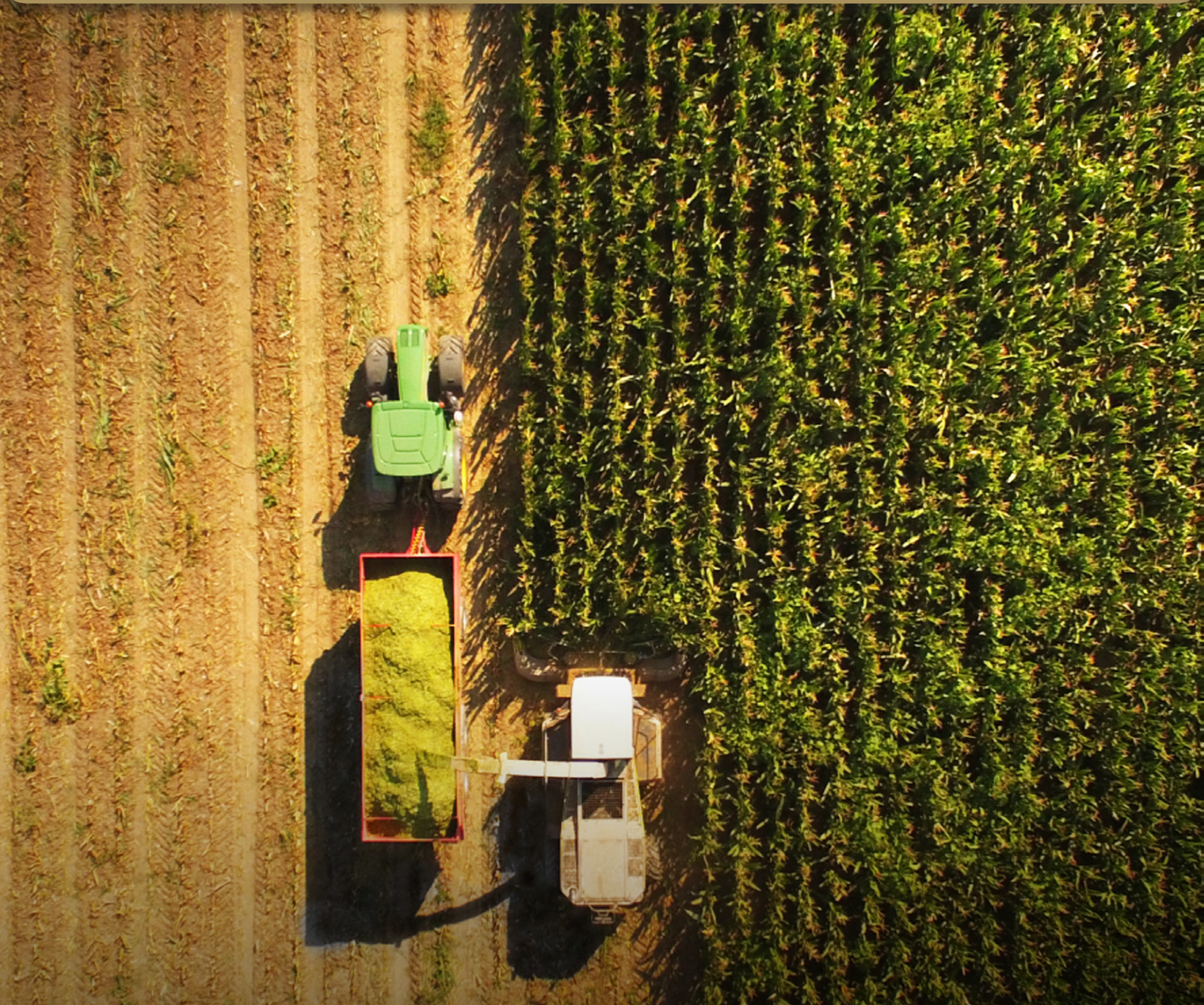
INFORMATION EXCHANGE – AN UNDERAPPRECIATED ANTICOMPETITIVE STRATEGY



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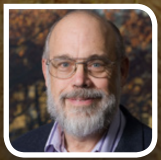

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I. INTRODUCTION

Information exchanges require an understanding among the parties to exchange information. As a result, the first element of a Sherman Act conspiracy exists. But does such an exchange constitute a "restraint of trade," the second element of a violation of the Sherman Act? The case law governing such exchanges has wobbled between "*per se*" condemnation and various forms of a "rule of reason" review. The resulting muddle results from the lack of clear differentiation between elements of a Section 1 offense and the standard for judging the legality of a "contract, combination. . . or conspiracy in restraint of trade..." Properly analyzed, the question in these cases is whether the agreement includes a "restraint" on the competitive freedom of the parties to the exchange. If it does, then it should be *per se* illegal. But not all exchanges justify such an inference. Consequently, the underlying question is whether it is "reasonable" to conclude that an exchange includes a restraint.

Recently, information exchange has emerged as a highly visible issue in antitrust law. The advances in computing technology have vastly increased the capacity for data collection and processing. The current litigation involving poultry and pork is the most immediate example, but the competitive concerns run across a wide range of markets. Generally, information exchange agreements are an increasing source of potential competitive harm. Hence, competition law should focus more on their merits and not look for some specifically defined additional anticompetitive agreement.

Part II illustrates the contrasting competitive implications of information exchanges. Part III explains the potential competitive effects of information exchanges in different market contexts. Part IV argues that the substantive outcomes in the leading cases are consistent with a focus on whether the facts reasonably supported an inference of restraint. Finally, Part V briefly identifies the evidence needed to prove that an exchange includes a restraint on competition as well as discussing the standards for reasonable information exchange.

II. THREE TYPES OF INFORMATION EXCHANGE

Three examples of information exchange provide context for this discussion.

First, in 1921, the Supreme Court condemned the information exchange among the members of the American Hardwood Manufacturers' Association.[2] The members agreed to provide daily reports of sales made and goods shipped with much detail, and provide monthly reports on inventory and production based on classifications "prescribed in the plan."[3] Price lists were filed monthly and members had to submit to periodic in-

2 *American Column & Lumber v. United States*, 275 U.S. 377 (1921).

3 *Id.* at 394-395.

spections to ensure the comparability of the reports.[4] The secretary, F. R. Gadd, collated and analyzed the data providing members with weekly and monthly reports showing inventory, prices, shipments, and sales along with an evaluation of the market.[5] The Court observed that guided by Mr. Gadd, the members restricted production with the result that prices for flooring increased despite a significant decline in demand.[6] The Court found that this agreement contained a restraint of trade:

> Genuine competitors do not make daily, weekly, and monthly reports of the minutest details of their business to their rivals . . . ; they do not contract. . . to submit their books to the discretionary audit, and their stocks to the discretionary inspection, . . . for the purpose of successfully competing . . ., and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a "harmonized" estimate of the market as it is, and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors, but is . . . a combination to restrict production and increase prices in interstate commerce, and . . . therefore a direct restraint upon that commerce . . . [7]

Second, in the late 1960s, as a young attorney at the Antitrust Division, I attended family reunions in rural Iowa. The family were mostly farmers. After a big meal, my farming cousins would stand around exchanging detailed information about their livestock and discussing future prices for cattle and hogs. The information exchanged included their current "inventory," when they expected to bring it to market, and what options might increase the amount they would receive, or how many steers or hogs to raise. While less formal that the Hardwood Association, this exchange of forward-looking information was the result of an understanding among these farmers to exchange detailed business information. Neither I nor, I am confident, any other observer of this information exchange would have regarded it as creating a restraint on competition.

Third, currently, Agri Stats is collecting detailed, often plant specific, information based on standardized criteria from most poultry integrators and pork packers. It then does an extensive analysis of this data and provides frequent detailed reports to the participants. The information allegedly includes details of "inventory," i.e. the number of chickens or hogs being raised, as well as details of costs of production, current production, and sales data. This allows each participant to compare its performance with that of other producers. Further, the participants allegedly can identify specific other firms despite the nominal anonymity of the data. This allows each producer to verify what other participating producers are doing and will be capable of doing in the near to intermediate future. The firms agree to provide information, and only those firms get to see the reports.

A series of pending antitrust cases in poultry have contended that the integrators have colluded to limit production, exploit the farmers who raise the poultry, and the workers whom these firms employ.[8] These cases allege an explicit restraint beyond the exchange of information itself. In the pork packing market, there are also a group of complaints that similarly assert that the pork packers had agreed to some specific reduction in output.[9] Thus, the cases so far have focused on assertions of specific conspiracy to control output, wages, or growers, and characterize the exchange of information as a "facilitating device" that advances the underlying conspiracy. The court hearing the initial poultry output control case has upheld the complaint, finding that the allegation of a conspiracy to restrict output was "plausible."[10] In contrast, the district court overseeing the pork case, concluded that the allegations of a specific agreement to restrict output were not sufficiently plausible.[11] The Court reached that decision despite overall industry data showing a decline in the number of hogs being processed and an increase in price of pork products.

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4 *Id.*

5 *Id.*

6 *Id.* at 405-407, 409.

7 *Id.* at 410.

8 See, e.g. *In re Broiler Chicken Antitrust Litigation*, 290 F.Supp.3d 772 (N.D. Ill, 2017) (upholding complaint charging restraint of trade in the broiler industry).

9 *In re Pork Antitrust Litigation*, 2019 WL 3752497 (D. Minn. 2019) (dismissing complaints charging restraint of trade in the pork industry with leave to amend). One difference between the pork and poultry cases is that the primary pork complaint named Agri Stats as a defendant while the primary poultry complaint did not.

10 *In re Broiler Chicken Antitrust Litigation*, 290 F. Supp. 3d at 802.

11 *In re Pork Antitrust Litigation*, 2019 WL 3752497 at *9; the court did permit the plaintiffs to file an amended complaint if they wished.

III. THE COMPETITIVE IMPLICATIONS OF INFORMATION EXCHANGES

Standard micro-economic price theory assumes that all market participants have full and complete knowledge of supply and demand. Hence, a simplistic view of the model would suggest that any agreement to improve information would be "procompetitive" and so unobjectionable. Of course, this is not in fact the case. Some information exchange is anticompetitive while other is consistent with improving market efficiency. The key distinction is the nature of the relationship of market participants to each other.

A. Purely Competitive Markets

A purely competitive market in which many buyers and sellers deal in homogeneous goods mean that no individual can affect market prices by strategic behavior. Each is a "price taker." Improved information makes everyone better able to anticipate changes in supply and demand. Thus, when my cousins discussed future cattle and hog prices, they were collectively assessing the available information about demand and supply, short and longer term, as bases for their individual decisions about when to sell livestock and how much to invest in new animals. Sharing information did not imply any commitment about what anyone would do with respect to buying or selling livestock because no individual's decision would have any effect on the price obtained by another.

Thus, economic theory and business reality combine to demonstrate that in markets with large numbers of participants the market process is improved with extensive sharing of information. Such information serves only to enhance the capacity of market participants. There is no implicit or explicit objective to control competition.

B. Rivalrous Markets

A rivalrous market is one in which competitors are rivals in the sales or purchases of goods or services.[12] The price and output decisions of each participant directly affect other market participants. Information about market conditions is still essential to such firms, but the fact that they are rivals means that it can serve anticompetitive as well as competitive functions. Knowing exactly what one's rival is doing can facilitate increased competition when used to take away customers. But no rival would intentionally disclose that kind of information if it were to be used that way. On the other hand, if the rival is expected (trusted) to use such knowledge to restrain its competition in ways that reduce or eliminate the risks of rivalry, then the shared information will produce anticompetitive outcomes.

An illustration comes from the *Container Corporation* case.[13] There, competing box makers would disclose to each other the current price they were charging to a customer when a rival, seeking to solicit that business, requested the information. This information allowed the competing rival to know what price it could beat. There were overall a significant number of competing box makers and entry barriers were relatively low, but with respect to any one buyer only a limited set of producers were plausible competitors.[14] Although prices were gradually declining and there was excess capacity, there was new entry.[15] These facts are consistent with prevailing prices being sufficiently above cost that it was rational for new entry into the market while existing competitors held back capacity to accommodate, in part, the expansion of potential supply resulting from the entry. The price disclosure made sense only if the rival would use it to restrain its incentive to cut prices. This did not require a buyer specific price agreement; it only required a tacit understanding that the pricing information would not be used to ratchet up price competition. While the decision is not well explicated, it is evident that the exchange was unlawful because the economic facts demonstrated competitive harms and the implausibility of the specific exchange having any goal other than facilitating some kind of tacit understanding about how rival box makers would compete for new business.

In contrast, the *Cement Manufacturers' Association* provided information to its members about outstanding future delivery contracts for the purchase of cement.[16] Such contracts were options to buy cement at a fixed price in the quantity necessary to handle some identified project.

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12 Rivalry can result when there are few competitors producing homogenous goods for sale to a distinct set of buyers, or when the goods are differentiated but substitutes exist such that each firm has a distinct demand but one that other producers can affect just as it can affect their demand curves.

13 *United States v. Container Corp.*, 393 U.S. 333 (1969).

14 *Id.* at 336.

15 *Id.*

16 *Cement Manufacturers' Assn. v. United States*, 268 U.S. 588 (1925).

Because a buyer could obtain several such options for the same job, it could obtain cement for various uses in significant quantity at a lower price if the market price increased. By sharing information about such contracts, a member of the association could refuse to deliver cement if it appeared that the buyer was not providing the cement to the job which the contract specified. Manifestly, this reduced the ability of buyers to avoid price increases; but the logic of the situation was that each manufacturer had to decide whether or not to sell regardless of what others did. Hence, these were unilateral, but often similar, decisions. Indeed, analogous information is what credit bureaus produce on which sellers rely in making credit decisions.

Thus, for information exchange among rivals, the crucial question is whether it facilitates the efficient operations of the market or whether it operates to create a tacit (or express) understanding that the parties will modify or restrain their competition in reliance on rivals doing the same thing. The question is whether it is "reasonable" for genuine competitors to exchange specific types of information. If it is not, then the inference is that the exchange is to implement a restraint on the competitive freedom of the participants in the exchange. Indeed, the specific restraint itself can remain unarticulated and tacit.

IV. LEGAL ANALYSIS – NOT RULE OF REASON, BUT REASONABLE INFERENCE OF RESTRAINT

A. General Principles

Courts and commentators have failed to distinguish between the question of whether a restraint on competition exists and whether such a restraint is lawful if it exists. The second issue is the one normally addressed under the "rule of reason", which includes a "*per se*" condemnation of naked restraints of competition such as cartels. An information exchange that results in a restraint on competition is a naked restraint of cartelistic character since it operates to eliminate competition among firms having no other economic relationship with each other.

In the case of information exchange, there is no question of the existence of an agreement. A brief review of the leading cases shows that in fact the resolution of the question of the existence of a restraint is what explains the outcomes in the cases. Such decisions are often nuanced and fact dependent and so easily described as applications of a "reasonableness" test, i.e. whether the inference of restraint is reasonable under the facts.

As previously described, the *American Column* case involved the kind of exchange of information combined with a set of activities including meetings that was consistent with an understanding that the rivals would restrain their competition among themselves. In contrast the early *Cement Manufacturers'* case involved the exchange of information that allowed each participant to determine whether it would continue to supply particular buyers. Certainly, in retrospect given the facts in the *Cement Manufacturers* case that showed a high level of coordination among the cement makers to enforce a uniform fixed price, the decision to allow the exchange of information may seem questionable.[17]

The *Maple Flooring* case, decided at the same time as *Cement Manufacturers*, similarly upholds the collection and distribution of information, here railroad rate tables based on a single base point and average cost and past price information.[18] The Court appears to have assumed that the association included only a modest share of industry production.[19] Of course, with some knowledge of the prices for the flooring and shipping, each manufacturer could estimate the prices of its competitors. Moreover, there seem to have been a great many competitors outside the association which moves the overall market away from the rivalrous end of the spectrum.

In condemning the information exchanged on current prices, the *Container Corporation* majority looked at the kind of information exchanged. Agreeing to tell your rival for specific business the price it needed to take the business would be irrational without some implicit or explicit understanding about how that information would be used. The overall economic facts of the industry, as discussed earlier, are consistent with the conclusion that the agreed exchange of pricing information made it possible for incumbent firms to retain higher prices by inhibiting price competition.

17 *FTC v. Cement Institute*, 333 U.S 683 (1948) (industry by agreement used basepoint pricing system to maintain uniform prices).

18 *Maple Flooring Mfrs.' v. United States*, 268 U.S. 563 (1925).

19 *Id.* at 565.

In *U.S. Gypsum*, a criminal conspiracy case, the Court rejected the effort by wall board manufacturers to justify their agreement to exchange specific price information.[20] These manufacturers claimed that they needed to do this to avoid claims of price discrimination under the Robinson-Patman Act which allowed selective discounts only if made in response to a rival's offer of a lower price. This exchange meant that discounts were disclosed between competitors with the inevitable effect to making it irrational to offer a discount. It followed that the information agreement included an understanding that the participants would not engage in discounting.

Because *Gypsum* involved a balancing of factors, the Court declared that the "*per se*" rule did not govern the legality of exchange of information.[21] While the Court was indeed correct to recognize that the determination of whether an exchange of information incorporated a restraint on the parties' freedom of competitive action required a "reasonable" assessment of conflicting facts and inferences, it is unfortunate that it rejected the *per se* standard for legality. This misdirects the inquiry because it implies that an exchange which has a purpose of restricting competition may somehow remain lawful. This is an illustration of the poverty of antitrust's doctrinal language.

The problem most recently surfaced in the *Exxon* case in the Second Circuit where the exchange involved detailed current salary information and discussions of salary budgets using job descriptions for one participant as benchmarks.[22] The court explicitly concluded that such an exchange in itself was subject to a "rule of reason."[23] The opinion then focused on market definition, existence of market power, and whether demand for workers was inelastic.[24] Only then did the court consider the nature of the information exchanged and found: "The characteristics of the data exchange in this case are precisely those that arouse suspicion of anticompetitive activity under the rule of reason."[25] Unfortunately, the use of the reasonableness label led the trial court, on remand, to focus on market definition rather than the potential function of the exchange and so dismiss the case on summary judgement.[26] Had the case focused on the question of whether the information exchange agreement reasonably implied an understanding that the parties would standardize their wages and so reduce competition for workers, the outcome might well have been different.

B. The Current Poultry and Pork Cases

Assuming the correctness of the allegations in the poultry and pork cases, the information collected and analyzed by Agri Stats goes well beyond what any rational rival would disclose to its competitors absent an understanding that it would be used to restrict competition. This understanding might be explicit and so constitute a distinct element of the overall agreement as the trial court found plausible in *Poultry*, or it might be simply a matter of mutual, tacit recognition that exchanging this kind of information among rivals assumes each would restrain its competitive conduct to increase the profitability of all participants. In *Pork*, the court did not find the allegations of a second agreement "plausible" and so dismissed the complaint even though the exchange of information allegedly correlated with a reduction in production and higher prices to consumer. Exactly the effects that one would predict if the exchange included a restraint on competition.

What is missing in these two decisions, and presumably from the complaints themselves, is a focus on the legality of the information exchange itself. Such exchanges necessarily require an agreement among the parties to share data. It seems "plausible" that if these agreements require parties to exchange the kind of detailed information that no true competitor in a rivalrous market context would reveal, then the parties are "united in an agreement, express or implied, to act together and pursue a common purpose under a common guide. . . to restrict production and increase prices in interstate commerce." [27]

Despite the logic of focusing on the inferences of restraint inherent in the agreement to exchange information, the plaintiffs in both the poultry and pork cases apparently felt it necessary to assert that there is a second agreement to restrict output. Exactly why this compulsion ex-

20 *United States v. U.S. Gypsum*, 438 U.S. 422 (1978).

21 *Id.* at 441, n. 16.

22 *Todd v. Exxon*, 275 F.3d 191, 196-198 (2nd Cir. 2001).

23 *Id.* at 198.

24 *Id.* at 199 -211.

25 *Id.* at 213.

26 *In re Compensation of MPT Employees Antitrust Litigation*, 2008 WL 38876619 (D. N. J. 2008).

27 *American Column* at 275 U.S. 310.

ists is not clear. One likely explanation is that the case law seems to impose a "rule of reason" standard that would require as in *Todd* on remand an assessment of market definitions and proof of some high level of market power even though that was not a feature of *American Column* or *Container Corporation*.

V. PROVING RESTRAINT INHERENT IN AN INFORMATION EXCHANGE AND REMEDY

To violate the Sherman Act, the agreement must involve a restriction on the economic freedom of the parties to pursue their own rational economic self-interest. Proof of such a restraint involves two kinds of evidence.

The first is the nature of the information exchanged itself. Sharing detailed firm specific data, especially forward looking, is unnecessary to enhance general market knowledge. Rather, the likelihood is that it is part of a project to restrain competition in some way even if that restraint remains largely unarticulated. The information itself makes competitive actions by the participant unlikely because their rivals can anticipate the conduct. Such information also provides confirmation of adherence to the restraints on competitive freedom. The basic test is whether this is the kind of information that true competitors would reveal to their rivals.

The second element is the external assessment of the market including both its structure and specific data about prices and volumes. When there is ambiguity as to the legitimacy of the information exchange, evidence of effects on output and price provide important insights as illustrated in *Container Corporation*, but not in the misleading way that *Todd* seems to require. For example, if the parties do not use existing capacity to expand output as prices raise and are exchanging detailed information about the use of capacity, then the inference that the agreement incorporates at least a tacit understanding to restrain competition is compelling.

In defining reasonable exchanges the challenge is again to differentiate between that information which is relevant to gaining a better sense of the overall market conditions and that which primarily serves the interest of the rivals in modifying their competition. The Health Guidelines issued by the DOJ and FTC provide benchmarks.[28] The EU has very similar standards.[29] Both require sharing only of past information that reflects averages and does not provide individual firm data however masked. These standards can provide guidance both in establishing information exchange programs and in evaluating the legality of existing programs. Moreover, they also provide a standard for injunctive relief where some of the information exchanged may be justifiable.

VI. CONCLUSION

Better antitrust doctrinal terminology would provide a clearer basis to evaluate the lawfulness of information exchanges. The pending poultry and pork cases illustrate the ways in which current doctrine governing information exchange misdirect the focus of inquiry away from the merits of the exchange itself. The increasing significance of information exchanges as a means of achieving restraints on competition create a compelling need to define more exactly the issues that need resolution in evaluating the merits of such conduct. The central question is whether an exchange of information entails at least an implicit commitment by the parties to restrain their competition with each other. If it does, the exchange is itself unlawful. There should be no need to show a second, related express agreement to restrict competition.

28 U.S. Dept. of Justice, and F.T.C., Statements of Antitrust Enforcement Policy in Health Care, 50-52(1996) available at https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.

29 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, ¶¶55 -110 (2011) available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.