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THE LEGALITY OF DISSEMINATION OF MARKET DATA BY TRADE ASSOCIATIONS: WHAT DOES *CONTAINER* HOLD?

James M. Kefauver†

Trade associations for many years have operated services, either directly or through arrangements with third parties, for the collection and dissemination of statistics relating to particular industries. Such services typically require each member or subscriber to report information pertaining to certain phases of his own operation, such as cost of raw materials, production, inventory, sales, and prices. This information is then compiled and disseminated, usually in composite form, to other members or subscribers. Until January 1969, when the Supreme Court rendered its decision in *United States v. Container Corporation of America*,¹ the permissible bounds of statistical reporting programs under the federal antitrust laws were relatively clearcut. *Container* has now made them considerably less clear.

I

THE LAW PRIOR TO *Container*

Participation by competitors in statistical reporting was established as legal under section 1 of the Sherman Act² in *Maple Flooring Manufacturers Association v. United States*³ and *Cement Manufacturers Protective Association v. United States*.⁴ In *Maple Flooring* the defendant trade association, composed of twenty-two producers of flooring, operated a system under which members reported weekly on individual sales, specifying dates, quantity, grade, kind of wood, prices received, freight rates, and commissions paid. Members also submitted monthly reports showing production and new orders of various types of flooring. All figures submitted referred only to past transactions. The association compiled the data and disseminated composite figures. Holding that the

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¹ 393 U.S. 333 (1969).

² 15 U.S.C. § 1 (1970). Section 1 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."

³ 268 U.S. 563 (1925).

⁴ 268 U.S. 588 (1925).

government had neither alleged nor proved that there was any agreement among the defendants which affected production or fixed prices, the Supreme Court noted:

It was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry; who gather and publish statistics as to 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 information.⁵

The Court emphasized that "each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record,"⁶ and distinguished⁷ three of its earlier decisions which the government had primarily relied upon.⁸ The unlawfulness of the combinations in those cases, it said,

⁵ 268 U.S. at 583-84 (emphasis added).

⁶ *Id.* at 579.

⁷ *Id.* at 584-85.

⁸ In *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), the members of several associations of retail lumber dealers had agreed to report to the association, among other things, the names of wholesale dealers who sold members' products directly to consumers. The names of the offending wholesalers were placed on a "blacklist" which was circulated among the members of the association. It was held that, although no agreement to refrain from dealing with the listed wholesalers had been shown, a conspiracy to accomplish such a restraint could be "readily inferred" as a "natural consequence" of the circulation list. *Id.* at 612. The Court noted that the record showed that the trade of the listed wholesalers actually had been impeded and that "the natural flow of commerce [had been] interfered with as a direct result of the circulation of the official reports in the manner stated." *Id.* at 614.

In *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), the members of an association of hardwood producers, under a so-called "Open Competition Plan," made daily reports to the association of their sales and shipments, giving full details as to prices, quantities, and purchasers. Price lists and production reports were submitted monthly. Estimates as to certain future activities were also elicited. The association disseminated on a weekly basis the sales data, including the names of purchasers and the prices charged them, and on a monthly basis production and price list information. Monthly meetings were held at which the written reports were supplemented by further exchanges of information and discussions. The Court held that although no specific agreement to restrict trade or fix prices was proved, "the fundamental purpose of the 'Plan' was to procure 'harmonious' individual action among a large number of naturally competing dealers with respect to the volume of production and prices," and that the restraints of business honor achieved conformity to the "tacit understanding that all were to act together under the subtle direction of a single interpreter [the association's manager of

arose not from the fact that the defendants had effected a combination to gather and disseminate information, but from the fact that the court inferred from the peculiar circumstances of each case that concerted action had resulted, or would necessarily result, in tending arbitrarily to lessen production or increase prices.⁹

Although noting that the "[e]xchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world,"¹⁰ the Court in *Maple Flooring* could find no basis in the record for concluding that defendants' concerted action would necessarily result, or had in fact resulted, in an unlawful restraint of trade. The Court specifically held:

We decide only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.¹¹

In *Cement Manufacturers*, which was decided the same day as *Maple Flooring*, the defendants were members of a trade association which had engaged in gathering and disseminating cost and price sta-

statistics] of their common purposes." *Id.* at 411. As to the effect of the plan, the Court concluded that the united action of the members had contributed greatly to the unprecedented price increases experienced for the grades of hardwood in most general use in the year 1919. *Id.* at 409.

United States v. American Linseed Oil Co., 262 U.S. 371 (1923), struck down a "subscription agreement" under which 12 linseed oil producers had agreed to furnish price schedules to an information bureau and to report immediately all their price quotations which deviated from these schedules, including the names of prospective buyers to whom lower prices had been quoted. Sales information, including quantity and terms, was reported daily. The information received by the bureau was made available to members in the form of statistical reports relating to specific transactions. Monthly meetings of the subscribers were held to discuss industry matters. The Court held that the agreement took away defendants' freedom of action by requiring each to reveal "all the intimate details of its affairs," that such action had a "necessary tendency" to destroy competition, and that the "manifest purpose was to defeat the Sherman Act." *Id.* 389-90. Although noting that it was not called upon to say when or how far competitors may go in revealing to each other the details of their affairs, the Court observed that "the ordinary practice of reporting statistics to collectors stops far short of the practice which defendants adopted." *Id.* at 390.

⁹ 268 U.S. at 585.

¹⁰ *Id.* at 582.

¹¹ *Id.* at 586.

tistics generally, and in addition, in gathering and disseminating detailed information pertaining to "specific job" contracts,¹² including price, quantity, and name of purchasers. The Court relied on the rationale of *Maple Flooring* and emphasized the freedom of the members to use the information as they saw fit:

[T]his record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; *and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action.*¹³

Significantly, the Court stated, "[S]uch activities are not in themselves unlawful restraints upon commerce and are not prohibited by the Sherman Act."¹⁴

As to the practice of members' providing each other with information about specific job contracts, the Court said such practices were justified to protect a member's legal rights from the fraudulent contractor who in a rising market might attempt violation of the specific job contract by ordering more cement than needed for a particular job. In this regard the Court observed that the government did not assert that any understanding existed among members concerning their use of this information and that the members were free to act or not to act upon it.¹⁵

The proposition that trade associations may collect and disseminate market information not connected with any agreement to restrain trade was bolstered in *Sugar Institute v. United States*.¹⁶ In that case the Supreme Court stated that "while the collection and dissemination of trade statistics are in themselves permissible and may be a useful adjunct of fair commerce, a combination to gather and supply information as a part of a plan to impose unwarrantable restrictions, as, for example, to curtail production and raise prices, has been condemned."¹⁷

¹² A "specific job" contract was, in effect, an option enabling contractors to purchase cement for a particular job at a set price which could be reduced if the market declined. The supplier, however, was bound to the price even in a rising market. Experience had shown that contractors often abused such contracts by obtaining options from several producers and securing deliveries from each of them, thus receiving at low prices excess cement which could be used on jobs not covered by the contract. 268 U.S. at 594-96.

¹³ *Id.* at 606 (emphasis added).

¹⁴ *Id.*

¹⁵ *Id.* at 603.

¹⁶ 297 U.S. 553 (1936).

¹⁷ *Id.* at 599-600.

Sugar Institute added the notion that, depending upon marketing practices in a particular industry, certain information if made available to producers must also be made available to purchasers.¹⁸ On the other hand, the Court seemed to approve, again depending upon the operations in the market involved, the dissemination of information relating to current and future prices,¹⁹ even though the information programs upheld in *Maple Flooring* and *Cement Manufacturers* had dealt only with past transactions.

Thus the law prior to *Container* with respect to the gathering and dissemination of industry data may be summarized as follows: price and other industry data might be gathered and disseminated by competitors through a trade association or otherwise without violating section 1 of the Sherman Act if the program had no purpose or effect of fixing prices, controlling production, or otherwise restraining trade. The facts of the cases discussed above indicated that information programs were more likely to pass antitrust muster if they dealt only with past transactions, did not identify individual parties or transactions, were available to all competitors, and did not involve meetings, discussions, or comments by any party on the information disseminated. Such programs were deemed permissible under section 1 even though their ultimate result might have been "to stabilize prices or limit production through a better understanding of economic laws,"²⁰ and even though it was recognized that effects on price and production "would naturally flow from the dissemination of that information in the trade."²¹ At no time had the Supreme Court branded such programs as unlawful per se under section 1.²²

II

THE IMPLICATIONS OF *Container*

In *Container* the Supreme Court by a six to three majority held that a reciprocal arrangement among eighteen manufacturers of cor-

¹⁸ *Id.* at 604-05.

¹⁹ *Id.* at 603-04.

²⁰ *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 584 (1925).

²¹ *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588, 606 (1925).

²² In his dissent in *Container*, Mr. Justice Marshall observed that the Court in the past had refused to apply a per se rule to exchanges of price and market information. 393 U.S. at 341. See *Tag Mfrs. Institute v. FTC*, 174 F.2d 452, 463 (1st Cir. 1949), where it was stated that neither *American Column & Lumber Co.* nor *American Linseed Oil Co.* suggested that it was unlawful per se for competitors to agree to an exchange of trade data through reports to a central agency.

rugated containers violated section 1 of the Sherman Act because it had the effect of stabilizing prices. The unlawful combination consisted of defendants' reciprocally providing each other, upon request, the most recent prices charged or quoted to a specific customer. The price quoted was the current price which a prospective purchaser would have to pay the manufacturer. Price exchanges occurred on an infrequent and irregular basis, and often the data exchanged were available from the records of the manufacturers or from the customers themselves. The Court concluded that this practice, characterized as a "somewhat casual" agreement,²³ satisfied the combination or conspiracy element of a section 1 violation.²⁴

Approximately ninety percent of the shipments of corrugated containers from the southeastern United States were attributable to defendant manufacturers. Entry into the market was easy, requiring an investment of \$50,000 to \$75,000. Indeed, even though capacity exceeded demand during the period covered by the complaint, the industry had expanded during the same period from thirty manufacturers with forty-nine plants to fifty-one manufacturers with ninety-eight plants.²⁵ The Court further noted that although the containers varied as to dimension, weight, and color, they were substantially identical no matter who produced them. Demand was inelastic. Sales were based upon price competition, and when it was known that a competitor was charging a particular price, a defendant would normally quote the same or a lower price.²⁶

Mr. Justice Douglas, writing for the majority, stated initially that this case was "unlike any other price decisions we have rendered."²⁷ Douglas observed that it involved an exchange of price information but no agreement to adhere to a price schedule²⁸ as in *Sugar Institute* and *United States v. Socony-Vacuum Oil Co.*²⁹ Unlike the exchange of information in *Maple Flooring*, actual sales to specific customers were identified. Although *Cement Manufacturers* had involved exchange of information as to prices charged specific customers, that case was distinguished. The information there disseminated was held to be necessary to protect the cement manufacturers from fraudulent inducement to deliver excess cement pursuant to specific job contracts.³⁰

²³ 393 U.S. at 337.

²⁴ *Id.* For a discussion of the Court's finding on this point, see Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 227-35 (1969).

²⁵ 393 U.S. at 336.

²⁶ *Id.*

²⁷ *Id.* at 334.

²⁸ *Id.*

²⁹ 310 U.S. 150 (1940).

³⁰ 393 U.S. at 335; see note 12 *supra*.

Douglas said that the result of the reciprocal exchange of information in *Container* was to stabilize prices, although at a downward level.³¹ Continuation of some price competition, however, was not fatal to the Government's case, since interference with the setting of prices by free market forces is unlawful per se.³² In virtually the same breath, however, the Court said that exchanges of price information in some markets may have no effect on a truly competitive price. The *Container* opinion characterized as "irresistible" the inference that the exchanges of price information in question had "had an anticompetitive effect in the industry, chilling the vigor of price competition."³³

Mr. Justice Fortas, in a concurring opinion, stated that he did "not understand the Court's opinion to hold that the exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a per se violation of the Sherman Act."³⁴ He noted that a "theoretical probability" of a practice falling within the range of condemnation of the Court's prior decisions was not enough to establish an unreasonable restraint of trade unless the mere exchange of current price information was to be regarded as so akin to price fixing as to deserve a per se classification.³⁵ Fortas declined to take this step. He did, however, conclude that there was sufficient although not overwhelming evidence in the special circumstances of the case to support a finding of an actual anticompetitive effect.³⁶

In a lengthy dissent concurred in by Justices Harlan and Stewart, Mr. Justice Marshall disagreed with the majority's finding that the record disclosed a purpose or actual effect of restricting price competition. The dissenters were especially critical of the Government's argument that despite overcapacity new companies had entered the market during the period covered by the complaint because they must necessarily have been attracted by the high profits which resulted from stabilization of prices at an unduly high level.³⁷ The minority refused to assume that the downward trend in prices would have been accelerated had the competitors been less informed of each other's prices. Reduced to simple terms, the dissenters' view was that the Government had presented a convincing argument in theoretical terms, but the evidence did not square with the theory. Citing *Maple Flooring*, Marshall stressed that the defendants were free to use the information as

³¹ 393 U.S. at 336.

³² *Id.* at 337, citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

³³ *Id.* at 337.

³⁴ *Id.* at 338-39.

³⁵ *Id.* at 339.

³⁶ *Id.*

³⁷ *Id.* at 345.

they pleased and that the evidence established they had done so in reaching individual pricing decisions.³⁸

Trade associations, business concerns, and the antitrust bar are equally apprehensive about the ultimate thrust of *Container*. Perhaps the most difficult problem is whether the majority's conclusion rests upon a finding of actual or theoretical anticompetitive effect. Although at one point the Court states flatly that "[t]he result of this reciprocal exchange of prices was to stabilize prices,"³⁹ the bulk of its analysis is theoretical, focusing on "tendencies" to be found and "inferences" to be drawn in light of market structure and conditions.⁴⁰

If the majority's decision is considered to be bottomed wholly on economic theory, then a new per se rule has been adopted: the exchange of current price information as to specific customers and transactions violates section 1 when conducted in an oligopolistic market.⁴¹ The majority view raised the specter of per se illegality by invoking the broad language of *Socony-Vacuum*, a case decided subsequent to the information exchange cases preceding *Container*.⁴² Taking this theoretical view of *Container*, not only a new rule, but an entirely new type of per se rule emerges—the *Container* rule would not ban a specific type of concerted action in all cases, but would do so only in certain markets. The Court could not have stated it more succinctly: "Price information exchanged in some markets may have no effect on a truly competitive price."⁴³

Obviously a per se rule of this sort places a burden on business concerns and associations to determine whether a given market can tolerate any sort of information exchanges among competitors without risking a finding of a tendency towards price stabilization. Sophisticated analyses of the structure and conditions of the market would have to be made. If the conclusion that a particular market could tolerate data exchanges should ultimately fail judicial scrutiny (in other words, if defendant's economic analysis is less persuasive than plaintiff's), the *Container* case under this interpretation would serve to brand the ex-

³⁸ *Id.* at 347.

³⁹ *Id.* at 336.

⁴⁰ *Id.* at 337.

⁴¹ In oral argument before the Supreme Court, Assistant Attorney General Edwin M. Zimmerman, in response to Justice Fortas's question whether the Government was seeking a per se rule, replied, "In an industry dominated by a small number of sellers . . . the exchange of current price with respect to particular customers necessarily inhibits price competition." When asked, "Without proof of effect?" he replied, "Yes." BNA ANTITRUST & TRADE REG. REP., No. 384, Nov. 19, 1968, at A-17.

⁴² See notes 2-22 and accompanying text *supra*.

⁴³ 393 U.S. at 337.

change unlawful per se and thereby to preclude defendant from presenting any justification for the exchanges.

Moreover, the per se rule would be less easily administered by antitrust enforcement authorities than those rules previously articulated by the Court. One of the purposes of having per se rules in the first place was to avoid "incredibly complicated and prolonged economic investigation[s] into the . . . industry involved."⁴⁴

On the other hand, a reasonable reading of the majority opinion, coupled with Fortas's concurring opinion, is that no new per se rule was created.⁴⁵ This view focuses on the Court's finding of an actual anticompetitive effect. In other words, the rule of reason would be applied in all price exchange cases, assuming there is no evidence of unlawful purpose or of agreement as to how the information was to be used; a violation of section 1 would be found only upon a showing of an actual anticompetitive effect in the market.

The view that *Container* did not promulgate a new per se rule is buttressed by the Court's failure to overrule expressly or even to narrow *Maple Flooring* and *Cement Manufacturers*. These cases were distinguished on their facts, despite clear statements in both that the ultimate result of the information exchanges there involved was to influence individual action in such a way as to stabilize prices or limit production. It is difficult to square *Container's* treatment of the stabilization effect with that in *Maple Flooring* and *Cement Manufacturers*, and the majority in *Container* must be faulted for its cursory discussion of those cases. The same is true with respect to the majority's treatment of *American Column & Lumber Co. v. United States*⁴⁶ and *United States v. American Linseed Oil Co.*⁴⁷ No real effort was made to point out any salient features of the exchange programs in question there as was done in distinguishing *Maple Flooring* and *Cement Manufacturers*. Instead the majority merely observed that the agreement in *Container* was "analogous," citing in a footnote the finding in *American Column* of a purpose to increase prices and the finding

⁴⁴ Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

⁴⁵ This apparently is the view of the authors of the American Bar Association's updating of the *Report of the Attorney General's National Committee To Study the Antitrust Laws*: "The [*Container*] decision does not hold all exchange of price information unlawful per se, but further restricts the limited circumstances under which price data can properly be shared by competitors." ABA SECTION OF ANTITRUST LAW, ANTITRUST DEVELOPMENTS, 1955-1968: A SUPPLEMENT TO THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS I (Supp. 1968-1970) (footnote omitted).

⁴⁶ 257 U.S. 377 (1921); see note 8 *supra*.

⁴⁷ 262 U.S. 371 (1923); see note 8 *supra*.

in *American Linseed Oil* that the plan had a "necessary tendency" to suppress competition.⁴⁸

That the majority opinion did in fact deal, though rather casually, with the Court's previous decisions in price information exchange cases seems to indicate the continuation of a case-by-case approach in this area rather than the introduction of a per se rule. Why then was it necessary for the majority to inject the per se language from *Socony-Vacuum*? The answer probably is that Douglas drew upon the opinion in *Socony-Vacuum* to underscore the proposition that stabilizing prices, even at a downward level, is as much within the prohibition of section 1 as classical price fixing. Moreover, perhaps because of the scant record in *Container*, consisting mostly of stipulations, the majority may have felt compelled to invoke the broadest possible language dealing with the scope of section 1.

The final judgment entered in *Container* may provide some insight into the Government's view of the case's implications. With respect to sales of corrugated containers shipped from the southeastern United States, defendants were enjoined for a period of ten years from requesting or furnishing to other manufacturers or sellers the most recent prices charged or quoted to identified customers. With respect to defendants' shipments from outside the southeastern United States, however, defendants were merely prohibited from requesting or furnishing such information "for the purpose or with the effect of stabilizing prices, minimizing price reductions or otherwise restraining competition in price of corrugated containers."⁴⁹ Thus from the terms of the final judgment it appears that the Court regards the exchange of current price information as to identified customers to be pernicious only when it in fact produces an anticompetitive effect. To prove its case the Government must show such an effect. Of course it is reasonable to assume that the Government in future cases would take the position, based on *Container*, that in a market in which competitors exchanged current price data as to identified customers, and in which prices were stable, the latter condition resulted from the former practice. In such a case *Container* might serve to shift the burden of proof to the defendants to show that stable prices were the result of market factors other than the exchange of price data. Consequently, it may be expected that in future cases of the *Container* type the defendants will develop a much more extensive record on market conditions than was before the Supreme Court in *Container*.

⁴⁸ 393 U.S. at 337-38 n.3.

⁴⁹ 1970 TRADE CAS. ¶ 73,091, at 88,267.

A final word about the implications of *Container* for trade associations is in order. All but one of the defendants in *Container* were members of the Fiber Box Association, which was not named in the complaint as a defendant or co-conspirator. This association collected and disseminated statistical data which did not pertain to specific transactions but rather were designed to indicate recent price trends for corrugated containers. In oral argument before the Supreme Court, Government counsel pointed out that this was not a case that "seeks to outlaw the availability of price information. The trade association is not challenged, price manuals are not challenged. . . . This is a case which claims that defendants through a combination have become too precise and that precision inhibits competition."⁵⁰ Thus nothing in the *Container* opinion itself or in the Government's presentation of its case could be taken as a frontal attack on the statistical reporting activities of trade associations.

III

CASES SUBSEQUENT TO *Container*

Two district court decisions subsequent to *Container* provide some indication of how that decision will be applied. In *United States v. FMC Corp.*⁵¹ the Government alleged that FMC's exchange of price and other market information in meetings with its competitors in the chlor-alkali industry violated section 1. More specifically, the Government charged that these meetings led to stabilization of the price of caustic soda, for which demand was relatively inelastic and which was in long supply during the period covered by the complaint. In 1960 the nine original defendants⁵² accounted for eighty-eight percent of the caustic soda capacity of the United States.⁵³

Early in its discussion, the court observed that in arguing by analogy from *Container*, "it is well to keep in mind the admonition of the United States Supreme Court in *Maple Flooring Manufacturing [sic] Ass'n v. United States* . . . that 'each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record' . . ."⁵⁴ The court noted that this case did not involve the

⁵⁰ BNA ANTITRUST & TRADE REG. REP., No. 384, Nov. 19, 1968, at A-13.

⁵¹ 306 F. Supp. 1106 (E.D. Pa. 1969).

⁵² Eight chlor-alkali producers named as defendants in the original complaint entered into consent decrees prior to trial. *Id.* at 1109.

⁵³ *Id.* at 1113.

⁵⁴ *Id.* at 1142 (citation omitted).

relatively routine and systematic exchanges by competitors of statistical information through the agency of a trade association, as did *Maple Flooring* and *Cement Manufacturers*. Instead, information exchanges "occurred only when necessary to impart information concerning departures from the established list price of caustic soda or disparities in quoting freight rates which portended industry-wide repercussions if not controlled in their impact."⁵⁵ The court concluded therefore that defendants had violated section 1 of the Sherman Act not only by exchanging information in a manner and with an effect proscribed by the Supreme Court in *Container*, but also that

FMC and its competitors did more than exchange information with one another under an implied agreement to supply information whenever requested, and use the information obtained to stabilize the market. The record of this case disclosed instances of direct assurances, as well as implied assurances and agreements, that "the disposition of men 'to follow their most intelligent competitors'" would be reinforced by a concert of action, in which all would willingly participate, to restrain the normal competition and fluctuations of the market place.⁵⁶

Apparently *FMC* added no gloss to *Container*, for the court found an agreement violative of section 1 independent of any violation based on *Container*. Something should be said, however, of the court's characterization of *Container* as holding that the defendants used the information obtained from one another to stabilize the market.⁵⁷ This statement implies that the *Container* defendants exchanged price information for the purpose of stabilizing prices throughout the industry. The majority in *Container* of course found an *effect* of price stabilization, but nothing in the opinion indicated that they had found a *purpose* on the part of defendants to achieve such an effect.

The final judgment entered in *FMC*, although prohibiting FMC from reporting its prices and other data to competitors, contained the following proviso:

Nothing contained in this Judgment shall be deemed to enjoin or restrain Defendant from:

. . . .

Furnishing to any trade association, other organization or industry group, information in connection with any otherwise lawful project, study, analysis, survey, or the like; *provided* that such information is furnished upon the condition that it be held in confidence and not be made known or available to any other Person

⁵⁵ *Id.* at 1146.

⁵⁶ *Id.* at 1152 (footnote omitted).

⁵⁷ *Id.* at 1142.

except as part of a composite containing other similar information⁵⁸

The express permission granted FMC to participate in data exchanges resulting in the publication of composite figures constitutes at least tacit recognition by the Government of the legitimacy of such activity. What the Government apparently was concerned with in both *Container* and *FMC* was the direct exchange of information so precise that it would necessarily result in price stabilization. The Government focused on this point in oral argument in *Container* and the court in *FMC* noted both that the information there exchanged as to selective discounts was not a matter of "precise common knowledge immediately upon [the discount's] occurrence," and that chlor-alkali producers "apparently did not consider indirect methods of communication precise enough to insure that they all would know the exact nature of the transactions."⁵⁹

The second case in which *Container* was discussed in some depth is *Wall Products Co. v. National Gypsum Co.*⁶⁰ In this private treble damages action the plaintiffs, who were customers of the defendant gypsum wallboard manufacturers, charged that defendants had violated the Sherman Act by (1) verifying for each other, pursuant to a mutual understanding, the prices which they reportedly had offered or charged to particular customers, and (2) withdrawing by concerted action certain exceptions to their price lists and terms of sale. With respect to the first charge, plaintiffs contended that the case was controlled by *Container*.

Defendants' tacit understanding whereby they mutually agreed to withdraw certain price concessions was found by the district court to be a violation of section 1 of the Sherman Act; but no violation was found in defendants' price verification activities. Although Judge Zirpoli noted that the gypsum wallboard market possessed many of the same characteristics as the corrugated container market—oligopolistic in structure, homogeneous product, excess capacity, inelastic demand, and sales turning mostly on price—he ruled that the case fell within what he called the "exception of *Container*."⁶¹ Judge Zirpoli said that "by recognizing and distinguishing *Cement Manufacturers*, *Container* excepts a case in which sellers exchange price information relating to

⁵⁸ United States v. FMC Corp., 317 F. Supp. 443, 446 (E.D. Pa. 1970) (emphasis in original).

⁵⁹ 306 F. Supp. at 1144.

⁶⁰ 326 F. Supp. 295 (N.D. Cal. 1971).

⁶¹ *Id.* at 312.

specific customers where there is present a 'controlling circumstance.'"⁶² The controlling circumstance in *Cement Manufacturers* was the cement producers' desire to protect themselves against fraudulent inducements to deliver excess cement under "specific job" contracts.⁶³ In *Wall Products*, the court found two controlling circumstances: (1) defendants' need to avoid the consequences of fraudulent misrepresentations by buyers under the "job price protection" practice of the wallboard industry (which was similar in effect to the "specific job" contract in the cement industry), and (2) the need for defendants to obtain accurate price information to avail themselves of the Robinson-Patman defense of having met competition in good faith.⁶⁴

Most of the court's opinion was directed at the latter controlling circumstance, observing that the Supreme Court in *Container* had made no reference whatever to the Robinson-Patman defense.⁶⁵ The court stressed that the record was replete with evidence that the purpose of the price verification system, operated on the advice of defendants' respective attorneys, was to achieve compliance with the Robinson-Patman Act by meeting but not beating competition when selling below list prices, and that verifications occurred only after a defendant had exhausted other available means of confirming reported deviations by competitors from their list prices. Significantly, Judge Zirpoli concluded that the price verification did not violate section 1, even though he expressly determined that it "had a tendency to stabilize price in that it retarded any downward spiral in price deviations."⁶⁶

In *Wall Products* the court confronted the problem of striking a balance between the prohibitions of section 1 of the Sherman Act and the requirements of section 2(b) of the Robinson-Patman Act. It may be that Judge Zirpoli went too far in approving defendants' activities on Robinson-Patman grounds at the expense of Sherman Act considerations, for there is a serious question whether a seller, in order to qualify for the good faith meeting of competition defense, must contact a competitor directly to verify prices reportedly quoted by the latter. The *Wall Products* decision also raises the question of the scope of the "exception of *Container*" it describes. At the core of the Supreme Court's holding in *Container* was the finding that the price exchanges had the effect, either actual or theoretical, of stabilizing prices. It therefore is doubtful that in its one-sentence treatment of *Cement*

⁶² *Id.* at 312-13.

⁶³ See note 12 and accompanying text *supra*.

⁶⁴ 15 U.S.C. § 13(b) (1970).

⁶⁵ 326 F. Supp. at 312.

⁶⁶ *Id.* at 311 (footnote omitted).

Manufacturers the majority in *Container* intended to carve out an "exception" as such. Even if such an exception was indeed intended, however, in view of the Court's sensitivity to the tendency of exchanges of price information to chill the vigor of price competition, it would appear that the defendants should have to present substantial evidence of having been systematically victimized by customer fraud and to show that the exchange of price information was the only practicable solution to the problem.

CONCLUSION

Container placed a new emphasis on the effect of competitors' exchange of market information. Although the Supreme Court distinguished on their facts *Maple Flooring* and *Cement Manufacturers*, cases that subordinated the stabilization effect to the interest of competitors' having full knowledge of the marketplace, the broad teaching of *Container* seems to be that if exchanges of price information have the effect of stabilizing prices or otherwise interfering with the free play of market forces, they violate section 1 of the Sherman Act. And a violation may be found even if the exchanges are not shown to have been part of a larger scheme to manipulate the market, but merely to have provided businessmen with information used in individual decision making.

The Court's obvious sensitivity to the possible anticompetitive effects of exchanges of price information might be taken as heralding a new per se rule. In my view, the Court in *Container* did not lay down a per se rule, even though it did use some indicative language. A reading of *Container* as a whole seems rather to suggest that the majority, subjecting the price exchanges to analysis under the rule of reason, found them in violation of section 1 under the circumstances. Nor should the per se approach be applied in cases involving exchanges of price information, for full knowledge of the market, including price factors, is a legitimate business interest. For a plaintiff to establish that a collective effort to obtain such information, absent a showing of unlawful purpose, produced an anticompetitive effect, he should be required to develop a complete record as to the mechanics of the exchange and especially as to the structure and conditions in the particular market. Further, it should not be enough for a plaintiff to show merely that prices in the industry were stable; he should be required to show that defendants' exchange of price information contributed appreciably to such stability.

Trade associations which gather and disseminate market information on behalf of their members should study their respective industries to determine whether such a program is likely to hinder the free play of market forces and particularly whether the program may affect prices. In industries likely to be considered concentrated, it might well be that no exchanges of price information are permissible. In industries not likely to be considered concentrated, information exchange programs should be organized and operated with a view towards eliminating any possibility of their affecting the overall market. In this connection, trade associations should consider the following factors in their efforts to assess the possible effects of a program on the market: whether the information disseminated pertains only to past prices or transactions, whether the information reveals, directly or indirectly, data pertaining to individual competitors and particular transactions, and whether the information is available to all parties who might need it to compete effectively. It is advisable that the association employ a third party to run the program, and that it be run in such a way as to preclude direct communications or discussions of the information by the members. In addition, the information disseminated should be limited to raw statistics; comments or recommendations by the association or a third party running the program could be construed as fostering uniform action.

At the very least, the short term effect of *Container* should be to cause trade associations to take a hard look at market information programs in terms of anticompetitive effects. As to the long term significance of the case, Mr. Justice Cardozo said it all: "Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully."⁶⁷

⁶⁷ B. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* 29 (1921).