THE ANTITRUST IMPLICATIONS OF STATISTICAL REPORTING BY TRADE ASSOCIATIONS: COST INDEXING IN AN INFLATIONARY ECONOMY

By ARTHUR L. HEROLD*

The businessman must have accurate factual information in order to make intelligent decisions. Governmental data is helpful but too often such information is incomplete, obsolete, or compiled in such a way that it is useless. In an effort to satisfy this continuing need of the businessman, trade associations have adopted as one of their primary functions the collection and dissemination of reliable information about industry.[1] Statistical reporting is the name that has been given to such trade association activities.

Justice Holmes very early recognized the value of statistical reporting activities, stating that "[t]he ideal of commerce [is] an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future on both sides."[2] Further, the ideal association statistical reporting procedure, which would facilitate such planning in the management of business affairs, has been said to possess the following attributes:

> It does not order, it advises. It does not coerce, it persuades. It does not issue mandates or even instructions. It uses only the moving eloquence of a reasoned appeal to the self-interest of its members. It does not tell its members what they must do. It tells them what, if influenced by a decent regard for their own interest, they will be glad to do. It assumes that its members are intelligent men, that they can think about the problems of their business, and if the facts out of which these problems arise are placed fairly before them, and if the significance of these facts is pointed out, a proper and profitable line of action will result.[3]

Thus, statistical compilation and reporting have been recognized as valuable business tools, and in this era of inflation and complex nation-wide marketing, statistical reporting by trade associations, particularly with regard to costs, will have greater impact than ever before.

Notwithstanding the overwhelming belief that statistical reporting facilitates the exercise of good business judgment, the dissemination of price-

* Partner in Webster, Kilcullen & Chamberlain, Washington, D.C. Tulane University (A.B., 1963; LL.B., 1966). Member of the District of Columbia Bar.

1. B. KIRSH, TRADE ASSOCIATIONS IN LAW AND BUSINESS 34 (1938). *See also* Kern, *Price Reporting by Trade Associations*, 6 ABA SECTION OF ANTITRUST LAW 62 (1955), where it was noted that a Chamber of Commerce survey revealed that approximately 75% of the trade associations surveyed engage in some form of statistical activity.

2. American Column & Lumber Co. v. United States, 257 U.S. 377, 412 (1921) (dissenting opinion). A similar comment was made by Justice Brandeis in his dissenting opinion. *Id.* at 415.

3. Meade, *Lawful Restraint of Trade Through Education*, THE ANALYST 252 (1929).

related information has, in some cases, been held to be an unreasonable restraint on competition in violation of section 1 of the Sherman Act.[4] Thus, any statistical reporting program, before undertaken, must be carefully constructed so as not to run afoul of the antitrust laws. This, however, has proven to be a difficult task for two reasons: (1) uncertainty as to when the Sherman Act will be applied;[5] and (2) the fact that only seven leading cases exist which involve the exchange of price information,[6] only one of which has been decided in the last 25 years.[7]

Spiraling inflation has caused pricing problems in virtually all industries, stimulating the development of new statistical reporting programs. Perhaps the hardest problems to solve are those of manufacturers which must bid on contracts for delivery of products at future dates. In such situations, changes in material and labor costs between the date of the contract and the date of delivery pose a particular problem because such changes may be beyond the control of the contracting parties. This uncertainty as to future material and labor costs has prompted some industries to attempt to develop procedures to minimize the uncertainty. One such development has been the industry cost index,[8] based on statistical data derived from association members and available for use in future pricing decisions.

Cost indexes could solve the pricing dilemmas of many industries burdened by inflation. However, as previously indicated, before any statistical reporting program is implemented, it should be carefully scrutinized to determine whether it meets the tests developed in the cases interpreting the Sherman Act. Cost indexes are intimately related to pricing decisions, and the Supreme Court's preoccupation with price restraints as violating section 1 of the Sherman Act is reflected in the recent statement that "[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition."[9]

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4. 15 U.S.C. §1 (1970). Some of the cases which have been held to violate the Sherman Act are American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); United States v. Container Corp. of America, 393 U.S. 333 (1969).

5. Fly, *Observations on the Antitrust Laws, Economic Theory and the Sugar Institute Decisions: I*, 45 YALE L.J. 1339 (1936).

6. 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. Ass'n v. United States, 268 U.S. 563 (1925); Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925); Sugar Institute v. United States, 297 U.S. 553 (1936); Tag Mfrs. Institute v. FTC, 174 F.2d 452 (1st Cir. 1949); United States v. Container Corp. of America, 393 U.S. 333 (1969).

7. United States v. Container Corp. of America, 393 U.S. 333 (1969).

8. A cost index is a device which shows fluctuations in the price of a fixed group of goods over a period of time. In most indexes, a base period is designated and an assigned value of 100 is given to the base period prices. Then periodic reports on price changes are made with the index increased or decreased accordingly, always reflecting changes over the base period. Cost increases can then be taken into account by sellers when making future pricing decisions.

9. United States v. Container Corp. of America, 393 U.S. 333, 338 (1969).

A determination, then, as to whether a cost indexing program could be an unreasonable restraint on competition requires not only an examination of whether it meets the well-established requirements for statistical reporting programs, but also an assessment of whether the program might be construed as an "informal" restraint on competition.

I. Basic Criteria for Statistical Reporting Programs

Several guidelines have emerged from the line of major cases on statistical reporting, and must be observed if the exchange of information between members is to be considered reasonable. Thus, a cost index program must be administered so as to clear each of the hurdles established by prior decisions. While the purpose of this article is not an exhaustive analysis of the development of the law of statistical reporting, a discussion of some of the major cases establishing landmark principles may prove helpful. Additionally, there have been some recent Advisory Opinions issued by the Federal Trade Commission reaffirming these earlier-established requirements for proper statistical reporting programs.

American Column & Lumber Co. v. United States[10] and *United States v. American Linseed Oil Co.*[11] were the first of the line of major cases to be decided by the Supreme Court. In both cases, the Court concluded that the exchange-of-information program in question constituted a combination and conspiracy in restraint of interstate commerce.[12] The Court found objectionable both the secrecy in the reporting of the data and the requirement in *American Column & Lumber* that members give estimates of future production, expected shut-downs, market trends, and prices. The Court was also disturbed by the fact that the association in *American Column & Lumber* provided analyses of the statistics published. Accordingly, the Court held that the program violated section 1 of the Sherman Act.

In order to comply with the previous two judicial opinions, the Maple Flooring Manufacturer's Ass'n began reporting only those prices which dealt exclusively with past and closed transactions. The names of members and purchasers were even omitted from the Association reports but these assembled statistics still received extensive publicity. The Supreme Court, in *Maple Flooring Manufacturers Ass'n v. United States*,[13] found no illegal agreements or attempts to fix prices.[14] This case is recognized as establishing the legality of reporting cost figures so long as the data collected con-

10. 257 U.S. 377 (1921).
11. 262 U.S. 371 (1923).
12. 257 U.S. at 410; 262 U.S. at 389. The data here exchanged included information about prices, inventories, sales, and other basic production data.
13. 268 U.S. 563 (1925). *See also* the companion case, Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925).
14. 268 U.S. at 578.

cerns past transactions, is compiled by a third party, *e.g.*, the association, and is disseminated in the form of composite figures which in no way reveal the identity of individual companies or transactions.[15]

In *Sugar Institute v. United States*[16] the Court condemned a price reporting plan under which sellers announced price increases in advance. The increases were ostensibly delayed for a short period to permit buyers to purchase at the old price. In practice, however, the delay also served as a "testing period"—if other sugar sellers did not follow a price change, it would be retracted. It is important to note, however, that the Court did not condemn the statistical reporting system, even though that system reported advance prices. Rather, the Court found only the following aspects of the program objectionable:

> 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.[17]

Thus, a statistical program requiring that members adhere to published statistics may be struck down as an unreasonable restraint on competition.

The most recent Supreme Court case involving an exchange of statistical data is *United States v. Container Corporation of America*.[18] Although the case did not involve an association statistical reporting program, it is important to associations because of the principles involved. Pursuant to an informal understanding, each defendant, anticipating the availability of reciprocal information upon request, furnished data to other manufacturers concerning the most recent price charged in specific sales to identified customers. It is important to note also that several factors in the market structure of the container industry served to facilitate interdependent pricing: (1) its generally oligopolistic structure; (2) product homogeneity; (3) excess capacity; and (4) inelastic demand.[19] The Court held that in this set of circumstances "[t]he 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."[20]

The Federal Trade Commission, although recently issuing Advisory Opinions which sanction the use of statistical reporting programs, has nevertheless urged caution in the use of these programs.[21] These Opinions

15. G. WEBSTER, THE LAW OF ASSOCIATIONS §8.02[2] (2d ed. 1975).
16. 297 U.S. 553 (1936).
17. *Id.* at 601.
18. 393 U.S. 333 (1969).
19. Note, *Antitrust Law—Reciprocal Price Information Exchanges*, 47 N. CAR. L. REV. 881, 882 (1969).
20. 393 U.S. at 337.
21. Advisory Opinion Digest No. 162, [1967-70 Transfer Binder] TRADE REG. REP. ¶18,168 (1968); Advisory Opinion Digest No. 306, [1967-70 Transfer Binder] TRADE REG. REP. ¶18,584 (1968).

are beneficial in that they reassert the basic criteria which must be observed if a statistical reporting plan is to survive an antitrust attack. For example, in one opinion which dealt with the topic of permitting the exchange of labor contracts among association members, the following antitrust hazards were identified:

> Statistical reporting plans which involve the collection and dissemination of data related to future prices are not illegal per se. However, experience in other cases indicates that an association's price reporting plan which involves future or advance prices, particularly when that plan invites an industrywide pricing policy, may provide the basis for an inference of an agreement or combination to fix prices in violation of Section 5 of the FTC Act. Since labor costs represent a very significant element bearing upon the future price of milk, an agreement among competitors as to wage rates would be illegal, since it would have the effect of fixing the price of milk. In essence, it is the potential danger inherent in the reporting plan which is related to future prices that prompts the Commission to suggest that it be used with extreme care.[22]

Thus, statistical reporting programs which directly affect future pricing decisions must necessarily be well-constructed. As will be seen, this standard also applied to cost indexes.

One of the more recent Federal Trade Commission Advisory Opinions regarding a proposed statistical reporting plan was issued to the Knitted Textile Ass'n on March 7, 1974, approving a plan for collecting data.[23] Pursuant to this plan, the data collector, required by the Opinion to be an independent accounting firm, would collect no data on prices or future projections, would retain individual company data in confidence, and would distribute only composite industry data.

In another Advisory Opinion, released August 5, 1974,[24] the Federal Trade Commission answered an association's request for advice regarding a proposed statistical survey exploring consumer and customer attitudes toward the packaging of cookware products. The Commission stated that it would not initiate proceedings against the association unless the survey resulted in an association policy on packaging which had a coercive effect on members who elected not to follow it. The Commission further stated that in the event that access to the aggregate data became essential to compete in the industry, non-members were to be allowed to receive such data upon payment of a reasonable fee.

These Advisory Opinions make it clear that even in view of the *Container Corp.* case, properly conducted statistical programs are still appropriate trade association functions. However, the cases and Opinions

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22. Advisory Opinion Digest No. 162, *supra* note 21.
23. 3 TRADE REG. REP. ¶20,548 (1974).
24. 3 TRADE REG. REP. ¶20,680 (1974).

require that at least these criteria be observed when conducting such programs:

> 1. Participation in the program, both in collecting the data and in putting the reported data to practical use, should be voluntary.
> 2. Non-members of the association should be allowed to participate in the association program, though a reasonable price may be charged them.
> 3. Data collected should be of past transactions or activities.
> 4. Data should be collected by an independent (not connected with any one company) third party.
> 5. The confidentiality of an individual company's data should be preserved.
> 6. After data has been collected, it should be compiled in composite form so as to conceal the identity of specific companies and specific transactions.
> 7. The data should be distributed in composite form.
> 8. The composite data should be available to all those with a valid business reason for the information.[25]

II. INDEXING

Assuming that a cost index program could be administered in accordance with the above criteria, it does not automatically follow that such a program would be unassailable under the Sherman Act. These criteria serve only as a base from which a court could launch a further inquiry as to whether a cost index's intimate relation to pricing decisions might not render it an unreasonable restraint on competition. After all, the purpose of an index is to assist members in determining what price to charge, and could in some circumstances be considered an "informal manner to restrain competition."[26] Analysis of a hypothetical cost indexing plan will assist in pointing out the antitrust difficulties which might be encountered. Described below, therefore, is a hypothetical cost indexing program which might be implemented by the typical manufacturers' association.

> 1. First, the association draws up a BILL OF MATERIALS, which is simply a list of seven or eight components of a typical member-manufactured product. The members then report to the association the cost figures of these seven or eight items. The BILL OF MATERIALS thus becomes the basic tool in determining cost fluctuations, and ensures that each periodic price/cost review involves the same group of materials.
> 2. The association then establishes a base period and price/cost ratio by using the following system:

25. G. WEBSTER, THE LAW OF ASSOCIATIONS §8.02[5] (2d ed. 1975); Comment, *Antitrust: Agreement to Exchange Price Information Violates Sherman Act*, 54 MINN. L. REV. 206, 209-10 (1969).

26. United States v. Container Corp. of America, 393 U.S. 333, 338 (1969).

A.(1) Participating firms compute the cost of the BILL OF MATERIALS (excluding labor costs) on December 15, 1972 and, 20 months later, on August 15, 1974. The August 15, 1974 cost of materials becomes the BASE COST.
(2) Firms then report to the association the increase in these material costs over the 20-month period AS A PERCENTAGE INCREASE (%M).
B.(1) Participating firms compute the selling price of these materials (fully assembled, with labor) on December 15, 1972 and on August 15, 1974.
(2) Firms then report to the association the increase in this SELLING PRICE over the 20-month period AS A PERCENTAGE INCREASE (%S).
C. The association computes the AVERAGE percentage increase in selling price (AVERAGE %S) and compares it to the AVERAGE percentage increase in cost of materials (AVERAGE %M). This comparison takes the form of the PRICE/COST RATIO:

$$\frac{\text{AVERAGE \%S}}{\text{AVERAGE \%M}}$$

The resulting figure is rounded downward to the nearest 1/10, *i.e.*, .72 becomes .70. This figure is the PRICE/COST RATIO for the current period, and should be updated every 12 months.

3. The association then establishes procedures for the computation and reporting of a monthly price index:

A.(1) Each month participating firms report to the association the TOTAL PERCENTAGE INCREASE in the cost of the basic BILL OF MATERIALS, over the cost on August 15, 1974.
(2) Reporting is done on a standard form supplied by the association. This form is submitted by the 25th of each month, based on current material costs as calculated on the 15th of that month.
B.(1) The association averages the total percentage increase in material costs over the August 15, 1974 BASE COST.
(2) The month's price index is computed by multiplying the AVERAGE total percentage increase by the current PRICE/COST RATIO (for example, .70) and adding the result to a base index of 100 (for August, 1974).

EXAMPLE: (May 15, 1975)

—AVERAGE TOTAL PERCENTAGE INCREASE IN MATERIAL COSTS OVER BASE PERIOD	20
—MULTIPLY BY CURRENT PRICE/COST RATIO	X .70
	=14
—ADD TO BASE INDEX OF 100	+100
—CURRENT PRICE INDEX	+114

(3) After circulation, the association publishes the resulting PRICE INDEX by the 1st of the following month.
Thus, for example, if the prior selling price were $2,000, the new suggested price would be $2,280.

It is important to note that a program structured in this manner satisfied, on its face, a number of the prerequisites for statistical reporting plans listed above: (1) the data collected is of past transactions or activities; (2) data is collected by an independent third party; (3) data is compiled and distributed in composite form; (4) the confidentiality of an individual company's data is preserved; and (5) there is no requirement of adherence to the published cost increase index. In addition, the other prerequisites can easily be observed if the program is properly carried out.

One means by which manufacturers can put a cost increase index to practical use is in an escalator clause contract. In such a contract, the parties agree to the establishment of an initial price or rate. They then agree that the price will be adjusted in proportion to the increase or decrease in the price index, and thus the final selling price will be determined. This type of arrangement is very useful for manufacturers who contract to manufacture and deliver at a future date or who seek to enter long-term requirement contracts. In addition, the index could be used by all members to determine the amount by which they should increase their present selling price over the base price. The question remains, however, whether these applications of the cost index, or any other applications of the index, constitute an unreasonable restraint on competition.

In situations where the index is used in conjunction with escalator contracts, the inference that competition is preserved could be easily, but perhaps mistakenly, settled upon. Competition would continue to exist in the establishment of the initial price, and the use of the index to arrive at sales is "mechanical and once established, cannot be manipulated by either party."[27] In this situation, the index could perhaps be considered only half a price-fix. In an inflationary economy, however, substantial competi-

27. *The Use of Price Indexes in Escalator Contracts*, MONTHLY LABOR REVIEW 948 (Bureau of Labor Statistics, August, 1963).

tion may revolve around the question of which manufacturer will absorb more of the increased costs rather than pass them on to the purchaser. Existence of an industry cost increase index might, to a substantial degree, eliminate this element of competition, since industry members would be aware that their competitors would be likely to observe with them the index increase.

Alternatively it can be argued that since competition is preserved in establishing the initial price, and since any other non-trade association-established index, *e.g.*, the Consumer Price Index or Wholesale Price Index, could be used for the same purpose, the establishment of the industry index does not inhibit competition. Further, it could be argued that the index makes the delivered price more accurate, basing it on that particular industry's predicted cost increases. Such an argument fails, however, to overcome the two factors previously mentioned: (1) one element of competition is the willingness to absorb increased costs; and (2) if all of an industry's members participate in a cost increase indexing program, each will use the index increase with the presumptive knowledge that his competitors (the other participating members) will likewise use the index. Since the association to which all the members belong has established the index, it is easier to infer an agreement to adhere to this index as opposed to some independently established index like the Wholesale Price Index. Thus, an indexing program may be precisely the "informal" manner of restraining competition which the Supreme Court in the *Container Corp.* case indicated would be condemned.[28] It would also be difficult to refute the contention that if the association published an average selling price for the prior period (which was established as a legitimate subject of statistical survey in *Maple Flooring*[29]), this statistic together with the index increase would invariably lead to near-identical selling prices. Thus, even absent an express agreement, a court may determine that such a combination of statistical reports is a price-fix and per se violation of section 1 of the Sherman Act,[30] or an unreasonable restraint on competition in violation of section 1.

It was stated earlier that a cost index could be used simply to inform members of the industry and others of the average increase in the cost of materials for a certain period. This service would be particularly important to smaller industry members, who for financial reasons cannot, before executing each new contract, independently determine their material cost increases. But this function, too, may lead to anticompetitive effects. After the latest index is published, one manufacturer computes his costs and finds that his actual cost increase was less than the index increase. A second manufacturer discovers that his cost increase was above the index

28. 393 U.S. at 338.
29. 268 U.S. at 586.
30. United States v. Trenton Potteries, 273 U.S. 392 (1927).

amount. The manufacturer below the index knows that to remain competitive in future transactions, he need not lower his price; in fact, he could raise them to be equivalent to the index increase: "[r]ecipients of a report concerning average prices may be expected to raise prices that are below the reported average."[31] The second manufacturer, whose costs were above the index increase, realizes that to remain competitive, he must lower his price a certain percentage. The result is that prices stabilize at or near the most recent average selling price plus the index increase, and "[s]tabilizing prices as well as raising them is within the ban of §1 of the Sherman Act."[32]

Note that it does not always automatically follow that an activity which is anticompetitive is a violation of the Sherman Act. Section 1 of that Act states that "[e]very contract, combination or conspiracy in restraint of trade" is prohibited.[33] Early Supreme Court decisions construed this declaration as an absolute prohibition of anticompetitive activities.[34] However, in *Standard Oil of New Jersey v. United States*,[35] the Supreme Court declared illegal only those activities which *unreasonably* restrain trade. Thus, each case must be examined to determine whether under its particular circumstances the alleged violative conduct constitutes an unreasonable restraint of trade—unless the conduct constitutes a per se violation of the Sherman Act.[36]

Mr. Justice Douglas' majority opinion in *Container Corp.* leaves some question as to whether the exchange of the price information there involved was illegal per se. One commentator has concluded that a per se rule was not intended, stating:

> A cursory reading of the opinion suggests that the *per se* rule has been extended to the practice of exchanging price information. Arguably, since nothing in the opinion expressly negates such a reading and since the

31. Comment, *Trade Association Statistics and the Antitrust Laws*, 18 U. Chi. L. Rev. 380, 382 (1951).

32. United States v. Container Corp. of America, 393 U.S. 333, 337 (1969).

33. 15 U.S.C. §1 (1970).

34. Northern Sec. Co. v. United States, 193 U.S. 197 (1904); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

35. 221 U.S. 1 (1911).

36. The courts have recognized that

> certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

Among the activities deemed unlawful per se are division of markets, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir.), *aff'd*, 175 U.S. 211 (1899); group boycotts, Fashion Originators Guild v. FTC, 312 U.S. 457 (1941); tying arrangements, International Salt Co. v. United States, 332 U.S. 392 (1947); and most importantly, price fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1939).

> Court appears to establish some sort of relationship between *Socony* and the instant case, one might indeed conclude that a new *per se* rule has been announced. However, a reading of the opinion which is more consistent with the actual thrust of the majority's decision suggests that the rule of reason inquiry, rather than the *per se* approach, was applied.[37]

Additionally, there is direct language in the opinion implying that a per se test would be inapplicable. The Court's statement that "[p]rice information exchanged in some markets may have no effect on a truly competitive price"[38] strongly suggests the continued application of the "rule of reason" approach and negates any idea that a per se rule was intended.

If subsequent cases do define the *Container Crop.* case as holding the exchange of price information a per se violation, the opinion would be so sweeping as to make it "hazardous to furnish price data to newspapers or trade journals."[39] Considering that the Supreme Court failed to apply a per se rule in its previous cases, and that "[i]n many ways the factual pattern considered by the Court in *Container Corp.* constitutes the least persuasive record of price-fixing and manipulation that can be found among all such cases,"[40] it follows that the "rule of reason" should continue to be the test in statistical reporting cases.

The "rule of reason" approach requires that the alleged violative conduct be examined not in a vacuum, but in its factual context. The *Container Corp.* case is very useful in establishing the guides one must look for on the road to a determination of whether a particular information exchange in an unreasonable restraint of trade in violation of the Sherman Act. Factual analysis is the core of any antitrust consideration under the rule of reason.

In the *Container Corp.* case, the Court was analyzing an oligopolistic market characterized by a fungible and standardized product.[41] In such a situation, an anticompetitive effect may result from the dissemination of some forms of price information.[42] For example, in a one-product industry, like the corrugated container industry, competition will be almost solely over price.[43] Dissemination of a cost increase index followed by stabilized

37. Note, *Antitrust—Exchange of Price Information In Violation of Section 1 of the Sherman Act*, 31 OHIO ST. L.J. 182 (1970). The same uncertainty as to whether the Court applied a per se text was expressed in Note, *Antitrust Implications of the Exchange of Price Information Among Competitors: The Container Corporation Case*, 68 MICH. L. REV. 720, 731-33 (1970). However, the conclusion was that the Court did not mean to condemn all attempts to improve market knowledge through price exchanges.

38. 393 U.S. at 336.

39. Hale, *Communication Among Competitors*, 14 ANTITRUST BULL. 63, 69 (1969).

40. Note, *Antitrust Implications of the Exchange of Price Information Among Competitors: The Container Corporation Case*, 68 MICH. L. REV. 720, 725 (1970).

41. *Id.* at 727. .

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

43. *See* Sugar Institute v. United States, 297 U.S. 553 (1936).

prices, even at an upward or downward level, would likely be condemned for the reason that it eliminates the only source of competition—price. This would be particularly sound reasoning in a bad economy where decreasing demand would normally cause prices to drop, but where, because of adherence to the cost index increases, prices are kept artificially high. It would be in this type of market, characterized by one or a few fungible products, that each manufacturer would be charged with being conscious of the probability that his competitor's price would be based almost solely on past selling prices plus the increase suggested by the index of the trade association to which all or most of the competitors belong. It is only a simple step to find an agreement to increase, lower or stabilize prices in violation of section 1. In fact, a court could infer existence of such an agreement where the effects of price manipulation have become manifested in a particular market.

On the other hand, in an industry characterized by fierce, multi-faceted competition, existence of a cost index may not constitute an unreasonable restraint on competition. For example, in the automobile, toy or power tool industry, competition will continue to exist over differences in features, quality, marketability of each manufacturer's product and other matters of purchaser preference. Existence of the cost index would only assist management in making intelligently its pricing decisions and would not have the purpose or effect of chilling the vigor of competition. The Court recognized this in the *Container Corp.* case, stating:

> 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. The product is fungible and the competition for sales is price. . . . The exchange of price data tends toward price uniformity.[44]

The facts of the particular industry involved are a crucial consideration in any price indexing situation.

III. Conclusion

Thus, trade associations whose members do not market identical products, and do not compete solely over price, should be permitted to conduct cost index programs as a service to their members. Such programs would be particularly beneficial during periods of rapidly rising material costs. These programs may not, however, be undertaken by associations where their purpose or effect would be to eliminate the only source of competition between association members. In a price structure particularly influenced by the input of price information, close scrutiny should be given any price exchange until further decisions crystallize the meaning of the Supreme Court's decison in *Container Corp.*

44. 393 U.S. at 337.