



Federal Trade Commission

Antitrust Issues Related to Benchmarking and Other Information Exchanges

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before the

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Other Information Exchanges Among Competitors**

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That exchanges of price and other information among competitors can raise antitrust concerns has long been recognized. At least as far back as 1925, the Supreme Court has examined the competitive implications of firms sharing price information¹ with each other. These exchanges raise two principal antitrust concerns. The first is that they may lead to or be part of a price-fixing conspiracy. The second concern is that such exchanges, even if unaccompanied by any express or tacit agreement to fix prices, may tend to stabilize prices and facilitate coordinated behavior.

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisors, Henry Su and Darren Tucker, for their invaluable assistance preparing this paper.

¹ For the sake of brevity, in talking about information exchanges I am going to use the term "price information" although where the context so permits, I mean to include information about costs, inventories, capacities, and other aspects of production, marketing, sales and distribution that might also be exchanged among competitors.

In my remarks today, I will discuss how information exchanges are treated under both U.S. and E.U. law, including some of the key cases, the framework under which they are judged, and the FTC's unique ability to challenge certain aspects of this conduct. I will also discuss how the antitrust agencies have addressed benchmarking, a particular type of information exchange.

I.

The Supreme Court has repeatedly held that sharing of price information among competitors, standing alone, is not *per se* illegal under Section 1 of the Sherman Act.² Notably, in the 1925 case of *Maple Flooring Manufacturers Association v. United States*,³ the Court recognized a “consensus opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise.”⁴ In other words, information about prices, costs, capacity and availability can benefit both producers and consumers, by allowing markets to function more efficiently, intelligently and competitively, at prices and output levels that more accurately reflect changes in supply and demand. The Sherman Act does not forbid producers to operate their businesses as they will, using the best

² See *United States v. Citizens & So. Nat'l Bank*, 422 U.S. 86, 113 (1975) (“But the dissemination of price information is not itself a *per se* violation of the Sherman Act.”) (*citing* *United States v. Container Corp.*, 393 U.S. 333, 339 (1969) (Fortas, J., concurring); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588, 604-06 (1925); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 582-83 (1925)).

³ 268 U.S. 563 (1925).

⁴ *Id.* at 582-83.

information available about what is happening in the marketplace.⁵ Rather, the Act forbids them only from using such information to act in a concerted manner, “which operates to restrain the freedom of action of those who buy and sell.”⁶

Against the backdrop of *Maple Flooring* and its progeny, the Supreme Court in 1978 decided *United States v. United States Gypsum Company*, a criminal price-fixing case.⁷ The Government’s case centered on allegations of interseller price verification—a practice by which gypsum board manufacturers would telephone a competing producer to determine the price of gypsum board that the producer was currently offering to a particular customer—and the contention that this alleged practice was part of an unlawful agreement that had the effect of stabilizing prices and policing agreed-upon price increases.⁸ In defense of these charges, the defendants claimed that any exchanges of price information were made for the salutary purpose of meeting competition in compliance with the Robinson-Patman Act and preventing customer fraud.⁹

On appeal, the Supreme Court held that wrongful intent is a required element of a criminal antitrust offense under the Sherman Act, and that such intent cannot be presumed based on the fact that a challenged practice had the effect of stabilizing prices.¹⁰ In so holding, the

⁵ *Id.* at 583 (“The manufacturer is free to produce, but prudence and business foresight based on that knowledge influence free choice in favor of more limited production.”).

⁶ *Id.*

⁷ 438 U.S. 422 (1978).

⁸ *Id.* at 429.

⁹ *Id.* at 429 & n.4.

¹⁰ *Id.* at 435 (“[W]e hold that a defendant’s state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.”). In the trial below, the jury was instructed that “[t]he law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if

Court acknowledged the longstanding concern that the Sherman Act, unlike traditional criminal statutes, does not clearly and precisely identify the unlawful conduct that it proscribes.¹¹ Instead, the Act is worded in broad and general terms, such that the behavior it proscribes—with the exception of certain species of per se illegal conduct that have “unquestionably anticompetitive effects”—“is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct.”¹²

Indeed, although the Government had charged the defendants in *Gypsum* with price-fixing, the Court recognized that the underlying conduct at issue—namely, the exchange of price information among competitors—was “illustrative” of the gray zone under the Sherman Act.¹³ The Court explained that enforcement of the Act against conduct of this nature “holds out the distinct possibility of overdeterrence” because business people, fearful of being held criminally liable for even good-faith errors in judgment, might choose to shun “salutary and procompetitive conduct lying close to the borderline of impermissible conduct[.]”¹⁴ By imposing a requirement of proving wrongful intent, the Court intended to differentiate criminal conduct under the Sherman Act, which is “undertaken with knowledge that the proscribed effects would most likely

the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.” *Id.* at 430.

¹¹ *Id.* at 438-39.

¹² *Id.* at 440-41.

¹³ *Id.* at 441. Specifically, the Court reaffirmed the teaching of *Maple Flooring* and progeny:

The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act.

Id. at 441 n.16.

¹⁴ *Id.*

follow,”¹⁵ from conduct that violates the Act under the Rule of Reason because it is determined, after the fact, to have an anticompetitive effect.¹⁶

Shortly after *Gypsum* was decided, however, Professor Richard Posner criticized the Court’s decision for missing the big picture—a fundamental distinction between the *level* and *dispersion* of prices in the market in which the information exchange occurs.¹⁷ As Professor Posner pointed out, “[t]he purpose of a legitimate exchange of price information is to narrow the dispersion of prices—that is, to eliminate as far as possible those prices in the tails of the price distribution that reflect the ignorance of buyers or sellers concerning the conditions of supply and demand.”¹⁸ If one recognizes that an exchange of price information designed to narrow *price dispersion* is perfectly lawful, then the only basis for imposing liability—criminal or civil—under the Sherman Act would be if the evidence were to show that the exchange in fact raised the *entire price level* above the competitive level.¹⁹ And if the latter were the case, then in Professor Posner’s view, there is no reason why a showing of wrongful intent would be required

¹⁵ *Id.* at 444.

¹⁶ *Id.* at 445-46 (“The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks.”).

¹⁷ Richard A. Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEO. L.J. 1187, 1188 (1979) (“Although the Court’s analysis may sound reasonable enough, I believe that it rests on a confusion in the Justices’ minds between the *level* and the *dispersion* of prices in a market in which competitors are exchanging price information.”) (emphasis in original). *See also id.* at 1197 (“And the Court’s inability in *Gypsum* to distinguish between the effect of information on the dispersion of prices in a market and its effect on the average price in the market suggests that the Court lacks a sure grasp of the fundamental economics of the issue.”).

¹⁸ *Id.*

¹⁹ *Id.* at 1189.

for criminal liability but not for civil liability, which could have serious consequences for a defendant as well, namely, exposure that “could amount to be hundreds of millions of dollars.”²⁰

In view of the procompetitive benefits flowing from a narrowing of the dispersion of prices, as first recognized in *Maple Flooring*, Professor Posner proposed in his article that “[a] pure agreement to exchange price information should *always* be considered lawful.”²¹ The level of concentration or other aspects of market structure would not change this conclusion.²² The Government or an antitrust plaintiff would still be free to argue, however, that the existence of such an agreement “provides circumstantial evidence of an underlying agreement to fix prices[,]” such as if the effect of the exchange were to raise the price level and not merely to reduce the dispersion.²³

II.

What does this history lesson teach us today? First of all, consistent with the concerns raised by the Court in *Gypsum*, the Antitrust Division has hewed to the general policy that it criminally prosecutes only “hard core” violations of Section 1 of the Sherman Act—that is, price fixing, bid rigging and market allocation.²⁴ Taken on its literal terms, this policy would

²⁰ *Id.* at 1190.

²¹ *Id.* at 1199 (emphasis added). Professor Posner explained that “I do not believe that an agreement to exchange price information is some sort of halfway house between competition and price fixing, the legality of which should be decided sometimes one way, sometimes the other, depending on the structure of the market.” *Id.*

²² *Id.* at 1199, 1203.

²³ *Id.* at 1197, 1199, 1203.

²⁴ See Thomas O. Barnett, Asst. Atty. Gen., U.S. Dep’t of Justice, Antitrust Div., Criminal Enforcement of Antitrust Laws: The U.S. Model, Remarks before the Fordham Competition Law Institute’s Annual Conference on International Antitrust Law and Policy (Sept. 14, 2006), at 2 (“At the same time, the Division focuses its criminal enforcement only on hard core violations. By focusing narrowly on price fixing, bid-rigging, and market allocations, as opposed to the “rule of reason” or monopolization analyses used in civil antitrust law, we have established clear, predictable boundaries for businesses.”), *available at*

seemingly exclude competitor exchanges of price information, standing alone, from the ambit of criminal antitrust enforcement. In fact, however, that has not been the case. Why?

Although cartel enforcement remains the highest priority at the Antitrust Division (as it should),²⁵ in my view there is little “low-hanging fruit”—that is, the pure price-fixing conspiracies that take place in smoke-filled rooms—left in the stable of cases under investigation and prosecution. As a result, the Antitrust Division has been bringing more cases involving conduct in the “gray zone,” such as exchanges of price information. The basic working theory, as seen in *Gypsum*, is that these exchanges are being made as part of an alleged agreement to fix

<http://www.justice.gov/atr/public/speeches/218336.pdf>; U.S. DEP’T OF JUSTICE, ANTITRUST DIV., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 2 (Apr. 2005 rev.) (“Price fixing, bid rigging, and market allocation are violations of Section 1 and generally are prosecuted criminally.”), available at <http://www.justice.gov/atr/public/guidelines/209114.pdf>; U.S. DEP’T OF JUSTICE, ANTITRUST DIV., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2 (Sept. 28, 2005 rev.) (“Most criminal antitrust prosecutions involve price fixing, bid rigging, or market division or allocation schemes.”), available at <http://www.justice.gov/atr/public/guidelines/211578.pdf>; U.S. DEP’T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIV. MANUAL ch. III.C.5 at III-20 (4th ed. July 2009 rev.) (providing an internal agency statement that the “current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, *per se* unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations”), available at <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf>. Cf. *Gypsum*, 438 U.S. at 439-40 (reviewing the then prevailing statements of policy from the Attorney General of the United States and the Antitrust Division).

²⁵ See, e.g., Scott D. Hammond, Deputy Asst. Atty. Gen. for Criminal Enforcement, U.S. Dep’t of Justice, Antitrust Div., Recent Developments, Trends, and Milestones in the Antitrust Division’s Criminal Enforcement Program, Remarks before the ABA Section of Antitrust Law’s 56th Annual Spring Meeting (Mar. 26, 2008), at 1 (“The detection, prosecution, and deterrence of cartel offenses remain the highest priority of the Antitrust Division.”), available at <http://www.justice.gov/atr/public/speeches/232716.pdf>; Thomas O. Barnett, Asst. Atty. Gen., U.S. Dep’t of Justice, Antitrust Div., Seven Steps to Better Cartel Enforcement, Remarks before the European Union Institute’s 11th Annual Competition Law and Policy Workshop (June 2, 2006), at 2 (“The most important step in prosecuting cartels, and particularly in deterring them, is to make clear to all that anti-cartel enforcement is a priority.”), available at <http://www.justice.gov/atr/public/speeches/216453.pdf>.

prices.²⁶ Where such exchanges become the *centerpiece* of the Government's case, however, the prosecution runs the risk that the jury will return a defense verdict or hang.

For example, in October 2006, the Antitrust Division charged Gary Swanson, a senior sales executive at Hynix America, and two other co-defendants with conspiring to fix the prices of dynamic random access memory (DRAM) chips.²⁷ The case against Swanson went to trial in February 2008. In the course of discovery and trial preparation, it became clear that much of the evidence against Swanson involved his role in obtaining price information from competitors to provide to his superiors in Korea.²⁸ Accordingly, the defense asked District Judge Phyllis Hamilton to instruct the jury about the legality of exchanging price information.²⁹ Judge

²⁶ See, e.g., Margaret C. Levenstein & Valerie Y. Suslow, *Cartel Bargaining and Monitoring: The Role of Information Sharing*, in THE PROS AND CONS OF INFORMATION SHARING ch. 3, at 44 (Swedish Competition Authority 2006) (concluding based on a study of international cartels that information exchange plays an important role both in striking the initial price-fixing agreement and in monitoring ongoing agreements).

²⁷ Indictment, United States v. Swanson, No. 4:06-cr-00692-PJH (N.D. Cal. filed Oct. 18, 2006), ECF No. 1.

²⁸ See, e.g., Gov't's Trial Mem. at 2:11-14 ("As early as 1998, in response to encouragement from Hynix managers, including Gary Swanson, Hynix salesmen began contacting competitors to obtain future pricing information relating to upcoming negotiations with major customers."), 4:18-20 ("Gary Swanson also had a significant role in pricing decisions for customers in the United States through his collection of competitor pricing information from his subordinates, as well as his own price recommendations on key accounts."), 5:13-15 ("On pricing, Gary Swanson played an important role in recommending prices to other Hynix managers, including D.S. Kim, C.K. Chung, and K.C. Suh, and in relaying competitor pricing information from sales account managers to Hynix senior managers."), & 6:9-11 ("In addition, Gary Swanson organized regular conference calls with the sales account managers in which they openly provided Swanson with future competitor pricing information they had received from their competitor contacts."), United States v. Swanson, No. 4:06-cr-00692-PJH (N.D. Cal. filed Oct. 24, 2007), ECF No. 198.

²⁹ See Def.'s Proposed Rev. to Gov't's Jury Instr. No. 1, at 1:27 to 2:6 ("As the court will learn on December 19th, when the government files its papers on the co-conspirators' statements issues, the government's evidence to a very large degree consists of emails and testimony relating to the exchange of price information among competitors' employees. . . . Thus, at the end of the trial, the court's instructions will inform the jury about how to evaluate the price exchange evidence."), & 2:7-12 ("Up to that point, it is highly likely that the jury will have no idea -- or an erroneous idea -- about what constitutes price fixing and the legality of price exchanges among competitors, and

Hamilton agreed and gave this sentence as part of her instructions: “It is not unlawful for a person to obtain information about a competitor’s prices or even to exchange information about prices unless done pursuant to an agreement or mutual understanding between two or more persons as charged in the indictment.”³⁰

The trial resulted in a hung jury, and Swanson moved for judgment of acquittal, emphasizing the *absence* of any evidence about agreements or “mutual understandings” to fix prices, and the *existence* of only evidence about “regular pricing discussions” and other exchanges of information, which are not per se illegal.³¹ When the Antitrust Division indicated that it would not seek a retrial,³² Judge Hamilton dismissed the indictment with prejudice.³³

In my view, the Swanson case shows that despite the best efforts of excellent advocates at the Antitrust Division, juries can and do recognize the difference between price-fixing agreements and exchanges of price information. When the Government’s case focuses on the activities of salespeople to collect price information from competitors and to relay that information to their superiors, and not on the alleged agreements of decision makers on prices to

about the significance of much of the evidence it heard. For these reasons, the defendant believes that it is extremely important the jurors be given a brief roadmap at the beginning of the case to be able to place the evidence on price fixing and price exchanges into context as it is presented to them.”), *United States v. Swanson*, No. 4:06-cr-00692-PJH (N.D. Cal. filed Dec. 10, 2007), ECF No. 256.

³⁰ Trial Tr. at 2296:6-10; *see generally* Trial Tr. at 2295:24 to 2296:13, *United States v. Swanson*, No. 4:06-cr-00692-PJH (N.D. Cal. Feb. 22, 2008); *see also* Jury Instructions, No. 17, *United States v. Swanson*, No. 4:06-cr-00692-PJH (N.D. Cal. filed Mar. 6, 2008), ECF No. 337.

³¹ Mem. Supp. Def.’s Fed. R. Crim. P. 29(c) Mot. at 5:24-26, 6:15-18, 15:5-13, 16:5-11, 17:5 to 18:3, *United States v. Swanson*, No. 4:06-cr-00692-PJH (N.D. Cal. filed Mar. 12, 2008), ECF No. 342.

³² Criminal Minutes, *United States v. Swanson*, No. 4:06-cr-00692-PJH (N.D. Cal. Mar. 19, 2008), ECF No. 343.

³³ Order Dismissing Indictment, *United States v. Swanson*, No. 4:06-cr-00692-PJH (N.D. Cal. Mar. 21, 2008), ECF No. 345.

be charged by the company and its competitors, a reasonable doubt exists as to whether the Government has really proven its case. I agree with Swanson's defense counsel³⁴ that carefully crafted jury instructions are important in this regard—not only does the explanation of the crucial difference between lawful information exchanges and unlawful price-fixing carry the imprimatur of the district judge, but it also reinforces the points made by defense counsel during opening statement and closing argument.

As a matter of law, the outcome in the Swanson case is consistent with *Gypsum, Maple Flooring*, and Professor Posner's views regarding exchanges of price information. In essence, the Government failed to meet its burden of connecting what is otherwise lawful conduct (collecting and reporting price information from competitors) with an underlying unlawful agreement to fix prices. Even if key decision makers in Korea had entered into an express or tacit agreement with competitors to fix prices, there was insufficient evidence to prove beyond a reasonable doubt that Swanson and the salespeople he managed knew about such an agreement or understood that their efforts to collect price information would result in an increase in the price level.

III.

Of course, the outcome of the Swanson case does not mean that firms and their employees can engage in the exchange of price information liberally or with impunity. This

³⁴ Robert H. Bunzel & Howard Miller, *Defending "The Last Man Standing": Trench Lessons from the 2008 Criminal Antitrust Trial*, United States v. Swanson, ANTITRUST SOURCE 6-7 (June 2008) ("The defense theme of permissible communications on price was reinforced by the jury instructions, and the *Swanson* case teaches how carefully crafted instructions are of great importance in antitrust jury trials. The court gave preliminary instructions about permitted price discussions before opening statements, and the same but more detailed instructions were shown in graphics and read slowly by the defense to the jury at the trial's closing."), <http://www2.americanbar.org/antitrust/Searchable%20Antitrust%20Library/Jun08-Bunzel6=26f.pdf>.

practice still has its risks. First, there is the psychological burden that comes from not knowing whether the information that is being exchanged will be used to facilitate collusion on prices.³⁵ Even if one honestly believes that he or she is engaging in perfectly lawful behavior, there remains the fear—in a complex corporate environment—that someone else is engaging in unlawful, anticompetitive behavior, and that he or she will be implicated based on association and working relationships. And if a criminal investigation ensues, then the risk heightens because of the prospect of jail time as well as substantial fines.

Second, there is the significant time and expense involved in defending a criminal or civil action based on price-fixing. Individuals may need to retain separate counsel from their corporate employers, and hopefully, these legal fees and costs will be reimbursed by the firm. Moreover, one will invariably have to divert his or her time and attention to the case, and away from work and family.

Third, the agency guidance from both sides of the Atlantic provides scant cover. In the U.S., we have the April 2000 Antitrust Guidelines for Collaborations Among Competitors,³⁶ which regard exchanges of price, cost and other “competitively sensitive” information as inherently risky because they can facilitate explicit or tacit collusion on price or output.³⁷ Accordingly, the Collaboration Guidelines discourage such exchanges, to the extent they are

³⁵ See Posner, *supra* note 17, at 1188-89 (“To be sure, the level and dispersion of prices are not entirely independent. A reduction in dispersion, and hence in uncertainty, may result in an increase in the price level by facilitating collusion to raise prices. If there is no tacit or express collusion, however, exchanges of price information designed to reduce price dispersion should not result in a change in the price level.”).

³⁶ U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), *available at* <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

³⁷ *Id.* §§ 2.2, 3.31, 3.34(e).

avoidable, in the context of collaboration agreements,³⁸ and instead, single out only the sharing of “certain technology, know-how, or other intellectual property” as an example of a procompetitive exchange in the context of an R&D collaboration.³⁹

The Agencies’ August 1996 Statements of Antitrust Enforcement Policy in Health Care⁴⁰ take a different, and somewhat inconsistent, approach to the exchange of price information, as compared to the Collaboration Guidelines. Instead of discouraging the exchange of price information, the Health Care Guidelines recognize that “[p]roviders can use information derived from price and compensation surveys to price their services more competitively and to offer compensation that attracts highly qualified personnel,” and “[p]urchasers can use price survey information to make more informed decisions when buying health care services.”⁴¹ The Health Care Guidelines therefore set up an antitrust “safety zone” for third-party-mediated exchanges of

³⁸ *See id.* § 3.31(b):

Nevertheless, in some cases, the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables. Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information.

³⁹ *Id.* § 3.31(b).

⁴⁰ U.S. Dep’t of Justice & Fed. Trade Comm’n, Statements of Antitrust Enforcement Policy in Health Care, Stmt. 6: Enforcement Policy on Provider Participation in Exchanges of Price and Cost Information (Aug. 1996 rev.), *available at* <http://www.ftc.gov/bc/healthcare/industryguide/policy/statement6.pdf>.

⁴¹ *Id.*, Stmt. 6, at 1.

certain provider price and cost information,⁴² and otherwise indicate that exchanges of information will be evaluated under a rule of reason.⁴³

In January 2011, the European Union issued a revised set of guidelines on horizontal co-operation agreements that includes a new chapter on information exchanges.⁴⁴ In stark contrast to the U.S. Collaboration and Health Care Guidelines, the EU Guidelines address information exchanges in excruciating detail. However, the guidance provided is not any more encouraging of exchanges of price information.

As a general matter, the EU Guidelines treat exchanges of price information, standing alone, as a type of horizontal cooperation agreement.⁴⁵ Although the Guidelines recognize that information exchanges may have procompetitive benefits such as improving internal efficiency and reducing inventory for companies, and reducing consumer search costs and improving consumer choice,⁴⁶ the legality of such exchanges under Article 101 very much depends on the structural characteristics of the market affected and the type of information that is exchanged.⁴⁷ In particular, the EU Guidelines pay close attention to market characteristics that are likely to facilitate a collusive outcome based on an exchange of price information; such markets tend to

⁴² *Id.*

⁴³ *Id.* at 2 (“Exchanges of price and cost information that fall outside the antitrust safety zone generally will be evaluated to determine whether the information exchange may have an anticompetitive effect that outweighs any procompetitive justification for the exchange.”).

⁴⁴ European Comm’n, Communication: Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements ch. 2, 2011 O.J. (C. 11) 1 (Jan. 14, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

⁴⁵ *Id.* ¶ 56.

⁴⁶ *Id.* ¶ 57.

⁴⁷ *Id.* ¶ 58 (“The competitive outcome of information exchange depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity etc.) as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination.”).

be “sufficiently transparent, concentrated, non-complex, stable and symmetric.”⁴⁸ Thus, the more concentrated a market is, the riskier the exchange is, all other things being equal.

The EU Guidelines also attempt to draw a distinction between “strategic data,” defined as data that reduce “strategic uncertainty” in the market, from other types of information because the former are viewed as decreasing the incentives to compete, and hence the decision-making independence, of companies in a given market.⁴⁹ As I see it, the problem with this approach is that the Guidelines cut too broad a swath. They describe “strategic information” as being “related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results,” and regard information related to prices and quantities as “the most strategic, followed by information about costs and demand.”⁵⁰ If firms were to refrain from exchanging “strategic information” on price or cost, heeding the caution from the Guidelines, then neither they nor the consumers may be able to realize the procompetitive benefits of such exchanges. This is not the kind of outcome that public law enforcement officers should want to achieve.

IV.

I want to turn next to benchmarking but before I do, let me say a few words about invitations to collude. As you may know, the Commission has challenged invitations to collude as violations of Section 5 of the FTC Act, as opposed to the Sherman Act. Most recently, we

⁴⁸ *Id.* ¶ 77.

⁴⁹ *Id.* ¶ 86.

⁵⁰ *Id.*

took this enforcement approach in the *U-Haul International* consent order, which became final in July 2010.⁵¹

In my view, invitations to collude should be factually and legally distinguishable from pure information exchanges because the competitor communications in question do not involve merely the dissemination of price information, as was involved in *Gypsum* or the Swanson case. Rather, as was involved in *U-Haul*, there is some statement about what the speaker plans or wants to do, and some solicitation or encouragement of a response from the intended recipient. The content and context of the communication make reasonably clear that the purpose of the information exchange is not to narrow the dispersion of prices, but rather, to affect the overall price level.⁵² I therefore do not view the Commission's enforcement activities against invitations to collude as muddying the historical distinction between pure information exchanges, which should be lawful, and communications that are made with the intent of producing a collusive outcome.

V.

One particular type of information exchange is benchmarking. Benchmarking refers to the practice of a firm comparing its practices, methods, or performance against those of other companies. A benchmarking exercise can be a one-time event, such as a plant visit or seminar, or can be an on-going process, such as a hospital comparing its infection rate against peer hospitals on an annual basis. Benchmarking has obvious procompetitive potential. It allows

⁵¹ Decision and Order (Public Record Version), U-Haul Int'l, Inc., FTC Dkt. No. C-4294 (July 20, 2010), available at <http://www.ftc.gov/os/caselist/0810157/100720uhauldo.pdf>.

⁵² See, e.g., Analysis of Agreement Containing Consent Order to Aid Public Comment at 2 ("I encouraged them to monitor my rates and to move their rates up.") & 3 ("U-Haul is acting as the industry price leader. The company has recently raised its rates, and competitors should do the same."), U-Haul Int'l, Inc., FTC File No. 081 0157, Dkt. No. C-4294 (July 20, 2010), available at <http://www.ftc.gov/os/caselist/0810157/100609uhaulanal.pdf>.

companies to learn about more efficient means of production and distribution, which can in turn lead to better and lower cost products for consumers. But benchmarking, like other forms of information exchange, can lead to tacit or even explicit collusion.

One of the few litigated benchmarking cases is *Todd v. Exxon* from the Second Circuit.⁵³ The plaintiff in that case alleged that fourteen petroleum companies violated Section 1 of the Sherman Act by regularly sharing detailed information regarding compensation to nonunion managerial, professional, and technical employees, as well as current and future salary budgets for these employees. The plaintiff alleged that these benchmarking exercises had the purpose and effect of depressing salaries paid by defendants. In antitrust speak, it was a monopsony, or oligopsony, case. The suit alleged that Exxon alone was able to lower its salaries by \$20 million a year.

The district court granted defendants' motion to dismiss but the Second Circuit, in an opinion written by then-Judge Sotomayor, reversed. The court of appeals explained that the legality of the benchmarking activities of the defendants was controlled by the information-sharing cases that I've previously discussed, in particular *Gypsum*. The court read those cases to say that the defendants' conduct should be analyzed under the full rule of reason, under which a court should focus on "the structure of the industry involved and the nature of the information exchanged."⁵⁴

To determine the susceptibility of the industry to tacit collusion, the Second Circuit focused on the degree of concentration, the fungibility of the plaintiffs' services, and the

⁵³ *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) (Sotomayor, J.).

⁵⁴ *Id.* at 199 (quoting *Gypsum*, 438 U.S. at 441 n.16). Before turning to defendants' conduct, the court found that the plaintiff's complaint alleged a plausible market consisting of "the services of experienced, salaried, non-union, managerial, professional and technical employees in the oil and petrochemical industry, in the continental United States." *Id.* (quoting Complaint ¶ 97.) In that market, the defendants were alleged to have an 80-90% share. *Id.*

elasticity of demand. While acknowledging that the industry might not be viewed as concentrated under the Merger Guidelines, the court found that the number of defendants and their market concentration was comparable to those in another Supreme Court case. The court found that the jobs in question were sufficiently fungible in light of “the sophisticated techniques employed by defendants to account for the differences among jobs.”⁵⁵ And, with little discussion, the court found that the supply of labor is “a classic example of inelastic supply flow.”⁵⁶ In short, the court found that all three factors indicated that the market was susceptible to collusion, particularly in light of the sophistication of the defendants.

The Second Circuit then considered the anticompetitive potential of the information exchange, relying on four factors. The first is the timeframe of the data. The court noted that “‘exchanges of current price information . . . have the greatest potential for generating anti-competitive effects and although not *per se* unlawful have consistently been held to violate the Sherman Act.’ The exchange of past price data is greatly preferred because current data have greater potential to affect future prices and facilitate price conspiracies.”⁵⁷

The second consideration is the specificity of the information. As the court explained: “Price exchanges that identify particular parties, transactions, and prices are seen as potentially anticompetitive because they may be used to police a secret or tacit conspiracy to stabilize prices. Courts prefer that information be aggregated in the form of industry averages, thus avoiding transactional specificity.”⁵⁸

⁵⁵ *Id.* at 210.

⁵⁶ *Id.* at 211.

⁵⁷ *Id.* at 211 (quoting *Gypsum*, 438 U.S. at 441 n.16).

⁵⁸ *Id.* at 212 (citations omitted).

The third consideration is whether the information is made publicly available. According to the court, “[p]ublic dissemination is a primary way for data exchange to realize its pro-competitive potential.”⁵⁹ When both buyers and sellers have access to information, the market will function more efficiently.

The fourth consideration is the context in which the information is exchanged. Frequent meetings between competitors to discuss the results of the information exchange can lead to an explicit collusion or uniformity with regard to the benchmarked metric.⁶⁰

In this case, the Second Circuit found that all four factors suggested that the information exchange was anticompetitive. The complaint alleged that the defendants exchanged not only past salary information but also current and future salary data. The court was also troubled by the specificity of the data: some information was company specific, while other information was aggregated to just three companies, making it fairly easy to detect any deviations from a purported agreement on salaries. The information “was not disclosed to the public nor to the employees” at issue, which hindered employees from bargaining “intelligently and competitively with the members of the information exchange.”⁶¹ Finally, the court noted its concern that the defendants participated in “frequent meetings” where they discussed the salary information and assured each other that they would use the data to help set their salaries.⁶²

That the data was compiled by a third party – ordinarily a mitigating factor – was not discussed by the court. And perhaps because the posture of the case was a 12(b)(6) motion, the

⁵⁹ *Id.* at 213.

⁶⁰ *Id.*

⁶¹ *Id.* at 213 (quoting Complaint ¶ 3).

⁶² *Id.* at 213.

court did not consider potential efficiencies of the benchmarking exercise or that the named plaintiff did not appear to have been financially harmed from the arrangement.⁶³

Discussions of *Todd v. Exxon* frequently end at this point in the proceedings. But there is more to the story. After the Second Circuit's remand, the case was transferred by the Judicial Panel on Multidistrict Litigation to the District of New Jersey for consolidated pretrial proceedings.⁶⁴ That court denied class certification because the relevant market and the extent of injury would likely vary by profession and position.⁶⁵ The court observed that the proposed class of 40,000 managerial and technical employees in the oil industry represented over 4,000 different jobs with differing employment prospects outside the oil industry.

Then, in 2008, the district court granted summary judgment for the defendants, concluding that there was no genuine issue of material fact as to the relevant market.⁶⁶ As explained by Judge Brown: "the evidence before the Court further demonstrates that the relevant

⁶³ *Id.* at 196 ("Towers Perrin compiled the information, then analyzed, refined, and distributed it to the defendants on diskettes and in the form of hard copies."); *id.* at 204 n.7 ("Defendants, while not relying on this argument, note that plaintiff left Exxon for a higher-paying job outside the oil industry.").

⁶⁴ *In re Compensation of Managerial, Professional, & Technical Employees Antitrust Litig.*, 206 F. Supp. 2d 1374 (J.P.M.L. 2002) (consolidating similar actions in the District of New Jersey for pretrial proceedings).

⁶⁵ *See In re Compensation of Managerial, Professional, & Technical Employees Antitrust Litig.*, No. 02 Civ. 2924, 2003 U.S. Dist. LEXIS 22836, at *11-12 (D.N.J. May 22, 2003) (denying class certification under Rule 23(b)(3)) ("The relevant job market for an attorney will differ from that of an accountant or a geologist or project engineer, all positions, along with many others, that comprise the putative class."); *In re Compensation of Managerial, Professional, & Technical Employees Antitrust Litig.*, No. 02 Civ. 2924, 2006-1 Trade Cases ¶ 75,096, 2006 U.S. Dist. LEXIS 249, at *29 (D.N.J. Jan. 4, 2006) (denying class certification under Rule 23(b)(1) and 23(b)(2)) ("Depending on the characteristics of the relevant job market, and thus the extent of Defendants' market power in that market, an employee may or may not be susceptible to a depression in wages.").

⁶⁶ *In re Compensation of Managerial, Professional, & Technical Employees Antitrust Litig.*, No. 02 Civ. 2924, 2008-2 Trade Cas. (CCH) ¶ 76,438, 2008 U.S. Dist. LEXIS 63633 (D.N.J. Aug. 19, 2008).

labor markets for the individual plaintiffs are not necessarily limited to the oil and petrochemical industry and in fact vary based upon the individual's qualifications and experience."⁶⁷ In 2009, the parties settled for an undisclosed sum.

What should we take away from *Todd v. Exxon*? One lesson is that the analysis of benchmarking exercises follows the case law of information exchanges generally, such as *Gypsum*. Second, there are a number of factors that raise the antitrust scrutiny of these exchanges, including a concentrated industry, a fungible product or service, inelastic demand, use of current or future data, non-aggregated results, not making the survey results public, frequent meetings among participants, and agreements regarding the use of the survey results.

Third, benchmarking and other information exchanges are likely to be reviewed under the full rule of reason rather than under a per se, truncated, or "quick look" analysis. The Second Circuit explained that the "alleged conduct in this case—the exchange of information—is not so inherently or intuitively anticompetitive" as to justify a truncated approach.⁶⁸ This indicates a recognition by the Second Circuit that most information exchanges are competitively neutral or even pro-competitive.

Fourth, these are tough cases for plaintiffs to win. It's important to remember that the Second Circuit's opinion was in the context of a motion to dismiss. If you read the Second Circuit's decision carefully, you'll see that the court noted several times that plaintiffs' burden on remand would be substantial both on the merits and with regard to class certification. And as I just noted, the court held that the defendants' conduct should be evaluated under the full rule of

⁶⁷ *Id.* Plaintiffs also failed to adduce any evidence that the plaintiffs received a salary premium from working in the oil industry.

⁶⁸ *Todd*, 275 F.3d at 207. The court did note, however, that plaintiffs could show market power through direct evidence, rather than through reliance on inferences from market shares. *See id.* at 206-07.

reason, which typically results in a win for defendants. Finally, I think it is noteworthy that the litigation lasted twelve years – no small amount of time for a plaintiff’s attorney to invest in a case – and ultimately lead to a defense victory.

Arguably, a final lesson from *Todd v. Exxon* is that actions of buyers may be subject to the same level of antitrust scrutiny as those of sellers.⁶⁹ This is a teaching with which I respectfully disagree. In my view, the antitrust laws should be limited to protecting *consumers* – and by “consumers” I mean the people who purchase the final product or service.⁷⁰

Accordingly, antitrust liability should not attach to buy-side behavior unless it causes an adverse effect on consumers in the downstream market. From my perspective, the lack of any allegation that the oil companies’ conspiracy affected the price or quantity of any final petroleum products should have been fatal to plaintiffs’ case.

VI.

Perhaps because most benchmarking exercises are procompetitive, the Commission investigates these practices somewhat infrequently. Perhaps the best known FTC benchmarking case was the GM/Toyota joint venture back in the 1980s; although, I suspect that few people remember the benchmarking aspect of this case.

Let me start with a little background. In 1984, the Commission gave qualified approval to a production joint venture between GM and Toyota, which at the time were the largest and

⁶⁹ *Id.* at 201 (“The Sherman Act, however, also applies to abuse of market power on the buyer side—often taking the form of monopsony or oligopsony. Plaintiff is correct to point out that a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers.” (citation omitted)); *id.* at 214 (“In an oligopsony, the risk is that buyers will collude to depress prices, causing harm to sellers.”).

⁷⁰ I have discussed my views on this point in more detail before. J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Monopsony and The Meaning of “Consumer Welfare”: A Closer Look at *Weyerhaeuser*, Remarks before the Milton Handler Annual Antitrust Review (Dec. 7, 2006), available at <http://www.ftc.gov/speeches/rosch/061207miltonhandlerremarks.pdf>.

third largest automobile companies in the world. The companies set up a plant in Northern California to build Chevy Geo Prizms and Toyota Corollas. One of the goals of the venture was a mutual education process in which Toyota would gain experience producing vehicles with a U.S. labor force and GM would become familiar with more efficient Japanese manufacturing techniques.⁷¹

The proposed joint venture was subject to one of the most rigorous antitrust investigations in history. The agency focused on two concerns: the venture's effect on GM's incentives to produce small cars at other plants, and the possibility of anticompetitive information exchanges that were unnecessary to achieve the legitimate purposes of the joint venture.

The parties entered into a consent agreement that permitted the joint venture to proceed with restrictions. The first concern was addressed by limiting the number and type of vehicles to be produced, as well as the duration of the venture.⁷² As to the second concern, "[t]o ensure that the joint venture [was] not used to facilitate the exchange of competitively sensitive information unnecessary to its operation, the exchange of certain information was prohibited, and record-keeping and reporting requirements concerning exchanges of other information were imposed to

⁷¹ See generally Thomas B. Leary, Comm'r, Fed. Trade Comm'n, *Efficiencies and Antitrust: A Story of Ongoing Evolution*, Prepared Remarks at the ABA Section of Antitrust Law Fall Forum (Nov. 8, 2002), available at <http://www.ftc.gov/speeches/leary/efficienciesandantitrust.shtm>; General Motors Corp., 103 F.T.C. 374 (1984) (statement of Chairman Miller) ("[T]he joint venture offers a valuable opportunity for GM to complete its learning of more efficient Japanese manufacturing and management techniques.").

⁷² General Motors Corp., 103 F.T.C. 374 (1984). This consent order limited the Joint Venture between General Motors Corporation and Toyota Motor Corporation to the manufacture and sale of no more than 250,000 subcompact cars per year, for a period of twelve years, ending no later than Dec. 31, 1997.

ensure continued, close monitoring of the venture's future operations.”⁷³ Specifically, the order limited the exchange of non-public information concerning prices and costs of GM or Toyota cars or parts, sales or production forecasts, and marketing plans for any product. In addition, the order limited discussions of product designs, sales or production forecasts, and the cost of products supplied by GM and Toyota to those “necessary to accomplish, and solely in connection with, the legitimate purposes or functioning” of the joint venture.⁷⁴

About a decade later, the Commission eliminated the restrictions on the joint venture, finding that they were no longer necessary in light of the “significant new entry and expansion in the [U.S.] automobile industry,” including a number of joint ventures by other automobile companies.⁷⁵ The Commission was concerned that the information sharing restrictions may have put the GM/Toyota venture at a competitive disadvantage and prevented it from engaging in some legitimate activity. At the same time, the Commission warned that terminating the consent order would not immunize communications between GM and Toyota and that they were responsible for ensuring that collusive activity did not occur.⁷⁶

The Commission is not alone in reviewing benchmarking exercises. The Antitrust Division has examined these activities in a number of enforcement actions and business review

⁷³ *Id.* (statement of Chairman Miller)

⁷⁴ *Id.* Order §§ IV, V.

⁷⁵ General Motors Corp., 116 F.T.C. 1276, Order § II (1993) (“There appears to be no continuing need for the order’s restrictions on the duration and scope of the joint venture, and continuing the restrictions in the context of the changed conditions may hinder the ability of the joint venture to respond to consumer demand.”).

⁷⁶ The experiment was apparently successful from a business perspective, as Toyota subsequently built a number of assembly plants in the United States and General Motors applied the lessons learned in the venture to its other business units. *Id.* (“GM states that it is continuing to reap the benefits of gaining first-hand experience with an efficient production system. Moreover, the parties assert that permitting NUMMI to continue its operations beyond 1996 will facilitate GM’s efforts to reduce costs . . .”).

letters. For example, in 1994, the Division entered into a consent decree to resolve its concerns that several hospitals in Salt Lake County, Utah conspired to restrain wage competition through the use of a salary benchmarking survey.⁷⁷ The Division alleged that the hospitals exchanged current and prospective non-public compensation information for registered nurses, which had the effect of depressing their wages. The final judgment enjoined the defendants from exchanging current and prospective wage and budget information, except under limited circumstances.

It appears that no topic has generated more business review requests than benchmarking and other forms of information exchange.⁷⁸ For example, in April 2007, the Division said it had no intention to challenge a plan by the National Association of Small Trucking Companies “to conduct an operational and financial survey of small- and medium-sized trucking companies and then share the collected information in aggregate form with survey participants and nonparticipants ‘to enable them to benchmark themselves against the aggregate information and

⁷⁷ Competitive Impact Statement, *United States v. Utah Society for Healthcare Human Resources Administration*, Civil Action No. 94C282G (D. Utah Oct. 27, 1994), *available at* <http://www.justice.gov/atr/cases/utahrn.htm>.

⁷⁸ U.S. Dep’t of Justice, *Digest of Business Reviews, Topical Index 1968-2007*, <http://www.justice.gov/atr/public/busreview/229887.htm>. *See, e.g.*, Department of Justice Business Review Letter to the Woodwork Institute of California (Aug. 20, 2003), *available at* <http://www.justice.gov/atr/public/busreview/201239.htm>; Department of Justice Business Review Letter to Truckload Carriers Association (Mar. 27, 2001), *available at* <http://www.justice.gov/atr/public/busreview/7746.htm>; Department of Justice Business Review Letter to Birmingham Cooperative Clinical Benchmarking Demonstration Project (June 20, 2004), *available at* <http://www.justice.gov/atr/public/busreview/211862.htm>.

The FTC has also issued Advisory Opinions related to salary surveys. *See, e.g.*, FTC Advisory Opinion Letter to B. Ward Lane, American College of Surgeons (Dec. 12, 1985) (survey of half of the surgeons practicing in northern Texas regarding the range of fees charged for the ten most common surgical procedures in each specialty “does not appear to raise significant antitrust issues”), *available at* <http://www.ftc.gov/bc/healthcare/industryguide/advisory.htm>.

to reduce their operating costs.’’⁷⁹ The survey included the number of tractors, trucks, and drivers; driver turnover rate and compensation; and a variety of operating capacity metrics. In its Business Review Letter, the Division observed that benchmarking exercises often offer significant pro-competitive potential:

Participation by members of an industry in benchmarking surveys does not necessarily raise antitrust concerns. In fact, with appropriate safeguards, such surveys can benefit consumers when industry members use information derived from such surveys to gain efficiencies and price their products or services more competitively.⁸⁰

The Division concluded that there was little risk of harm from the Trucking survey because it would be administered by a third party; individual company information would be kept confidential; the published report would contain information aggregated from a minimum of five companies on a national basis; and the published information would be at least three months old. The letter also observed that the trucking industry did not appear to be concentrated or have significant barriers to entry.

VII.

So far in my remarks, I have focused on the antitrust implications of information exchanges and benchmarking. I want to point out, however, that there can also be consumer protection issues from these exercises as well. In the Intel case, the Commission alleged that the company failed to disclose to benchmarking organizations and consumers that the compiler it released in 2003 skewed the performance results of non-Intel CPUs.⁸¹ OEMs and consumers

⁷⁹ Department of Justice Business Review Letter to the National Association of Small Trucking Companies and Bell & Company (Apr. 9, 2007), *available at* <http://www.justice.gov/atr/public/busreview/222533.htm>.

⁸⁰ *Id.*

⁸¹ Complaint ¶¶ 10, 56-71, 103, Intel Corp., FTC Dkt. No. 9341 (Dec. 16, 2009), *available at* <http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf>.

rely on these benchmarking organizations to judge the performance of competing CPUs. Intel promoted its systems' performance under these benchmarks as realistic measures of typical or "real world" computer performance. The Complaint alleged that Intel's failure to disclose the effects of its compiler was a deceptive act or practice under Section 5 of the FTC Act,⁸² as well as a type of exclusionary conduct.

The consent decree resolving the FTC's case requires Intel to take steps to prevent future misrepresentations related to its compilers and benchmarking organizations.⁸³ Intel is prohibited from making claims about the performance of its compiler unless it has substantiated that those claims are true and accurate using accepted analytical methods. Intel is also required to make disclosures concerning the reliability and relevance of performance claims based on benchmarks.

Thus, companies should be on notice that providing false or misleading information to a benchmarking organization may violate Section 5 as a deceptive practice if consumers rely on the results of the benchmarking exercise to help make purchasing decisions.

⁸² Deception exists "if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment." Fed. Trade Comm'n, Policy Statement on Deception (1983), *appended to Cliffdale Assocs.*, 103 F.T.C. 110, 174 (1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,205.

⁸³ Decision and Order §§ VII, VIII, Intel Corp., FTC Dkt. No. 9341 (Oct. 29, 2010), *available at* <http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf>.