

# Michigan Law Review

---

Volume 68 | Issue 4

---

1970

## Antitrust Law--Restraint of Trade--Antitrust Implications of the Exchange of Price Information Among Competitors: The *Container Corporation Case*

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Antitrust and Trade Regulation Commons](#)

---

### Recommended Citation

Michigan Law Review, *Antitrust Law--Restraint of Trade--Antitrust Implications of the Exchange of Price Information Among Competitors: The Container Corporation Case*, 68 MICH. L. REV. 720 (1970).

Available at: <https://repository.law.umich.edu/mlr/vol68/iss4/5>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## NOTES

### ANTITRUST LAW—RESTRAINT OF TRADE—

#### Antitrust Implications of the Exchange of Price Information Among Competitors: *The Container Corporation Case*

Traditionally, it has not proved difficult to find policy considerations which justify the existence of programs of price information exchange among competitors. There has been widespread agreement that businessmen require knowledge of all the economic forces which affect their operations. Justice Holmes once said: "I should have thought that the ideal of commerce was an intelligent interchange made with full knowledge of the facts as a basis for the forecast of the future on both sides."<sup>1</sup> Similarly, Justice Brandeis commented that "[t]he Sherman Law . . . certainly does not command that competition shall be pursued blindly, that business rivals shall remain ignorant of trade facts or be denied aid in weighing their significance."<sup>2</sup> It has traditionally been accepted that the competitive ideal, which serves as the *ratio essendi* for the antitrust laws, is best served by full knowledge on the part of buyers and sellers of their respective choices.<sup>3</sup> It is admitted that the pattern of transaction prices in a market characterized by full knowledge would be different from the pattern in a market characterized by ignorance.<sup>4</sup> Some prices would be higher, some would be lower. Some customers would be denied bargains and some would gain them. But an essential order, a stability would be introduced into the system and arguably would enable the system to operate more efficiently than would random confusion.

In practice, however, the dissemination of price information has not always served the competitive ideal. In a classic comment Adam Smith observed that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation

---

1. *American Column & Lumber Co. v. United States*, 257 U.S. 377, 412 (1921) (dissenting opinion).

2. *American Column & Lumber Co. v. United States*, 257 U.S. 377, 415 (1921) (dissenting opinion).

3. See Turner, *Cooperation Among Competitors*, 61 Nw. U. L. Rev. 865, 866 (1967). See also *Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563, 584-85 (1925):

Persons who unite in gathering and dissemination of information in trade journals and statistical reports on industry, who gather and publish statistics as the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of them.

4. See note 74 *infra*.

ends in a conspiracy against the public, or in some contrivance to raise prices.”<sup>5</sup> On numerous occasions antitrust actions have been successfully brought against competitors who, under the guise of some type of statistical reporting service involving not only price but production, inventory, and shipments data, have conspired to fix prices and divide markets.<sup>6</sup> The most recent example is *United States v. Container Corporation of America*.<sup>7</sup>

Between 1955 and 1963, Container Corporation of America and seventeen other corporate manufacturers, which together supplied ninety per cent of the shipments of corrugated containers in the southeastern United States,<sup>8</sup> engaged in an informal exchange of price information. Whenever one of these manufacturers needed sales information, not available from another source, as to the most recent price charged or quoted by a competitor to a specific customer for a particular product, the manufacturer would simply request the information directly from that competitor. The competitor would then furnish current price information with the understanding that it would, upon request at some future date, receive similar information.

The United States Government filed suit in a federal district court, alleging that the container manufacturers’ scheme constituted a “continuing agreement . . . among the defendants to exchange among themselves information respecting prices . . . for the purpose and with the effect of restricting price competition among themselves . . . .”<sup>9</sup> The district court, unable to find that the Government had demonstrated the presence of either collusion or adverse effects upon price competition, dismissed the action.<sup>10</sup> The Supreme Court of the United States, however, on direct appeal,<sup>11</sup> reversed the district court’s decision, holding that the informal exchange of price information had the effect of chilling the vigor of price competition

---

5. THE WEALTH OF NATIONS 128-29 (Modern Library ed. 1937).

6. Prior to *United States v. Container Corp. of America*, 393 U.S. 333 (1969), there had been six leading decisions involving the exchange of price information: five Supreme Court cases [*American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563 (1925); *Cement Mfrs. Protective Assn. v. United States*, 268 U.S. 588 (1925); *Sugar Institute v. United States*, 297 U.S. 553 (1936)] and a major decision from a federal circuit court [*Tag Mfrs. Institute v. FTC*, 174 F.2d 452 (1st Cir. 1949)].

7. 393 U.S. 333 (1969).

8. For the purposes of the *Container Corporation* case, the southeastern United States was defined as including the states of Alabama, Florida, Georgia, Kentucky, North Carolina, South Carolina, Tennessee, and Virginia. *United States v. Container Corp. of America*, 273 F. Supp. 18, 21-22 (M.D.N.C. 1967).

9. 273 F. Supp. at 20.

10. 273 F. Supp. at 67-68.

11. Direct appeal is authorized under the Federal Antitrust Expediting Act § 2, 15 U.S.C. § 29 (1964).

and was within the scope of the ban expressed in *United States v. Socony-Vacuum Oil Company*,<sup>12</sup> and thus constituted price fixing and a restraint of trade in violation of section 1 of the Sherman Act.<sup>13</sup>

The Court's holding in *Container Corporation* must, of course, be examined against the backdrop of previous cases involving exchanges of statistical data among competitors. Antitrust difficulties involving such systems of exchange have historically occurred in industries, like the corrugated-container industry, in which the chief product is highly fungible and standardized, and in which competition is based primarily on price.<sup>14</sup> Thus, in *American Column & Lumber Company v. United States*<sup>15</sup> the members of the Hardwood Lumber Manufacturers' Association submitted to the manager of the association detailed and specific daily reports describing aspects of business activity which were relevant to the price level.<sup>16</sup> The information was disseminated to all member manufacturers, although not to buyers or other interested parties. The Supreme Court had no difficulty in finding that the Association clearly constituted a combination to restrict competition and to restrain interstate commerce.<sup>17</sup> Similarly, in *United States v. American Linseed Oil Company*<sup>18</sup> the Court was presented with an intimate system for the exchange of price information. The Court found that the information, which was used exclusively and secretly by the sellers of linseed products, was clearly aimed at discouraging independent decision making by trade rivals.<sup>19</sup> Any freedom of action with regard to

---

12. 310 U.S. 150 (1940).

13. Sherman Act § 1, 15 U.S.C. § 1 (1964), provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations is declared to be illegal . . . ."

14. The origin of statistical reporting services in trade associations is usually traced to the work of Arthur Jerome Eddy, who, in his book, *The New Competition*, denounced the Spencerian notion of the survival of the economic fittest. Alarmed by what he perceived to be the viciousness of price competition, he suggested that, "so far from promoting progress, competition stays and hinders . . . . Rightfully viewed, there is not a single good result accomplished by man in . . . economics . . . that should not be attained by intelligent and far sighted cooperation." A. EDDY, *THE NEW COMPETITION* 26 (1912). See also Stocking, *The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities*, 21 U. CHI. L. REV. 527, 543 (1954).

15. 257 U.S. 377 (1921).

16. The Hardwood Lumber Manufacturers' Association program was patterned after Eddy's work. See note 14 *supra*. The slogan of the Association, "Cooperation, not Competition, is the Life of Trade," was borrowed from Eddy. Stocking, *supra* note 14, at 545.

17. The Supreme Court quoted the following excerpt from a letter of the Association manager: "With this information before him it is difficult to see how any intelligent hardwood manufacturer can entertain any hesitation as to the proper course for him to pursue in selling his lumber." 257 U.S. at 405.

18. 262 U.S. 371 (1923).

19. 262 U.S. at 389.

deviation from the agreed plan was forestalled by heavy penalty provisions. In both *American Column* and *American Linseed Oil* unlawful conspiracies were found to exist, but in both cases the Court condemned only the anticompetitive results of the conspiracy, not the practice of exchanging price information.

*Sugar Institute v. United States*<sup>20</sup> involved a thoroughly demoralized sugar industry with sales running at fifty per cent of capacity.<sup>21</sup> In an effort to offset this industry-wide malaise, some individual sellers developed the practice of giving secret price concessions. To combat this practice the Sugar Institute was formed, and it inaugurated a price-reporting plan which called for sellers to announce in advance any increase in price. A short waiting period followed, during which time buyers could still buy at the old price and yet other sellers could announce price increases. In practice, if the entire industry did not follow the price leader, that leader had to rescind its announced increase since it could not sell at the higher price. The Supreme Court sustained the trial court's finding that the Institute's dominant purpose was "to create and maintain a uniform price structure . . ." <sup>22</sup> Even in this case, however, the Court expressly reserved condemnation of the statistical-reporting system involved, even though that system included the reporting of advance prices. Rather, what the Court condemned was the agreement to adhere to announced prices and terms.<sup>23</sup>

The companion cases of *Maple Flooring Manufacturers' Association v. United States*<sup>24</sup> and *Cement Manufacturers' Protective Association v. United States*<sup>25</sup> have often been referred to as the Magna Carta of statistical-reporting programs.<sup>26</sup> The Maple Flooring Manufacturers' Association maintained a statistical-reporting service for its members, who were responsible for about seventy-five per cent of the industry's production.<sup>27</sup> The data which members of the Association reported consisted of (1) the average cost of all dimensions and grades of flooring, (2) comprehensive freight shipping costs, (3) the prices and kinds of flooring sold and the amount of inventory

---

20. 297 U.S. 553 (1936).

21. 297 U.S. at 574-77.

22. 297 U.S. at 577.

23. 297 U.S. at 601:

The unreasonable restraints which defendants imposed lay not in advance announcements, but in the steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition . . . .

See Comment, *Trade Restraints—Trade Association—Open Price Agreements—Sugar Institute Case*, 34 MICH. L. REV. 1016 (1936).

24. 268 U.S. 563 (1925).

25. 268 U.S. 588 (1925).

26. See G. LAMB & S. KITTELLE, *TRADE ASSOCIATION LAW AND PRACTICE* 33 (1956).

27. 268 U.S. at 566.

on hand, and (4) miscellaneous other information exchanged at meetings of industry executives.<sup>28</sup> Among the price information cases which the Court has considered, its opinion in *Maple Flooring* is unique, for in this case the Court dealt exclusively with the practice of statistical reporting itself. The Court stated that "it is neither alleged nor proved that there was any agreement among the members of the Association either affecting production, fixing prices or for price maintenance."<sup>29</sup> Instead of dealing with such an agreement, then, the Court concerned itself with the contention of the Government that the result of the dissemination of this type of information

must necessarily be to bring about a concerted effort on the part of members of the Association to maintain prices at levels having a close relation to the average cost of flooring reported to members and that consequently there is a necessary and inevitable restraint of interstate commerce and that therefore the plan of the Association itself is a violation of § 1 of the Sherman Act which should be enjoined regardless of its actual operation and effect so far as price maintenance is concerned.<sup>30</sup>

The Supreme Court rejected the Government's argument. It found no illegal plan or conspiracy, either express or implied, to use the material gathered as part of some illegal undertaking. In sweeping language the Court affirmed the legality—indeed, the desirability—of exchanges of information, including prices, in order to encourage competitive interchange.<sup>31</sup>

*Container Corporation*, as Justice Douglas admitted in his opinion for the Court, differed appreciably in its facts from all of these previous cases involving the exchange of price information among competitors. The Court point out that

[t]here was here an exchange of price information but not agreement to adhere to a price schedule as in *Sugar Institute* . . . or . . . *Socony-*

---

28. 268 U.S. at 566-67.

29. 268 U.S. at 567.

30. 268 U.S. at 568.

31. 268 U.S. at 584-85, quoted in note 3 *supra*.

*Cement Manufacturers* involved the collection and dissemination of information relating to "specific job contracts" for the purpose of enabling manufacturers to protect themselves from being defrauded by their customers. "Specific job contracts" operated in effect to give contractors options to buy at a set price all the cement needed for a particular job. In times of rising prices, however, some contractors apparently had been exploiting this trade practice by taking more than one specific job contract for each job and then using cement bought under contracts for one job on other jobs. The information program which the manufacturers' association developed to meet this problem was held not to violate the Sherman Act because the information did not affect the manufacturers' price decisions but only notified manufacturers when they would be justified in refusing to deliver cement at the contract price.

*Vacuum* . . . . There was here an exchange of information concerning specific sales to identified customers, not a statistical report on the average cost to all members, without identifying the parties to specific transactions as in *Maple Flooring Mfrs. Assn.* . . . While there was present here as in *Cement Mfrs. Protective Assn. v. United States* . . . an exchange of prices to specific customers, there was absent the controlling circumstances, *viz.*, that cement manufacturers to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job.<sup>32</sup>

In many ways, then, the factual pattern considered by the Court in *Container Corporation* constitutes the least persuasive record of price fixing and manipulation that can be found among all such cases with which the Supreme Court has dealt, including *Maple Flooring*.<sup>33</sup>

But the major distinction between *Container Corporation* and its predecessors does not seem to lie in the facts. The price exchange system in this case involved no really novel practice—no practice which was not more or less implicitly approved in a prior case. For example, the exchange of specific information, present here and absent in *Maple Flooring*, was approved not only in *Cement Manufacturers*,<sup>34</sup> but also in a major case from the First Circuit, *Tag Manufacturers' Institute v. FTC*.<sup>35</sup>

*Container Corporation*, then, is not to be distinguished on its facts, but rather should be examined in terms of the legal principles applied to the factual situation—legal principles which are brought into focus by the juxtaposition of the majority, the concurring, and the dissenting opinions.<sup>36</sup> But before examining the areas of disagreement among members of the court, it should be noted that in

---

32. 393 U.S. at 334-35.

33. See Stocking, *supra* note 14, at 546-67, in which Professor Stocking analyzes the record in *Maple Flooring* and sharply disagrees with the result reached by the Court in that case; *Container Corp.*, 393 U.S. at 341, 347 (Justice Marshall, dissenting); text accompanying notes 55-56 *infra*.

34. See note 31 *supra*.

35. 174 F.2d 452 (1949). In *Tag Manufacturers*, as in *Container Corporation*, the product was custom made. Information was not exchanged informally, however, but by price tables regularly sent out through a trade association to all competing manufacturers and to other interested parties. The effect of the information exchanged was, as in *Container Corporation*, a knowledge by all manufacturers of the price which was quoted to a customer in any given transaction, since there was little off-the-list selling. But the association did not exchange information concerning the actual identity of customers as the defendants in the *Container Corporation* case apparently did.

36. The opinion of the Court was written by Justice Douglas; Justice Fortas filed a concurring opinion, and Justice Marshall, joined by Justices Harlan and Stewart, dissented. See text accompanying notes 51-53 *infra*.

several instances the *Container Corporation* Court was in unanimous agreement. For example, both the majority and the dissent dealt summarily with the questions of intent and conspiracy, which had previously occupied so much of the Court's time. The trial court held that the Government had "failed to sustain its burden of proving facts from which an agreement to exchange price information may be inferred."<sup>37</sup> That court expressed the view, shared by by some commentators,<sup>38</sup> that the proper standard of proof is a rather stringent one,<sup>39</sup> and that "[p]roof of a course of conduct by defendants, or parallel business behavior, does not necessarily require an inference or conclusion that a conspiracy actually existed."<sup>40</sup> Indeed, the trial court suggested that "[t]he conceded freedom of each defendant to request from or furnish to competitors, or not request from or furnish to competitors, price information on corrugated containers, is the very antithesis of an agreement."<sup>41</sup> The Supreme Court, however, unanimously rejected the trial court's position and experienced little difficulty in finding that an agreement existed among the defendants to exchange information. It agreed that there was freedom to withdraw from the agreement, but noted that "[t]he fact remains that when a defendant requested and

37. *United States v. Container Corp. of America*, 273 F. Supp. 18, 58-59 (M.D.N.C. 1967).

38. See A. NEALE, *THE ANTI-TRUST LAWS OF THE USA* 49-53 (1966):

Collusion means in this context a real "meeting of the minds" in a common endeavor to suppress or limit price-competition; moreover, it is implied that the plan or understanding can be relied upon with some reasonable confidence by the participants. The individual firm, in other words, must be under some fairly effective inhibition as regards "breaking the price-line" when the temptation to do so is apparently strong.

The *Container Corporation* decision seems to diminish the importance of the intent factor within the area of exchanges of price information. According to the decision, so long as the conscious joint conduct of the competitors has a tendency to "stabilize prices," whether or not that tendency is the intended consequence of the exchange, the requisite "agreement" will be found to exist. But see *United States v. FMC Corp.*, 5 CCH TRADE REG. REP. (1969 Trade Cas.) ¶ 72,901 (E.D. Pa. Aug. 22, 1969), in which a federal district court appears to have imposed a harsher burden of proving conspiracy than that imposed in *Container Corporation*. The district court cited *Container Corporation*, perhaps somewhat restrictively, for the proposition that "[t]he systematic exchange of price information by competitors pursuant to an understanding or agreement that such information will be exchanged whenever requested, and the use of such information to stabilize prices, constitutes an unlawful conspiracy and *per se* violation of § 1 of the Sherman Act." 5 CCH TRADE REG. REP. (1969 Trade Cas.) ¶ 72,901, at 87,433. See text accompanying note 86 *infra*. An alternative type of reasoning has been used in cases such as *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921). In this type of case, agreement is inferred from the behavior of the parties. The fact situation is analyzed and an attempt is made to prove that such a state of affairs could not be maintained without collusion. Conversely, in *Container Corporation*, as in most of the other trade association cases, the existence of an agreement is virtually assumed and the court concerns itself with examining the consequences of that agreement. See A. NEALE, *supra*, at 49-50.

39. Cf. *Theatre Enterprises, Inc. v. Paramount Pictures Film Distrib. Co.*, 346 U.S. 537 (1954).

40. 273 F. Supp. at 59.

41. 273 F. Supp. at 59.



received price information, it was affirming its willingness to furnish such information in return."<sup>42</sup> Both the majority and dissent indicated that the exchange of price information is clearly a disfavored activity and that the burden of proof needed to establish an unlawful conspiracy in this area can be sustained by a minimal amount of evidence. In *Container Corporation*, then, the entire Court was much more interested in the effect of the combination upon prices than it was in the combination's form and nature.

The majority, the concurrence, and dissent in *Container Corporation* also agreed on the basic economic theory to be used in analyzing the effect of the defendants' agreement on competition. Although the Court tacitly acknowledged that the exchange of information could *theoretically* be regarded as a desirable means to encourage competitive conditions, it recognized that this result could occur only within the context of a perfectly competitive economic model. All three of the opinions filed in the case indicated that an entirely different economic theory, one which recognizes the oligopolistic character of the market involved, was more appropriate.

In an oligopolistic market, characterized by a highly fungible and standardized product, a decidedly anticompetitive effect may occur as a result of the dissemination of at least some forms of price information.<sup>43</sup> A rational seller in such an industry may well decide that there is no potential advantage in price competition. Any price made by one seller in an oligopoly is quickly met by another. Such a seller is aware that "a lower price does not mean a larger share of the available business but a share of the existing business at a lower return."<sup>44</sup> Modern economics recognizes that prices determined in a market occupied by a few sellers selling a standardized product do not behave in accordance with the competitive ideal. In a situation in which a few sellers face substantially identical demands and costs, each, acting independently but with some price information from the others, might restrict output and charge artificially higher prices. Indeed, it is generally accepted that, in such a market, "[i]f each [of two or a few sellers] seeks his maximum profit rationally and intelligently . . . the equilibrium result is the same as though there was a monopolistic agreement between them."<sup>45</sup> Each, in effect, acts as a monopolist. As one commentator has remarked:

To the extent that the sellers anticipate each other's reactions and

---

42. 393 U.S. at 335.

43. Brodley, *Oligopoly Power Under the Sherman and Clayton Acts: From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285 (1967).

44. *Container Corp.*, 393 U.S. at 337.

45. E. CHAMBERLAIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 48 (6th ed. 1950). See also Stocking, *supra* note 14, at 535.

become of one mind, they behave like one seller—a monopolist. But it is not the number of sellers which is crucial. Some *uncertainty*, some good gambling chance that price cuts will not be immediately met, is necessary for effective competition. Some degree of ignorance is therefore no blemish or imperfection in a market; it is an advantage. Too much ignorance, however, keeps buyers from responding to price cuts.<sup>46</sup>

With its enthusiastic embrace of the economic theory of oligopolistic pricing, the Supreme Court continued to expand its attack on the abuse of power in oligopolistic markets. Students of the Court date this attack from the case of *Brown Shoe Company v. United States*.<sup>47</sup> Prior to *Container Corporation*, however, the attack had been directed primarily against mergers, joint ventures, and the distribution practice of consignment selling.<sup>48</sup> *Container Corporation* seems to have expanded the scope of oligopolistic conduct violating the antitrust laws to other behavioral areas. Historically, a violation of section 1 of the Sherman Act was a violation no matter who committed it.<sup>49</sup> Conduct proscribed by section 2, on the other hand, could constitute perfectly legitimate conduct when engaged in by a normal businessman, although it violated the Act when it was committed by a monopolist.<sup>50</sup> After *Container Corporation*, there seems to be a middle ground of new section 1 violations, which can be committed only by an oligopolist. Thus, certain modes of behavior by an oligopolist, while not violative of section 2, can violate section 1 even though similar behavior by a "true competitor" would not.

In *Container Corporation*, then, the Court was in agreement concerning the nature of the conspiracy and concerning the oligopolistic framework within which the alleged misconduct was to be analyzed. However, the Court found itself in sharp internal disagreement as to whether the fact situation presented by the Government fit within the applicable oligopolistic pattern. Justice Douglas and the majority

46. Adelman, *Effective Competition and the Anti-Trust Laws*, 61 HARV. L. REV. 1289, 1299 (1948). See also C. KAYSER & D. TURNER, ANTITRUST POLICY, AN ECONOMIC AND LEGAL ANALYSIS 150 (1959): "In markets where oligopolistic elements are present some ignorance and uncertainty about the behavior of rivals is an important competitive element in the market, since it prevents 'rational' oligopolistic calculation leading to joint maximization of profits."

47. 370 U.S. 294 (1962). See Brodley, *supra* note 43, at 299.

48. E.g., *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) (horizontal merger); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965), *rev.* 329 F.2d 623 (7th Cir. 1964), *rev.* CCH TRADE REG. REP. [1961-1963 Transfer Binder] ¶ 16,182 (FTC 1962) (conglomerate merger); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964) (joint venture); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (retail price maintenance through consignment agreements).

49. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 n.59 (1940).

50. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 n.59 (1940). Sherman Act § 2, 15 U.S.C. § 2 (1964), proscribes monopolizing, attempting to monopolize, and conspiring to monopolize interstate or foreign commerce.

found the inference "irresistible" that price competition had been chilled.<sup>51</sup> Justice Fortas, in a concurring opinion, remarked that "although [the evidence is] not overwhelming, [it] is sufficient in the special circumstances of this case to show an actual effect on pricing . . . ."<sup>52</sup> Finally, Justice Marshall, joined by Justices Harlan and Stewart in a dissenting opinion, stated that he could not agree with the majority or the concurrence that the combination "had the purpose or effect of restricting price competition . . . ."<sup>53</sup>

In reversing the decision of the district court, the majority looked to the period involved in the complaint, 1955-1963, and noted that, despite the excess supply and the downward-sloping price levels, the industry expanded from thirty manufacturers with forty-nine plants to fifty-one manufacturers with ninety-eight plants. Although entry into the industry appears to have been relatively easy during this period,<sup>54</sup> the Court was unable to come to any other conclusion than that the continued entry was caused by, and was a sufficient indication of, a price structure that was kept artificially high. The Court's inference may have been economically unwarranted, for it seems to have been based upon a static rather than a dynamic economic analysis. Certainly, in a perfectly competitive market moving toward equilibrium, such continued entry would not have occurred. But as the dissent points out, in the eight-year period covered by the complaint, the demand for corrugated containers almost doubled.<sup>55</sup> It is just as logical, then, to assume that new entrants were attracted by an anticipated future demand as it is to assume that they were drawn by the possibility of charging artificially high prices.

Indeed, Justice Marshall emphatically objected to the Government's hypothesis that new entrants were attracted by high profits: "[T]he Government did not introduce any evidence about the level of profits in this industry [or, surprisingly enough,] evidence about price levels."<sup>56</sup> Again he stated: "The Government admits that the price trend was down, but asks the Court to assume that the trend would have been accelerated with less informed and, hence more vigorous, price competition."<sup>57</sup> In fact, while it had ample op-

---

51. 393 U.S. at 337.

52. 393 U.S. at 339.

53. 393 U.S. at 340. A hint of the theory of oligopolistic competition adopted by the majority in *Container Corporation* is found in *Sugar Institute v. United States*, 297 U.S. 553, 600 (1936): "The fact that because Sugar is a standardized commodity, there is a strong tendency towards uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired."

54. The Court itself stated that an investment of \$50,000 to \$75,000 was sufficient for entry into the industry. 393 U.S. at 336.

55. 393 U.S. at 342.

56. 393 U.S. at 345.

57. 393 U.S. at 345.

portunity to do so, the Government at no time called customers of the industry to testify concerning price stabilization.<sup>58</sup>

Furthermore, Justice Marshall in his dissent referred to findings by the trial court which tend to dampen the "irresistible inference" that price competition had in fact been lessened.<sup>59</sup> Those findings indicate that, despite an increase in manufacturing costs, the trend in prices was down. Indeed, rather than finding an absence of price competition, the district court reported that buyers frequently changed suppliers on the basis of price considerations. The statistics compiled by the industry and stipulated by the Justice Department showed a marked absence of price uniformity or price stability. Moreover, substantial evidence was introduced that the determination of price by manufacturers was based not only on the knowledge of prices offered by competitors, but also on other input variables such as plant production, the quality of needed materials, the size of the order, and the credit rating of the customer.<sup>60</sup>

Justice Marshall's doubts about the absence of price competition are reinforced by the fact that the complaint issued by the Government named only the eighteen defendants and did not indicate whether any or all of the other thirty-three manufacturers in the industry, which together accounted for ten per cent of industry shipments, participated in the price exchange program.<sup>61</sup> Since the record is silent on the matter, it is at least arguable that they did not participate. This inference raises two interesting questions. First, if they did not participate, why were their attempts to secure new business insufficient to guarantee vigorous price competition in the industry? Second, accepting the argument that small and weak firms in a market dominated by oligopolists are willing to follow the price leadership afforded by the larger concerns, how did the small manufacturers in this case effectively secure the price information necessary for them to follow the defendants? The apparent ability of the small firms to secure the price information without resort to price exchanges serves to enhance the argument advanced by the defendants in *Container Corporation* that, in light of the numerous other means of communication, reciprocal price exchanges play a relatively small part in market operations.

In view of the ambiguities present in the *Container Corporation* opinion, some confusion remains as to the correct rule to be applied when analyzing a system of price exchanges in order to determine

---

58. 393 U.S. at 345.

59. 393 U.S. at 345-46.

60. It appears from the opinion of the district court that knowledge of the prices charged by competitors was far more often gleaned from customers and other sources than directly from the competitors themselves. See 273 F. Supp. at 61.

61. *Container Corp.*, 393 U.S. at 343 n.1 (Justice Marshall, dissenting).

whether or not the Sherman Act has been violated. It is not clear whether the Court in this case adopted a *per se* rule of illegality or a very stringent rule-of-reason approach.

There is language in the majority opinion which strongly hints at the adoption of the *per se* rule. While it is true that Justice Department spokesmen have for some time indicated their support of "proper" systems of price exchanges,<sup>62</sup> the Court's opinion seems to offer some support to those who would invalidate such programs entirely by invoking a *per se* rule. Thus, the Court stated:

The limitation or reduction of price competition brings the case within the ban, for as we held in *United States v. Socony-Vacuum Oil Co.*, . . . interference with the setting of price by free market forces is unlawful *per se*.<sup>63</sup>

At the close of its opinion, the Court offered this additional suggestion: "Price is too critical, too sensitive a control to allow it to be used, even in an informal manner to restrain competition."<sup>64</sup> Such language indicates, at a minimum, that the majority took a very dim view of exchanges of price information.

The Court did not, however, expressly label the activity as a *per se* offense.<sup>65</sup> In this connection, Justice Fortas noted in his concurring opinion: "I do not understand the Court's opinion to hold that the exchange of specific information among sellers as to price charged to individual buyers, pursuant to mutual arrangements, is a *per se* violation of the Sherman Act."<sup>66</sup> Justice Fortas may have attached too little importance to the decision, since it is difficult to imagine

---

62. Galgay, *Antitrust Considerations in the Exchange of Price Information Among Competitors*, 8 ANTITRUST BULL. 617, 619 (1963) (The author was then chief of the New York office of the Antitrust Division of the Department of Justice.): "Let me hasten to say that the mere exchange of price information among competitors is not in itself illegal. It is the role which such an exchange plays in any agreement to tamper with price competition which determines its propriety." Turner, *supra* note 3, at 866 (The author was then Assistant Attorney General in charge of the Antitrust Division.):

[I]t has always been and remains clear that competitors are free to collect and disseminate considerable amounts of data pertinent to informed business decisions, even though it is likely that informed judgments by various individual competitors may produce somewhat different price and other decisions than would otherwise take place.

See note 84 *infra*.

63. 393 U.S. at 337. The Court clearly limited this analysis to situations involving oligopolistic elements by adding the following to the language quoted in the text: "Price information exchanged in some markets may have no effect on a truly competitive price. But the corrugated container industry is dominated by relatively few sellers." 393 U.S. at 337.

64. 393 U.S. at 338.

65. *But see* Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 717-18 (S.D.N.Y. 1969): "Without inquiry into their purpose or effect, many agreements have been held to be illegal *per se* under the antitrust laws. See, e.g., *United States v. Container Corporation of America* . . ."

66. 393 U.S. at 338-39.

a situation after *Container Corporation* in which sellers would exchange particularized price information, at least with regard to current and future prices to specified customers. But Fortas' statement does offer the insight that the Court, while mindful that it was approaching the brink of the per se test, hesitated—at this time—from crossing the final line. There are several possible reasons for such hesitancy. Historically, the per se rule has been applied only to situations in which there is an "inference or presumption" either that the primary intent underlying the practice involved is to achieve an anticompetitive effect, or that, absent such intent, a high probability remains that the efficiency of the practice will be outweighed by an anticompetitive effect.<sup>67</sup> As previously mentioned, there are sound economic considerations which might justify a program such as that before the Court in *Container Corporation*.<sup>68</sup> Furthermore, it may be that the Court implicitly recognized that, in light of the limited level of economic knowledge, it is difficult to define with any degree of certainty the level of economic concentration in an oligopolistic market sufficient for that market to behave monopolistically.<sup>69</sup> Thus, the Court may have found it much easier and just as effective to apply a stringent test under the rule of reason to determine the effect upon prices.<sup>70</sup>

Assuming that the Court did not adopt a per se test—and that assumption is by no means certain—it still seems to have indicated that it will not tolerate significant effects upon the price structure arising from the exchange of information. The Court stated that "[t]he result of this reciprocal exchange of prices was to stabilize prices though at a downward level,"<sup>71</sup> and added that "[s]tabilizing prices as well as raising them is within the ban of § 1 of the Sherman Act."<sup>72</sup> Moreover, it cited *Socony-Vacuum* for the principle that "in terms of market operations stabilization is but one form of manipula-

67. See Bork, *The Rule of Reason and the Per Se Concept*, 74 YALE L.J. 775 (1967); Van Cise, *Future of Per Se in Antitrust*, 50 VA. L. REV. 1165, 1172 (1964).

68. See text accompanying notes 1-3 *supra*.

69. The problem of market definition will doubtless be of considerable importance in future applications of the principles of *Container Corporation*. It is conceivable that differing types of price exchanges might be permissible if there are differing economic concentrations and conditions. There are, of course, some markets characterized by so concentrated an oligopolistic framework—markets such as steel, aluminum, oil, and sugar—that any price exchange at all would automatically be invalidated. The number of competitors, however, might not be crucial in determining the economic conditions of the market. See C. KAYSER & D. TURNER, *supra* note 46, at 150; Adelman, *supra* note 46, at 1299. In *Container Corporation*, for example, the market consisted of fifty-one producers, yet the Court deemed an oligopolistic analysis to be appropriate. 393 U.S. at 336-37.

70. See 393 U.S. at 341 (Justice Marshall, dissenting).

71. 393 U.S. at 336.

72. 393 U.S. at 337.

tion."<sup>73</sup> Nevertheless, it is difficult to imagine that the Court, in attacking stabilization, meant to condemn *all* attempts to narrow the range and extreme variations of prices quoted at a given price level. Price stabilization has usually been thought to refer not only to fluctuations of price level, but also to extremes of variation within the price structure at any given average level. Yet to interpret the ban on stabilization as expressed in *Socony-Vacuum* to condemn attempts to control extreme variations would not be merely novel, but in direct contradiction with the opinion expressed by the Court in numerous previous instances.<sup>74</sup> Moreover, in the twenty-five years since *Socony-Vacuum* was decided, the Court does not seem ever to have used that case to prevent the stabilization of extreme variations within the price structure. In many ways such a reading of the Court's opinion would entail more significant consequences than would a determination of the per se illegality of price exchanges. Certainly, a few systems of price exchange would survive such a test. Moreover, the logic of a holding that prohibits all types of stabilizations would condemn many other forms of information exchange. It has been estimated that seventy-five per cent of all trade associations have a statistical reporting system of some sort.<sup>75</sup> Conceivably a re-examination of the effect of these statistics, particularly in the areas of production, inventory, and retail sales, might result in the demonstration of a stabilizing factor on the supply conditions

73. 393 U.S. at 337, citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

74. *Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563, 582 (1925):

It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity of prices in markets of the world. Knowledge of the supplies of available merchandise tends to prevent overproduction and to avoid the economic disturbances produced by business crises resulting from overproduction.

*Sugar Institute v. United States*, 297 U.S. 553, 598 (1936):

Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade. . . . The natural effect of the acquisition of the wider and more scientific knowledge of business conditions on the minds of those engaged in commerce, and the consequent stabilizing of production and price, cannot be said to be an unreasonable restraint or in any respect unlawful.

*Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 374 (1933): "The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the co-operation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result." *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1917): "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby encourages competition or whether it is such as may suppress or even destroy competition."

75. See Jacobs, *Statistical, Standardization, and Research Activities [of Trade Associations]*, 6 ABA SECTION OF ANTITRUST PROC. 80, 81 (1955).

and hence on price. One commentator, struck by the potential scope of the *Container Corporation* opinion, has complained—and justifiably so if the above interpretation is correct—that “the opinion could be read as making it hazardous to furnish price data to newspapers or trade journals.”<sup>76</sup>

It is not at all clear that the majority opinion stands for so sweeping a definition of the term “stabilization.” Certainly neither Justice Fortas nor Justice Marshall and the other dissenters would so apply the law. However, all three opinions can be read to support the position that price exchanges leading to stabilization are illegal when evidence is present that the price level itself has also been affected. Justice Fortas stated that “[t]he obvious effect was to ‘stabilize’ prices by joint arrangement—at least to limit any price cuts to the minimum necessary to meet competition.”<sup>77</sup> The dissent emphasized the lack of evidence indicating an effect upon price levels and the necessity for such proof to justify the finding of a violation.<sup>78</sup> The majority opinion, too, hinted at such a rule. In finding that “[t]he exchange of price information seemed to have the effect of keeping prices within a fairly narrow ambit,”<sup>79</sup> the majority discussed the probability that while prices had sloped downward, they would have declined even further had the information exchange not existed.

If such an interpretation of the rule is correct, then the differences among the majority, the concurrence, and the dissent become simply a matter of the sufficiency of proof required to prove an effect upon the price level. The majority was satisfied by an “inference,” perhaps even a slim inference, of an effect on price levels.<sup>80</sup> Justice Fortas felt that the “probability” that the exchange of specific price information led to an unlawful effect was adequate.<sup>81</sup> The dissenters would have required substantial proof.<sup>82</sup>

Under such an interpretation, the opinion in *Container Corporation* can be construed as consistent with precedent and practice. Antitrust lawyers have long advised their clients that notwithstanding *Tag Manufacturers* and *Cement Manufacturers*, the exchange of particularized information dealing with prices is suspect.<sup>83</sup> They

---

76. Hale, *Communication Among Competitors*, 8 ANTITRUST BULL. 63, 69 (1969).

77. 393 U.S. at 340.

78. 393 U.S. at 341-45.

79. 393 U.S. at 336.

80. See 393 U.S. at 337.

81. See 393 U.S. at 339.

82. See 393 U.S. at 344.

83. See G. LAMB & S. KITTELLE, *TRADE ASSOCIATION LAW AND PRACTICE* 68 (1956); Kern, *Price Reporting by Trade Associations*, 6 ABA SECTION OF ANTITRUST PROC. 62, 78 (1955); Withrow, *Trade Associations*, 4 ANTITRUST BULL. 173, 181 (1959); Com-



have recognized that the dicta in *Maple Flooring* and the line of cases following it, were perhaps too broad in parts to be successfully reconciled with the anti-price-fixing and anti-price-stabilization policies of *Socony-Vacuum*. Particularized price information, they have realized, lends itself easily to concerted price-fixing activities and to an unconscious, but nonetheless direct, effect upon the price level,<sup>84</sup> especially when current and future price information is exchanged.<sup>85</sup>

ment, *Trade Association Statistics and Anti-Trust Laws*, 18 U. CHI. L. REV. 380, 384 (1951). See also note 91 *infra*.

84. Turner, *supra* note 3, at 866 (footnote omitted):

In oligopoly situations, too quick and too detailed a dissemination of information may make the market perform worse rather than better. It is generally recognized that elements of informational schemes which some might think innocuous may be used not for the purpose of promoting rational independent judgment, but for the purpose of discouraging price competition. One immediately suspects an illicit purpose, for example, in any informational scheme which involves the identification of individual sellers and buyers in each reported transaction. Normally, this is completely unnecessary to any market information scheme looking only to rational competitive pricing decisions. Even if the data need to be broken down geographically because there are different submarkets, there still is normally no need for identifying particular sellers. Consequently, it is reasonable to assume that the purpose of the identification is to detect and thus to discourage the would be price-cutter.

See note 62 *supra*.

85. One recurring antitrust dilemma not treated by the Court in *Container Corporation* is that involving the dissemination and publication of data to outside sources. The basic law concerning dissemination of statistics was expressed in the case of *Sugar Institute v. United States*, 297 U.S. 553 (1936). In that case the trial court, after discussing the Supreme Court's decisions in previous trade association cases, held that the failure to make more complete disclosures to the trade of statistics collected and circulated within their own ranks is an unreasonable restraint of trade. 297 U.S. at 604. The Supreme Court modified the injunction of the lower court. It agreed that in certain cases the "purchasing and distributing trade have a legitimate interest," but it stated that

it does not follow that the purchasing and distributing trade have such an interest in every detail of information which may be received by the Institute. Information may be received in relation to the affairs of refiners which may rightly be treated as having a confidential character and in which distributors and purchasers have no proper interest.

297 U.S. at 604. Thus, the Court manifested its preference that unless a strong policy dictates to the contrary, there should be open dissemination of the information gathered. See *Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563, 582-83 (1925). But the Court also made clear that it would look at nondisclosure not as an illegal action in itself, but as symptomatic of other practices which are illegal. The trial court had aptly summarized the Supreme Court's position: "It is thus abundantly clear that just as the secrecy in respect of statistics is an element of illegality in the 'Column & Lumber Company' and 'Linseed Oil' cases, so did the publicity given thereto tend to negate the illegality in the *Maple Flooring* case." 15 F. Supp. 817, 898 (S.D.N.Y. 1934). Cf. *Tag Mfrs. Institute v. FTC*, 174 F.2d 452, 462 (1st Cir. 1949), in which the court of appeals said: "We are clearly of the opinion that if the reporting agreement is otherwise unobjectionable, it cannot be said to have become illegal for failure of the subscribers to make the information generally available." See also *Hartford-Empire Co. v. United States*, 323 U.S. 386, 429 (1945), in which the Supreme Court stated: "The requirement that all trade information be given to the public would render the assembly of it for the information of members useless and indeed detrimental to competition. The inclusion of such a provision in an antitrust decree

An example of the exchange of such sensitive data is found in a recent district court decision, *United States v. FMC Corporation*.<sup>86</sup> In that case a group of chlor-alkali producers were charged with a conspiracy to eliminate price competition in the sale of some of their raw-material products. The United States District Court for the Eastern District of Pennsylvania found that an illegal conspiracy existed along the lines both of that in *Socony-Vacuum* and of that in *Container Corporation*. The per se violation consisted of "implied assurances and agreements" which led to a uniform system of freight rate pricing. That system in turn ensured complete information within the industry of all manufacturers' freight rates. As the district court pointed out, in industries in which a single commodity price prevails, such as both the chlor-alkali industry and the corrugated-container industry, knowledge of competitors' freight rates leads to universal price knowledge and, under the theory of oligopolistic pricing, uniformity of price. The trial court also found a more subtle violation of section 1, similar to, though more pronounced than, the violation in *Container Corporation*. In *FMC*, as is usual in such cases, the manufacturers were faced with a highly inelastic demand for their product and with no probability of increased sales to be derived from price cutting. Moreover, several of the industry's major customers from time to time found some chlor-alkali products to be fungible with other raw materials. In such situations, selective price cuts were made to specific customers, for the limited purpose of meeting competition from outside the industry. FMC and the other industry manufacturers occasionally informed each other of such selective discounts, apparently to impress one another with the limited purpose of the action. The district court held that this dissemination of price information in an effort to control industry-wide repercussions fell under the ban of *Container Corporation*.

It is not possible to know how much weight the courts in *Container Corporation* and *FMC* gave to the fact that current and future prices were exchanged or to the fact that they were exchanged surreptitiously, that is, without full knowledge of parties other than the manufacturers. As the *FMC* court said, however, it is well in such cases to keep in mind the admonitions of the Supreme Court in *Maple Flooring*:

[E]ach case arising under the Sherman Act must be determined upon

has been disapproved by this court." However, a survey of trade association consent decrees indicates the disfavor with which the courts, in practice, have viewed non-disclosure. Given the strong policy evinced by the Court in *Container Corporation* against price information exchanges in any form, it would now seem wise to make the information readily and equally accessible both to purchasers and other parties.

86. 5 CCH TRADE REG. REP. (1969 Trade Cas.) ¶ 72,901 (E.D. Pa. Aug. 22, 1969).

the particular facts disclosed by the record, and that the opinions in those cases must be read in light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied.<sup>87</sup>

Because a market characterized by an oligopolistic price structure is particularly influenced by inputs of price information, it does not seem particularly unreasonable to adopt a harsh attitude toward price exchanges. But since the exchanges of prices and other market information can be accomplished in many forms—some involving substantially less risk than others of chilling price competition—it would be unreasonable and harmful to condemn all such forms out of hand under a per se rule which was only obliquely suggested by the majority opinion in *Container Corporation*.<sup>88</sup> Thus, the “rule of reason” interpretation seems to be the more appropriate reading of the Court’s holding.

---

87. 268 U.S. 563, 579 (1925).

88. Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b) (1964), provides: Nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

In interpreting this provision dealing with the “meeting the competition” defense, the Supreme Court in *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1946), stated:

Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor’s. . . . The statute at least requires the seller, who knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

In view of this language, antitrust attorneys have long counseled their clients to grant discriminatory lower prices “only when [they] know in *advance* that a competitor is offering a lower price to a given customer, as attempts to justify lower prices extended without such price knowledge have not always met with success.” McClatchey, *Price-Discrimination, Meeting Competition and Promotional Allowances*, 29 OHIO ST. L.J. 314, 326 (1968). It has not, of course, been generally recommended that to benefit from the “meeting the competition” defense under the Robinson-Patman Act, a client should check with a competitor. The possible implications of doing so were evident even before *Container Corporation*. However, the very real problem of verification remains and may be greatly exacerbated by an apparent conflict between the teaching of *Container Corporation* and the increasingly rigid burden of showing “good faith” which was exemplified in the recent case of *Viviano Macaroni Co. v. FTC*, 411 F.2d 255 (3d Cir. 1969). In that case, the court of appeals held that the defendant had failed to fulfill its duty to investigate or verify the oral communication of its customer concerning a competitive offer, despite the fact that its salesman of eighteen years corroborated the customer’s report. The court did say, however, that it sympathized with the difficulty facing the petitioner in finding precise information as to the identity of the competitor and the amount of the offers. 411 F.2d at 258. Thus, if *Viviano Macaroni* stands for the proposition that a “meeting the competition” defense cannot be maintained by seeking verification with the buyer or with one’s own salesman, and if *Container Corporation* clearly precludes checking with the competitor, what possible method is left in most instances to verify adequately the existence of a competitive offer? See Handler, *Antitrust: 1969*, 55 CORNELL L. REV. 161, 177 (1970).

Moreover, the stringent "rule of reason" test arguably formulated in *Container Corporation* would probably not have disastrous practical implications, since the vast majority of statistical exchange programs in the United States are managed in a far more discrete manner than was used in the *Container Corporation* situation. Usually, a statistical exchange is handled through the offices of a private statistical-compiling service retained by an industry-wide trade association. As in *Maple Flooring*, each competitor sends his own specific statistical data to the central agency, and the agency in turn compiles the information into averages, categorized by product and geography. The general averages are then disseminated not only to manufacturers but also to all interested parties. Thus, each seller knows only the industry-wide price structure and is able to compare that structure with its own prices.<sup>89</sup> Clearly, this procedure involves a "stabilization" of prices to the extent that it imposes some price order in the industry. But arguably the effect on price competition is not at all the same as it was in *Container Corporation* in which it was found that the sellers met or just slightly undercut prices quoted by the relevant competitor. The ordinary program, it can be argued, is still legitimate after *Container Corporation*. The quality of the price information exchanged, not the existence of the exchange, would be determinative.

Regardless of the difficulties in interpreting the Court's holding, however, it is clear at least that the opinion in *Container Corporation* vests great opportunities for discretion and flexibility in the Justice Department and in the Federal Trade Commission. The Assistant Attorney General in charge of the Antitrust Division, Richard A. McClaren, has already stated that *Container Corporation* "stands for the proposition that such checking with competitors, where it has become a prevalent market practice, constitutes a violation of Section 1 of the Sherman Act."<sup>90</sup> It appears, however, that the Justice Department has not yet served notice that it intends to use this case to invalidate all statistical- or price-reporting services. The situation as it now stands can best be summarized in the words

---

89. See G. LAMB & S. KITTELLE, *supra* note 26, at 32.

90. Speech before the Antitrust Section of the American Bar Association, 5 CCH TRADE REG. REP. ¶ 50,235, at 55,469 (March 27, 1969) (emphasis added):

I doubt that the Supreme Court's recent decision in *Container Corporation* has materially changed the advice that the antitrust bar has been giving to clients for, lo, these many years. You have advised and, in private practice, I advised: "Don't call up your competitor to check if he actually made the offer your customer claims to have received." We thought—if he gives you a dishonest answer, it is worthless; if he is honest, you have antitrust problems. *Container* confirms the latter point. It stands for the proposition that such checking with competitors, where it has become a prevalent market practice, constitutes a violation of Section 1 of the Sherman Act. In a future case, on similar facts, I think we would have to give serious consideration to filing on the criminal side.

of Justice Holmes: "Certainty generally is an illusion, repose is not the destiny of man."<sup>91</sup>

---

---

91. *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).