Member States to ensure that in respect of operators with significant market power (underlining added):

"(b) all necessary information and specifications are made available on request to organisations considering interconnection, in order to facilitate conclusion of an agreement; the information provided should include changes planned for implementation within the next six months, unless agreed otherwise by the national regulatory authority;
(c) interconnection agreements are communicated to the relevant national regulatory authorities, and made available on request to interested parties, in accordance with Article 14(2), with the exception of those parts which deal with the commercial strategy of the parties. The national regulatory authority shall determine which parts deal with the commercial strategy of the parties. In every case, details of interconnection charges, terms and conditions and any contributions to universal service obligations shall be made available on request to interested parties;"

Article 7 of Directive 97/33 states (underlining added):

"3. National regulatory authorities shall ensure the publication, in accordance with Article 14 (1), of a reference interconnection offer. The reference interconnection offer shall include a description of the interconnection offerings broken down into components according to market needs, and the associated terms and conditions including tariffs.

Different tariffs, terms and conditions for interconnection may be set for different categories of organisations which are authorised to provide networks and services, where such differences can be objectively justified on the basis of the type of interconnection provided and/or the relevant national licensing conditions. National regulatory authorities shall ensure that such differences do not result in distortion of competition, and in particular that the organisation applies the appropriate interconnection tariffs, terms and conditions when providing interconnection for its own services or those of its subsidiaries or partners, in accordance with Article 6 (a).

The national regulatory authority shall have the ability to impose changes in the reference interconnection offer, where justified.

Annex IV provides a list of examples of elements for further elaboration of interconnection charges, tariff structures and tariff elements. Where an organisation makes changes to the published reference interconnection offer, adjustments required by the national regulatory authority may be retrospective in effect, from the date of introduction of the change.

4. Charges for interconnection shall, in accordance with Community law, be sufficiently unbundled, so that the applicant is not required to pay for anything not strictly related to the service requested."

b) Leased lines

Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, OJ L 165 , 19/06/1992 p. 27:

Article 3 on availability of information states (underlining added):

"1. Member States shall ensure that information in respect of leased lines, offerings on technical characteristics, tariffs, supply and usage conditions, licensing and declaration requirements, and the conditions for the attachment of terminal equipment is published in accordance with the presentation given in Annex I. Changes in existing offerings shall be published as soon as possible and, unless the national regulatory authority agrees otherwise, no later than two months before the implementation."

c) Access to the unbundled local loop

Regulation of the European Parliament and of the Council on Unbundled Access to the Local Loop of 5 December 2000:

Article 3 on the provision of unbundled access foresees (underlining added):

"1. Notified operators shall publish from 31 December 2000, and keep updated, a reference offer for unbundled access to their local loops and related facilities, which shall include at least the items listed in the Annex. The offer shall be sufficiently unbundled so that the beneficiary does not have to pay for network elements or facilities which are not necessary for the supply of its

services, and shall contain a description of the components of the offer, associated terms and conditions, including charges."

- d) Commission Recommendations on interconnection pricing and Commission information on interconnection tariffs in the Member States (the aim of the recommendation is to provide the regulators with the necessary information to review interconnection tariffs in the absence of cost accounting information)

In order to help the national regulatory authorities to ensure the obligation of cost-orientation imposed on operators with significant market power on the relevant interconnection market, the Commission has adopted a Recommendation on interconnection pricing that is regularly updated on the basis of best practice, (cf. e.g. Commission Recommendation amending Commission Recommendation 98/511/EC of 29 July 1998 on Interconnection in a liberalised telecommunications market (Part 1 - Interconnection Pricing) of 20. 3. 2000).

Furthermore, the Commission services (DG Infso) regularly publish information on interconnection tariffs in the MS (cf. e.g. <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/ictarifc0en.pdf>).

2.2.3 *transparency obligations to foster consumer interest*

EU telecoms policy has recognised the importance of tariff transparency for the EU consumers. Examples of this are:

- a) Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review, Communication from the Commission, COM (1999) 539:

"...4.5.4. Transparency of information including tariffs

The full benefits of a liberalised, competitive market can only be achieved if consumers are sufficiently well informed and act upon this information. Consumer behaviour is as instrumental to achieving a competitive market as competition law.

With the liberalisation of the market, telephone tariffs are no longer determined by one operator, prices for different types of calls are no longer obvious from the number dialled, and tariff changes - upward and downward - are frequent. Tariffs and contracts for mobile services have been of particular concern to consumers.

Transparency of consumer tariffs and the provision of itemised bills are a requirement under the existing voice telephony Directive. However, in view of the difficulties consumers experience in working out the costs of the service they buy, these provisions need to be clarified in the new framework directive. The Commission is also considering whether it would be appropriate to require per call tariff information to be provided as a network service, in particular where such facilities have been standardised for example in respect of GSM networks)."

- b) Communication From The Commission - The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework, COM (2000)239 final, 26.4.2000:

"....2.6.4. Tariff transparency

There was broad support for increasing tariff transparency for consumers from all quarters. But there were differences of opinion about how best to achieve this. Operators were generally opposed to regulatory obligations related to per-call tariff transparency. They argued that the nature of competition was such that operators had a direct interest in ensuring that consumers were well informed about the price of the services they offered. They believed that the implementation of per-call tariff information could ossify tariff structures and make tariff innovations harder to implement. But many were prepared to consider self-regulatory solutions to increase transparency.

Regulators and user and consumer interests were concerned to ensure that consumers had accurate and transparent information about tariffs. They called for the various options available, including per call tariff information, to be explored further before taking a decision to impose any one technical solution."

c) Voice telephony

Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of Open Network Provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, OJ L 101 , 01/04/1998 p. 24:

Article 11(1) provides (underlining added):

"Member States shall ensure that all organisations providing fixed public telephone networks and mobile public telephone networks or publicly available telephone services publish adequate and up-to-date information for consumers on their standard terms and conditions with regard to access to and use of the public telephone networks and/or publicly available telephone services. In particular, national regulatory authorities shall ensure that tariffs for end-users, any minimum contractual period, if relevant, and conditions of renewal of the contracts are presented clearly and accurately."

2.2.4 Proposed New Regulatory Framework

In July 2000, the Commission submitted a package of reform proposals that also contain specific transparency provisions.

One example is the proposal for a Directive of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities, COM(2000) 384 final, 12.7.2000:

Article 9 on the obligation of transparency provides (underlining added) to be imposed only on dominant companies:

"1. National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or network access, requiring operators to make publicly available specified information, such as technical specifications, network characteristics, terms and conditions for supply and use, and prices.
2. In particular where an operator has obligations of non-discrimination, national regulatory authorities may require that operator to publish a reference offer, sufficiently unbundled, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices.

3. National regulatory authorities may specify the precise information to be made available, the level of detail required and the manner of publication.”

Recital 26 of Directive 97/33/EC clearly reminds that it is without prejudice to the application of the competition rules of the Treaty. Imposing on all market players obligations to publish tariffs, to apply cost-oriented tariffs as well as a prohibition to discriminate would make competition virtually impossible. This is why DG Competition always opposed allowing Member States to impose such obligations on non dominant undertakings, which would result in competition restraints.

2.3 *The Internal Motor Vehicles Market*

It is well known that there exist differentials in prices for car sales between different Member States. Article 11 of Regulation (EC) No 1475/95³¹, on the application of Article 81(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, requires the Commission to evaluate on a regular basis the application of the regulation, particularly as regards the impact of the exempted system of distribution on price differentials of contract goods between the different Member States and on the quality of service to final users.

To reduce price differentials, the Commission is relying upon Price Transparency to highlight better deals available to consumers in other Member States of the EU. Since 1993, the Commission has been monitoring car price differences in the Community in its twice yearly ‘Report on car prices within the European Union’³². This publication is based on the recommended retail prices for the best-selling models across the Community, which the manufacturers submit on 1 May and 1 November to the Commission. There is growing consumer demand for this report (about 6 000 copies are distributed annually). Price advertising on the Internet and the effects of the single currency should further encourage consumers to shop around on the nascent single market for Motor Vehicles.

NOTES

1. 94/601/EC: Commission Decision of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 – Cartonboard) *Official Journal L 243*, 19/09/1994, p. 0001 – 0078.
2. *Ibid.* at Para 253.
3. Judgement of the Court of First Instance (Fourth Chamber, Extended Composition), 15 March 2000 (Joint Cases T-25/95 *et seq.*).
4. Decision 94/815/EC: Commission Decision of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 - Cement). *Official Journal L 343*, 30/12/1994 p. 0001 – 0158.
5. Judgement of the Court of First Instance (Fourth Chamber, Extended Composition), 15 March 2000 (Joint Cases T-25/95 *et seq.*) at Para. 1644.
6. Decision 94/215/ECSC Commission Decision of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams. *Official Journal L 116*, 06/05/1994 p. 0001- 0062.
7. Thyssen Stahl AG v Commission of the European Communities. Case T-141/94. *European Court Reports 1999 page II-0347* at Para. 8.
8. Judgement of the Court of First Instance (Second Chamber) of 27 October 1994. Fiatagri UK Ltd and New Holland Ford Ltd v Commission of the European Communities. Case T-34/92. *European Court Reports 1994 page II-0905*.
9. Decision 92/157/EEC: Commission Decision of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty IV/31.370 and 31.446 - (UK Agricultural Tractor Registration Exchange) *OJ L 068*, 13/03/1992 p. 0019 – 0033.
10. *Ibid.*, at Para. 19.
11. *Ibid* at Para 8.
12. *Ibid* at Para 39.
13. *Ibid* at Para 52.
14. Judgements in Cases T-34/92, *Fiatagri UK Ltd and New Holland Ford Ltd. V. Commission* [1994] ECR II, p.905, at paragraph 91 and T-35/92, *John Deere Ltd v Commission* [1994] ECR II p. 957, at paragraph 51.
15. *John Deere Ltd v Commission of the European Communities.* *ibid.* at para 52. UK Agricultural Tractor Registration Exchange Decision. *Op. cit.* 9. See paragraphs 44 to 48.
16. Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector *OJ L 143*, 07/06/1991 p. 0001 – 0003.
17. *Ibid.* Article 2.
18. *Ibid.* Article 3.
19. Article 3(c.)
20. Article 5.

21. XXVIIIITH REPORT ON COMPETITION POLICY 1998 D SEC (99) 743 FINAL 67. Case No IV/M.1225.
22. Case no. COMP/M.1741, Commission decision of 28.06.2000.
23. Case no. T-101/96, *Gencor vs. Commission*, decision of 25 March 1999.
24. *Gencor vs. Commission*, at 227.
25. Case no. IV/M.1383, Commission decision of 20.09.1999.
26. Case no. IV/M.1852, no decision as merger abandoned.
27. Case no. IV/M.1313, Commission decision of 09.03.1999.
28. Including Danish Crown, Vestjyske Slagterier and Steff-Houlberg.
29. XXVIIIITH Report On Competition Policy 1998 Sec (99) 743 Final 25.
30. Council Directive 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users, *Official Journal L 185* , 17/07/1990 P. 0016 – 0024.
31. Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (*OJ L 145*, 29.6.1995). See also 1996 Competition Report, points 54-56, and IP/00/121, 7.2.2000.
32. Available from the Commission offices in the Member States and on the home page of the Competition DG (<http://europa.eu.int/comm/dg04/aid/en/car>).

BRAZIL

Introduction

Several cases in recent Brazilian experience involve price transparency, both in the format of regulations imposed by the government or measures adopted by private parties to improve the availability of information to them.

Price transparency regulations and the effort to make prices public to consumers in Brazil have largely been driven by consumer protection laws and agencies. Advocates of increased transparency claim that reduced search costs and less information asymmetries best protect the interests of consumers.

Competition Law, for its part, does not specifically rule on the exchange of information and private measures to increase price transparency. However, in some cases, general legal provisions were used to rule such transparency measures illegal, once they may influence price coordination. Thus, the classical trade-off between reduced search costs and facilitating devices for collusion is also present in the enforcement of antitrust law in Brazil. Significant cases involving transparency issues are still being developed and have not been sent to trial yet. On a near future, the rulings on these cases may set important precedents.

As cases are still pending, not many generalizations about public policy relative to price transparency can be made yet. But experience has already shown that when transparency of prices is only available to the suppliers of a certain good or service, the potential benefits to consumers are nearly none, and the hazards to competition are most evident, particularly in oligopolistic industries.

1. Government price transparency enhancement policies

The most important regulation relative to price transparency in Brazil is the Consumer Protection Law (Federal Law 8078), enacted in 1990. According to articles 6 and 31 (transcribed below) of this law, consumers have the right to clear, adequate, precise and ostensive information on the characteristics of products and services, which includes price information.

“Article 6. The consumer’s basic rights are:

.....

*III- clear and adequate information about the different products and services, with correct specification of quantity, characteristics, composition, quality and **price**, as well as the risks that they may present;*

.....

*Article 31. The supply and the presentation of products or services shall ensure information that is clear, precise, **ostensive** and in Portuguese language about its characteristics, qualities, quantity, composition, **price**, warranty, expiration dates and origin, among other data, as well as the risks that it may present to health and safety of the consumers.”*
(emphasis added)

Despite an ongoing controversy about the net effect of the regulation, the most accepted interpretation of these terms (with a particular emphasis on the word “**ostensive**”), has been that every business must individually display the prices on every item it carries, including merchandise on windows, internal displays, racks, shelves and other forms of storage that are accessible to the public. The cases presented below illustrate the controversial aspects regarding the effect of this and other industry-specific regulations.

2. Supermarkets

The price transparency issue in supermarkets involves the individual labeling of products. The Consumer Protection Law was enacted in 1990, when the use of price scanners in Brazilian supermarkets was insignificant. Thus, price information requirements set forth in the law did not take into consideration the use of new technologies. After the implementation of barcodes in products and scanning devices at supermarket checkouts, major grocery stores in Brazil stopped placing individual price labels on products. According to the industry, labels placed on the shelves and scanners scattered across the stores would enable significant savings in menu costs in the same time that it would not bring any substantial harm to consumers.

In this case, price transparency presented a trade-off involving reduced search cost for consumers and increased menu costs for supermarkets. Government agencies had divergent opinions on this issue. SEAE (Ministry of Finance) favored the adoption of an intermediate measure, allowing supermarkets not to label prices for each (piece of) product, as long as they agreed to install a minimum number of scanners per unit of store area, and accepted to charge the lowest price, whenever there was a discrepancy between the scanned price and the price displayed on the shelf. The rationale for this recommendation was that increased menu costs will likely result in higher prices on the long run, and the proposed terms of the agreement were, in the opinion of SEAE, sufficient to guarantee the possibility of comparison shopping by consumers and, more important, to avoid fraud.

However, SDE (Ministry of Justice) thought differently, based on a more direct interpretation of Articles 6 and 31 of the Consumer Protection Law, presented above. Their final ruling was that the arguments presented by the supermarkets, and largely accepted by SEAE, were insufficient to guarantee ostensive information that is correct, clear and precise to consumers, as written in Article 31. Because the Department of Consumer Protection of SDE has the legal capacity to issue regulations on this matter, its administrative decision was binding and supermarkets that failed to comply with this regulation have been recently fined. Supermarkets, however, appealed from the decision and from the fines that were imposed to them. In several judicial actions, Federal Courts have consistently upheld the decision of SDE and required supermarkets to place individual price labels on products. One major supermarket chain has appealed to the Supreme Court on this issue, but since it is hardly a constitutional matter, it seems very unlikely that the Court will even review their request.

3. Gasoline stations

Shortly after the liberalization of fuel retail prices, a regulation was enacted, establishing requirements for retailers to post their prices on signs that are clearly visible by drivers from the road. The regulation even includes specific details about the minimum size of signs and lettering used. These requirements, aiming at increased price transparency and reduced search costs for consumers, are legally founded upon the more general provisions of the Consumer Protection Law. The Article 10 of Directive

number 116, issued by the ANP (National Petroleum Agency), establishes the obligations for retailers, as written below.

“Article 10. The retailer is obliged to:

.....
VII – show the prices of the automotive fuels that are being sold in a panel with adequate size, located at the entrance of the service station, in a manner that stands out and is clearly visible from the distance, either during day or night;”

Despite strong support given by consumer advocates, to this regulation, its effects on competition in the gasoline retail market do not allow clear conclusions. On the one hand, clear advantages for consumers to know the prices that retailers are charging without having to stop there are widely accepted. On the other hand, there is some evidence that while this form of transparency has been an insufficient mechanism for consumers to find the cheapest stations, it may also be a facilitating mechanism for the enforcement of cartel agreements.

Currently, at least 80 processes were opened by competition authorities in Brazil in order to investigate allegations of cartels in the fuel retail sector in Brazil, after prices were liberalized. Complaints usually come together with comments that the regulation requiring gasoline stations to post their prices is not sufficient for consumers to identify lower prices and direct their fuel purchases to these stores. In a further step towards price transparency in the fuel retail industry in Brazil, ANP hired a large research team to quote retail prices in ten of the largest cities in Brazil in order to make them public. The research makes public not only the fuel retail prices, but it also informs the prices that retailers themselves are paying to distributors, and the mark-ups for each retailer. The results of the research are publicly available on ANP’s web page and are frequently updated. Newspapers in those cities often publish the price lists.

Increased price transparency has shown its predictable side-effects on the supply side, too. In a recent cartel case, in which a judicial wiretap was used to intercept conversations between gasoline retailers, antitrust authorities learned that conspirators established a “committee” to drive around the city of Florianópolis (a 300-thousand inhabitants city in the southern state of Santa Catarina) looking at price signs and to identify retailers who had not complied to their illegal agreements. When cheating was detected by the committee, the president of the trade association of gasoline retailers, leading the collusive activities, would contact the defecting station owner and try to persuade him to comply, in a typical cartel enforcement measure. At least in this case, price transparency seems to have helped the enforcement of the cartel, by reducing costs to monitor the agreement.

4. Prescription drugs

In 1992, the Ministry of Finance issued the Directive 37, liberalizing prices of prescription drugs charged by pharmaceutical producers, and the only remaining obligation of those companies was to report the prices to the Ministry. The same regulation, nevertheless, limited the maximum price to consumers charged by drugstores: the prices charged by pharmaceutical companies to drugstores, divided by 0.7, resulted in the maximum retail price of drugs. Therefore, the maximum mark-up of drugstores was subject to control, but within this limit, drugstores were free to choose whatever prices they found suitable. Furthermore, in order to improve the availability of information to consumers, Directive 37 ordered all drugstores to maintain an updated price list with the maximum prices for each prescription drug.

As an additional transparency enhancing mechanism, SEAE has recently started publishing on its web page on the Internet a complete list with the maximum prices of all prescription drugs sold in Brazil.

This set of rules does not inform consumers about the best prices available in the market. However, the price lists enable consumers to determine the amount of reduction from the maximum price that is charged by each drugstore.

An evidence of the effect of this regulation is that consumers have become used to asking for price lists at the counter of retailers, in order to evaluate the prices that are charged and improve their possibilities of asking for discounts and comparing pricing policies of stores.

5. Private price transparency enhancement measures

A number of cases in the Brazilian antitrust history have involved price transparency measures adopted by businesses, and trade or professional associations. Competition Law (Federal Law 8884) in Brazil does not specifically rule on the exchange of information by competitors. However, as such activities may represent an effort to hinder competition, they may be considered illegal. Articles 20 and 21 of the Competition Law, which rule on anticompetitive conducts, are partially transcribed bellow.

“Article 20. Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed an infringement of the economic order:

I – to limit, restrain or in any way injure open competition or free enterprise;

.....

Article 21. The acts spelled out below, among others, will be deemed an infringement of the economic order, to the extent applicable under article 20 and items thereof:

I – to set or offer in any way – in collusion with competitors – prices and conditions for the sale of a certain product or service;

II – to obtain or otherwise influence the adoption of uniform or concerted business practices among competitors;”

The wording of Article 20 is sufficiently broad to include information exchange with the intent to form an agreement as an infringement of the economic order. Moreover, the interpretation of sections I and II of Article 21 may also be applied to some forms of information exchange as facilitating practices. The exchange of information among competitors with the intent to coordinate conducts is a form of influence on the adoption of uniform or concerted business practices among competitors. Likewise, it can be argued that when a trade or a professional association issues price lists, it is influencing the business practices of its members.

The cases presented bellow illustrate some of the transparency issues under discussion here. The airline case and the vitamins case have not been decided yet, and thus have not set legal precedent. This is not so with the trade association cases. Several of those have already been decided and were ruled illegal.

5.1 The Airline Case

In August 1999, the presidents of the four major airlines in Brazil met, privately, in a luxury hotel in São Paulo. Just five days after the meeting, the prices of the flights between central airports of Rio de Janeiro and São Paulo went up, by exactly ten percent, in the four airlines whose presidents had met. The price

increase, in the same day and by the same amount, affected the most lucrative market in Brazilian air transportation industry. The route between São Paulo and Rio de Janeiro connects the two major cities in the country and serves thousands of business travelers every day. The four airlines had 100 percent of the market for regular air transportation services in that route.

The airlines were asked to explain the motivation for the price increase on that specific day. In response to this request, the companies gave unspecific answers and did not mention the price increase of their competitors or any price matching policy. Also, there was no explanation on the reasons for the choice of that specific date and amount of increase. Having discarded alternative explanations for the price increase, SEAE saw this case as a price-parallelism with a plus factor, and decided to recommend SDE to open an administrative process against the four airlines.

After being sued for collusion, the defendants changed their argumentation and presented the explanation of price leadership for their conduct. The airlines alleged that the leading company had increased its prices and rivals just matched the price increase, and the main tool for that was the computerized system of the Airline Tariff Publishing Company (ATPCO). According to the companies, on August 6th the leading airline published on ATPCO a price increase that would become effective on August 9th. Therefore, the competitors just matched the price change.

At this point it should be noted that ATPCO's previous antitrust history is widely known. The case U.S. v. Airline Tariff Publishing Company, et al. was referred to by Jonathan Baker as "the first horizontal price-fixing case in cyberspace", and as a result of it, ATPCO signed a consent decree in which they agreed to change their system in a way that competing airlines in the United States would not be able to see future price increases of their rivals before they were available for sale. However, the system was only adapted to comply to U.S. law, so the service to the rest of the world, other than the United States and Canada, continues to be the same as it was before. That is, competing airlines can still post their prices on the ATPCO system announcing to their competitors future price increases that may or may not actually happen.

In the Brazilian case, the largest airline published its prices on the 6th of August and inserted a specific command – a first-ticket date – that instructed the system to disseminate immediately the information to other airlines, but to hold that information from the computer reservation systems until the 9th. As a result of this, from the 6th to the 9th, the competing airlines knew that one of them was planning to increase its prices, but no one else knew it, including customers and travel agents. If the price increase had not been matched by competitors, the first airline could have simply cancelled the price change and customers would have any knowledge of these events.

The case illustrates that the design of the ATPCO system gives airlines a complete transparency on all the prices of their competitors, but the information is not known by travel agents and passengers. By using a first-ticket date, the Brazilian airline made transparent to its competitors information on what was a contingent price increase. Consumers, for their part, were completely excluded from such exchange of information.

In the opinion of SEAE, the use of first-ticket dates on ATPCO system increases the potential risks for market coordination without reducing the search costs or creating better conditions for comparison shopping by consumers, and could be ruled illegal since it "limits, restrains and injures open competition", and arguably, is a way "to obtain or otherwise influence the adoption of uniform or concerted business practices among competitors". The case should be sent to trial shortly, which will probably set an important legal precedent on this sort of information exchange.

5.2 *The Vitamins Case*

Like several other jurisdictions, when Brazilian authorities learned from the press releases of the United States Department of Justice that the main producers of vitamins in the world had formed a cartel, they decided to initiate their own investigations. SEAE focused its work on the three largest producers of vitamins A and E that centralized their Latin American operations in Brazil, where they had regional centers. Interviews were carried out with acting and former regional managers at these companies. All of them denied having any knowledge, prior to the press coverage around August 1999, that their world headquarters had been involved in illegal price-fixing activities. They claimed that they had not participated in any collusive activities, and it struck them as a surprise to find out that some of the managers that they used to reported to were threatened with incarceration in the United States.

Despite of their alleged lack of knowledge of the international cartel, they informed that they were instructed to meet quarterly with competitors in São Paulo and to exchange information about prices and sales quantities of vitamins A and E. They were supposed to produce detailed reports of the Latin American market, including their sales information and their competitors'. According to the regional managers, the objective of those meetings was to establish the total size of the market and to have a clearer picture of price trends. However, the facts that were admitted to were understood as sufficient evidence for a case to be opened against the companies: there were news of an international cartel of vitamins and the regional managers of the same companies met in Brazil to exchange detailed information about prices and quantities.

The case also illustrates a point for the evaluation of price transparency measures adopted by competitors. During a press conference at the time when the case was opened, journalists questioned whether the exchange of such sort of information is illegal on itself. If one was aware that this exchange of information was part of an international conspiracy, it would seem clear that the meetings and exchange of information consisted in the enforcement of the agreements that were decided at the top (global) level. As such, there are few doubts that the exchange of information should be considered illegal, and could be regarded as a way "to set or offer in any way – in collusion with competitors – prices and conditions for the sale of a certain product or service".

On the other hand, one can imagine a scenario where SEAE discovered that those companies met to exchange information on prices and sales volumes without any knowledge that a global conspiracy was taking place. In itself, it would be a measure adopted by competitors to increase the price (and sales volumes) transparency among themselves only. This information was being exchanged in closed-door meetings. It is the opinion of SEAE that even if this exchange of information fell short of a characterization of a hard-core cartel, it could be understood as an effort to "obtain or otherwise influence the adoption of uniform or concerted business practices among competitors". In the absence of an explicit agreement, such conduct would at least drastically increase the possibility of a tacit collusion without making comparing shopping or inferences on market trends any easier for consumers.

The vitamins case has not been sent to trial yet, and its final ruling should also help to set legal precedent on the exchange of information among competitors.

5.3 *Professional Association Cases*

Several cases relative to professional associations were brought to the analysis of competition authorities in Brazil, particularly involving health care services. The main issue is the publication, by medical associations, of "uniform" price lists for their members. The complaint mentioned that "uniform"

lists did not take into consideration the qualifications of each individual physician, or the quality of services being provided.

According to the plaintiffs, uniform price lists were a means used by physicians to fix prices. In their defense, the medical association argued that they never intended to determine minimum fees to anyone whatsoever; their only intent was to calculate, publish and recommend fees for their members and the recommended fees had an informational nature. As most physicians and small clinics in Brazil have limited information about costing and pricing procedures, it was argued that the lists were a form of business orientation provided by the association.

On the cases involving physicians, CADE has ruled price lists as harmful to competition and illegal, even if the lists are non-binding for members of the associations. The arguments of the physicians defense were not accepted, on the basis that price lists affected the individual decision making of each economic agent. CADE decided that such lists are a form “to obtain or otherwise influence the adoption of uniform or concerted business practices among competitors”.

One peculiar remark should be made about price lists published by professional associations. Despite the pattern of decisions against physicians, legislation in Brazil still shows some degree of ambiguity. Article 58 of Federal Law 8906, enacted in 1994, establishes that it is in the capacity of the Sectional Councils of the Brazilian Bar Association to publish a list with fees relative to private legal services, which is valid in the state where the Council is located.

“Article 58. It is the capacity of the Sectional Council:

.....

V – to establish the list with the fees for legal services, valid in the entire State;”

Therefore, while price lists published by professional association of physicians have been ruled illegal based on the Federal Law 8884, of June 11th 1994 (Competition Law), the Federal Law 8906, of July 4th 1994 (Statute of the Brazilian Bar Association) determines that it is in the capacity of the Sectional Councils of the Bar Association to publish price lists. No cases involving private legal fees have been brought to the analysis of competition authorities so far, and the incompatibility between the regulations is still unsettled.

6. Final remarks

The examples presented above raise some doubts whether general measures of price transparency have effectively resulted in lower prices to consumers. Even disregarding potential anticompetitive effects, it is not completely clear from our experience that requirements on price transparency (such as the price signs at gas stations) are effective means to reduce prices.

Economic theory shows that, when information about price is limited, merely reducing search costs may not lower average prices (as in the case of single price equilibrium in the tourist-trap model). In fact, the reduction of search costs does not actually provide consumers with extra information, and no additional searches will necessarily occur as a result of this reduction. On the other hand, providing consumers with extra information – such as comparative information on prices or the location of the cheapest store – may, in fact, lower prices to consumers.

3. One interesting question to policy-makers therefore may be the nature of the main effects of price transparency requirements: Whether they merely reduce search costs for consumers or they actually

provide them with extra information. Requirements for business to publicize their prices, say, in the form of visible signs, may not be a sufficient measure to lower prices, since it only reduces search costs. A program to provide more price information to consumers could be a more effective solution.

LITHUANIA

TRANSPARENCY AND PRICE INFORMATION. DOES PUBLISHING PRICES AND TERMS FACILITATE COLLUSION OR HELP CONSUMERS?

In many cases enhanced price transparency produces an overall positive effect. There are several laws now in effect in Lithuania that directly require publicly announced prices.

First, the Law on Consumer Protection requires that each seller or service provider indicate to consumers the prices of their goods or services. This is the way to ensure that consumers receive truthful information, are not subject to price discrimination, and enjoy the possibility to choose by comparing prices.

Second, the Public Procurement Law requires that prices offered by participants in the open procedure are announced publicly (to all contractors) at the open meeting of a tender commission with all contractors present. The Law also says that the tender commission having opened the envelopes with the tenders shall publicly announce the prices tendered by contractors. The tendered prices and terms of implementation of a project shall be recorded in the protocol with which all contractors may familiarize themselves. The contractors shall be individually informed of the winner. This is envisaged to prevent corruption, unfair evaluation of tenders and ensure fair competition among contractors. However, in different industries this may produce different effects. For instance, in the construction business such public announcement is generally less likely to result in anti-competitive effects since most construction projects are rather individual which makes it more difficult to predict future prices of competitors. However, the public announcement of prices in the event of a repeated procurement of the same produce may result in a restrictive effect since the future prices of competitors might be quite easily inferred from a preceding tendering procedure.

Apart from that, price transparency may prevent corruption in public procurement procedures, which eventually facilitates competition. For example, the Public Procurement Law provides for an obligation to announce the prices indicated in the tenders. Among the objectives of this obligation is to prevent abuse by the officials in charge for the procurement, and ensure that the contractor who gave the lowest-priced quotation is announced the successful bidder. Should not the best tender be announced a winner, legitimate interests of other undertakings would be violated, confidence in public authorities would be shaken, pursuit of fair competition becomes senseless, competition is weakened.

Although the Law on Competition in Lithuania does not directly provide for a requirement to maintain and promote price transparency, the Competition Council holds a view that the pricing policy of a dominant enterprise should be transparent, - buyers of the produce of the enterprise must be aware of the prices and discounts applied by the enterprise. The hidden discounts applied by an enterprise holding a dominant position may imply that buyers are subject to price discrimination. Therefore, in some cases enhanced price transparency may be a means of preventing the abuse of a dominant position (e.g. through price discrimination).

On several recent occasions the Competition Council has obligated several dominant enterprises using discriminatory pricing to enhance their price transparency. The dominant enterprises were applying

dissimilar conditions among buyers engaged in downstream competition. Enhanced price transparency here (official price-lists, transparent discount system, etc.) was considered to be helpful in facilitating competition in the buyers' markets by protecting the buyers from discrimination.

Recently the Competition Council investigated a case where enhanced price transparency via a professional association produced an anti-competitive effect in the market. The Lithuanian Union of Architects "recommended" to their members to apply certain predefined prices for design work. Deviation from "recommendations" was deemed an infringement of the Code of Architects' professional ethics, which in turn might lead to the exclusion of architects from the Union. Most architects followed the recommendations which in practice meant that price competition among them was restricted, and they were allowed to compete with their colleagues only by professionalism. Recommendations issued by the Union had an anti-competitive effect since architects were deprived of a possibility to compete for contracts by reducing prices.

On the other hand, in oligopolistic markets with few suppliers (sellers) enhanced price transparency increases the possibilities that sellers will engage in concerted actions.

Generally, in cartel investigations in Lithuania, price transparency is deemed to facilitate concerted actions, although transparent prices alone are insufficient to prove that an agreement or concerted practice actually took place. For example, last year the Competition Council investigated a cartel case related to the distribution of refined oil products (petrol, etc.) at the retail level. In a local market (a small town of Lithuania) there were only two competitors operating at the retail trade in oil products with the outlets distanced only by 100 metres away from one another. Here natural price transparency (the competitor's prices were easily visible through the window of the petrol station) was supplemented and enhanced by the employees visiting the competitor's premises and trying to find out about the future pricing policy, and also by companies' managers exchanging phone calls just before price changes.

In this particular case the price transparency produced a dual effect, - facilitating competition (customers could immediately see prices offered by competing petrol stations and choose the more acceptable), and, on the other hand, - anti-competitive (the homogeneity of the product is conducive to planning one's own actions in response to those of the competitor). In this case the Competition Council neither prohibited the price transparency, nor obligated increasing it, - the status quo remained. One of the enterprises (the smaller one) argued that it was merely observing the price policy of the larger competitor: once the latter increased the prices, on the same day the smaller would do the same, and once the larger one lowered the prices, so did the other one.

On certain occasions the effects produced by enhanced price transparency are not obvious. For example, a dominant oil refinery, of which the only competitors are importers, fixes prices for its oil products for the next day on a daily basis. Such price announcement policy has not been observed to produce any anti-competitive effect in the downstream market among petrol stations. It may be assumed to have a neutral effect or even facilitate competition, since the price transparency maintained by a dominant enterprise prevents discrimination in sales to retailers and ensures them equal competitive conditions. The outcome could be different if the dominant enterprise fixed the prices for its produce for a longer term ahead. This circumstance could facilitate concerted practices by allowing retailers to better coordinate the strategy of their actions.

The Competition Council aimed at finding out whether the announcement by the dominant enterprise of the next day's sale prices for petrol could possibly become guidance for retail petrol stations for co-ordinating their future pricing policy. So far this kind of correlation has not been established.

Major companies in Lithuania usually have their own Internet sites, however, only rarely do they announce their prices there. There are independent companies that publicize on their sites the day-to-day prices of different competing suppliers (e.g., petrol stations). This information is supposed to reach final consumers. Whether electronic exchange of price information among competitors is occurring is hard to say. Such facts have not been noticed as yet.

AIDE-MEMOIRE OF THE DISCUSSION

The **Chairman** opened the roundtable by remarking that seventeen written contributions were received, thus evincing a significant degree of interest in the topic. The contributions also revealed a considerable amount of difficulty and confusion both as to analytics and practice. The analytics are complicated by the fact that on the one hand, price transparency can increase competition, while on the other hand, it can sometimes limit competition with or without a redeeming offsetting contribution to economic progress or some other positive development. Concerning practice, the Chairman noted that there can be quite large differences among countries and sometimes within one country from one case to another.

In many countries there are regulations outside the scope of competition law, usually consumer competition regulations, which try to increase price transparency. At the same time, however, there may be considerable efforts by competition authorities to prevent price transparency from reducing competition. The result is that consumer organisations sometimes get hopelessly lost trying to understand what the reason and purpose of competition law is.

The written contributions include elements of a lively debate on price transparency and public procurement. Some countries advocate publication of all bids as a way to enhance price transparency and possibly to help monitor the behaviour of the authority organising the consultation, i.e. to prevent corruption. Some other contributions say that publishing bids is inherently anti-competitive because it assists in preserving the stability of a possible cartel by making it easier to detect and punish cheating.

A third area where the practice of competition authorities is sometimes hard to follow arises with regard to professional organisations. There are cases where professional organisations have exerted an anti-competitive impact by restricting price transparency, but there are also cases where such organisations have had an anti-competitive effect by increasing price transparency.

Some of the seeming contradictions in the area of price transparency policy are more apparent than real, but there may indeed be difficulties in knowing exactly what the appropriate policy *vis à vis* transparency should be.

The Chairman observed that several contributions contained extensive comments on the analytical aspects of the issue. The United Kingdom contribution in particular noted the paradox that measures designed to increase price transparency can both help consumers and facilitate collusion. The UK contribution also discussed quite extensively the potential effects of price transparency on competition and efficiency. The Chairman asked the UK delegation to present an analytical overview of price transparency and thus lay the foundation for the subsequent discussion.

A **United Kingdom** delegate began by noting that price transparency can exert a positive effect by first of all improving the price discovery role of a market economy. The resource reallocating power of changes in prices, a phenomenon emphasised by Hayek and others, would be considerably muted without a certain degree of price transparency. Secondly, at a more micro level, transparent prices put consumers in a better position to know exactly what they are getting when they enter into a deal. If consumers can see clearly the prices they are paying and particularly if they can compare the prices of different suppliers, that

should tend to intensify price competition. A firm making a price cut should, other things being equal, gain more business the more transparent are prices.

The possible bad news from price transparency, already mentioned by the Chairman, has to do with risks of facilitating collusion. Rather than prices signalling in a competitive market all sorts of useful information for resource allocation, prices could instead reflect the results of rigged competition. Even without collusion, greater price transparency among suppliers may weaken a supplier's incentive to cut price, because with more transparency a firm can expect a faster matching response from its rivals. The ultimate loser would be the customer.

Related to the previous point about lower incentives to cut price, it is important to distinguish between transactions prices and list prices. There are many markets where transactions virtually all take place at posted list prices. There are many others, particularly in business-to-business dealings, where transaction prices may well differ from list prices. In such markets, the analytics of transparency are somewhat subtler, possibly more favourable as well from a competition point of view.

So there is a dilemma in that more transparency can certainly be good for competition and indeed integral to the way a competitive market economy works, but at the same time or under some conditions it can be helpful for collusion, therefore bad for competition. How does one attack that dilemma? The delegate believed there are no universal answers, but he supplied four helpful guiding principles.

The delegate's first principle was that activities enhancing transparency only among businesses provide more cause for concern than transparency enhancement among businesses and their clients. This is because worries about facilitating collusion have to do with increased transparency among businesses, i.e. horizontal transparency among suppliers, rather than vertical transparency extending to customers. An example of harmful horizontal transparency improvement is information sharing agreements relating explicitly or implicitly to pricing terms. Another possible example is price guidance by trade associations. Still another example, barely qualifying, is resale price maintenance (RPM). In a sense RPM yields a very transparent price. Every dealer has to offer the same price to customers so price variation across dealers is eliminated. An interesting area which does not go as far as RPM but may have similar effects is the case of recommended retail prices.

The delegate's second principle focused on measures by firms to restrict the availability of price information to consumers. Those are clearly a prime concern of competition policy. Examples include trade or professional associations restricting price advertising or possibly comparative price information or indeed restrictions on marketing activities more generally.

The delegate's third principle focused on measures extending to consumers the same degree of transparency already existing among businesses. These are generally to be welcomed because they fall in the good news box without increasing concerns about collusion enhancement. The UK's submission mentioned web sites enabling consumers to make comparisons between the prices of different utility suppliers, for example, in electricity and gas. That is not of great concern because the suppliers will presumably already have that information. The web sites merely extend the same information to consumers. Another example, is unit pricing requirements, i.e. price per kilo etc., for supermarket goods. Again, that gives helpful information to consumers without probably increasing information horizontally among suppliers.

The delegate's fourth point was that when thinking about enhanced collusion related to price transparency, one must ask whether other circumstances exist in a particular situation which either facilitate or inhibit collusion. If circumstances are very unfavourable to collusion, one can probably be more relaxed about price transparency than otherwise. One should consider things like: how concentrated

is the market, how homogenous is the product or service, what are entry conditions and so on. Sometimes, those circumstances are just given by the economic fundamentals. In other circumstances the authorities can help design them.

With reference to what the Chairman said about public procurement, the delegate mentioned the example of the UK's highly transparent mobile telephone spectrum auction. Participants could see day by day who had bid what. But the other features of the auction design were overwhelmingly pro-competitive. So one had the benefit of price transparency without the detriment.

The delegate concluded by noting that transparency enhancing technology has clearly leapt forward in recent years owing to the development of e-commerce and the Internet. He was uncertain as to what conclusions one should draw from that, but expressed a general view that the Internet is vastly more good news than bad.

The **Chairman** drew attention to the fact that the Swedish contribution contained a rather extensive discussion of the literature on price transparency, plus a discussion of how transparency may facilitate collusion. He then called on the European Commission noting that the EU has adopted rules affecting price transparency mostly with the aim of enhancing market integration. The second part of the European Commission's submission dealt with private practices relating to price transparency. It made a distinction among various practices acting as facilitating mechanisms. The ones forming a part of a collusive agreement are clearly bad. But in the EU, even when they are not allegedly part of a collusive arrangement, some exchanges of information can apparently be prohibited. The Chairman requested more information about that and asked for comment as well about whether, in the area of promoting price transparency, there could be a conflict between market integration and competition promotion aims.

Concerning the Chairman's first question, a delegate from the **European Commission** noted that with governmentally mandated increases in price transparency it is not always possible to simultaneously advance market integration and promote competition. The feasibility of doing this would depend on two elements: the particular market's structure and competitive conditions; and the specific modalities of the mandated transparency. This leads to the obvious conclusion, also noted in the Secretariat's background paper and several country contributions, that a case by case analysis is required.

The delegate stated that market integration is the key objective of EU competition policy, and price transparency is crucial in achieving that objective. So EU legislation will in some cases mandate an increase in price transparency. The intention is to facilitate arbitrage by European consumers. As an example, the delegate cited the EU's twice yearly report on car prices across the EU. This helps consumers find a better deal in another member state, and may simultaneously increase competition and market integration. Increased price transparency may also enhance market integration by encouraging the entry of firms situated in one member state into the market of another. For example various directives assist new suppliers in gaining access to existing infrastructure for the supply of gas and electricity, or communication services. Transparency obligations in each of these directives need to be tailored to conditions in specific markets. For example, transparency is dealt with differently in the electricity market directive and in the one pertaining to inter-connection in telecommunications. The first mandates publication of indicative prices for the use of the transmission and distribution systems. These prices are based on the average price agreed in negotiations in a previous twelve month period. For inter-connection services in telecommunications, the transparency requirement is to make available on request, not to publish, details regarding inter-connection charges and other relevant terms and conditions (including required contributions to universal service obligations). In sum, as regards the Chairman's first question, the choice of markets and the mandated means of improving price transparency must be chosen with an eye on both market integration and competition enhancement purposes. If both objectives cannot be advanced, perhaps the market is not one in which price transparency should be enhanced.

As to the second question about anti-competitive voluntary information exchanges, the delegate noted that the EU's written contribution might be a bit misleading. Both categories ultimately would lead to some facilitation of collusion. The essential difference is that the first category comprises instances where the price or other information exchange can be proved to be a support for a larger collusive design. The second category addresses cases where there is no evidence proving an anti-competitive horizontal agreement. In order to prohibit such a system, one needs a very different type of analysis than applies to the first category. The UK Tractor case is a good example of the second category.

Second category exchanges of information are prohibited when their effect is to replace the normal risks of competition by practical co-operation, i.e. the exchange permits competitors to observe very closely each other's market strategies and react accordingly. Proving such an effect can be very difficult. The UK Tractor case presents two relevant criteria for such a proof - it also addresses paragraphs 48 to 52 of the Secretariat's paper. First, one must analyse the characteristics of the information exchange. Is the information exchanged publicly available? Is it price data or sales data and if the latter, is it transaction, list or recommended price data? The degree of disaggregation as well as its age and the frequency of exchange can also be critical. Finally, one must consider the structure of the exchange system itself. It could be accomplished by one of the firms collecting the data from the others. Alternatively it could be done by a trade association, as in UK Tractor, or a completely independent organisation. As to the second criteria, this concerns the structural characteristics of the market. In UK Tractor there was an oligopolistic and highly concentrated market (four suppliers had 76 percent of the market), high barriers to entry, brand loyalty, dense distribution systems, widely dispersed demand, and little product differentiation. Under such circumstances, the information exchange system foreclosed new entry regardless of whether the new entrant became part of the exchange or not. If it participated, then it would be vulnerable to customised retaliation by the members. If it did not, it could be at an informational, hence competitive disadvantage. The Commission concluded the case by asking the parties to aggregate the data before exchanging it, and not to distribute data newer than twelve months.

The **Chairman** next turned to Australia which was the only country that answered a particularly tough question included in the Secretariat's questionnaire. The question asked whether in addition to possibly increasing buyers' abilities to comparison shop and sellers' abilities to engage in anti-competitive co-ordination, were there other pro- or anti-competitive effects that might flow from enhanced price transparency in a market?

An **Australian** delegate said he would provide more a series of case related examples than an analytical answer. The Australian Competition and Consumer Commission (ACCC) has considered the possibility that price transparency might enhance new entry. For example, when Australia's electricity generation industry was privatised and deregulated a few years ago, there was a lot of concern that there was no public information available regarding the prices being paid by particular electricity users. Many of the potential buyers suggested that price information would probably facilitate new entry into the deregulating sectors by allowing better investment decisions. It might also allow new entrants to more effectively compete for customers by targeting particular customers who appeared to be paying excessive prices.

A second fairly recent example concerns information asymmetry in a merger case where the acquirer was a major purchaser of hardwood logs in the wood chip industry. It purchased logs from a very large number of small farmers and there was no information available to the sellers as to the prices being paid by other purchasers in the market. The ACCC gained an undertaking from the acquiring firm that it would publish on a web-site and in newspapers in remote regional communities, information about prices it paid for logs.

Another example of possible pro-competitive effects from increased price transparency has to do with making it easier to detect collusion. In Australia, some states require petrol stations to display price boards. This has led to increased consumer allegations of collusion especially when all of the petrol companies raise their prices around the same time. In Australia it often happens that petrol prices rise very rapidly, as much as 10 cents a litre, on the day of a public holiday. When this happens, the ACCC gets hundreds of complaints from the public alleging collusion. The ACCC recognises, however, that simultaneous price increases are not in themselves proof of collusion.

One more way in which increased price transparency may prove beneficial has to do with its effects on increasing non-price competition. One often finds that when price comparisons can easily be made, suppliers start to look for alternative methods to differentiate themselves such as through improved service.

Turning to possible anti-competitive consequences of enhanced price transparency, the delegate commented that these may be mirror images of his previous examples. The ACCC is sometimes concerned that increased price transparency in one market could possibly reduce price competition in another market where the same parties participate. For example, parties to tolling arrangements have a lot of price information about their competitors' input costs, and that might inhibit downstream competition. The ACCC found that the concrete industry has been characterised by substantial price transparency as to its input costs, because the sellers have tolling arrangements in cement and aggregate. It is possible this facilitates downstream collusion rather than increased price competition in the concrete market.

There are also examples where greater price transparency has actually encouraged misleading practices. With regard to the highly price competitive mobile telephony and internet service provision markets, the ACCC received a large number of complaints regarding misleading advertising. This was linked to the hidden terms and conditions attached to very public and low banner prices. The ACCC was concerned that a loss of consumer confidence caused by this misleading price information could actually damage longer term competition in these industries. Apparently, many consumers have simply drifted back to the previous incumbent monopoly supplier of telecommunication services on the assumption that it is less likely to mislead than anybody else. The ACCC has also investigated complaints from a lot of small businesses about price and other information displayed in electronic form by, for example, financial services providers and airline computer reservation systems. Small airlines have complained that their discount fares have not been displayed on travel agents' screens in a way that would allow travel agents to effectively compare prices between large and small airlines. The computerised reservation systems may have generated greater relative price transparency regarding the tariffs for larger airlines while simultaneously disadvantaging smaller competitors.

The **Chairman** noted that although the Australian examples may not offer firm conclusions, they nevertheless presented some intriguing ideas. He highlighted the possibility that too much open price competition could lead to hidden lower quality having the eventual effect of increasing insecurity among consumers and thereby strengthening dominant firms.

The next country called upon was the United States. The Chairman noted that the U.S. contribution examined most favoured nation clauses that in some cases may increase price transparency while simultaneously decreasing competition. The contribution discussed the *RxCare*, *Ethyl*, and *AOL/Time Warner* cases. The Chairman was most intrigued by *Ethyl* in which there was a difference of opinion between the Federal Trade Commission administrative law judge and the Second Circuit Court of Appeals. The latter apparently repealed the decision on the basis that the FTC had not met the heavy evidentiary standard for proving its case. This leads to considering what the appropriate burden of proof ought to be in cases involving exchanges of price information. Should these be treated as *per se* illegal, or should the exact competitive effects have to be demonstrated?

A **United States** delegate noted that, as the Secretariat's paper argued and as the discussion in the roundtable had already demonstrated, price transparency may have ambiguous effects. This is illustrated in microcosm when it comes to most favoured nation (MFN) clauses. These sometimes appear to increase price transparency in a way that is anti-competitive. In other cases, for example in *AOL/ Time Warner*, the FTC has insisted on adoption of MFN clauses in order to increase price transparency to promote a more competitive solution. The fact that the FTC has challenged some MFN clauses should not be taken as expressing the view that MFN clauses are somehow suspicious or sinister. Indeed, they are a very typical feature of contracts in competitive and oligopolistic markets, as well as in monopolies. MFN clauses are generally benign. They can be used, however, particularly in concentrated industries, to promote anti-competitive outcomes.

MFN clauses can protect a party to a contract, often a buyer, from a competitor getting better terms. They can also increase the efficiency of contracts, particularly long term contracts, by introducing price flexibility. And another pro-competitive benefit of an MFN clause is that it can make it more difficult to punish cheaters. A seller involved in a cartel may be restrained by MFN clauses from offering low prices to try to combat cheating. Instead of targeting lower prices in a way designed to punish a cheater, a retaliating seller could be forced by its MFN clauses to offer discounts to a much larger set of customers. That could prove too expensive to be worthwhile, hence tend to make a cartel less stable. Such a benefit could be offset, however, by the effect of MFN clauses on a potential cheater's incentives to selectively lower prices.

The delegate stated that the 1979 *Ethyl* case is a bit complicated, dated and unusual, and perhaps should not be considered illustrative. It was a case against four manufacturers of lead based anti-knock compounds. The market was highly concentrated and characterised by uniform prices, a homogenous product and high accounting profits. The FTC observed that the four leading manufacturers all engaged in what was characterised as facilitating practices, including advanced notifications of price changes, uniform delivered pricing and MFN clauses. The FTC claimed that none of these practices had a legitimate business justification. What the FTC did not find nor allege was an explicit agreement among the firms to collude on prices. So this case was essentially an attempt to deal with what was then called the oligopoly pricing problem. It was conceded that the suspect practices were adopted by the companies unilaterally, sometimes at the request of the buyers, the ostensible victims.

One might ask how the FTC could be empowered to bring a case like *Ethyl*. After all, the Sherman Act requires an agreement. The answer is that Federal Trade Commission Act is basically directed against unfair methods of competition, and its Section 5 is especially targeted on such practices. In the overwhelming majority of cases, unfair methods of competition would also violate the Sherman Act, but there is arguably some space beyond the Sherman Act for unfair methods of competition. The FTC believed the practices cited in *Ethyl* fell into that category, and it sought to ban the MFN clauses.

The theory in *Ethyl* was that sellers would be more willing to deviate from cartel prices if they could do so selectively, but they could not because if they offered a discount to one customer, they would have to offer it to all of them. So, the MFN clauses operated to reduce incentives to discount. The case was tried before an administrative law judge who upheld the charges. It was then appealed to the Federal Trade Commissioners acting in their appellate capacity. The charges were upheld and the MFN clauses banned. The companies then appealed to the Federal Court of Appeals. It was a landmark case in articulating the standards that the FTC would have to meet in proving liability under Section 5 of the FTC Act when an agreement is not alleged. Those standards were set very high. To succeed, the FTC would have to present evidence of anti-competitive intent or purpose and prove the absence of legitimate businesses reasons for the conduct. The Appeals Court found that the FTC failed to meet that burden.

In retrospect, it must be noted that the uniform prices seen in *Ethyl* could be consistent with a competitive market. The FTC did not advance compelling evidence showing that the market was operating anti-competitively and linking that with the impugned facilitating practices. There was no evidence of anti-competitive intent or effect. The clauses were adopted unilaterally and one finds the same clauses in competitive markets as well.

Following *Ethyl*, the FTC has not attempted, in the absence of evidence of an agreement, to use Section 5 to attack the same kinds of facilitating practices.

The **Chairman** next turned to Mexico which he noted takes a dim view of information exchanges, treating them as "absolute monopolistic practices". Such practices can be prohibited without the need to establish substantial market power, whenever those practices have the object or effect of fixing, increasing, or manipulating price. The Chairman commented that in order to judge whether a price information exchange may have the object or effect of increasing prices, presumably one has to determine whether the participants of the price exchange had some market power. Absent such power, the Chairman did not see how one could presume or establish that the exchange had any effect on price. He asked for more information concerning the Mexican standard for judging the legality of price information exchanges.

A **Mexican** delegate began by stating that in Mexico, price fixing is illegal *per se*. Such an approach makes the law both more transparent and easier to enforce. Mexico is aware, however, that *per se* illegality means that some efficient price fixing may be prohibited. For example, in the case of taxis it might be better to have the same rate for all taxis. In any case, if price fixing is illegal *per se*, it makes sense that an exchange of information having price collusion as its main purpose or effect should also be illegal. The difficulty lies in determining when an exchange of information has price fixing as its main purpose. There probably is no general solution to this and the Mexican delegate espoused a case by case approach.

The delegate mentioned Mexico's inter-bank rate case where a proposed information exchange mechanism was believed to be anti-competitive. He explained that the inter-bank reference rate was calculated by the central bank. The central bank asks all banks to give a quotation of their inter-bank rate. Then, the Bank of Mexico computes an average. Significantly, the Bank of Mexico has the power to borrow money from the bank reporting the lowest rate or to lend money to the bank posting the highest rate. Therefore, the rate setting mechanism does not amount to an invitation to engage in "cheap talk". Using the mechanism as a signalling device could be very costly for the banks.

The banks do not like the current procedure and are proposing replacement mechanisms. The Federal Competition Commission (FCC) has determined that one such proposal is likely to be anti-competitive. Under that proposal, the banks would hire Reuters to calculate a daily average of their inter-bank rates. All the banks would put money into a trust fund, and the fund would be further fed with money from sanctions imposed on those banks quoting rates diverging by more than one standard deviation from the average.

The banks claimed their proposal was very similar to the mechanism used for the determination of the London inter-bank offer rate (LIBOR). That rate is calculated by an independent agency which averages the quotations of individual banks. There are two main differences, however, with the proposal by the Mexican banks. First, unlike LIBOR, the proposed system generated a rate that would not necessarily be linked to any banking transactions, consequently it could be used to facilitate "cheap talk". Second, the proposal would continually result in sanctions being paid by roughly half of the banks, unless they all quote exactly the same rate.

Although the Bank of Mexico had initially supported the banks' proposal, it did not argue with the FCC's conclusion that it would probably be anti-competitive.

The **Chairman** commented that, as he understood it, the FCC was using a rule of reason approach to enforce a *per se* ban on exchange of information. He then moved on to the German contribution which he thought illustrated some possible inconsistencies between competition policy and government attempts to increase price transparency. In Germany there is a substantial body of legislation applying to retail trade which is designed to increase price transparency, or may in any case have that effect. The Chairman mentioned the Act on Bonuses and Extras of 1932, the Act on Discounts of 1933, and the Price Transparency Regulation of 1985. He noted that Germany's contribution indicated the German competition authority's displeasure with these laws, and asked for further information concerning them.

A **German** delegate confirmed what the Chairman had said. He added that one might assume that price transparency, at least at the consumer level is usually beneficial. German experience shows that the validity of that assumption may depend on the circumstances surrounding price transparency.

In Germany, retail price rebates are legally limited to three percent. In practice this means there are no rebates and there are no extra bonuses either. The aim and real effect of these regulations is not to enhance competition, but to strictly limit and reduce price competition. And that is done with the intention of benefiting small and medium enterprises in competition with big retail chains. The result is equal list prices.

For decades the competition authority has fought against the rebate and bonus restrictions, but the defenders of the status quo have so far prevailed. Now, the situation has changed, partly because of an important new element, namely a new directive on e-commerce from the European Union. This directive could place domestic sellers at a competitive disadvantage with foreign sellers since the latter, in both their domestic and Internet sales, will only be governed by rules applying in their domestic market, i.e. they will be able to offer rebates and bonuses. Faced with this new development, the German parliament is now going to review and hopefully abolish regulations on rebates and extra bonuses. The competition authorities hope this will produce positive price transparency effects for consumers.

The **Chairman** commented that the Hungarian contribution also contained a discussion of government mandated increases in price transparency touching things like the publishing of retail petrol prices, the listing of school books (with their prices) that can be ordered by schools, and the regulation affecting tobacco product price indications. He noted that the Office for Economic Competition (OEC) was apparently consulted on all three measures and did not raise objections to the first two. The Chairman requested more information concerning why the first two were acceptable but the third was not.

An **Hungarian** delegate explained that the retail petrol price situation is a price monitoring system which is proactive in nature. The book list system is a rather reactive approach. As regards retail petrol price transparency, which is supposed to be effected through an Internet web-site, the key issue was the possibility of a cartel enhanced by ministerial action. The Ministry requested the OEC's opinion. Several factors entered into the OEC's consideration of this matter including the characteristics of the market in question, consumer price sensitivity, and the objectives of the Ministry of the Economy. One of those objectives was to inform consumers and another was to increase competition including among distributors. The Ministry also wanted to ensure that its measures were non-discriminatory. The OEC was aware that publishing accurate, very detailed price information could be dangerous since it might enhance co-operation among sellers. But because of the special features of the market and because of the importance of the information to consumers, the OEC decided not to object to the Ministry's plan. It noted, however, that future conduct might raise competition policy problems and concerns. As an aside, the

delegate pointed out that the Internet home page system had not actually functioned because of important disagreements among participants. Some retailers want average prices published. Others want maximum or minimum prices, and a third group desires a range of prices to be put on the Internet. Such disagreement perhaps verifies the OEC's view that the cartel enhancing risks of the proposal are indeed small.

In the text book case, a proposal was made to deal with the apparently unfair and anti-competitive way that some text book publishers were operating. The OEC worked with the Ministry of Education to elaborate a system according to which none of the competitors would be able to make its offers before the other publishers, and there would be no possibility to modify offers once made (typographical errors excepted). The OEC believes this solution protects consumers' interests and might in some cases enhance price competition.

In both the cases so far discussed, the OEC believed the positive and negative effects were somewhat balanced, and is aware that further review may be necessary in future. The OEC considered consumer interests and other, possibly political, objectives. It was principally concerned about how the price information system operated rather than about the prices themselves. The situation was quite different in the tobacco case because it involved quasi-price fixing.

1. Price Transparency and Public Procurement

To begin this new topic, the **Chairman** called on Lithuania whose public procurement law requires that tendered prices be announced publicly to all contractors at an open meeting of a tender commission. Some other countries apparently feel such a practice could lead to serious competition problems because, if there were a cartel, information about all bids would help participants detect cheating. The Chairman requested further information as to the objective and operation of Lithuania's system.

A **Lithuanian** delegate opened by observing that the Lithuanian situation is perhaps a bit different from many established Western economies. In Lithuania there is little awareness of the laws on competition and public procurement. The requirement to publicly announce all bids in a public procurement is intended to reduce the possibility of corruption and unfair assessment of bids, i.e. awarding contracts to friends or acquaintances of public commission members. Another positive aspect is that public knowledge of the bids gives bidders the information they may need to make well founded complaints concerning the fairness of the process including transparent analysis of bids.

The Lithuanian delegate believed that for the time being and for the foreseeable future, given transitions underway in his country, the current procurement rules are perhaps more beneficial than harmful. General public trust in government authorities is quite low and transparent procedures are intended to make processes fairer.

The **Chairman** added, on a personal note, that the French construction industry has been severely hit by a number of anti-trust cases. Current industry reaction is to lobby the French parliament to mandate publication of bids in order to increase transparency. Given the different situation in France, this would not appear to be as good an idea as it may be in Lithuania. Nevertheless, it is very hard to explain to members of parliament that something increasing price transparency is unlikely to be beneficial. The Chairman went on to comment that the Canadian Competition Bureau generally advises against publishing bids in public procurement. He called on Canada for further detail.

A **Canadian** delegate wanted to qualify her country's written submission. The Competition Bureau does not universally counsel against revealing bids. One of the guiding principles for the Competition Bureau is transparency and it recognises that in most instances the public interest is served

through enhanced transparency just as was described by the Lithuanian delegate. However, the public interest benefits of transparency need to be balanced against the possibility that it can contribute to fostering price fixing or bid rigging. This is particularly true in circumstances where there are few competitors (as often happens in a smaller economy) and a relatively homogeneous product. Under those conditions, it is believed that publishing bids can facilitate collusion since any deviation from the collusive arrangement would become evident once the bids are published. The fact that deviations would be revealed would deter defection from the agreement.

Like Lithuania, Canada does have certain transparency requirements in its public bidding processes motivated by public interest considerations in, among other things, a fair process. This is also consistent with transparency requirements in international procurement agreements. For example, for public procurement exceeding certain thresholds, NAFTA requires that either the winning bid or a range of bids from the lowest to the highest must be published.

When the Competition Bureau is consulted regarding a procurement process, it highlights the potential dangers of publishing bids particularly where certain market conditions exist. It may also make recommendations about how to overcome some of the potential negative effects. Where there is a requirement to make bids public, as is often the case, the options regarding publication are obviously limited. However, the Bureau may recommend that the buyer not necessarily commit itself to taking the lowest bid instead reserving the right to consider a range of factors besides price. Proceeding in that way could lessen the prospect of bidders reaching some collusive arrangement.

The Competition Bureau shares the views of some other delegates that price transparency in and of itself may not be the sole cause of collusive behaviour. Other factors, such as those described in a couple of cases in Canada's written submission, can play a critical role. Those other factors refer to facilitating practices such as trade associations, price leadership, published prices etc.

The **Chairman** next turned to Japan where it is fairly common that the organisation conducting a public tender determines a "planned price", i.e. a kind of reference price or a normal price. The Japanese contribution says that the publication of this price either before or after the tenders have been received may have positive effects. The Chairman requested more information about that.

A **Japanese** delegate stated that the planned price usually plays a part in tenders for public work contracts and other public procurement. If all the bidding prices exceed the planned price, the bidder offering the lowest bid cannot win the contract. In recent years, a growing number of local governments have come to publicise the planned price in advance of or after the tender. Disclosure of planned prices might have positive effects such as: increased transparency of the procurement procedure; prevention of corruption such as leaking a planned price by a procurement officer; and assisting firms in calculating their own costs. Nevertheless, it is not necessarily the case that disclosures of planned prices will have positive effects on price competition. The Japan Fair Trade Commission (JFTC) believes that, generally speaking, advance publication of planned prices makes it easier for bidders to collude. With this in mind, the JFTC is paying close attention to how tenders for public work projects are carried out.

2. General Discussion

A **German** delegate took the floor to note that on the issue of transparency and public procurement matters, the German competition authority is very close to the Canadian position although perhaps a little more cautious. It agrees that price transparency tends to be a negative factor, especially where homogeneous products are concerned. But even in cases featuring seemingly non-homogenous products, price transparency can cause problems when costs of homogeneous inputs are revealed. For

example, competition in tenders for school construction might be reduced if bidders had, because of public procurement rules, good information on rivals' costs of concrete.

A **Swedish** delegate noted that her country's submission contained mainly theoretical remarks, and that the Swedish Competition Authority lacks extensive experience concerning the tricky practical issues posed by price transparency. Its contribution refers, however, to some examples from the Swedish market and one, the *SPI* case, concerned the petrol market. The Competition Authority in that case alleged that information sharing on individual firm sales volumes may be as harmful to competition as information sharing on prices. This case was lost in court partly because of insufficient evidence linking the information sharing with effects on prices.

The Swedish Competition Authority agrees that communication among firms concerning individual sales volumes and prices should be prohibited, but attention must be paid to the market, product and other circumstances. And of course, there are difficulties when the information is public and/or there are some possible welfare gains associated with greater transparency. The Authority also thinks inter-business exchange of information on individual demand and cost data should be considered as having a potential to promote collusive outcomes. As for aggregated data, the Authority believes exchanges of such data should be allowed. The delegate also believed that the four principles mentioned at the outset by the United Kingdom delegate will prove very helpful in handling actual cases.

An **Italian** delegate asked about the situation in France as regards public procurement. Administrative law, at least in Italy, makes it mandatory for every bidder to know where it stands when the bidding is over. The **Chairman** responded that to the best of his knowledge there is no such provision in French law (nor in German law either) which is the reason for the continued agitation over several things. One of them concerns a proposed automatic rule that would eliminate abnormal bids (i.e. more than five or ten percent above or below some objective price), and another would increase the transparency of the bidding process. So far, although this issue has been discussed for many years, there continues to be fierce resistance by the competition authority.

3. Price Transparency and the Professions

The **Chairman** next turned to Japan with a question relating to price transparency and the professions. In its written contribution Japan cites a number of fair competition codes having clauses affecting price transparency. It seems that the JFTC is not much concerned about such clauses, nor about professions publishing price lists. He asked for more information on these points.

A **Japanese** delegate stated that in Japan, companies and trade associations are allowed to establish voluntary rules on labelling and other representations in order to prevent misleading representations that could obstruct fair competition. The JFTC approves fair competition codes if they are appropriate in ensuring fair competition, do not adversely affect consumer welfare and relevant businesses, and meet other requirements. Some fair competition codes have clauses on indicating prices. For example, the automobile trade association's code stipulates that member companies must indicate the retail prices of their products. A real estate trade association's code requires its members to indicate the cost of maintenance in addition to the price of a particular property. Price indications are believed to play an important role in maintaining and promoting fair competition as they allow consumers to save on transactions costs and more efficiently make choices.

The **Chairman** noted an important distinction between professional associations requiring members to advertise their own prices, and associations taking a hand in setting those prices. He then turned to Korea where apparently the professions used to be permitted to fix prices. The Korean

contribution tells us that the Omnibus Cartel Repeal Act of 1999 has a provision abolishing fee fixing by professional associations. The contribution suggests this has had positive consequences and the Chairman wished to know more about that. He also wondered whether there had been a negative reaction from consumers. Such a reaction has been observed in many countries where consumer organisations lobby for a kind of normal, fixed, indicated or average price to be published.

A **Korean** delegate remarked that fee setting by professional associations has indeed been abolished in Korea. Consumers are now protected from paying unfair fees by a provision ensuring transparent price information. The Korean national council of consumer organisations has performed biennial surveys of fees charged by lawyers, certified public accountants and six other professional groupings and notified the results to consumers. The survey shows a general upward trend in fees in the first half of 2000. However, the overall level of fees dropped in the latter half of 2000 (e.g. compared with the end of 1999, average lawyer's earnings fell by 10.6 percent and average earnings of certified public accountants dropped by nine percent). It seems that price competition arising from eliminating standard fee levels has increased and price differentiation depending on the nature and quality of work, is in process. The price survey has itself assisted consumers in choosing among professionals.

The Korean Fair Trade Commission (KFTC) has made a strenuous effort to publicise through a press release and posting on the KFTC web site (plus securing the co-operation of the cyber consumer association), the abolition of standard fees for professional services. Surveys now show that almost all professionals are aware of the change as well as 66-68 percent of consumers.

The **Chairman** commented that Switzerland presents an important contrast with what is occurring in Korea. Apparently there are numerous professional associations in Switzerland which publish price lists and the Competition Commission has many times had to deal with that phenomenon. The written Swiss contribution deals at length with calculation aids provided to assist professionals in setting their prices. The Chairman asked for further comment on this and other matters.

A **Swiss** delegate began by noting that Swiss professional associations are indeed very active at both the cantonal and federal levels. These associations traditionally engage in recommending prices, a role that is rooted in their formative statutes. In general, such price recommendations are advantageous not only for professionals, who receive useful price guidance, but also for consumers to the extent the recommendations furnish information regarding prices they can expect to pay.

Under Switzerland's competition statute, price recommendations by professional associations could amount to illegal cartelisation, but they are not illegal *per se*. Instead, a case by case analysis of actual effects is required. The Commission has acquired considerable experience in this domain. Three examples were cited.

The first concerned the Canton of Fribourg's driving school association which annually publishes recommended prices. Its statutes require association members to display these tariffs and to distribute them to their pupils. An investigation found that the recommended tariffs were largely followed by both members and non-members alike. The Competition Council has forbidden the Association members to agree on future tariffs.

The second case concerns three daily newspapers in Tessin, the Italian speaking canton. On October 12, 1999, the three dailies informed their readers that subscription prices would go up by exactly the same proportion, hence would remain identical. For a long time, the market shares of the three papers had remained almost constant. The Competition Commission believed the announcement was based on an illegal price raising agreement. The parties subsequently agreed with the Commission to no longer

communicate regarding prices in advance of publishing new prices, and not to engage in price fixing or concurrently announcing new prices.

The third case concerned price recommendations by associations of cafeteria restaurants. Five such associations operating in the French speaking cantons, met to inform simultaneously their members about increased recommended prices for commonly served drinks. The Competition Commission secretariat concluded that such recommendations would tend to raise prices. Proving such an effect would have proved costly for the five associations which preferred instead to agree to cease issuing such recommended prices.

These three studies show that professional association price recommendations generally have negative effects on competition. It is difficult to change habits and association members commonly follow their associations' recommendations. Such recommendations affect competition when they allow firms to predict the pricing practices of their competitors, when they influence both member and non-member behaviour, or when they lead to a general increase in prices. In addition, price recommendations are not very useful for consumers since they do not necessarily increase market transparency. Time saved in comparing prices is used to compare qualities, a notoriously difficult activity especially as regards non-homogeneous products. Price recommendations are also not very useful for consumers because they do not necessarily improve predictions of actual costs. For example, it is not much help to know the price per hour of driving lessons if the instructor largely retains the power to determine how many hours will be necessary.

The **Chairman** wound up discussion about price transparency and the professions by calling on the United States where competition agencies have sought both to increase and decrease price transparency in the professions. For example, the FTC brought action against the California Dental Association because it prohibited certain valuable categories of price advertising. But in other cases such as *Wisconsin Chiropractic Association*, the Commission acted to benefit consumers by decreasing price transparency. The Chairman asked the U.S. not only to discuss these cases but also to provide methodological assistance for distinguishing between good and bad instances of increased price transparency in the professions.

A **United States** delegate noted that the bottom line in these cases is to determine the actual competitive effects of more price transparency. He noted that paragraph 21 of the Secretariat's paper identifies some of the factors one would look at to determine whether price transparency would be less likely to have an anti-competitive effect. They are things like: a large number of sellers; low levels of concentration; asymmetry among sellers and product offerings; and lumpy purchase patterns. Markets in the professions are probably characterised by all these factors and more, yet one can see in the cases how the existence of a trade association can use rules affecting price transparency to help sellers surmount obstacles that might otherwise make it difficult for them to achieve anti-competitive effects. In the 1993 *California Dental Association* case, the association decreased price transparency to consumers by restricting advertising, while in *Wisconsin Chiropractors*, the relevant professional association increased price transparency among sellers.

In *California Dental Association*, the FTC alleged that the Association, representing about 75 percent of all dentists in the state, adopted rules to prohibit dentists from engaging in certain types of truthful, non-deceptive advertising including with respect to prices. For example, it adopted rules prohibiting across the board discounts for seniors and others, and prohibited statements about care and reasonable prices. So consumers were deprived of the ability to learn of discounts and found it more difficult to compare prices. The FTC found these actions illegal and prohibited the association from banning truthful, non-deceptive advertising, including price advertising. The case wound up having a long history of appeal through the courts, in fact up to the Supreme Court. Some of the aspects of the case have already been described on other occasions at the CLP. There were, for example, issues concerning the

proper application of the rule of reason in professions cases. Ultimately the Commission's order was reversed on appeal and the Commission decided earlier this year, for a variety of reasons, not to proceed further. The FTC remains convinced that serious antitrust concerns are raised when an association enforces advertising restrictions in a manner systematically depriving consumers of valuable price information without corresponding benefits to competition or consumers.

The second case arose when a chiropractic association in Wisconsin achieved anti-competitive effects by increasing price transparency among chiropractors. Since this case terminated with a consent agreement, what follows concerns allegations rather than proven facts.

In January 1997, the Federal government and a number of insurance companies changed their billing code system for reimbursement of chiropractic services making it much more similar to the system used for osteopathic services. Subsequently, the Wisconsin Chiropractic Association held meetings in which their executive director urged chiropractors not to decide their fees under these new codes before attending certain seminars. At the seminars, the executive director urged chiropractors to adopt reimbursement fees at the same levels as osteopaths, told them what those were and said this provided a unique opportunity to raise fees. He noted that third party insurers would be unlikely to reject or reduce higher charges if they were submitted. In fact, he urged the members to discuss among themselves their contracts with insurers in order to improve their bargaining position and encouraged them to boycott managed care plans that were not amenable to higher reimbursement rates. Furthermore, the Association surveyed member pricing and reported back that chiropractors had succeeded in raising reimbursement levels. This information was provided in a disaggregated way so one could tell what office was involved. The FTC reached a consent agreement with the Association that prohibited it from, among other things, conducting certain types of fee surveys for a number of years and from using the survey information in an anti-competitive manner.

In sum, the U.S. cases do not provide a magic rule regarding the assessment of price transparency actions by professional associations.

4. Focus on Certain Sectors (Including Retail Petroleum and Airlines)

At this point the **Chairman** referred back to one of his introductory points. From a competition authority's point of view, case by case analysis indicates being open to all the subtleties of a real world situation. However, to people outside the circle, it may appear that competition authorities have decided they can do whatever they like without justification. Competition authorities may well have a duty to try to explain at least the methodology they apply in their case by case analyses. Several contributions tried to develop such a methodology with regard to price transparency, and focused on a list of relevant factors. Whether these factors are directly related to the probability that an exchange of price data may or may not be anti-competitive could be debated, but at least it seems wise to identify such criteria. The Norwegian contribution does that and goes on to apply the criteria to two cases concerning exchanges of information among hotels and meat packers. He asked Norway to explain and illustrate its criteria.

A **Norwegian** delegate noted that the two cited cases are still under consideration by the competition authority. They are nevertheless important because they are the first cases considered after the 1994 amendments affecting information exchanges. Prior to 1994, there was an explicit prohibition against undertakings reporting information to some kind of a common unit or an association. This is excluded from the current act, so Norway may now be in the same position as Mexico in that it has a general prohibition against price fixing and is considering how to use that to cope with the exchange of information.

The delegate foresaw three conditions having to be met in order for an exchange of information to be prohibited. Firstly, there will have to be some kind of co-operation. That might be easy to establish since the mere exchange of information could qualify as co-operation. Secondly, the exchange will have to be liable to affect prices. Thirdly, the competition authority will have to show that competition is liable to be affected. These conditions were illustrated with reference to the recent hotel case in which a group of hotels agreed to exchange average price and occupancy rates. The result is that the participants have highly disaggregated information about all the other parties' average prices and occupancy rates on a daily basis with a one day time lag. This seems to be detrimental to competition, but the Norwegian authority is still not certain how the amended Act will be interpreted as regards this point.

The **Chairman** next turned to the Czech Republic. The Czech contribution starts from a premise that agreements intended to acquire information needed by various undertakings to determine future independent free market action mostly do not distort competition. It says, however, that some such agreements might be anti-competitive. It then provides details about the kind of analysis and factors it will take into consideration to determine whether a particular exchange of information is anti-competitive.

A **Czech Republic** delegate noted that the Czech competition authority applies the same approach to information exchange as is found in the EU. The legality of such exchanges depends on three factors: market structure, types of information exchanged and frequency of exchange. As to market structure, the delegate noted that the exchange of sensitive data on an atomised market does not allow undertakings to predict the behaviour of its competitors. The degree to which the market is concentrated and the percent of it accounted for by the entities exchanging information is clearly important. Concerning the types of information exchanged, an important consideration is the degree to which data are aggregated. From the competition point of view it is critical to determine whether participants can discover sensitive data applying to individual competitors. Czech experience suggests that a skilled person could extract individual information even from aggregated data applying to five entities. The delegate also discussed the various different types of information which could be exchanged, again emphasising that enabling competitors to obtain sensitive enterprise specific information could facilitate cartelisation. As for the frequency of exchange of information, the delegate distinguished among: data older than one year (the exchange of such data is generally permitted); data not older than one year; and data referring to the future. The more recent the data and the more frequently it is exchanged, the greater the risk to competition.

The delegate referred to two examples. The first was an agreement among insurance companies to annually exchange information about the number of car accidents, human injuries etc. All such information exchange will be covered by a planned block exemption that will apply to the insurance sector. The second referred to agreements among some travel agencies that established a pool having the objective of reducing the incidence of bankruptcies. An information exchange was included in this agreement. In this case the office took a stronger position and limited the agreement to a two year duration.

The delegate concluded his remarks by distinguishing between public and private transparency on the market. Public market transparency means transparency for customers while private market transparency means price transparency for undertakings. Public transparency is the basis for and enhances economic competition because it allows consumers to effectively compare products and services. In contrast, private market transparency only improves market transparency for undertakings and imports the risk of facilitating price co-ordination.

The **Chairman** noted that several submissions dealt with the retail gasoline sector. Italy was one such country. The Italian contribution also dealt with an illegal exchange of information in the insurance sector. This is particularly intriguing because if one looks at the European Commission contribution, one learns there is a block exemption for the insurance sector and it is stated that in many cases the nature of the insurance business requires exchange of information in order to better assess risks.

An **Italian** delegate began by describing the insurance case noting that the participating companies had organised something going considerably further than the exchange of information authorised by the EU directive. First of all, the EU directive speaks only of exchanging in aggregated form, commercial or pure premium type of information, i.e. costs relating to damages paid, not information on insurance prices. In contrast, the Italian insurance companies organised an exchange of extremely disaggregated price information. That information was broken down by Italian zip code, and contained all types of information on pricing and characteristics of insurers, company by company. The system was organised through a third commercial company. The information was available on sale to everybody, so it was certainly not an exchange of information taking place in a small, smoke-filled room. Instead it was an exchange of information happening in the market place. In addition the co-ordinating company sponsored frequent discussions on price developments and future prospects in the market. In sum, this was a system of full price transparency among producers which operated without consumers having effective access to the same information. Although Italian insurance companies had an obligation to publish their tariffs for consumers, the means by which this was done (not necessarily involving collusion) meant it was very difficult for consumers to make price comparisons.

The Italian Competition Authority considered that such a detailed exchange of information, given the characteristics of the insurance industry and the fact that consumers did not enjoy the same amount of information, amounted to a violation of the competition law. It was also a violation arising because of an anti-competitive objective so there was no need to examine the effects of the information exchange. That was an important point because such a wide spread scheme of exchange of information may lead to any equilibrium of prices. It is not possible to say with certainty what a collusive equilibrium would be. For example, would all the companies charge the same price or would there be price differences among them?

The delegate emphasised a special characteristic of the insurance market which considerably increased the negative consequences of a collusive arrangement facilitated by an extensive, asymmetric (i.e. not extending to consumers) exchange of information. There are no capacity constraints in this business. Any insurance company can easily gain market share based on comparative price shopping and switching by consumers. This is why the competition authority considered such a detailed exchange of information a very severe violation of the competition law and heavily sanctioned the thirty or more insurance companies involved with a fine exceeding 350,000,000 Euros.

The petroleum case was an example of a much more sophisticated scheme for increasing price transparency. Once again the increased transparency benefited competitors rather than consumers. The way this was done was not by an exchange of information but by a very clever system of inverse quantity related discounts given to retail gasoline distributors, i.e. the more they sold the lower the discount they received. It should be noted that Italy has a system whereby producers are required to set recommended prices for gasoline distributors who are then free to sell below that price. Through their inverse quantity discounts, the gasoline producers were able to discourage the distributors from discounting on the recommended price. That dampened competition among distributors and simultaneously made the recommended prices more transparent to the "rival" oil producers.

The Italian competition authority sanctioned the inverse discount scheme with a fine exceeding 300 000 000 Euros. The reason for the severity of the fine was that, due to various regulations, there were very limited ways in which competition could be introduced into the Italian gasoline market. One way was through price competition, but the oil producers had effectively blocked that.

The **Chairman** observed that shortly after the liberalisation of retail fuel prices in Brazil, a regulation was enacted requiring retailers to post their prices. There are now apparently some 80 cases alleging price fixing at the local level. The Chairman wanted to know whether the regulation was a root

cause of some of these allegations, i.e. does the transparency engendered by the regulation tend to facilitate collusion in many parts of Brazil.

A **Brazilian** delegate began by noting that Brazilian price transparency regulations are intended to increase Brazilian consumers' price information and have largely been driven by consumer protection laws and agencies. Advocates of increased transparency claim that consumer interests are advanced by reducing search costs and information asymmetries. Competition law for its part, does not specifically deal with private information exchanges enhancing price transparency. However, in some cases general prohibitions were used to catch price transparency enhancement that facilitated price co-ordination. The classical trade-off between the benefits of reduced search costs and a greater danger of collusion is therefore also present in the enforcement of anti-trust law in Brazil. Significant cases in this domain are currently being brought and will have an important precedential value.

The delegate referred to a professional association case in which the Brazilian antitrust tribunal ruled that professional price lists for physician services are harmful to competition and illegal even though they are non-binding for members of the association. Despite that decision, there remains some ambiguity in the area of professional association fee setting. In particular, there is a federal law allowing Brazilian bar associations to publish lists of legal fees.

As for gasoline stations, the Brazilian national petroleum agency requires retailers to post their prices on signs that are clearly visible to drivers passing by. There is strong support by consumer advocates for this measure, but its effects on competition are unclear. On the one hand, consumers benefit from knowing what retailers are charging without having to stop to check. On the other hand, there is some evidence that the transparency may be a facilitating mechanism for the enforcement of cartel agreements. The antitrust authority learned of some conversations among gasoline retailers revealing a conspiracy that included establishing a committee to drive around a city looking for evidence of non-compliance with the illegal agreement. When cheating was detected, the president of the trade association of gasoline retailers would contact the relevant outlet to try to obtain compliance with the cartel measures.

The Brazilian airline case resembles the one that arose in the United States (the Airline Tariff Publishing Company case). Although prohibited in the United States, this did not rule out the same mechanism being used in other countries. The Brazilian competition authority began an investigation after finding notes published in a newspaper and after some airlines increased prices by ten percent on the same day. It was discovered that the airlines used the computer reservation system to discover prices three days before they were to go into effect and subsequently adjusting prices before consumers got a chance to transact at the pre-announced prices.

The **Chairman** next called on Sweden to expand on the earlier mentioned 1995 *SPI* case where the decision of the competition authority was overturned by the market court.

A **Swedish** delegate stated that the competition authority learned a lot from the *SPI* case which concerned the exchange of both price and sales volume data. Sweden's written contribution contained a check list of relevant criteria for judging the impact of information exchange in the petroleum sector. In the case at hand the competition authority found that the numbers of competitors and new entrants were small, production technology changed very slowly, costs were symmetric, company structures and interests coincided as did their time preferences, and there was little demand uncertainty (hence price cutting was relatively easy to detect). This was and is an example of a very concentrated market having high entry and exit barriers, stable market shares, homogeneous products, and little possibility of product substitution. In such a situation there is a high risk of co-ordinated activity being facilitated by information exchanges.

5. General Discussion

A delegate from the **European Commission** opened the general discussion with a comment that in a number of merger reviews, price transparency played an important role in deciding whether there was a collective dominant position. The first such case arose in the magazine paper market. This was an oligopoly experiencing sluggish demand and displaying all the other elements previously highlighted in the roundtable discussion, except that market and price transparency in particular were absent. The producers did not have readily available information on prices and quantities, and there were some hidden rebates. The Commission concluded that due to the lack of price transparency, there was no risk of a collective dominant position being created. By contrast, in *Gencor/Lonhro*, *Exxon/Mobil*, and *TimeWarner/EMI*, the Commission found that market and price transparency played a key role in increasing the risk of collective dominance. Further detail is contained in the European Commission's written submission.

A delegate from **Spain** commented that many countries had talked about the pros and cons of price transparency in the gasoline distribution market. Last year, Spain adopted a regulation establishing that all prices for gas or oil distribution should be published and this is now done on a very timely basis on the web site of the Spanish Ministry of Economy. The Chairman enquired about whether average prices have increased since then, and the delegate answered that no relation had been established between the publication of prices and their evolution, adding, however, that there have been many cases of alleged price fixing by the larger petroleum producers. But as many other countries have commented, it is very difficult to prove collusion in such cases. That was one reason Spain decided to increase price transparency, i.e. to make collusive patterns more readily observable.

6. Chairman's Concluding Remarks

The **Chairman** closed the roundtable by noting that the four principles elucidated at the outset by the United Kingdom delegate are quite useful for approaching the topic, and a lot of presentations alluded to one or more of them. He particularly drew attention to the fourth principle, i.e. that in thinking about enhanced collusion related to price transparency, one must ask whether other circumstances exist in a particular market which either facilitate or inhibit collusion. Much was said during the course of the roundtable about the variables determining that proclivity and the kinds of information exchange that are most dangerous in terms of facilitating collusion.

The Chairman believed that competition authorities should be as explicit as possible concerning the criteria they will apply and factors they will investigate in deciding cases involving information exchanges. He also reminded delegates that consumers may have a different appreciation of the advantages and disadvantages of enhanced price transparency owing to a different view of the costs of using markets and how increased price transparency may reduce those. This might explain why consumers and consumer organisations are usually more receptive to the exchange of prices among professions.

As regards public procurement, the Chairman noted that competition authorities may not be paying sufficient attention to broad social/political benefits that might be associated with a high degree of price transparency. The benefits of reducing the risks of corruption are very difficult to balance against the risks of reduced competition. Lithuania apparently considered that the benefits of enhanced price transparency among bidders outweighed the costs in lost competition. Competition authorities are not usually mandated to factor this dimension into their analyses and this contributes to difficulties in explaining their views to other interested constituencies.

AIDE-MÉMOIRE DE LA DISCUSSION

Ouvrant la table ronde, le **Président** note que dix-sept contributions écrites ont été reçues, ce qui témoigne du grand intérêt porté à la question. Les contributions montrent aussi que demeurent, aussi bien au niveau de l'analyse que de la pratique, de grandes difficultés et pas mal de confusion. Les analyses sont compliquées par le fait que la transparence en matière de prix peut renforcer la concurrence, mais qu'elle peut aussi parfois la limiter, sans nécessairement contribuer en retour au progrès économique ou à d'autres évolutions positives. Sur le plan pratique, le Président fait remarquer qu'il peut exister de grandes différences entre les pays et parfois même d'une affaire à l'autre dans un même pays.

Dans beaucoup de pays, des réglementations ne relevant pas du droit de la concurrence, généralement des réglementations visant à améliorer la concurrence au niveau de la consommation, ont pour objet d'accroître la transparence des prix. Dans le même temps, toutefois, les autorités de la concurrence peuvent déployer des efforts considérables pour éviter que la transparence des prix ne réduise la concurrence. Dans ces conditions, les organisations de consommateurs sont parfois totalement perdues lorsqu'elles essaient de comprendre quelles sont les motivations et les objectifs du droit de la concurrence.

Les contributions écrites apportent les éléments d'un débat ouvert sur la transparence des prix et les marchés publics. Certains pays considèrent que la publication de toutes les offres est un moyen d'accroître la transparence des prix et, éventuellement, de faciliter la surveillance du comportement de l'autorité organisant la consultation, c'est-à-dire d'empêcher la corruption. Certaines contributions soulignent, en revanche, que la publication des offres est fondamentalement anticoncurrentielle car elle contribue à préserver la stabilité d'un éventuel cartel en permettant plus facilement de détecter et de punir les déviations par rapport aux termes de l'entente.

Un troisième domaine où la pratique des autorités de la concurrence est parfois difficile à suivre concerne les associations professionnelles. Il arrive que ces associations exercent une incidence anticoncurrentielle en limitant la transparence des prix, mais elles ont eu aussi parfois une incidence anticoncurrentielle en renforçant cette transparence.

Certaines des contradictions perçues en matière de transparence des prix sont plus apparentes que réelles, mais il est de toute évidence difficile de savoir exactement quelle est la politique la plus adaptée dans ce domaine.

Le Président fait observer que plusieurs contributions contiennent de longs commentaires sur les aspects analytiques de la question. La contribution du Royaume-Uni, en particulier, note le paradoxe selon lequel les mesures visant à accroître la transparence des prix peuvent à la fois aider les consommateurs et faciliter la collusion. La contribution du Royaume-Uni examine aussi assez longuement les effets potentiels de la transparence des prix sur la concurrence et l'efficacité. Le Président invite la délégation britannique à présenter une vue d'ensemble analytique de la question et à préparer ainsi le terrain aux débats ultérieurs.

Un **délégué du Royaume-Uni** note pour commencer que la transparence des prix peut avoir un effet positif, tout d'abord en améliorant la fonction de découverte des prix dans une économie de marché. La réaffectation des ressources induite par les modifications de prix, phénomène souligné par Hayek et d'autres, serait considérablement moindre sans une certaine transparence des prix. Deuxièmement, au

niveau micro-économique, des prix transparents permettent aux consommateurs d'être mieux à même de savoir exactement ce qu'ils obtiennent lorsqu'ils concluent un marché. Donner aux consommateurs la possibilité de percevoir clairement les prix qu'ils acquittent et, en particulier, de comparer les prix des différents fournisseurs devrait tendre à intensifier la concurrence par les prix. Une entreprise accordant une réduction de prix devrait, toutes choses égales par ailleurs, gagner d'autant plus de clients que les prix sont plus transparents.

Les éventuels inconvénients de la transparence des prix, déjà mentionnés par le Président, concernent les risques de collusion. Au lieu de refléter, sur un marché concurrentiel, tous les types d'informations utiles pour l'affectation des ressources, les prix peuvent être le résultat d'une concurrence concertée. Même sans collusion, le renforcement de la transparence des prix entre fournisseurs peut rendre ces derniers moins prompts à réduire les prix, car, dans une situation de plus grande transparence, une entreprise peut s'attendre à une réaction en retour plus rapide de ses concurrents. Le perdant sera finalement le consommateur.

A propos de la moindre incitation à réduire les prix, il importe de faire une distinction entre les prix des transactions et les prix catalogue. Sur de nombreux marchés, les transactions ont lieu pratiquement toutes aux prix catalogue. Sur beaucoup d'autres, en particulier dans les transactions entre entreprises, les prix des transactions peuvent différer des prix catalogue. Sur ces marchés, l'analyse de la transparence est un peu plus subtile, avec une incidence plus favorable également sans doute du point de vue de la concurrence.

Il existe donc un dilemme en ce sens qu'un renforcement de la transparence peut certainement être favorable à la concurrence, et est de fait indissociable du fonctionnement d'une économie de marché concurrentielle, mais qu'il risque dans le même temps ou sous certaines conditions de favoriser aussi la collusion, ce qui est mauvais pour la concurrence. Comment faire face à ce dilemme ? Le délégué considère qu'il n'y a pas de réponse universelle, mais propose quatre principes directeurs pouvant être utiles.

Le premier de ces principes est que les activités qui renforcent la transparence seulement entre entreprises sont plus préoccupantes que celles qui visent la transparence entre les entreprises et leurs clients. En effet, le risque de collusion n'est présent que dans le cas d'un renforcement de la transparence entre entreprises, c'est-à-dire la transparence horizontale entre fournisseurs et non la transparence verticale en direction des clients. Un exemple de renforcement de la transparence horizontale dommageable est celui des accords d'échange d'informations concernant expressément ou implicitement les conditions de fixation des prix. On peut citer également les indications en matière de prix données par les associations commerciales. L'imposition de prix de revente peut aussi être mentionnée dans ce contexte, encore que cette pratique puisse conduire à une très grande transparence des prix. Chaque vendeur devant offrir le même prix aux consommateurs, les variations des prix entre négociants sont éliminées. Les prix de détail recommandés constituent un aspect intéressant qui ne va pas aussi loin que l'imposition des prix de revente mais peut avoir des effets similaires.

Le deuxième principe directeur concerne essentiellement les mesures prises par les entreprises pour limiter les informations sur les prix dont disposent les consommateurs. C'est là un domaine de préoccupation essentielle de la politique de la concurrence. On peut citer en exemple les restrictions imposées par les associations commerciales et professionnelles en matière de publicité des prix ou, éventuellement, d'information comparative sur les prix ainsi que les restrictions sur les activités de commercialisation de manière plus générale.

Le troisième principe vise les mesures destinées à assurer aux consommateurs le même degré de transparence que celui existant déjà entre les entreprises. Ces mesures sont généralement les bienvenues

car elles entrent dans la catégorie des actions positives et n'aggravent pas le risque de collusion. La contribution du Royaume-Uni mentionne les sites web qui permettent aux consommateurs de faire des comparaisons entre les prix des différents fournisseurs de services publics, par exemple l'électricité et le gaz. Cette pratique n'est guère préoccupante car les fournisseurs disposent déjà vraisemblablement des mêmes informations. Les sites web servent simplement à transmettre ces informations aux consommateurs. Un autre exemple concerne l'obligation de fixation de prix unitaires, c'est-à-dire les prix au kilo, etc., pour les biens vendus dans les supermarchés. Là encore, cela donne des informations utiles aux consommateurs sans accroître vraisemblablement les informations disponibles horizontalement entre fournisseurs.

Le quatrième principe mentionné par le délégué concerne la nécessité de se demander, lorsqu'on pense que les risques de collusion sont aggravés par la transparence des prix, si d'autres conditions existent dans une situation particulière qui soit facilitent la collusion, soit la limitent. Si les circonstances sont très défavorables à la collusion, il y a probablement moins de craintes à avoir quant aux inconvénients de la transparence des prix. On peut se poser les questions suivantes : quelle est la concentration du marché, quel est le degré d'homogénéité du produit ou du service, quelles sont les conditions d'entrée, etc.. Parfois, ces circonstances tiennent juste aux données économiques fondamentales. Dans d'autres cas, elles peuvent résulter d'une action délibérée des autorités.

Pour ce qui est des commentaires du Président sur les marchés publics, le délégué du Royaume-Uni mentionne l'exemple de la procédure d'enchère très transparente qui a eu lieu dans son pays pour l'attribution des licences de téléphonie mobile. Les participants ont été informés quotidiennement des offres qui étaient faites. Les autres aspects de l'enchère étant, cependant, très favorables à la concurrence, il a été possible de tirer parti de la transparence des prix sans en subir les inconvénients.

Le délégué conclut en notant que la technologie permettant d'améliorer la transparence a de toute évidence considérablement progressé ces dernières années grâce au développement du commerce électronique et de l'Internet. Il n'est pas certain des conclusions qui doivent être tirées de cette évolution, mais considère de manière générale que l'Internet comporte largement plus d'aspects positifs que d'aspects négatifs.

Le **Président** appelle l'attention sur le fait que la contribution suédoise contient un examen assez détaillé des ouvrages sur la transparence des prix ainsi qu'une analyse de la façon dont la transparence peut faciliter la collusion. Il invite ensuite la Commission européenne à prendre la parole, notant que l'UE a adopté des règles affectant la transparence des prix, essentiellement dans le but de renforcer l'intégration du marché. La deuxième partie de la contribution de la Commission européenne concerne les pratiques privées dans ce domaine. Cette contribution établit une distinction entre les diverses pratiques pouvant faciliter la collusion. Celles qui conduisent effectivement à l'exécution d'une entente sont de toute évidence à proscrire. Cependant, dans l'UE, même lorsqu'ils ne font pas expressément partie d'un accord de collusion, certains échanges d'information peuvent apparemment être interdits. Le Président demande plus d'informations à ce sujet ainsi que des commentaires sur la question de savoir si, dans le domaine de la promotion de la transparence des prix, il peut y avoir un conflit entre l'objectif d'intégration du marché et celui de renforcement de la concurrence.

Pour ce qui est de la première question du Président, un délégué de la **Commission européenne** note que, du fait du renforcement voulu par les gouvernements de la transparence des prix, il n'est pas toujours possible de faire progresser simultanément l'intégration du marché et la concurrence. La possibilité de progression parallèle dépend de deux éléments : la structure particulière du marché et les conditions de la concurrence, d'une part, et les modalités particulières de la transparence voulue, de l'autre. Cela conduit à une conclusion évidente, notée également dans le document de synthèse du Secrétariat et dans plusieurs contributions des pays, à savoir qu'une analyse au cas par cas s'impose.

Le délégué souligne que l'intégration du marché est l'objectif essentiel de la politique de la concurrence de l'UE. La transparence des prix revêtant un rôle déterminant pour la réalisation de cet objectif, la législation de l'UE prévoit, dans certains cas, l'obligation de renforcer cette transparence. Il s'agit de faciliter l'arbitrage des consommateurs européens. Le délégué cite comme exemple le rapport semestriel de l'UE sur les prix des automobiles dans l'ensemble des pays de l'Union. Ce rapport permet aux consommateurs d'obtenir un véhicule à de meilleures conditions dans un autre État membre et peut aussi notablement accroître la concurrence et l'intégration du marché. Le renforcement de la transparence des prix peut aussi contribuer à l'intégration du marché en encourageant l'entrée d'entreprises d'un État membre sur le marché d'un autre. Par exemple, diverses directives facilitent l'accès de nouveaux fournisseurs aux infrastructures existantes pour l'approvisionnement en gaz et en électricité ou les services de communication. Les obligations de transparence prévues dans chacune de ces directives doivent être adaptées aux conditions des marchés particuliers. Par exemple, la transparence est traitée de manière différente dans la directive sur le marché de l'électricité et dans celle concernant l'interconnexion des réseaux de télécommunications. La première exige la publication de prix indicatifs pour l'utilisation des systèmes de transport et de distribution. Ces prix sont fondés sur le prix moyen négocié au cours de la période de douze mois précédente. Pour les services d'interconnexion, l'obligation de transparence consiste à fournir sur demande, et non à publier, des détails sur les tarifs d'interconnexion et les autres conditions pertinentes (y compris les contributions requises pour satisfaire à l'obligation de service universel). En résumé, s'agissant de la première question du Président, les marchés et les moyens préconisés pour améliorer la transparence des prix doivent être choisis à la fois dans l'optique de l'intégration du marché et dans celui du renforcement de la concurrence. Si ces deux objectifs ne peuvent être poursuivis simultanément, peut-être celui concernant le marché est celui pour lequel le renforcement de la transparence en matière de prix est le moins important.

Pour ce qui est de la deuxième question intéressant le caractère anticoncurrentiel des échanges d'informations volontaires, le délégué note que la contribution écrite de l'UE prête sans doute légèrement à confusion. Les deux catégories d'échanges considérées peuvent conduire en fin de compte à promouvoir la collusion. La différence essentielle est que la première catégorie couvre les cas où il peut être prouvé que l'échange d'informations sur les prix et d'autres éléments vise à favoriser un projet de collusion sur une plus grande échelle. La deuxième catégorie couvre les cas où aucun élément d'information ne permet de conclure à l'existence d'un accord horizontal anticoncurrentiel. Pour interdire un tel système, il faut un type très différent d'analyse que celle qui s'applique à la première catégorie. L'affaire des tracteurs anglais est un bon exemple de la deuxième catégorie.

Les échanges d'informations de la deuxième catégorie sont interdits lorsqu'ils ont pour effet de remplacer les risques normaux de la concurrence par une coopération pratique, c'est-à-dire lorsque l'échange permet aux concurrents d'observer de très près leurs stratégies de marché réciproques et de réagir en conséquence. Une telle incidence peut être difficile à prouver. Le cas des tracteurs anglais met en évidence deux critères pertinents pour apporter une telle preuve -- on peut se référer aussi à cet égard aux paragraphes 48 à 52 du document du Secrétariat. Premièrement, les caractéristiques de l'échange d'informations doivent être analysés. L'information échangée est-elle accessible au public ? S'agit-il de données sur les ventes ou de données sur les prix et, dans ce dernier cas, s'agit-il des prix de transactions, des prix catalogue ou des prix recommandés ? Le degré de désagrégation ainsi que l'ancienneté des données et la fréquence des échanges d'information peuvent aussi revêtir une importance critique. Enfin, il faut prendre en compte la structure du système d'échange d'information elle-même. Il peut s'agir de la collecte par l'une des entreprises de données auprès d'autres entreprises. Il peut aussi s'agir d'une association commerciale, comme dans le cas des tracteurs anglais, ou d'une organisation totalement indépendante. Le deuxième critère porte sur les caractéristiques structurelles du marché. Dans le cas des tracteurs anglais, le marché était très oligopolistique et très concentré (quatre fournisseurs en détenaient 76 pour cent) et se caractérisait par de très fortes barrières à l'entrée, la loyauté aux marques, des systèmes denses de distribution, une demande très dispersée et peu de différenciation des produits. Dans ces

conditions, le système d'échange d'information empêchait les nouvelles entrées. Tout nouvel arrivant cherchant à s'intégrer à ce système s'exposait en effet à une riposte personnalisée des participants. En revanche, s'il ne cherchait pas à s'intégrer, il pouvait être défavorisé sur le plan de l'information, et par conséquent sur celui de la concurrence. Pour finir, la Commission a demandé aux parties d'agréger les données avant de les échanger et de ne pas communiquer de données ayant moins de douze mois d'ancienneté.

Le **Président** s'adresse ensuite à l'Australie, qui est le seul pays à avoir répondu à une question particulièrement difficile figurant dans le questionnaire du Secrétariat, à savoir si, outre le renforcement éventuel de la capacité des acheteurs de procéder à des comparaisons et de la capacité des vendeurs de coordonner leur action à des fins anticoncurrentielles, l'amélioration de la transparence des prix sur un marché peut avoir d'autres effets favorables ou défavorables à la concurrence.

Un **délégué de l'Australie** indique qu'il ne procédera pas à un examen analytique et se concentrera plutôt sur quelques exemples pertinents. La Commission australienne de la consommation et de la concurrence (ACCC) a envisagé la possibilité que la transparence des prix facilite de nouvelles entrées. Par exemple, lorsque le secteur de production de l'électricité a été privatisé et déréglementé en Australie il y a quelques années, le fait que le public ne dispose pas d'informations sur les tarifs appliqués aux différents utilisateurs d'électricité a été jugé préoccupant. Un grand nombre des acheteurs potentiels ont suggéré que des informations sur les tarifs faciliteraient probablement de nouvelles entrées dans le secteur déréglementé en permettant de meilleures décisions d'investissement. Elles permettraient aussi aux nouveaux entrants de se montrer plus compétitifs en ciblant certains consommateurs qui semblaient acquitter des tarifs excessifs.

Un deuxième exemple assez récent d'asymétrie d'information concerne un cas de fusion où l'acquéreur était un gros acheteur de grumes de feuillus dans l'industrie de déchiquetage du bois. Cette entreprise achetait des grumes à un très grand nombre de petits exploitants et les vendeurs ne disposaient d'aucune information quant aux prix payés par les autres acheteurs sur le marché. L'ACCC a obtenu de l'entreprise acquéreuse qu'elle s'engage à publier sur un site web et dans les journaux des communautés régionales éloignées des informations sur les prix payés pour les grumes.

Un autre exemple d'éventuels effets favorables à la concurrence du renforcement de la transparence des prix concerne la plus grande facilité de détection de la collusion. En Australie, certains États exigent des stations d'essence qu'elles installent des panneaux d'affichage des prix. Cette obligation a conduit à une augmentation des allégations de collusion par les consommateurs, en particulier lorsque toutes les compagnies pétrolières augmentent leurs prix à peu près en même temps. En Australie, il n'est pas rare que les prix de l'essence augmentent très rapidement, de pas moins de 10 cents le litre, le jour d'un départ en vacances. Lorsque cela arrive, l'ACCC reçoit des centaines de plaintes du public faisant état de pratiques de collusion. La Commission reconnaît, toutefois, que les hausses simultanées de prix ne sont pas en elles-mêmes une preuve de collusion.

L'amélioration de la transparence des prix peut avoir aussi une incidence favorable par le biais de ses effets de renforcement de la concurrence hors prix. Il arrive souvent, lorsqu'il est facile de procéder à des comparaisons de prix, que les fournisseurs commencent à rechercher d'autres moyens de se différencier, notamment par une amélioration du service.

Pour ce qui est des éventuelles conséquences anticoncurrentielles du renforcement de la transparence des prix, le délégué fait observer que certaines situations peuvent être des images inversées des exemples précédents. L'ACCC craint parfois qu'un renforcement de la transparence sur un marché réduise la concurrence en matière de prix sur un autre marché où les mêmes parties sont présentes. Par exemple, les parties à des contrats de prise ferme disposent de beaucoup d'informations sur les coûts des

facteurs de production de leurs concurrents, ce qui peut freiner la concurrence en aval. L'ACCC a constaté que le secteur du béton a été caractérisé par une très grande transparence au niveau des coûts de production, car les vendeurs étaient parties à des contrats de prise ferme pour le ciment et le granulat. Il est possible que cela facilite la collusion en aval au lieu d'accroître la concurrence par les prix sur le marché du béton.

Il existe aussi des cas où le renforcement de la transparence des prix a en fait encouragé des pratiques trompeuses. Pour ce qui est des marchés de la téléphonie mobile et des services Internet, où il existe une très forte compétitivité des prix, l'ACCC a reçu un grand nombre de plaintes concernant des publicités trompeuses. Ces plaintes concernaient les conditions non stipulées liées aux très faibles prix annoncés dans les publicités. L'ACCC s'est inquiétée du risque d'une perte de confiance des consommateurs due à ces informations trompeuses en matière de prix, qui pouvaient nuire à la concurrence à long terme dans ces secteurs. Apparemment, un grand nombre de consommateurs sont simplement revenus à l'ancien monopole fournissant précédemment des services de télécommunications, partant du principe qu'il y avait moins de risque qu'il ne cherche à tromper la clientèle que les autres. L'ACCC a aussi enquêté sur des plaintes émanant d'un grand nombre de petites entreprises et concernant les prix et d'autres informations fournies sous forme électronique, par exemple par des fournisseurs de services financiers et les systèmes informatisés de réservation des compagnies aériennes. Les petites compagnies aériennes se sont plaintes du fait que leurs tarifs préférentiels n'aient pas été affichés sur les écrans des agences de voyage d'une manière permettant à celles-ci de comparer efficacement les prix entre les petites compagnies et les grandes. Les systèmes informatisés ont en général permis une plus grande transparence au niveau des tarifs relatifs des grandes compagnies aériennes, mais ont défavorisé les concurrents de plus petite taille.

Le **Président** note que si les exemples de l'Australie ne permettent pas de tirer de conclusions définitives, ils posent néanmoins certaines questions intéressantes. Il souligne le risque qu'une concurrence trop ouverte en matière de prix ne conduise à une diminution masquée de la qualité, ayant en fin de compte pour effet d'accroître l'insécurité au niveau des consommateurs et par conséquent de renforcer les entreprises dominantes.

Les États-Unis sont le prochain pays appelé à prendre la parole. Le Président signale que, dans leur contribution, les États-Unis examinent les clauses de la nation la plus favorisée qui, dans certains cas, peuvent accroître la transparence des prix, tout en réduisant simultanément la concurrence. Y sont examinées les affaires *RxCare*, *Ethyl* et *AOL/Time Warner*. Le Président manifeste une très grande curiosité pour l'affaire *Ethyl*, dans laquelle il y a eu une divergence de vues entre la Commission fédérale du commerce (FTC) et la Cour d'appel du second circuit. Cette dernière a apparemment annulé la décision, arguant du fait que la FTC ne s'était pas conformée à la norme de preuve plus élevée requise pour faire valoir son cas. Cela conduit à se demander quelle est la charge appropriée de la preuve dans les cas impliquant des échanges d'informations sur les prix. Ces échanges doivent-ils être traités comme illégaux en soi ou leurs véritables effets sur la concurrence doivent-ils être démontrés.

Un délégué des **États-Unis** note, comme il est dit dans le document du Secrétariat et comme l'ont déjà démontré les débats tenus lors de la table ronde, que la transparence des prix peut avoir des effets ambigus, ce qu'illustrent en microcosme les clauses de la nation la plus favorisée. Il arrive parfois, semble-t-il, que ces clauses renforcent la transparence des prix d'une manière anticoncurrentielle. Dans d'autres cas, par exemple, dans l'affaire *AOL/Time Warner*, la FTC a insisté pour que soient adoptées des clauses NPF afin d'accroître la transparence des prix et d'encourager ainsi une solution plus concurrentielle. Le fait que la Commission ait remis en cause certaines de ces clauses ne doit pas être interprété comme signifiant que celles-ci présentent un caractère suspect ou répréhensible. De fait, elles constituent un aspect très courant des contrats sur les marchés compétitifs et oligopolistiques, ainsi que

dans les monopoles. Les clauses NPF sont généralement favorables. Elles peuvent être utilisées, toutefois, en particulier dans les industries concentrées, pour encourager des résultats anticoncurrentiels.

Les clauses NPF peuvent protéger une partie à un contrat, souvent un acheteur, du risque qu'un concurrent n'obtienne des conditions plus favorables. Elles peuvent aussi accroître l'efficacité des contrats, en particulier des contrats à long terme, en introduisant la flexibilité des prix. Un autre effet favorable à la concurrence d'une clause NPF est qu'elle peut rendre plus difficile la pénalisation de ceux qui ne respectent pas les termes d'une entente. Un vendeur participant à une entente peut être empêché par des clauses NPF d'offrir des prix faibles pour essayer de combattre les francs-tireurs. Au lieu de cibler ses réductions de prix de façon à pénaliser ces derniers, le vendeur voulant appliquer des mesures de rétorsion peut être contraint par les clauses NPF d'offrir des prix plus bas à un ensemble beaucoup plus important de consommateurs. Une telle action risque d'être trop onéreuse par rapport aux résultats attendus, ce qui tend à déstabiliser l'entente. Un tel avantage pourrait être annulé, toutefois, par l'effet que les clauses NPF ont sur les incitations potentielles à une diminution sélective des prix.

Le délégué a déclaré que l'affaire *Ethyl* de 1979 est un peu compliquée, ancienne et assez inhabituelle et qu'elle ne doit peut-être pas être considérée comme illustrative. Cette affaire impliquait quatre fabricants de composés antichoc à base de plomb. Le marché était très concentré et caractérisé par des prix uniformes, un produit homogène et des profits comptables élevés. La Commission fédérale du commerce (FTC) a observé que les quatre principaux fabricants avaient tous suivi des pratiques propres à faciliter la collusion, notamment la notification préalable des modifications de prix, des prix avec livraison uniformes et des clauses NPF. La FTC a considéré qu'aucune de ces pratiques n'avait une justification commerciale légitime. Elle n'a toutefois ni constaté ni invoqué l'existence d'un accord explicite entre les entreprises pour se concerter sur les prix. Il s'est agi donc essentiellement d'une tentative de règlement de ce qu'on appelait alors le problème de fixation concertée des prix en situation d'oligopole. Il a été admis que les pratiques suspectées avaient été adoptées par les entreprises de façon unilatérale, parfois à la demande des acheteurs, victimes évidentes.

On peut se demander comment la FTC peut être habilitée à saisir un tribunal dans une affaire comme *Ethyl*. Après tout, la loi Sherman exige l'existence d'un accord. La réponse est que la loi sur la Commission fédérale du commerce vise essentiellement les méthodes de concurrence déloyales et que son article 5 est plus particulièrement ciblé sur ces pratiques. Dans la majorité écrasante des cas, les méthodes de concurrence déloyales violent aussi la loi Sherman, mais on peut avancer que cette loi ne couvre sans doute pas toutes les dites méthodes. La FTC a estimé que les pratiques visées dans l'affaire *Ethyl* entraient dans cette catégorie et a cherché à interdire les clauses NPF.

La théorie dans l'affaire *Ethyl* était que les vendeurs seraient plus prompts à s'écarter des prix de cartel s'ils pouvaient le faire de façon sélective, ce qui était impossible puisque tout rabais offert à un consommateur devait être offert à tous. Ainsi, les clauses NPF ont joué pour réduire les incitations à la réduction des prix. Un juge administratif a été saisi de l'affaire et a maintenu les charges. Les entreprises ont ensuite exercé un recours devant la juridiction d'appel de la FTC. Les charges ont été maintenues et les clauses NPF interdites. Les entreprises ont ensuite interjeté appel auprès de la Cour d'appel fédérale. Cette affaire a constitué une étape historique et a permis de définir le niveau de preuves à fournir par la FTC pour établir la responsabilité en vertu de l'article 5 de la loi la concernant lorsqu'un accord ne peut être invoqué. La norme a été fixée à un niveau très élevé. Pour obtenir gain de cause, la FTC devait présenter des éléments de preuve démontrant l'existence d'une intention ou d'un objectif anticoncurrentiel et l'absence de raisons commerciales légitimes expliquant le comportement. La Cour d'appel a jugé que la FTC n'avait pas fourni des éléments de preuve suffisants.

Rétrospectivement, il faut noter que l'uniformité des prix constatée dans l'affaire *Ethyl* pouvait être compatibles avec un marché concurrentiel. La FTC n'a présenté aucun élément prouvant de façon

concluante que le marché opérait de façon anticoncurrentielle et permettant d'établir un lien avec les pratiques de facilitation mises en causes. Rien ne prouvait par ailleurs une intention ou une incidence de caractère anticoncurrentiel. Les clauses ont été adoptées de façon unilatérale et elles existent également sur des marchés compétitifs.

Après l'affaire *Ethyl*, la FTC n'a pas essayé, en l'absence de preuve d'un accord, d'invoquer l'article 5 pour attaquer les mêmes types de pratiques susceptibles de faciliter la collusion.

Le **Président** se tourne ensuite vers le Mexique qui, note-t-il, a un point de vue assez négatif des échanges d'information, les traitant de « pratiques monopolistiques absolues ». Ces pratiques peuvent être interdites sans avoir à établir l'existence d'une position dominante substantielle, chaque fois qu'elles ont pour objet ou pour effet de fixer, d'accroître ou de manipuler les prix. Le Président fait savoir qu'afin de déterminer si un échange d'informations sur les prix peut avoir pour objet ou pour effet d'accroître les prix, il faut vraisemblablement déterminer si les participants à cet échange ont une position dominante sur le marché. Faute d'une telle emprise, le Président ne voit pas comment on peut assumer ou établir que l'échange a un effet quelconque sur les prix. Il demande davantage d'informations concernant les critères appliqués par le Mexique pour juger de la légalité des échanges d'informations sur les prix.

Un délégué **mexicain** déclare pour commencer qu'au Mexique la fixation des prix est illégale en soi. Avec une telle approche, la loi est plus transparente et plus facile à appliquer. Le Mexique se rend compte, cependant, que l'illégalité de facto signifie qu'une fixation des prix efficiente peut se trouver interdite. Par exemple, dans le cas des taxis, il serait sans doute préférable d'avoir le même tarif pour l'ensemble des véhicules. En tout état de cause, si la fixation des prix est jugée illégale d'emblée, il est normal qu'un échange d'informations ayant pour principal objectif la collusion en matière de prix soit aussi illégal. La difficulté tient à la nécessité de déterminer quand un échange d'informations a pour principal objectif la fixation des prix. Il n'y a probablement pas de solution générale à ce problème et le délégué mexicain prône une approche au cas par cas.

Le délégué mentionne le cas du taux interbancaire au Mexique, pour lequel le projet d'un mécanisme d'échange d'informations a été jugé anticoncurrentiel. Il explique que le taux de référence interbancaire est calculé par la Banque centrale. Celle-ci demande à toutes les banques de donner une cotation de leur taux interbancaire. Ensuite, la Banque du Mexique calcule une moyenne. Ce qui est important, c'est que la Banque du Mexique a la possibilité d'emprunter des capitaux à la banque qui notifie le taux le plus faible ou de prêter les capitaux à la banque qui notifie le taux plus élevé. En conséquence, le mécanisme de fixation des taux ne constitue pas une incitation au "cheap talk". L'utilisation par les banques de ce mécanisme pour envoyer des signaux de prix pourrait être très coûteux.

Les banques n'apprécient guère la procédure actuelle et proposent des dispositifs de remplacement. La Commission fédérale de la concurrence a déterminé qu'une des propositions envisagées serait vraisemblablement anticoncurrentielle. Selon cette proposition, les banques s'assureraient les services de Reuters pour calculer une moyenne journalière de leurs taux interbancaires. Toutes les banques déposeraient leurs capitaux dans un fonds fiduciaire et ce fonds serait ensuite alimenté par les capitaux correspondant aux sanctions imposées aux banques appliquant des taux dont l'écart par rapport à la moyenne dépasse un certain plafond.

Les banques ont avancé que leur proposition était très semblable au mécanisme utilisé pour la détermination du taux interbancaire offert sur la place de Londres (LIBOR). Ce taux est calculé par un organisme indépendant, qui fait la moyenne des cotations des différentes banques. Il existe toutefois deux différences fondamentales avec la proposition des banques mexicaines. Premièrement, contrairement au LIBOR, le système proposé générerait un taux qui ne serait pas nécessairement lié à des transactions bancaires et pourrait par conséquent encourager le "cheap talk". Deuxièmement, la proposition se traduirait

en permanence par l'imposition de sanctions à environ la moitié des banques, parce qu'elles n'appliqueraient pas exactement le même taux.

Bien que la Banque du Mexique ait initialement souscrit à la proposition des banques, elle ne s'est pas opposée à la conclusion de la Commission fédérale de la concurrence selon laquelle ce dispositif serait probablement anticoncurrentiel.

Le **Président** croit comprendre que la Commission fédérale de la concurrence applique une approche de la règle de raison pour interdire d'emblée l'échange d'information. Il passe ensuite à la contribution de l'Allemagne qui illustre certaines des incohérences pouvant être observées entre la politique de la concurrence et les efforts faits par les autorités pour accroître la transparence des prix. En Allemagne, de nombreux textes de loi s'appliquant au commerce de détail visent à accroître la transparence des prix, ou peuvent, en fin de compte, avoir cet effet. Le Président mentionne la loi de 1932 sur les primes et les suppléments, la loi de 1933 sur les rabais et le règlement de 1985 sur la transparence des prix. Il note que la contribution de l'Allemagne indique que l'autorité allemande de la concurrence n'est pas satisfaite de ces textes de loi et il demande davantage d'informations les concernant.

Un délégué **allemand** confirme ce que le Président vient de dire. Il ajoute que l'on peut supposer que la transparence des prix, du moins au niveau des consommateurs, est généralement bénéfique. L'expérience de l'Allemagne montre que la validité de cette hypothèse peut dépendre des circonstances environnantes.

En Allemagne, les rabais consentis sur les prix de détail sont légalement limités à 3 pour cent. Dans la pratique, cela signifie qu'il n'y a pas de rabais et qu'il n'y a pas non plus de suppléments. L'objectif et l'effet réel de ces réglementations ne sont pas d'accroître la concurrence, mais plutôt de limiter et de réduire strictement la concurrence par les prix. Il s'agit aussi en outre d'aider les petites et moyennes entreprises à concurrencer les grandes chaînes de détail. Dans ces conditions, les prix catalogue sont partout les mêmes.

Depuis des décennies, l'autorité de la concurrence lutte contre les restrictions en matière de rabais et de primes, mais les partisans du statu quo l'ont jusqu'ici emporté. Aujourd'hui, la situation a changé, en partie en raison d'un important nouvel élément, à savoir une nouvelle directive de l'Union européenne sur le commerce électronique. Cette directive pourrait nuire à la compétitivité des entreprises allemandes par rapport à leurs concurrentes étrangères, car ces dernières, aussi bien pour leurs ventes intérieures que pour leurs ventes sur l'Internet, seront soumises aux règles applicables sur le marché intérieur, c'est-à-dire qu'elles seront en mesure d'offrir des rabais et des primes. Face à cette nouvelle évolution, le Parlement allemand est aujourd'hui en train d'examiner les réglementations dans ce domaine et on peut penser qu'elles seront abolies. Les autorités de la concurrence espèrent que cela aura un effet positif sur la transparence en matière de prix pour les consommateurs.

Le **Président** souligne que la contribution de la Hongrie contient aussi une analyse des mesures de renforcement de la transparence des prix voulues par les autorités, notamment la publication des prix de détail de l'essence, l'établissement de listes des livres scolaires (avec leurs prix) pouvant être demandés par les écoles et le règlement concernant l'indication des prix des produits du tabac. Le Président note que le Bureau de la concurrence économique a été apparemment consulté sur ces trois mesures et n'a pas soulevé d'objections pour ce qui est des deux premières. Il demande davantage d'informations, cherchant à savoir pourquoi les deux premières ont été jugées acceptables et la troisième non.

Un délégué **hongrois** explique que la situation en matière de prix de détail de l'essence s'inscrit dans le cadre d'un système de contrôle des prix de caractère proactif. Le système d'établissement de listes des livres scolaires est une approche assez réactive. Pour ce qui est de la transparence des prix de détail de

l'essence, qui est censée être assurée au moyen d'un site web Internet, le problème essentiel tient au risque que l'action ministérielle ne favorise la création d'une entente. Le ministère a demandé l'avis du Bureau de la concurrence économique. Plusieurs facteurs ont été pris en compte par ce bureau, notamment les caractéristiques du marché en question, la sensibilité des prix à la consommation et les objectifs du ministère de l'Économie. L'un de ces objectifs a été d'informer les consommateurs et un autre de renforcer la concurrence, y compris entre les distributeurs. Le ministère a aussi souhaité s'assurer que les mesures prises revêtaient un caractère non discriminatoire. Le Bureau de la coopération économique est conscient du fait que la publication d'informations exactes et très détaillées sur les prix peut être dangereuse en favorisant la coopération entre les vendeurs. Cependant, du fait des caractéristiques spéciales du marché et de l'importance de l'information des consommateurs, il a décidé de ne pas s'opposer au plan du ministère. Il a noté, toutefois, que ce type d'intervention pourrait à l'avenir être à l'origine de problèmes et de préoccupations dans l'optique de la politique de la concurrence. Le délégué hongrois indique en outre que la page d'accueil Internet n'a pas fonctionné de façon efficace en raison de désaccords importants entre les participants. Certains détaillants souhaitent publier les prix moyens. D'autres veulent publier les prix maximaux et minimaux et un troisième groupe préfère qu'une fourchette de prix soit indiquée sur l'Internet. Ces désaccords confirment vraisemblablement l'opinion du Bureau de la coopération économique, qui estime que les risques de promotion d'une entente liés à cette proposition sont en fait peu importants.

Pour ce qui est des mesures concernant les livres scolaires, une proposition a été présentée pour remédier à la façon apparemment inéquitable et anticoncurrentielle dont certains éditeurs de livres scolaires opéraient. Le Bureau de la concurrence économique a travaillé avec le ministère de l'Éducation pour mettre en place un système en vertu duquel aucun des concurrents n'est en mesure de faire ses offres avant les autres éditeurs et il n'est pas possible de modifier les offres une fois qu'elles ont été faites (à l'exception d'erreurs typographiques). Le Bureau de la concurrence économique estime que cette solution protège les intérêts des consommateurs et pourrait, dans certains cas, renforcer la concurrence par les prix.

Dans les deux cas examinés jusqu'ici, le Bureau de la concurrence économique estime que les effets positifs et négatifs ont été à peu près identiques et qu'un examen plus approfondi pourrait se révéler nécessaire à l'avenir. Il a pris en compte les intérêts des consommateurs et sans doute aussi d'autres objectifs politiques. Il s'est préoccupé davantage de la façon dont fonctionnait le système d'information sur les prix que des prix eux-mêmes. La situation était tout à fait différente dans le cas du tabac car il s'agissait d'une quasi fixation concertée des prix.

1. **Transparence des prix et marchés publics**

Pour débiter l'examen de ce nouveau thème, le **Président** donne la parole à la Lituanie, dont la loi sur les marchés publics exige que les prix des offres soient annoncés publiquement à tous les entreprises concernées lors d'une réunion ouverte à tous de la commission d'adjudication. Certains autres pays estiment apparemment qu'une telle pratique peut conduire à de graves problèmes de concurrence car, s'il existe une entente, la fourniture d'informations sur l'ensemble des offres permet aux participants de savoir quelles sont les entreprises qui ne respectent pas les termes de l'entente. Le Président demande de plus amples informations sur les objectifs et le fonctionnement du système lituanien.

Un délégué **lituanien** fait observer pour commencer que la situation en Lituanie est peut-être un peu différente de celle prévalant dans nombre d'économies occidentales établies. En Lituanie, les lois sur la concurrence et sur les marchés publics ne sont guère connues. L'obligation faite d'annoncer publiquement toutes les offres dans le cadre d'un marché public vise à réduire le risque de corruption ou d'évaluation inéquitable des offres, c'est-à-dire l'octroi des marchés à des amis ou à des connaissances des membres de la commission publique. Un autre aspect positif est que la publication de l'ensemble des offres

permet aux entreprises de disposer des informations dont elles peuvent avoir besoin pour déposer des plaintes en toute connaissance de cause concernant l'équité du processus, dans le cas, par exemple, d'analyse non transparente des offres.

Le délégué lituanien estime que, pour le moment et dans l'avenir prévisible, compte tenu de la transition en cours dans son pays, les règles actuelles en matière de marchés publics présentent sans doute davantage d'aspects positifs que négatifs. La confiance générale du public dans les autorités gouvernementales est assez faible et des procédures transparentes devraient contribuer à une plus grande équité.

Le **Président** observe à titre personnel qu'en France le secteur du bâtiment a été gravement secoué par plusieurs affaires antitrust. La réaction actuelle du secteur est de convaincre le Parlement français de rendre obligatoire la publication des offres afin d'accroître la transparence. Compte tenu de la situation différente en France, cela ne semblerait pas être une aussi bonne solution qu'en Lituanie. Néanmoins, il est très difficile d'expliquer aux membres du Parlement qu'un renforcement de la transparence des prix n'est pas toujours bénéfique. Le Président fait ensuite des observations sur le fait que le Bureau de la politique de la concurrence du Canada conseille généralement de ne pas publier les offres dans le cadre des marchés publics. Il demande au Canada plus de précisions à cet égard.

Un délégué **canadien** voudrait apporter quelques précisions quant à la contribution écrite de son pays. Le Bureau de la politique de la concurrence ne conseille pas de façon générale de ne pas publier les offres. L'un de ses principes directeurs étant la transparence, il reconnaît que, dans la plupart des cas, un renforcement de celle-ci sert l'intérêt du public, comme l'a indiqué le délégué lituanien. Cependant, les avantages de la transparence pour le public doivent être mis en balance avec le risque de contribuer à promouvoir la fixation des prix ou les soumissions concertées. Cela est particulièrement vrai dans les cas où il y a peu de concurrents (comme cela arrive souvent dans une petite économie) et où le produit est relativement homogène. Dans ces conditions, on estime que la publication des offres peut faciliter la collusion car le fait que tout écart par rapport à l'entente puisse apparaître clairement une fois que les offres sont publiées aura sans doute pour effet d'empêcher toute velléité de défection.

A l'instar de la Lituanie, le Canada prévoit aussi certaines obligations de transparence dans ses procédures d'appel d'offres pour les marchés publics, considérant que l'équité du processus, entre autres, est dans l'intérêt public. Cela est aussi compatible avec les obligations de transparence figurant dans les accords internationaux sur les marchés publics. Par exemple, pour les contrats publics supérieurs à certains seuils, l'ALENA exige soit que l'offre retenue, soit qu'une série d'offres situées entre la moins disante et la plus disante, soient publiées.

Lorsque le Bureau de la concurrence est consulté à propos d'un marché public, il souligne les risques de la publication des offres, en particulier lorsque le marché présente certaines caractéristiques. Il peut aussi faire des recommandations sur la façon de surmonter certains des effets négatifs potentiels. Lorsqu'il est obligatoire de publier les offres, comme c'est souvent le cas, les options concernant la publication sont de toute évidence limitées. Cependant, le Bureau peut recommander que l'acheteur ne s'engage pas nécessairement à choisir l'offre la moins disante, se réservant plutôt le droit de prendre en compte une série de facteurs en dehors des prix. Procéder de cette manière peut diminuer le risque de collusion entre les soumissionnaires.

Le Bureau de la concurrence partage les vues de certains autres délégués selon lesquels la transparence des prix pourrait ne pas être la seule cause des comportements collusifs. D'autres facteurs, comme ceux décrits dans deux cas présentés dans la contribution écrite du Canada, peuvent jouer un rôle critique. Ces autres facteurs concernent les pratiques susceptibles de faciliter la collusion comme les associations commerciales, les prix directeurs, les prix publiés, etc.

Le **Président** se tourne ensuite vers le Japon, pays où il est assez courant que l'organisation chargée de l'appel d'offres détermine un « prix planifié », c'est-à-dire une sorte de prix de référence ou de prix normal. La contribution japonaise précise que la publication de ce prix soit avant soit après que les offres ont été reçues peut avoir des effets positifs. Le Président demande davantage d'informations à cet égard.

Un délégué **japonais** précise que le prix planifié est généralement utilisé dans les appels d'offres pour les marchés de travaux publics et d'autres marchés. Lorsque les prix de toutes les offres dépassent le prix planifié, le soumissionnaire présentant l'offre la moins disante ne peut obtenir le contrat. Ces dernières années, un nombre croissant d'administrations locales ont publié le prix planifié avant ou après l'appel d'offres. La publication des prix planifiés peut avoir des effets positifs, notamment renforcer la transparence de la procédure, empêcher la corruption, entre autres pour obtenir d'un responsable des marchés publics qu'ils dévoilent le prix planifié, et aider les entreprises à calculer leurs propres coûts. Néanmoins, il n'est pas toujours acquis que la publication des prix planifiés aient des effets positifs sur la concurrence en matière de prix. La Commission japonaise de la concurrence estime, de manière générale, que la publication préalable des prix planifiés peut faciliter la collusion des soumissionnaires. Dans cette optique, elle accorde une étroite attention à la façon dont sont menés les appels d'offres pour les marchés de travaux publics.

2. Discussion générale

Un délégué **allemand** fait remarquer, à propos de la transparence et des marchés publics, que l'autorité allemande de la concurrence se rapproche beaucoup de la position du Canada, encore que son approche soit plus prudente. L'autorité allemande de la concurrence considère que la transparence des prix tend à être un facteur négatif, en particulier dans le cas de produits homogènes. Cependant, même dans les cas de produits apparemment non homogènes, la transparence des prix peut susciter des problèmes lorsque les coûts d'intrants homogènes sont révélés. Par exemple, la concurrence pour les appels d'offres concernant les marchés de construction scolaire peut être réduite si les soumissionnaires disposent, du fait des règles concernant les marchés publics, d'informations fiables sur le prix d'achat du béton acquitté par leurs concurrents.

Un délégué **suédois** note que la contribution de son pays contient essentiellement des remarques théoriques et que l'autorité suédoise de la concurrence n'a pas une large expérience des problèmes pratiques complexes soulevés par la transparence des prix. La contribution suédoise mentionne, toutefois, quelques exemples relatifs au marché suédois, l'un d'entre eux, l'affaire *SPI*, concernant le marché pétrolier. L'autorité de la concurrence a soutenu dans cette affaire que l'échange d'informations sur le volume des ventes des entreprises avait sans doute eu des effets aussi négatifs sur la concurrence que l'échange d'informations sur les prix. Elle n'a pas obtenu gain de cause auprès des tribunaux, en partie en raison de l'insuffisance de données d'information reliant l'échange d'information et les effets sur les prix.

L'autorité suédoise de la concurrence convient que la communication entre entreprises concernant le volume des ventes et les prix doit être interdite, mais il faut prêter attention au marché, aux produits et à d'autres circonstances. En outre, bien entendu, des difficultés surgissent lorsque l'information est rendue publique et/ou lorsque d'éventuels gains de bien-être peuvent être associés à une plus grande transparence. L'autorité estime également que les échanges de données interentreprises sur la demande et les coûts doivent être considérés comme comportant le risque de promotion de pratiques collusives. Pour ce qui est des échanges de données agrégées, l'autorité est d'avis qu'ils doivent être autorisés. Le délégué considère également que les quatre principes mentionnés au début de la réunion par le délégué du Royaume-Uni se révéleront très utiles dans la pratique.

Un délégué **italien** demande quelle est la situation en France concernant les marchés publics. Le droit administratif, du moins en Italie, prévoit l'obligation d'informer chaque soumissionnaire de sa position relative lorsque l'appel d'offres est clos. Le **Président** répond que, pour autant qu'il le sache, il n'existe pas de dispositions de ce type dans la loi française (ni dans la loi allemande), ce qui explique l'agitation qui persiste à propos de certains aspects. L'un d'entre eux concerne la proposition d'une règle automatique qui éliminerait les offres anormales (c'est-à-dire supérieures ou inférieures de 5 à 10 % à un certain prix objectif), alors qu'une autre viserait à renforcer la transparence du processus d'appel d'offres. Jusqu'ici, bien que cette question soit débattue depuis plusieurs années, l'autorité de la concurrence oppose toujours une ferme résistance.

3. Transparence des prix et professions libérales

Le Président pose ensuite au Japon une question concernant la transparence des prix et les professions libérales. Dans sa contribution écrite, le Japon cite plusieurs codes de concurrence équitable comportant des clauses de transparence des prix. Il semble que la Commission japonaise de la concurrence ne soit très préoccupée ni par ces clauses ni par la publication par les professions de listes des prix. Le Président demande davantage d'informations sur ces points.

Un délégué **japonais** précise qu'au Japon, les entreprises et les associations commerciales sont autorisées à établir des règles volontaires, en matière d'étiquetage notamment, afin d'empêcher des présentations trompeuses pouvant nuire à une concurrence équitable. La Commission de la concurrence approuve ces codes de concurrence équitable s'ils sont adaptés à leur objectif, n'affectent pas le bien-être des consommateurs et des entreprises concernées et répondent à d'autres obligations. Certains codes comportent des clauses sur l'indication des prix. Par exemple, celui de l'association automobile stipule que les entreprises membres doivent indiquer le prix de détail de leurs produits. Le code d'une association immobilière exige de ses membres qu'ils indiquent le coût de la maintenance en plus du prix d'un bien particulier. On estime que les indications de prix jouent un rôle important dans le maintien et la promotion d'une concurrence équitable car elles permettent aux consommateurs d'économiser sur les coûts des transactions et de faire des choix plus efficaces.

Le **Président** note qu'une distinction importante doit être faite entre les associations professionnelles exigeant de leurs membres qu'ils publient leurs propres prix et celles qui interviennent dans la fixation de ces prix. Il s'adresse ensuite à la Corée où, apparemment, les professions ont en général été autorisées à fixer de façon concertée les prix. La contribution coréenne indique que l'Omnibus Cartel Repeal Act de 1999 contient une disposition abolissant la fixation des tarifs par les associations professionnelles. Il est suggéré que cette mesure a eu des conséquences positives et le Président souhaiterait en savoir davantage. Il se demande aussi s'il y a eu une réaction négative de la part des consommateurs. Une réaction de ce type a été observée dans nombre de pays où les organisations de consommateurs cherchent activement à ce que soit publiée sous une forme ou une autre, un prix moyen, normal, fixe ou indicatif.

Un délégué **coréen** fait remarquer que la fixation des tarifs par les associations professionnelles a bien été abolie en Corée. Les consommateurs ne risquent plus désormais de devoir acquitter des tarifs non équitables grâce à une disposition assurant une information transparente sur les prix. Le Conseil national coréen des organisations de consommateurs procède à des enquêtes semestrielles des tarifs appliqués par les avocats, les experts comptables et six autres groupements professionnels et notifie les résultats aux consommateurs. L'enquête fait apparaître une tendance générale à la hausse des tarifs pour la première moitié de 2000. Cependant, le niveau global des tarifs a chuté dans la deuxième moitié de 2000 (par rapport à la fin de 1999, les tarifs moyens des avocats ont diminué de 10.6 pour cent et les tarifs moyens des experts comptables de neuf pour cent). Il semble que la concurrence par les prix se soit renforcée du

fait de l'élimination des niveaux de tarifs normatifs et qu'une différenciation des prix sur la base de la nature et de la qualité du travail soit en cours. L'enquête sur les prix a elle-même aidé les consommateurs à choisir parmi les professionnels.

La Commission coréenne de la concurrence n'a pas ménagé ses efforts pour faire connaître, par des communiqués de presse et par le biais de son site web (en plus de s'assurer la coopération de l'association des cyberconsommateurs), l'abolition des tarifs normatifs pour les services professionnels. Les enquêtes montrent maintenant que presque tous les professionnels sont au courant du changement ainsi que 66 à 92 pour cent des consommateurs.

Le **Président** observe que la situation en Suisse contraste fortement avec la situation en Corée. Apparemment, il y a dans ce pays de nombreuses associations professionnelles qui publient des listes de prix et la Commission de la concurrence a été amenée plusieurs fois à s'occuper de cette pratique. La contribution écrite de la Suisse analyse longuement les aides fournies aux professionnels pour la fixation de leurs tarifs. Le Président demande de plus amples précisions sur cette question et d'autres.

Un délégué **suisse** commence son intervention en notant que la vie associative professionnelle est encore très présente tant au niveau des cantons qu'au niveau fédéral. Traditionnellement, les associations ont pour compétence statutaire d'édicter des listes de prix. En général, ces tarifs indicatifs peuvent être utiles non seulement aux professionnels, mais aussi aux consommateurs dans la mesure où ces recommandations leur donnent la possibilité d'avoir des informations concernant les prix qu'ils doivent s'attendre à payer.

Au regard du droit suisse sur la concurrence, les recommandations de prix des associations professionnelles peuvent constituer des ententes illicites, mais elles ne sont pas illicites en soi. De fait, une analyse au par cas de leurs effets pratiques est requise. La Commission a acquis une expérience considérable dans ce domaine. Trois exemples sont cités.

Le premier a trait à l'Association des écoles de circulation du canton de Fribourg, qui publie annuellement des tarifs conseillés pour les leçons de conduite. Selon les statuts de cette association, les moniteurs doivent afficher la liste des prix dans leurs locaux et la transmettre à leurs élèves. Il ressort d'une enquête que les tarifs recommandés ont été largement appliqués à la fois par les membres et par les non membres. La Commission de la concurrence a interdit aux membres de l'association de s'entendre à l'avenir sur les tarifs.

Le deuxième cas concerne trois quotidiens du canton italoophone du Tessin. Le 12 octobre 1999, les trois quotidiens ont informé leurs lecteurs d'une augmentation de même pourcentage de l'abonnement à chaque quotidien. Pendant longtemps, les parts de marché des trois journaux sont restées quasiment inchangées. La Commission de la concurrence a estimé qu'il existait un accord illégal sur les prix. Les parties sont convenues ultérieurement avec la commission de ne plus se communiquer des informations concernant les prix avant la publication de ces derniers et de renoncer à la fixation et à la publication communes des prix.

Le troisième cas concerne les recommandations de prix des associations de cafetiers-restaurateurs. Cinq associations de ce type opérant dans les cantons francophones ont émis à l'intention de leurs membres des recommandations de prix pour certaines boissons servies couramment dans la restauration. Le secrétariat de la Commission de la concurrence a conclu que ces recommandations tendent à avoir un effet de nivellement des prix vers le haut. Prouver le contraire aurait été coûteux pour les cinq associations, qui ont préféré convenir de ne plus émettre de recommandations de prix.

Ces trois études montrent que les recommandations de prix des associations professionnelles ont généralement des effets négatifs sur la concurrence. Il est difficile de modifier les habitudes et les membres des associations suivent généralement les recommandations de celles-ci. Ces recommandations affectent la concurrence lorsqu'elles permettent aux entreprises de prévoir les pratiques de leurs concurrents en matière de prix, lorsqu'elles influent sur le comportement des membres et des non membres et lorsqu'elles conduisent à une hausse générale des prix. En outre, les recommandations de prix ne sont pas très utiles pour les consommateurs car elles ne contribuent pas nécessairement à la transparence du marché. Le temps économisé pour comparer les prix est utilisé pour comparer la qualité, une activité notoirement difficile en particulier en ce qui concerne des produits non homogènes. Les recommandations de prix ne sont pas en outre très utiles pour les consommateurs car elles n'améliorent pas nécessairement la prévisibilité des coûts effectifs. Par exemple, il n'est pas d'un grand secours de connaître le tarif par heure des leçons de conduite, si le moniteur garde dans une large mesure la possibilité de déterminer combien d'heures sont nécessaires.

Le **Président** achève la discussion sur la transparence des prix et les professions en donnant la parole aux États-Unis où les organismes de la concurrence ont cherché à la fois à renforcer et à diminuer la transparence des prix dans les professions. Par exemple, la FTC a engagé une action contre la *California Dental Association*, qui interdisait certaines formes utiles de publicité des prix. Mais, dans d'autres cas, comme celui de la *Wisconsin Chiropractic Association*, la Commission est intervenue pour protéger les consommateurs en diminuant la transparence des prix. Le Président a demandé aux États-Unis non seulement d'examiner ces affaires mais aussi de fournir une aide méthodologique pour établir une distinction entre les cas où le renforcement de la transparence des prix dans les professions a une incidence favorable et les cas où il a une incidence défavorable.

Un délégué des **États-Unis** note que l'essentiel dans ces cas est de mettre en évidence les effets effectifs sur la concurrence d'une plus grande transparence des prix. Il note que le paragraphe 21 du document du Secrétariat identifie certains des facteurs qu'il faut prendre en compte pour déterminer si la transparence des prix risque d'avoir un effet anticoncurrentiel. On peut citer notamment les suivants : grand nombre de vendeurs, faible niveau de concentration, asymétrie entre les vendeurs et les produits offerts et achats groupés. Les marchés concernant les professions considérées sont probablement caractérisés par l'ensemble de ces facteurs et d'autres, et pourtant l'on peut constater dans ces cas comment une association professionnelle peut utiliser les règles affectant la transparence des prix pour aider les vendeurs à surmonter les obstacles qui pourraient autrement leur rendre difficile l'obtention de résultats anticoncurrentiels. Dans l'affaire de 1993 relative à la *California Dental Association*, l'association a réduit la transparence des prix pour les consommateurs en limitant la publicité, alors que dans l'affaire *Wisconsin Chiropractors*, l'association professionnelle compétente a renforcé la transparence des prix entre les vendeurs.

Pour ce qui est de la *California Dental Association*, la FTC a considéré que l'association, représentant environ 75 pour cent de l'ensemble des dentistes de l'État, avait adopté des règles interdisant à ceux-ci de recourir à certaines formes de publicité sincères et non trompeuses, y compris en ce qui concerne les tarifs. Par exemple, elle a adopté des règles interdisant des réductions générales de tarifs pour les personnes âgées et d'autres groupes et a interdit des déclarations concernant les soins et le niveau raisonnable des prix. Les consommateurs ont été ainsi privés de la possibilité de connaître les réductions possibles et ont eu plus de difficultés à comparer les prix. La Commission a considéré que ces actions étaient illégales et a empêché l'association d'interdire la publicité non trompeuse, y compris en matière de tarifs. L'affaire s'est terminée par une longue série d'appels devant les tribunaux, allant même jusqu'à la saisine de la Cour suprême. Certains de ses aspects ont déjà été décrits à d'autres occasions au sein du Comité du droit et de la politique de la concurrence. Elle a été citée, par exemple, à propos de l'application de la règle de raison dans les cas des professions. Enfin, l'ordonnance de la Commission a été rejetée en appel et la Commission a décidé au début de l'année, pour diverses raisons, de ne pas donner suite. Elle reste convaincue que de sérieux problèmes antitrust se posent lorsqu'une association applique de façon

systématique des restrictions en matière de publicité, privant les consommateurs d'informations valables sur les prix sans avantages correspondant sur le plan de la concurrence.

La deuxième affaire concernait une association de chiropracteurs du Wisconsin, dont l'action a eu des effets anticoncurrentiels du fait du renforcement de la transparence des prix entre les chiropracteurs. Cette affaire s'étant terminée par un accord consensuel, seule des allégations sont présentées ci-après, et pas des faits prouvés.

En janvier 1997, l'administration fédérale et plusieurs compagnies d'assurance ont modifié leur système de codes de facturation pour le remboursement des services de chiropracteurs, l'alignant davantage sur le système utilisé pour les services d'ostéopathes. Ultérieurement, la Wisconsin Chiropractic Association a tenu des réunions au cours desquelles son directeur exécutif a demandé instamment aux chiropracteurs de ne pas établir leurs honoraires sur la base de ces nouveaux codes avant d'avoir participé à certains séminaires. A l'occasion des séminaires en question, le directeur exécutif a invité les chiropracteurs à aligner leurs honoraires sur ceux des ostéopathes, leur a indiqué ces honoraires et leur a précisé que cela constituait une occasion unique d'appliquer des hausses de tarifs. Il a noté qu'il était peu probable que l'assurance responsabilité civile rejette ou réduise ces taux de remboursement plus élevés. En fait, il a demandé aux membres de discuter entre eux de leurs contrats avec les assureurs afin d'améliorer leur position de négociation et les a encouragés à boycotter les régimes de soins gérés qui ne se prêtaient pas à des taux plus élevés de remboursement. En outre, l'Association a procédé à une enquête sur les honoraires appliqués par ses membres et a fait savoir que les chiropracteurs avaient réussi à augmenter les niveaux de remboursement. Cette information a été fournie de façon désagrégée, de sorte qu'il est difficile de dire quel bureau était impliqué. La FTC est arrivée à un accord consensuel avec l'Association, interdisant à celle-ci, entre autres choses, de mener certains types d'enquête sur les honoraires pendant plusieurs années et d'utiliser les informations ainsi obtenues de façon anticoncurrentielle.

En résumé, les affaires des États-Unis ne fournissent pas de baguette magique pour évaluer les actions des associations professionnelles et leur incidence sur la transparence des prix.

4. Examen plus particulier de certains secteurs (y compris la distribution de l'essence et les compagnies aériennes)

A ce stade des débats, le **Président** revient sur l'une de ses remarques introductives. Du point de vue de l'autorité de la concurrence, une analyse au cas par cas permet mieux d'apprécier toutes les subtilités du monde réel. Cependant, les non initiés peuvent considérer que les autorités de la concurrence ont décidé qu'elles peuvent faire ce qu'elles veulent sans justification. Dans ces conditions, ces autorités pourraient bien avoir pour mission d'essayer d'expliquer au moins la méthode qu'elles appliquent dans leurs analyses au cas par cas. Plusieurs contributions ont essayé de mettre au point une telle méthode en ce qui concerne la transparence des prix et ont dressé une liste de facteurs pertinents. On peut s'interroger sur le point de savoir si ces facteurs sont directement liés au risque d'incidence anticoncurrentielle d'un échange de données sur les prix, mais il paraît néanmoins souhaitable de mettre en évidence ces différents critères. La contribution norvégienne décrit leur application dans deux affaires concernant des échanges d'information entre des hôtels et des entreprises d'emballage de viande. Le Président demande à la Norvège d'expliquer et d'illustrer ces critères.

Un délégué **norvégien** note que les deux affaires citées sont encore en cours d'examen par l'autorité de la concurrence. Elles sont néanmoins importantes car ce sont les premières examinées après les amendements de 1994 concernant les échanges d'information. Avant 1994, la notification d'informations par des entreprises à une unité commune ou à une association était expressément interdite. Cette interdiction ne figure plus dans la loi actuelle, de sorte que la Norvège pourrait désormais être dans la

même situation que le Mexique, en ce sens qu'elle a instituée une interdiction générale de la fixation concertée des prix et doit trouver les moyen d'utiliser cette interdiction pour faire face au problème de l'échange d'information.

Le délégué estime que trois conditions doivent être réunies pour interdire un échange d'information. Premièrement, une certaine forme de coopération doit avoir lieu. Cela peut être facile à établir, étant donné que le simple échange d'information peut, à lui seul, être considéré comme de la coopération. Deuxièmement, l'échange doit risquer de peser sur les prix. Troisièmement, l'autorité de la concurrence doit montrer que la concurrence peut être affectée. Ces conditions ont été illustrées par l'affaire récente des hôtels dans le cadre de laquelle un groupe d'hôtels est convenu d'échanger leurs taux moyens de prix et d'occupation. Les participants ont ainsi pu disposer d'informations très désagrégées sur les prix et les taux d'occupation moyens de toutes les autres parties sur une base journalière, avec un jour de décalage. Cela semble nuire à la concurrence, mais l'autorité norvégienne n'est pas encore très certaine de la façon dont la loi modifiée sera interprétée sur ce point.

Le **Président** se tourne ensuite vers la République tchèque. La contribution tchèque part du principe que les accords visant à acquérir les informations nécessaires aux différentes entreprises pour déterminer la stratégie qu'elles appliqueront de façon indépendante à l'avenir sur le marché libre ne faussent pas, pour la plupart, la concurrence. Elle considère, toutefois, que certains de ces accords pourraient être anticoncurrentiels. Elle fournit ensuite des précisions sur le type d'analyses et de facteurs qui seront pris en considération pour déterminer si un échange d'informations particulier est anticoncurrentiel.

Un délégué de la **République tchèque** note que les autorités tchèques de la concurrence appliquent la même approche en matière d'échange d'information que celle de l'UE. La légalité de ces échanges dépend de trois facteurs : structure du marché, type d'informations échangées et fréquence des échanges. Pour ce qui est de la structure du marché, le délégué note que l'échange de données sensibles sur un marché atomistique ne permet pas aux entreprises de prévoir le comportement de ses concurrents. Le degré de concentration du marché et la part de marché représentée par les entités échangeant des informations sont de toute évidence importants. Pour ce qui est des types d'informations échangées, un aspect important est le degré d'agrégation des données. Du point de vue de la concurrence, il importe de déterminer si les participants peuvent découvrir des données sensibles concernant leurs différents concurrents. D'après l'expérience tchèque, quelqu'un d'assez bien formé peut extraire des informations individuelles même de données agrégées applicables à cinq entités. Le délégué examine aussi les divers types d'informations qui pourraient être échangés, soulignant une fois encore que permettre aux concurrents d'obtenir des informations spécifiques sur des entreprises sensibles peut faciliter la formation d'ententes. Pour ce qui est de la fréquence de l'échanges d'information, le délégué fait une distinction entre les données ayant plus de douze mois d'ancienneté (l'échange de ces données est généralement autorisé), les données de moins de douze mois d'ancienneté et les données portant sur l'avenir. Plus les données sont récentes et plus elles sont échangées fréquemment, plus le risque de concurrence est grand.

Le délégué cite à cet égard deux exemples. Le premier concerne un accord entre des compagnies d'assurance visant à échanger tous les ans des informations sur le nombre d'accidents automobiles, de blessures, etc. Tous ces échanges d'information sont couverts par une disposition d'exemption par catégorie s'appliquant au secteur des assurances. Le deuxième concerne les accords passés entre des agences de voyage ayant établi un pool afin de réduire l'incidence des faillites. Un échange d'information était prévu dans cet accord. Dans ce cas, le bureau a adopté une position plus ferme et a limité à deux ans l'accord en question.

Le délégué conclut ses remarques en faisant une distinction entre la transparence publique et privée sur le marché. La transparence publique concerne la transparence pour les consommateurs, alors que

la transparence privée est celle qui touche les entreprises. La transparence publique est la base de la concurrence économique, qu'elle renforce, en permettant aux consommateurs de comparer efficacement les produits et les services. En revanche, la transparence du marché privé n'améliore que la transparence pour les entreprises et comporte le risque de faciliter la coordination en matière de prix.

Le **Président** note que plusieurs contributions traitent du secteur de vente au détail de l'essence, celle de l'Italie notamment. La contribution italienne traite aussi de l'échange illégal d'information dans le secteur des assurances. Cela est particulièrement surprenant car la contribution de la Commission européenne mentionne l'existence d'une exemption par catégorie pour le secteur des assurances et note que, dans nombre de cas, la nature de ce secteur exige un échange d'information afin de mieux évaluer les risques.

Un délégué **italien** décrit pour commencer l'affaire des assurances, notant que les compagnies participantes ont mis en place un système allant considérablement plus loin que l'échange d'information autorisé par la directive de l'UE. Premièrement, cette directive ne traite que de l'échange sous une forme agrégée d'informations commerciales ou d'informations sur les primes nettes, c'est-à-dire d'informations concernant les coûts relatifs aux dommages-intérêts, et non d'informations sur les tarifs des assurances. Or, les compagnies d'assurance italiennes avaient organisé un échange de données extrêmement désagrégées sur les prix. Ces données, ventilées sur la base des codes postaux de l'Italie, apportaient de nombreuses indications sur la tarification et les caractéristiques des assureurs, compagnie par compagnie. Ce système a été mis en place par l'intermédiaire d'une société commerciale tierce. Les informations pouvaient être vendues à n'importe qui sur le marché, de sorte qu'il ne s'agissait en aucune manière d'un échange de données en petit comité. En outre, la société coordinatrice organisait de fréquentes rencontres sur l'évolution des tarifs et les perspectives futures du marché. En bref, ce système permettait une totale transparence des prix entre les producteurs, qui opéraient sans que les consommateurs aient effectivement accès aux mêmes informations. Bien que les compagnies italiennes d'assurance aient pour obligation de publier leurs tarifs pour les consommateurs, les moyens utilisés pour ce faire (n'impliquant pas nécessairement une entente) ne permettaient guère aux consommateurs de procéder à des comparaisons de prix.

L'Autorité italienne de la concurrence a considéré qu'un échange d'informations détaillées de ce type constituait, compte tenu des caractéristiques du secteur des assurances et du fait que les consommateurs n'avaient pas accès aux mêmes informations, une violation du droit de la concurrence. Cette violation ayant également un objectif anticoncurrentiel, point n'était besoin d'examiner les effets de l'échange d'informations. C'était là un point essentiel, car un système aussi répandu d'échange d'information peut conduire à n'importe quel équilibre des prix. Il est impossible de dire avec certitude quel est l'équilibre correspondant à une entente. Par exemple, toutes les entreprises appliqueraient-elles le même tarif ou y aurait-il des divergences entre elles ?

Le délégué souligne une caractéristique spéciale du marché des assurances qui renforce considérablement les conséquences négatives d'un accord de collusion, facilité par un large échange d'information asymétrique (c'est-à-dire ne s'étendant pas aux consommateurs). Il n'y a pas de contraintes de capacité dans ce secteur. Toute compagnie d'assurance peut facilement obtenir une part de marché si les consommateurs comparent les tarifs et changent de compagnie. C'est la raison pour laquelle l'Autorité de la concurrence a considéré qu'un échange d'informations aussi détaillées constituait une violation grave du droit de la concurrence et a sévèrement sanctionné la trentaine de compagnies d'assurance concernées, les condamnant à une amende supérieure à 350 millions d'euros.

L'affaire de l'essence est un exemple d'un système beaucoup plus sophistiqué de renforcement de la transparence des prix. Là encore, cette plus grande transparence a bénéficié aux concurrents et non aux consommateurs. Il ne s'agissait pas dans ce cas d'échange d'informations mais d'un dispositif très

judicieux de rabais inversement proportionnels à la quantité accordés aux détaillants. Dans le cadre de ce dispositif, plus ceux-ci vendaient d'essence, plus le rabais qu'ils obtenaient était faible. Il convient de noter que l'Italie a un système par lequel les producteurs sont tenus d'établir des prix recommandés pour les détaillants d'essence, qui sont ensuite libres de vendre à un prix inférieur. Grâce aux rabais inversement proportionnels à la quantité, les producteurs d'essence ont été en mesure de décourager les détaillants de vendre à un prix moindre que le prix recommandé. Cela a nuit à la concurrence entre les détaillants et a simultanément rendu les prix recommandés plus transparents pour les producteurs "concurrents".

L'Autorité italienne de la concurrence a sanctionné le système de rabais inversement proportionnels en imposant une amende supérieure à 300 millions d'euros. La gravité de l'amende s'explique par le fait qu'en raison des diverses réglementations, il n'y avait que très peu de moyens de faire intervenir la concurrence sur le marché italien de l'essence. L'un d'entre eux était la concurrence par les prix, que les producteurs avaient effectivement bloquée.

Le **Président** fait observer que, peu après la libéralisation des prix de détail des combustibles au Brésil, une réglementation a été adoptée exigeant des détaillants qu'ils affichent leurs prix. Actuellement, la fixation concertée des prix au niveau local est invoquée dans quelques 80 affaires. Le Président souhaite savoir si la réglementation est à l'origine de certaines de ces plaintes, c'est-à-dire si la transparence générée par la réglementation tend à faciliter la collusion dans de nombreuses parties du Brésil.

Un délégué **brésilien** commence son intervention en notant que les réglementations brésiliennes en matière de transparence des prix visent à accroître les informations sur les prix dont disposent les consommateurs brésiliens et ont été largement motivées par la protection des consommateurs. Les tenants d'un renforcement de la transparence prétendent que la réduction des coûts de recherche et les asymétries d'information servent les intérêts des consommateurs. La législation sur la concurrence, quant à elle, ne traite pas expressément des échanges privés d'informations renforçant la transparence des prix. Cependant, dans certains cas, des interdictions générales ont été utilisées pour entraver les tentatives de renforcement de la transparence des prix visant à faciliter la coordination à ce niveau. L'arbitrage classique entre les avantages d'une réduction des coûts de recherche et un risque accru de collusion est donc aussi présent dans l'application de la loi antitrust au Brésil. Des affaires importantes dans ce domaine sont en train d'apparaître et auront une importante valeur de précédent.

Le délégué fait état du cas d'une association professionnelle pour laquelle le tribunal antitrust du Brésil a statué que les listes d'honoraires établies pour les services de médecins nuisent à la concurrence et sont illégales, même si elles ne sont pas contraignantes pour les membres de l'association. Malgré cette décision, une certaine ambiguïté demeure dans le domaine de la fixation des honoraires par une association professionnelle. En particulier, une loi fédérale permet aux associations de juristes brésiliens de publier des listes des honoraires.

Pour ce qui est des stations d'essence, l'organisme national brésilien exige des détaillants qu'ils affichent leurs prix sur des panneaux bien visibles pour les conducteurs à partir de la route. Les consommateurs soutiennent fermement cette mesure, mais ses effets sur la concurrence sont peu clairs. D'une part, les consommateurs peuvent connaître les prix pratiqués par les détaillants sans avoir à s'arrêter, ce qui est un avantage, mais de l'autre, il apparaît d'après certains signes que la transparence pourrait être un mécanisme facilitant la formation d'ententes. L'Autorité antitrust a eu connaissance de certaines conversations entre détaillants révélant une conspiration, notamment l'établissement d'un comité expressément chargé de détecter dans la ville les déviations de l'accord illégal. Lorsqu'un non respect des termes de l'entente est constaté, le Président de l'association commerciale des détaillants d'essence contacte le détaillant concerné pour essayer d'obtenir qu'il respecte les mesures imposées.

L'affaire de la compagnie aérienne brésilienne ressemble à celle examinée aux États-Unis (affaire de l'Airline Tariff Publishing Company). Bien qu'interdit aux États-Unis, cela n'empêche pas que ce mécanisme soit utilisé dans d'autres pays. L'Autorité de la concurrence brésilienne a commencé une enquête après avoir trouvé des notes publiées dans un journal et après que certaines compagnies aériennes ont accru leurs prix de 10 pour cent le même jour. Il a été découvert que les compagnies aériennes utilisaient le système informatisé de réservation pour connaître les prix trois jours avant qu'ils n'entrent en vigueur et qu'elles ajustaient leurs prix en conséquence avant que les consommateurs n'aient une chance d'acheter des billets sur la base des prix préannoncés.

Le **Président** demande ensuite à la Suède de faire des commentaires plus approfondis sur l'affaire *SPI* de 1995, déjà mentionnée, où la décision de l'Autorité de la concurrence a été annulée par le tribunal du commerce.

Un délégué **suédois** déclare que l'Autorité de la concurrence a appris beaucoup de l'affaire *SPI* qui concernait l'échange de données à la fois sur les prix et le chiffre d'affaires. La contribution écrite de la Suède contient une liste de pointage des critères à appliquer pour déterminer l'incidence des échanges d'informations dans le secteur de l'essence. Dans l'affaire considérée, l'Autorité de la concurrence a constaté que le nombre de concurrents et de nouvelles entreprises était peu important, que la technologie de production se modifiait très lentement, que les coûts étaient symétriques, que les structures des compagnies et leurs intérêts coïncidaient tout comme leurs préférences temporelles et qu'il y avait peu d'incertitude quant à la demande (les réductions de prix étaient assez faciles à détecter). Il s'agit donc là d'un exemple d'un marché très concentré où les obstacles à l'entrée et la sortie sont importants, les parts de marché stables, les produits homogènes et la substitution des produits difficile. Dans une telle situation, le risque d'une activité concertée est grand et est facilité par l'échange d'information.

5. Discussion générale

Un délégué de la **Commission européenne** ouvre la discussion générale en précisant que, dans nombre d'examen de fusions d'entreprises, la transparence des prix a joué un rôle important pour permettre de déterminer s'il y avait une position collective dominante. La première de ces affaires concerne le marché du papier pour les magazines. Il s'agissait d'un oligopole faisant face à une demande peu dynamique et présentant toutes les autres caractéristiques précédemment mises en lumière dans la table ronde, à l'exception de la transparence du marché et des prix. Les producteurs ne disposaient pas facilement d'informations sur les prix et les quantités et des rabais cachés étaient consentis. La Commission a conclu qu'en raison du manque de transparence des prix, il n'y avait pas de risque de création d'une position dominante collective. En revanche, dans les affaires *Gencor/Lonhro*, *Exxon/Mobil* et *TimeWarner/EMI*, la Commission a constaté que la transparence du marché et des prix jouait un rôle clé dans le renforcement du risque de domination collective. On trouvera plus de détails dans la contribution écrite de la Commission européenne.

Un délégué de l'**Espagne** fait observer qu'un grand nombre de pays ont parlé des avantages et des inconvénients de la transparence des prix sur le marché de la distribution de l'essence. L'an dernier, l'Espagne a adopté une réglementation établissant que tous les prix en matière de distribution de pétrole et de gaz doivent être publiés, ce qui est fait désormais sur une base très régulière sur le site web du ministère espagnol de l'Économie. Le Président demande si les prix moyens se sont accrus depuis et le délégué répond qu'aucune relation n'a pu être établie entre la publication des prix et leur évolution, ajoutant, toutefois, qu'il y a eu de nombreux cas de fixation supposée des prix par les grands producteurs. Cependant, comme l'ont souligné un grand nombre d'autres pays, il est très difficile de prouver la collusion dans ces cas. L'une des raisons pour lesquelles l'Espagne a décidé de renforcer la transparence des prix est notamment de rendre plus facilement observables les comportements collusifs.

6. Conclusions du Président

Le **Président** clôt la table ronde en notant que les quatre principes mis en évidence au début de la réunion par le délégué du Royaume-Uni sont tout à fait utiles pour examiner la question et qu'ils ont été mentionnés dans beaucoup d'interventions. Il appelle en particulier l'attention sur le quatrième principe, c'est-à-dire que lorsque on estime qu'il y a un risque de renforcement de la collusion lié à la transparence des prix, il faut se demander si d'autres caractéristiques d'un marché particulier soit facilitent la collusion soit y font obstacle. Beaucoup a été dit durant la table ronde sur les variables déterminant cet aspect et les types d'échanges d'informations qui sont les plus susceptibles de faciliter la collusion.

Le Président estime que les autorités de la concurrence doivent être aussi précises que possible en ce qui concerne les critères qu'elles appliquent et les facteurs qu'elles prennent en compte pour statuer sur les affaires impliquant des échanges d'informations. Il rappelle aussi aux délégués que les consommateurs peuvent porter un jugement différent sur les avantages et les inconvénients d'un renforcement de la transparence des prix, car ils n'ont pas le même point de vue sur les coûts d'utilisation du marché et sur la façon dont le renforcement de la transparence des prix peut les réduire. Cela peut expliquer pourquoi les consommateurs et les organisations qui les représentent réagissent généralement davantage à l'échange des prix entre les professions.

Pour ce qui est des marchés publics, le Président note que les autorités de la concurrence ne prêtent sans doute pas suffisamment attention aux avantages sociaux/politiques plus larges qui peuvent être associés à un degré élevé de transparence des prix. Les avantages d'une réduction des risques de corruption sont très difficiles à évaluer par rapport aux inconvénients d'une réduction de la concurrence. La Lituanie a apparemment estimé que les avantages d'un renforcement de la transparence des prix entre les soumissionnaires sont supérieurs aux coûts en termes de perte de concurrence. Les autorités de la concurrence n'ont généralement pas à tenir compte de cet aspect dans leurs analyses, ce qui contribue à rendre difficile l'explication de leurs points de vue aux autres parties intéressées.