HORIZONTAL PRICE EXCHANGES

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The private exchange of prices by competitors has long been a source of anticompetitive concern. Based on claims of possible procompetitive effects, the Supreme Court decided that antitrust challenges to these exchanges should be evaluated under the rule of reason. In reviewing the jurisprudence applying the rule of reason approach to horizontal price exchanges, we find it suspect as it is long on claims of procompetitive benefits but short on economic theory and evidence substantiating those claims. To fill this gap, this Article injects economic reasoning into the judicial discussion. While our analysis identifies several reasons for these exchanges to have anticompetitive effects, none of the claims of procompetitive effects survive close scrutiny. The case for applying the rule of reason to horizontal price exchanges is based on factually incorrect claims of economic effects. Though the evidence supports per se condemnation, courts are unlikely to treat horizontal price exchanges as per se illegal. We propose the quick-look rule as a compromise.

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INTRODUCTION

Antitrust law does not generally constrain firms in how they price as long as it does not involve an agreement with other firms that has the purpose or effect of raising prices. Firms can independently set their prices using whatever process or logic they see fit without violating antitrust law's prohibition on collusion. Antitrust concerns arise, however, when rival firms privately exchange pricing information with each other.

The recent European Commission (EC) decision involving truck manufacturers illustrates the problem. The headquarters of a European truck manufacturer would set an initial list price from customers and would negotiate a discount from either a dealer or the manufacturer.[1] This process engages various employees in the setting of internal prices and customers in the negotiating of transaction prices. Thus far it looks fine from an antitrust perspective, for rival firms are not involved. However, beginning in 1997 and on through 2011, the senior managers of six major European truck manufacturers agreed to regularly share their gross list prices through private meetings, phone calls, and emails. In response to a leniency application from one of the truck manufacturers, the EC pursued an investigation and found the six truck manufacturers in violation of Article 101(1), the EC's law against anticompetitive collusion.[2]

In deciding this case, the EC determined that the information exchange "had as its object the prevention, restriction and/or distortion of competition with respect to Trucks."[3] This decision exemplifies the European Union's (EU) view that private information exchanges of prices are inherently restrictive of competition and, therefore, establishing their illegality does not require showing effect. The EC has taken the position that "mere attendance at a meeting where an undertaking discloses its confidential pricing plans to its competitors is likely to be caught by Article 101(1)."[4] The EC codified this view in its Guidelines:

> [I]nformation exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating

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1 Commission Decision of July 19, 2016, Relating to a Proceeding Under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, Case AT.39824—Trucks, ¶ 27, 2016 (C 4673).

2 Treaty on the Functioning of the European Union art. 101(1), May 9, 2008, 2008 O.J. (C 115) 88 ("The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition . . . .").

3 Commission Decision of July 19, 2016, *supra* note 1, ¶ 69.

4 RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 117 (9th ed. 2018).

> collusion, that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete.[5]

The reasons for the EU viewing such information exchanges as having the object of restricting competition are well known. An agreement to exchange prices can facilitate price signaling whereby a firm raises its price with the intent that competitors see it as an invitation for them to match that higher price. Or the facilitated communication may be explicit as private meetings to exchange current prices provide a venue (and cover) to discuss and agree on future prices. Or an existing horizontal agreement on prices may be supported by an information exchange of prices that serves to monitor firms for compliance with the agreed-upon prices. Competitors meeting in private to exchange prices is inherently suspect because of these anticompetitive risks.

Nevertheless, American antitrust law treats the private exchange of prices between competitors more deferentially, requiring plaintiffs to define markets and prove anticompetitive effects. American and European law take different approaches because they have evolved from different premises: EU authorities assume all private exchanges of prices are done with an anticompetitive objective, while U.S. courts contend that these price exchanges may improve market efficiency. Towards resolving these divergent views, this Article critically examines claimed anticompetitive and procompetitive effects with the aim of identifying the appropriate treatment of certain exchanges of prices among competitors.

The analysis will pertain to horizontal price exchanges (HPEs), where an HPE is defined to be a private interseller exchange of prices directly relevant to the prices at which buyers will transact. Prices that are "directly relevant" to transaction prices include currently quoted prices such as list prices, surcharges, discounts, rebates, shipping fees, prices of add-ons, and all-inclusive prices (i.e., the actual payment a buyer would make in purchasing the good or service); recently transacted prices (as they can be informative of the prices that a firm is currently quoting); and planned or adopted future prices. As is currently recognized

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5 Communication from the Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements, ¶ 61, 2011 O.J. (C 11) 1 (footnote omitted).

and this Article examines in depth, the exchange of these prices can facilitate buyers paying supracompetitive prices.[6]

Referring to an exchange as "interseller" means sellers are exchanging prices to the exclusion of buyers. Buyers are excluded when prices are privately communicated between sellers or it is excessively difficult or costly for buyers to access the prices so that it is, in effect, an exchange exclusively among sellers. An interseller price exchange is nominally "public" but functionally private when the information is provided by a third party to anyone for a fee but where the fee is set at a level far exceeding the possible value of the information to an individual buyer. Because HPEs are private, the term does not reach firms publicly announcing future price changes, such as when airlines announce future fare changes.[7] These advance price announcements are easily accessible to buyers as well as sellers. While advance price announcements can raise anticompetitive concerns, they can also facilitate potential procompetitive benefits that are not present with HPEs.

Because they often interfere with the operation of competitive markets, HPEs implicate Section 1 of the Sherman Act. A Section 1 violation entails three elements: (1) an agreement (2) that constitutes an unreasonable restraint of trade and (3) inflicts antitrust injury.[8] After the plaintiff has established an agreement, courts use one of three modes of analysis to determine whether an agreement is unreasonable: the per se rule, the rule of reason, or the abbreviated rule of reason, also known as quick look.[9] If a challenged agreement falls in a forbidden category—a per se category—then the per se rule condemns the agreement without proof of actual anticompetitive effects, which are presumed as a matter of law. Price-fixing conspiracies among competitors are the quintessential example of per se illegal agreements.[10]

If an agreement does not fall in a per se category, courts can use either the full-blown rule of reason or quick-look condemnation to conclude that the agreement unreasonably restrains trade because its anticompetitive effects outweigh any procompetitive redeeming virtues. The rule of reason takes "into account a variety of factors, including specific information about the relevant business, its condition before and

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6 An example of prices that are relevant but not "directly" relevant to transaction prices are non-recent past prices, which can also have anticompetitive effect. If firms are participating in a collusive arrangement, the exchange of past prices serves to monitor for compliance. By stabilizing collusion, it can contribute to the setting of future supracompetitive prices.

7 *See* Severin Borenstein, *Rapid Price Communication and Coordination: The Airline Tariff Publishing Case* (1994), *in* THE ANTITRUST REVOLUTION 233 (John E. Kwoka, Jr. & Lawrence J. White eds., 2004).

8 Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993).

9 Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 508–09 (4th Cir. 2002).

10 *See* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213 (1940).

after the restraint was imposed, and the restraint's history, nature, and effect."[11] In between the per se rule and the traditional rule of reason resides a middle tier of analysis that courts have called various names, including quick look, abbreviated rule of reason, and truncated rule of reason. An agreement violates Section 1 under quick-look analysis if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[12] Historically, the decision on which standard applied has generally been outcome determinative.[13]

For over a century, the Supreme Court has discussed how antitrust law should treat the intercompetitor exchange of information. In arriving at the rule of reason for HPEs, those judicial discussions have been devoid of economic theory and evidence to substantiate claims about the effects of HPEs. This Article seeks to fill that gap by injecting sound economic reasoning into the discourse.

Part I explores how U.S. courts have evaluated the legality of HPEs under antitrust laws. In the 1920s, the Supreme Court condemned and exonerated various schemes of competing firms to share various forms of information, but the Court never articulated a legal standard. Then, beginning in the late 1960s, the Court authored a trilogy of cases that applied the rule of reason to HPEs. Part I presents these cases, shows their influence on modern law, and exposes their flawed legal reasoning.

Part II explains how HPEs necessarily tend to raise prices charged to consumers. Even without an underlying agreement on price, firms exchanging their current pricing plans puts upward pressure on their prices. More dangerously, price-fixing conspirators may employ HPEs to establish and stabilize an illegal conspiracy. HPEs facilitate achieving mutual understanding to collude and serve as a mechanism for cartel managers to monitor compliance. Our analysis then finds several solid reasons for a private price exchange to facilitate competitors to charge higher prices and thereby to have anticompetitive object and effect. Concerns about anticompetitive harm are justified.

Part III uses economic reasoning to challenge the foundations of the current legal doctrine on HPEs. Courts, commentators, and defendants have advanced three primary arguments for evaluating HPEs under the rule of reason: improved market efficiency, increased competition, and

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11 State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (citations omitted).

12 Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

13 Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 737 (2012); Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 685 (1991).

verification of consumer claims about available market prices. Part III shows how each of these justifications for applying the rule of reason to HPEs is flawed.

Part IV argues that courts should employ a stricter legal standard against HPEs. Applying the rule of reason to HPEs is cumbersome and unnecessarily increases the risk of false negatives. A strong case can be made that HPEs warrant per se condemnation—they are inherently anticompetitive (as shown in Part II) and lack any credible procompetitive justification (as shown in Part III). Although per se condemnation is arguably appropriate, to the extent that courts would be reluctant to take the per se leap, the quick-look rule provides a compromise that reduces the costs associated with the current rule of reason approach to HPEs while providing defendants with a meaningful opportunity to prove that their HPEs should survive antitrust scrutiny.[14]

I. THE JUDICIAL TREATMENT OF HORIZONTAL PRICE EXCHANGES

A Section 1 violation requires the plaintiff to prove both an agreement and that this agreement unreasonably restrains trade. A horizontal agreement to exchange price information can have significance for either of these elements. Regarding the first element—agreement—HPEs are relevant to proving a conspiracy to fix prices, which is per se illegal. An antitrust plaintiff can prove a price-fixing conspiracy through direct or circumstantial evidence. Direct evidence, however, is rarely accessible because price-fixing conspirators conceal their collusion by using codes names, secret assignations, cover stories, and falsified documents, among other methods.[15] Consequently, most antitrust plaintiffs rely on circumstantial evidence using a two-step process. First, the plaintiff demonstrates that the defendants increased prices in parallel (called "conscious parallelism"); and second, the plaintiff proffers evidence of plus factors, which represent circumstantial

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14 Some commentators argue that the United States' rule of reason treatment of information exchanges is superior to the EU's per se treatment. Kenneth Khoo & Jerrold Soh, *The Inefficiency of Quasi-Per Se Rules: Regulating Information Exchange in EU and U.S. Antitrust Law*, 57 AM. BUS. L.J. 45 (2020). However, their argument suffers from the same flawed foundation that has plagued the courts, which is the presumption "that information exchanges have many procompetitive effects." *Id.* at 93. That presumption is exactly what we will show is not true in the context of a private information exchange of prices. The authors also claim that any attempt to identify a category of information exchanges warranting per se treatment "is likely to be conceptually incoherent and arbitrary." *Id.* at 98. This bold claim is made without a single argument to substantiate it. Our analysis will show that private information exchanges of prices is a well-defined category deserving per se treatment because of the lack of known procompetitive benefits and the presence of well-established anticompetitive costs.

15 *See* Christopher R. Leslie, *How to Hide a Price-Fixing Conspiracy: Denial, Deception, and Destruction of Evidence*, 2021 U. ILL. L. REV. 1199 (2021).

evidence that "when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy."[16] Courts treat the intercompetitor exchange of prices as a plus factor for inferring collusion.[17] If the plaintiff presents a combination of plus factors—including the intercompetitor exchange of prices—sufficient to show that the defendants did, in fact, conspire to raise their prices, the plaintiffs have proven a per se violation. The defendants cannot argue a defense or attempt to justify their agreement. The exchange of price information in this scenario is not illegal; it is simply one piece of circumstantial evidence that plaintiffs can present to argue that the defendants conspired to fix prices, a per se violation.

Alternatively, an agreement among competitors to exchange their price information can constitute its own separate antitrust violation, even if the firms did not agree to charge the same price.[18] If rivals have agreed to exchange their current price information, this necessarily satisfies the first element of a Section 1 claim.[19] The focus then becomes what mode of analysis should be used to evaluate whether this agreement unreasonably restrains trade.

In sum, there are two separate paths to antitrust liability involving HPEs: HPEs can be a plus factor to help prove an underlying price-fixing agreement that is illegal and, separately, the HPEs can themselves constitute an illegal agreement.[20] Although the Supreme Court has not

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16 Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987). For a detailed explanation of plus factors, see Christopher R. Leslie, *The Probative Synergy of Plus Factors in Price-Fixing Litigation*, 115 NW. UNIV. L. REV. 1581 (2021).

17 *See, e.g.*, Omnicare, Inc. v. UnitedHealth Grp., Inc., 629 F.3d 697, 709 (7th Cir. 2011) ("Information exchange can help support an inference of a price-fixing agreement . . . ."); Wilcox v. First Interstate Bank of Or., N.A. 815 F.2d 522, 525 (9th Cir. 1987) (noting that plus factors include "exchange of price information"); Morton Salt Co. v. United States, 235 F.2d 573, 577 (10th Cir. 1956) (noting intercompetitor exchange of price information "is a factor appropriately considered in determining the existence of a conspiracy"); Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1046 (8th Cir. 2000) (Gibson, J., dissenting) ("In price fixing cases, the exchange of sensitive price information can sometimes be circumstantial evidence of the existence of a *per se* violation.").

18 *See* Christopher R. Leslie, *The Decline and Fall of Circumstantial Evidence in Antitrust Law*, 69 AM. U. L. REV. 1713, 1743 (2020).

19 In most cases, the defendants have not only agreed to exchange prices; they are actually doing so.

20 *In re* Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 447 n.13 (9th Cir. 1990) ("[I]nformation exchanges help to establish an antitrust violation only when either (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, *or* (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of § 1 under a rule of reason analysis." (emphasis added)); William H. Page, *Communication and Concerted Action*, 38 LOY. UNIV. CHI. L.J. 405, 431 (2007) ("An information exchange may be

spoken explicitly about HPEs as a plus factor, between 1969 and 1978 the Court issued three opinions discussing the standard for determining when an HPE itself violates Section One of the Sherman Act. We present these cases chronologically.

A. *The Supreme Court's HPE Trilogy*

1. *United States v. Container Corp. of America*

The Court announced the current rule of reason approach to HPEs in *United States v. Container Corp. of America*.[21] In *Container Corp.*, the Department of Justice (DOJ) had brought a civil antitrust complaint against eighteen manufacturers of corrugated paper containers in the Southeastern United States who had agreed to exchange price information with each other, albeit without an "agreement to adhere to a price schedule."[22] The defendants had "exchange[d] . . . information concerning specific sales to identified customers."[23] The district court dismissed the government's complaint, finding that the prosecutors had failed to prove an agreement among the defendants to exchange prices charged or quoted to specific customers for corrugated containers and that "[t]he requesting and furnishing of price information by the defendants did not have the effect of eliminating, reducing, minimizing or restricting price competition."[24]

The government appealed to the Supreme Court, which first reversed the district court's finding of no agreement. The Court then explained that whenever a defendant received a request for its rivals regarding "the most recent price charged or quoted," each defendant "usually furnished the data with the expectation that it would be furnished

unlawful if it is found to have an unreasonable effect on prices, or if it is found to be a plus factor permitting an inference of a per se illegal agreement to fix prices."); Leslie, *supra* note 18, at 1742–43 (noting that these are "two distinct inquiries"). Some courts improperly conflate these two doctrines. *Id.* (explaining how the Third Circuit made this mistake in *In re Baby Food Antitrust Litigation*, 166 F.3d 112 (3d Cir. 1999)).

21 393 U.S. 333, 338 (1969).

22 *Id.* at 334 (distinguishing *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936), and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)).

23 *Id.*

24 United States v. Container Corp. of Am., 273 F. Supp. 18, 67–68 (M.D.N.C. 1967), *rev'd*, 393 U.S. 333 (1969).

reciprocal information when it wanted it."[25] That is sufficient to prove the first element of a Section 1 claim: agreement.[26]

Regarding whether this agreement constituted an unreasonable restraint of trade, the Court emphasized that the defendants had exchanged current prices, not prices on past transactions.[27] The Court then noted that "this reciprocal exchange of prices . . . stabilize[d] prices though at a downward level."[28] Thus, although prices were declining, they remained higher than they would have been but for the agreement to exchange price information. The market was conducive to both tacit and explicit collusion, as the defendants controlled 90% of the market share and the product was homogeneous,[29] with demand being inelastic.[30]

Given these proven price effects from the horizontal agreement, the Court hinted at per se illegality. The majority noted that the "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."[31] But then the Court abruptly changed course, asserting without citation that "[p]rice information exchanged in some markets may have no effect on a truly competitive price."[32] The Court implicitly applied the rule of reason to hold that the agreement in this case violated Section 1 because "the corrugated container industry is dominated by relatively few sellers. The product is fungible and the competition for sales is price. The demand is inelastic, as buyers place orders only for immediate, short-run needs. The exchange of price data tends toward price uniformity."[33] By relying on the prevailing market conditions, the Court essentially took a rule of reason approach.

In his concurrence, Justice Fortas clarified that the majority did not "hold that the exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a per

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25 *Container Corp.*, 393 U.S. at 335.

26 *Id.* ("That concerted action is of course sufficient to establish the combination or conspiracy, the initial ingredient of a violation of § 1 of the Sherman Act. . . . [T]he essence of the agreement was to furnish price information whenever requested.").

27 *Id.* at 336 ("Further, the price quoted was the current price which a customer would need to pay in order to obtain products from the defendant furnishing the data.").

28 *Id.*; *see also id.* ("The exchange of price information seemed to have the effect of keeping prices within a fairly narrow ambit.").

29 *Id.* ("While containers vary as to dimensions, weight, color, and so on, they are substantially identical, no matter who produces them, when made to particular specifications.").

30 *Id.* at 337.

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

32 *Id.*

33 *Id.*

se violation of the Sherman Act."[34] While stating a reluctance to condemn price exchanges as per se illegal, Justice Fortas reasoned that the fact that the "defendants' tacit agreement to exchange information about current prices to specific customers did in fact substantially limit the amount of price competition in the industry" meant that "there is no need to consider the possibility of a per se violation."[35] Thus, Justice Fortas explicitly applied the rule of reason to the facts of this particular case, but did not rule out the possibility of per se analysis in the future.

In his dissent, Justice Marshall did not believe that the agreement among the defendants violated either the per se rule or the rule of reason. As to the per se rule, Justice Marshall asserted that the Court had previously "refused to apply a per se rule to exchanges of price and market information in the past."[36] In addition to his interpretation of precedent,[37] Justice Marshall advanced two substantive arguments. First, Justice Marshall seemed to believe that exchanging price quotes given to specified customers would fuel price competition because "the information obtained was sufficient to inform the defendants of the price they would have to beat in order to obtain a particular sale."[38] This, according to Justice Marshall, was a sufficient procompetitive benefit to take the agreement out of the per se category.[39] Second, when applying the rule of reason—without using that terminology—Justice Marshall asserted that there was not a sufficiently high danger of the exchanged price information having anticompetitive effects because the market was unconcentrated with the six largest firms controlling 60% of the market, entry being allegedly easy, and the number of sellers expanding.[40]

The *Container Corp.* majority did not engage in a full-throated discussion on the proper mode of analysis for HPEs. This is probably because the government devoted the lion's share of its brief to proving the factual argument that the defendants' agreement to share prices was anticompetitive. The government's brief gave short shrift to the legal

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34 *Id.* at 338–39 (Fortas, J., concurring).

35 *Id.* at 339–40. Ironically, the fact that agreement clearly suppressed price competition should be a reason for interpreting the per se rule to this category of agreements.

36 *Id.* at 341 (Marshall, J., dissenting) (first citing Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); then citing United States v. Am. Linseed Oil Co., 262 U.S. 371 (1923); then citing Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925); and then citing Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925)); *see also infra* notes 76–90and accompanying text (critiquing Justice Marshall's invocation of these cases).

37 *Container Corp.*, 393 U.S. at 341 (Marshall, J., dissenting) ("I believe we should follow the same course in the present case.").

38 *Id.* at 341–42.

39 *Id.* at 341 ("I do not believe that the agreement in the present case is so devoid of potential benefit or so inherently harmful that we are justified in condemning it without proof that it was entered into for the purpose of restraining price competition or that it actually had that effect.").

40 *Id.* at 342.

argument that the per se rule should apply, only mentioning the per se standard twice in the brief's text.[41]

Similarly, at oral argument, the government's request for a per se rule was muddled and muted. The government's lawyer, Edwin Zimmerman, argued that the district court "applied an erroneous legal standard to the question of the legality of the combination,"[42] implying that the DOJ would advocate for the per se rule. But he seemingly backtracked by pegging antitrust liability to the defendants possessing dominant market share, an inquiry that is relevant under rule of reason analysis but irrelevant when applying the per se rule.[43] When Justice Fortas asked Zimmerman whether "the Government is seeking a per se rule" against "a combination among the defendants to exchange current price information as to individual customers,"[44] the attorney responded:

> No, I think the rule we are advancing here, Mr. Justice Fortas, is that when you have an industry which is dominated by a relatively small number of sellers, then the precise exchange of current price information with respect to particular customers necessarily has an inhibiting effect on pricing, because of the ability of that small group to visualize the necessary consequences.[45]

After stating that no proof of price effects was necessary (which sounds "per se"), Mr. Zimmerman immediately added that "in this case we have explicit proof that this was their purpose" (which sounds "rule of reason"), but such proof "was not necessary after the *Socony-Vacuum* case,"[46] seemingly referencing that decision's adoption of a broad per se

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41 *See* Brief for the United States at 13, *Container Corp.*, 393 U.S. 333 (No. 27), 1968 WL 129392 ("Concerted activity aimed at limiting price competition or tampering with the price structure is unlawful *per se*, even if the limitation upon price competition may be indirect." (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221–23, 224 n.59 (1940))); *see also id.* at 27 ("The [district] court thus failed to recognize that concerted activity which is aimed at limiting price competition or interfering with the setting of price by free market forces is unlawful *per se*, and is no less unlawful because the limitation on price competition may be indirect." (first citing *Socony Vacuum Oil Co.*, 310 U.S. at 224 n.59; and then citing United States v. Gen. Motors Corp., 384 U.S. 127, 147–48 (1966))).

42 Transcript of Oral Argument at 3, *Container Corp.*, 393 U.S. 333 (No. 27) (statement of Edwin Zimmerman, DOJ).

43 *Id.* at 9–10. At oral argument, the government's argument emphasized factors that are common to a rule of reason analysis, such as the defendants' collective market share and their buyers' fixed demand. *Id.* at 15 (noting that defendants belonged to "a relatively small group of sellers, six of whom did almost 60 percent of the business, under circumstances where self-interest would dictate minimization of the rigors of price competition, and where the buyer's demand was fixed").

44 *Id.* at 44 (statement of Justice Fortas).

45 *Id.* at 44–45 (statement of Edwin Zimmerman, DOJ).

46 *Id.* at 45.

rule against horizontal agreements that raise price. In short, the government's request for a per se rule is not a model of clarity.

Ultimately, courts and commentators interpreted the *Container Corp.* opinion as holding that HPEs are evaluated under the rule of reason, not the per se rule.

2. *United States v. Citizens & Southern National Bank*

In *United States v. Citizens & Southern National Bank*,[47] the Supreme Court considered information sharing among a national bank (C&S) and its de facto branches (which were called "5-percent banks" because C&S's holding company owned five percent of each of these smaller banks) which had been created in a manner to circumvent a Georgia prohibition against city banks opening suburban branches.[48] After Georgia amended its law, the large bank sought to "absorb the 5-percent banks as true branches."[49] The Justice Department challenged the acquisitions as violating antitrust laws, and it claimed the prior "'de facto branch' relations between C&S and the six 5-percent banks" violated Section 1 of the Sherman Act.[50] The government argued that the relationships between C&S and the 5-percent banks included "an agreement to fix interest rates and service charges"—a per se violation of the Sherman Act.[51] The Court noted that "C&S did regularly notify the 5-percent banks—as it did its de jure branches—of the interest rates and service charges in force at C&S National and its affiliates. But the dissemination of price information is not itself a per se violation of the Sherman Act."[52] The Court seemed persuaded that despite price memoranda being exchanged, "the 5-percent banks were admonished by C&S, several times and very clearly, to use their own judgment in setting prices; indeed, the banks were warned that the antitrust laws required no less."[53] The opinion seems *sui generis* given that the Court repeatedly emphasized that the banks' scheme was an attempt to evade a statutory barrier that made "the potential bank customers of suburban, small town, and rural areas a captive market for small unit banks."[54] Consequently,

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47 422 U.S. 86 (1975).

48 *Id.* at 89–90.

49 *Id.* at 90.

50 *Id.*

51 *Id.* at 100.

52 *Id.* at 113 (first citing Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925); then citing Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588 (1925); and then citing United States v. Container Corp. of Am., 393 U.S. 333, 338 (1969) (Fortas, J., concurring)).

53 *Id.*

54 *Id.* at 118–19.

the Court found the banks' scheme to be procompetitive and legal.[55] Ultimately, the Court's statement about price exchanges not falling in the per se category seems like dicta, but the opinion's concise statement of the principle is widely cited.[56]

3. *United States v. United States Gypsum Co.*

In *United States v. United States Gypsum Co.*,[57] a group of drywall manufacturers had been criminally convicted of violating Section 1 because they had, among other things, exchanged current prices in the form of "interseller price verification."[58] Although the Supreme Court decision focused on the intent element for criminal antitrust cases, the jury instructions regarding withdrawal from conspiracy, and the appropriateness of ex parte communications between a trial judge and jury foreperson, the opinion also addressed the legal standard for evaluating horizontal exchanges of price information.[59] The defendants justified their HPEs as necessary to comply with the Robinson-Patman Act, an antitrust statute that precludes anticompetitive price discrimination.[60] The Act has a meeting-competition defense that allows a seller to charge a lower price in order to "meet the equally low price of a competitor."[61] After the jury found the defendants guilty of criminal price fixing, the Third Circuit reversed and the Supreme Court granted certiorari.[62]

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55 *Id.* at 119–20 ("We hold that, in the face of the stringent state restrictions on branching, C&S's program of founding new de facto branches, and maintaining them as such, did not infringe § 1 of the Sherman Act.").

56 *See, e.g.*, Burtch v. Milberg Factors, Inc., 662 F.3d 212, 223 (3d Cir. 2011); Olean Wholesale Grocery Coop., Inc. v. Agri Stats, Inc., No. 19 C 8318, 2020 WL 6134982, at *5 (N.D. Ill. Oct. 19, 2020); Valspar Corp. v. E.I. Du Pont De Nemours & Co., 152 F. Supp. 3d 234, 249 (D. Del. 2016), *aff'd*, 873 F.3d 185 (3d Cir. 2017).

57 438 U.S. 422 (1978).

58 *Id.* at 429.

59 While the opinion imposed an intent requirement for criminal convictions, the opinion "leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." *Id.* at 436 n.13.

60 *Id.* at 429; 15 U.S.C. § 13a.

61 *Gypsum*, 438 U.S. at 451 (quoting FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 760 (1945)); *see also* Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 438 (1983) ("The seller must show that under the circumstances it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors.").

62 United States v. U.S. Gypsum Co., 383 F. Supp. 462 (W.D. Pa. 1974), *rev'd*, 550 F.2d 115 (3d Cir. 1977), *aff'd*, 438 U.S. 422 (1978).

The *Gypsum* majority eschewed the per se rule because, it asserted, the horizontal exchange of price data "does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."[63] The Court suggested that some price exchanges could fall into "the gray zone of socially acceptable and economically justifiable business conduct."[64]

The *Gypsum* Court's embrace of the rule of reason for HPEs was not surprising because the antitrust standard was not contested in the case. Given the Supreme Court's statement in 1975's *Citizens & Southern National Bank* that "the dissemination of price information is not itself a per se violation of the Sherman Act,"[65] the DOJ declined to argue for a per se rule a mere three years later in *Gypsum*.[66] Instead, the government asserted that "some exchanges of price information have a beneficial effect."[67] The government did not specify these so-called beneficial effects. Nonetheless, given the Court's recent rejection of the per se rule, the DOJ did not press the point.

The progeny of the Supreme Court's HPE trilogy have reinforced the application of the rule of reason to HPEs. For example, the Second Circuit in *Todd v. Exxon Corp.*,[68] explained that "where the violation lies in the information exchange itself—as opposed to merely using the information exchange as evidence upon which to infer a price-fixing agreement[—t]his exchange of information is not illegal *per se*, but can be found unlawful under a rule of reason analysis."[69] That HPEs are to be judged under the rule of reason—and not the per se rule—is now well established.

B. *The Suspect Origins of the Current Antitrust Doctrine on HPEs*

The Supreme Court cases of *Container Corp.*, *Citizens & Southern National Bank*, and *Gypsum* are internally consistent with each other. But their shared footing is flawed. These cases misapprehended precedent and they spoke about economic concepts without evidence or understanding.

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63 *Gypsum*, 438 U.S. at 441 n.16.

64 *Id.* at 441.

65 United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113 (1975).

66 Brief for the United States at 76, *Gypsum*, 438 U.S. 422 (No. 76-1560), 1977 WL 189303 ("Because some exchanges of price information have a beneficial effect, it is not a *per se* violation of the antitrust laws to exchange competitive information.").

67 *Id.*

68 275 F.3d 191 (2d Cir. 2001).

69 *Id.* at 198 (citing Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 174–75 (2d Cir. 1984)).

1. Suspect Use of Precedent

The Supreme Court's 1970s-era trilogy is built on a foundation of several mid-1920s-era opinions that addressed intercompetitor information exchanges. In his *Container Corp.* majority opinion, Justice Douglas seemed to apply the rule of reason without explicitly saying so, while Justice Fortas in concurrence stated that the per se rule was unnecessary in the case at hand because the anticompetitive price effects were clear.[70] To make the case for not applying the per se rule to HPEs, Justice Marshall in his *Container Corp.* dissent cited four cases for the proposition that "[t]his Court has refused to apply a per se rule to exchanges of price and market information in the past"[71]: *American Column & Lumber Co. v. United States* (1921),[72] *United States v. American Linseed Oil Co.* (1923),[73] *Maple Flooring Manufacturers' Ass'n v. United States* (1925),[74] and *Cement Manufacturers' Protective Ass'n v. United States* (1925).[75]

Invoking these cases is problematic for two reasons. First, it is hardly surprising that the Court did not apply the per se rule in these opinions because the per se rule did not yet exist. The Supreme Court did not articulate the principle of per se illegality until 1927's *United States v. Trenton Potteries Co.*,[76] and did not use the term "per se" until 1940's *United States v. Socony-Vacuum Oil Co.*[77] Thus, Justice Marshall is wrong to read the pre-*Trenton Potteries* opinions as consciously rejecting the per se rule—a standard unknown to those opinions' authors.

Second, in *American Column* and *American Linseed*, the Court condemned HPEs as violating antitrust law.[78] The Third Circuit in *Gypsum* acknowledged that both of these cases "held that section 1 of the Sherman Act condemned the exchange of specific price information with

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70 *See supra* note 35 and accompanying text.

71 United States v. Container Corp. of Am., 393 U.S. 333, 341 (Marshall, J., dissenting).

72 257 U.S. 377 (1921).

73 262 U.S. 371 (1923).

74 268 U.S. 563 (1925).

75 268 U.S. 588 (1925).

76 273 U.S. 392, 399–401 (1927).

77 310 U.S. 150, 218 (1940); *see also* Garot Anderson Mktg., Inc. v. Blue Cross & Blue Shield United of Wis., 772 F. Supp. 1054, 1060 n.2 (N.D. Ill. 1990) ("The first Supreme Court case defining price fixing as *per se* illegal was *U.S. v. Trenton Potteries Co*. In *U.S. v. Socony-Vacuum Oil Co.*, the Court extended this categorization, and held that any combination which tampers with price structures is illegal *per se*." (first citing *Trenton Potteries*, 273 U.S. at 401; and then citing *Socony-Vacuum Oil Co.*, 310 U.S. at 221)).

78 American Column & Lumber Co. v. United States, 257 U.S. 377, 411–12 (1921); *American Linseed Oil*, 262 U.S. at 389–90.

regard to specific customers, where the clear purpose was to stabilize prices."[79] Indeed, at the oral argument in *Container Corp.*, the DOJ attorney pointed the Supreme Court justices to *American Column* as precedent for the proposition that agreeing to exchange prices violates Section 1 even without a further agreement to fix prices.[80] The opinions in no way exonerated HPEs.

Finally, the remaining two cases—in which the Court rejected antitrust liability—are factually inapposite. *Maple Flooring* did not involve current price information.[81] At oral argument in *Container Corp.*, the government distinguished *Maple Flooring* because "*Maple Flooring* was a case in which the information exchanged only [pertained] . . . to past transactions without identity of particular customers . . . . But there was no exchange of current or specific price information."[82] The DOJ attorney explained that *Maple Flooring* could not protect the defendants' agreement to exchange current price information because the *Maple Flooring* decision was limited to the "[e]xchange of information as to past and closed transactions."[83] Consequently, the *Maple Flooring* decision did not prevent the *Container Corp.* Court from holding the defendants liable for their HPE.

Of the precedent cited by Marshall, only *Cement Manufacturers* dealt with HPEs, but the case involved a unique fact pattern. The cement customers entered requirements contracts whose price was pegged to the spot market, such that "[w]hen the spot price of cement rose, purchasers ordered more than their requirements to take advantage of the price at which they could purchase from the manufacturers relative to the spot price in the market."[84] To counteract this fraud, the manufacturers exchanged price and sales data on specific customers. The *Cement Manufacturers* Court concluded:

> [W]e cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts or to prevent the fraudulent securing of deliveries of merchandise . . . as an

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79 United States v. U.S. Gypsum Co., 550 F.2d 115, 122 (3d Cir. 1977), *aff'd*, 438 U.S. 422 (1978).

80 *See* Transcript of Oral Argument, *supra* note 42, at 9–10 (statement of Edwin Zimmerman, DOJ); *see also id.* at 16 ("*[L]inseed [O]il* and *American Column* shows [sic] the dangers of over-specificity on current prices.").

81 Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 574 (1925) ("It is to be noted that the statistics gathered and disseminated do not include current price quotations . . . ."); *see also Gypsum*, 550 F.2d at 122 (noting that in *Maple Flooring*, the Court "permit[ted] the exchange of average cost data relating only to closed transactions").

82 Transcript of Oral Argument, *supra* note 42, at 46 (statement of Edwin Zimmerman, DOJ).

83 *Id.* at 13.

84 Fred S. McChesney, *Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law*, 52 EMORY L.J. 1401, 1421 n.87 (2003) (citing Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588, 595–96 (1925)).

> unlawful restraint of trade even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned.[85]

The holding of *Cement Manufacturers* is quite limited. In finding antitrust liability, the *Container Corp.* Court distinguished *Cement Manufacturers* because the latter had a "controlling circumstance," namely "that cement manufacturers, to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job."[86] The Supreme Court in *Gypsum* similarly noted that "*Cement* [*Manufacturers*] highlighted a *narrow* limitation on the application of the general rule that either purpose or effect will support liability."[87]

In short, with the possible exception of *Cement Manufacturers*, the cases cited by Marshall did not pardon or justify exchanges of customer-specific current prices. And the arrangement in *Cement Manufacturers* is highly atypical and easily distinguishable from traditional HPEs.

The Supreme Court's two post-*Container Corp.* majority opinions share some of the problems of Marshall's *Container Corp.* dissent. In *Citizens & Southern National Bank*, Justice Stewart cited *Maple Flooring* and *Cement Manufacturers*, as well as Justice Fortas's concurrence in *Container Corp.*, to support the holding that "the dissemination of price information is not itself a per se violation of the Sherman Act."[88] As noted, the first two cases do not support the position that the Court rejected the per se rule against HPEs. Moreover, the third citation is somewhat disingenuous because Justice Fortas did not say that HPEs should never be per se illegal, but that the per se approach was unnecessary on the facts of *Container Corp.* because the anticompetitive effects were so clear on the factual record before the Court.

Three years later in *Gypsum*, Chief Justice Burger noted that the Court had "held that such exchanges of information do not constitute a *per se* violation of the Sherman Act,"[89] and he cited *Citizens & Southern National Bank* and the Justice Fortas concurrence in *Container Corp.* Yet,

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85 *Cement Mfrs.' Protective Ass'n*, 268 U.S. at 604.

86 United States v. Container Corp. of Am., 393 U.S. 333, 335 (1969).

87 United States v. U.S. Gypsum Co., 438 U.S. 422, 446 n.22 (1978) (emphasis added).

88 United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113 (1975) (first citing Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925); then citing *Cement Mfrs.' Protective Ass'n*, 268 U.S. 588; and then citing *Container Corp.*, 393 U.S. at 338 (Fortas, J., concurring)).

89 *Gypsum*, 438 U.S. at 441 n.16 (first citing *Citizens & S. Nat'l Bank*, 422 U.S. at 113; and then citing *Container Corp.*, 393 U.S. at 338 (Fortas, J., concurring)).

as just explained, *Citizens & Southern National Bank* itself is built on faulty interpretations of precedent. And, again, Justice Fortas's concurrence does not argue against the per se rule, full stop. He merely found the issue superfluous in the case at hand.[90]

2. Suspect Reasoning

The Supreme Court decisions applying the rule of reason to HPEs are not based on sound economic reasoning. The Court's HPE trilogy makes economic claims, but the opinions do not use economic theory to support these claims. The *Container Corp.* Court adopted a rule-of-reason approach without explicitly articulating its holding or reasoning for doing so. The *Citizens & Southern National Bank* opinion only made passing reference to eschewing the per se rule. It never justified its rejection of the per se rule or explained why HPEs were potentially beneficial to consumers or the economy.

Finally, the *Gypsum* Court added more verbiage but not more analysis. The opinion infamously asserts that HPEs "can in certain circumstances increase economic efficiency."[91] But the record provides no support for this economic assertion. This sentence has no citation. The *Gypsum* defendants never argued an efficiency defense in their briefs.[92] At oral argument, neither the words "efficiency" nor "efficient" were uttered by any attorney or Justice. (Nor were the words "per se" or "rule of reason" ever mentioned.) The Justices never discussed the antitrust standard, let alone the so-called efficiency of HPEs. The *Gypsum* opinion's assertion of efficiency is made of whole cloth, without basis in either the briefs or oral argument in the case at hand and without foundation in antitrust precedent.

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90 *See supra* notes 34–35 and accompanying text.

91 *Gypsum*, 438 U.S. at 441 n.16.

92 The *Gypsum* defendants mention the word "efficient" in one footnote of their brief:

> From an economic standpoint, the Government's argument is too simplistic. As one example, it ignores the fact that costs vary among sellers and, therefore, that an efficient seller has an incentive to acquire more business by making a lower price offer which other sellers are unwilling or unable to meet. Indeed, if an efficient seller knows that his competitors may lawfully, through verification, meet somewhat lower price offers, that efficient seller then has all the more incentive to reduce his own prices even further to a level which his competitors will not or cannot economically meet, though they would be legally entitled to do so.

Respondents' Joint Brief at 37 n.51, *Gypsum*, 438 U.S. 422 (No. 76-1560), 1978 WL 206617. The *Gypsum* defendants never mention the word "efficiency."

Similarly, although the *Gypsum* Court asserted that HPEs could increase price competition,[93] the opinion never explained *why* rivals would exchange current price information if that were true. The rational rival would not supply the information if it believed that its sharing of information would reduce market prices; it would only share the information if it believed doing so would raise or stabilize market prices. It is clear why the receiver would want the information—to increase its chances of securing the sale. But it makes no sense for the speaker to share this information in a competitive market, especially because—according to the arguments made by antitrust defendants—this increases the likelihood of the information provider *losing* the sale.[94] This does not make sense. In contrast, the HPE makes perfect sense in a collusive market: the HPE stabilizes the market price at a supracompetitive level and helps enforce the underlying cartel agreement.

The following two Parts make the economic case against HPEs. Part II explains why HPEs are inherently anticompetitive. Part III explains why these anticompetitive effects are not counterbalanced by any efficiency effects. Combined, these Parts disprove the Supreme Court's rationale for applying the rule of reason to HPEs.

II. ANTICOMPETITIVE EFFECTS OF HORIZONTAL PRICE EXCHANGES (HPES)

Antitrust law condemns horizontal agreements to fix prices. Firms may attempt to skirt this antitrust prohibition by agreeing to exchange current price information but not agreeing to charge any particular price for a specified transaction. This distinction, however, elevates form over substance if both types of agreement have similar effects on price. They often do. This Part explains how HPEs produce supracompetitive prices with independent pricing (Section II.A) and with collusive pricing (Section II.B).

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93 The *Gypsum* Court asserted that the per se rule is inappropriate because "[t]he exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." *Gypsum*, 438 U.S. at 441 n.16.

94 *See* Reply Brief for the United States at 13, *Gypsum*, 438 U.S. 422 (No. 76-1560), 1978 WL 206620 ("If respondents were truly concerned with the loss of individual sales, because of price cutting by competitors, they would not have given to competitors the very information that assists their competitors in taking sales away."). *See generally* Christopher R. Leslie, *High Prices and Low-Level Conspirators*, 100 TEX. L. REV. 839 (2022).

A. *HPEs Put Upward Pressure on Price*

1. Effect of HPEs on a Firm's Price

Given the dynamics of price setting, HPEs can cause rivals to raise prices in parallel even without agreeing to fix prices as such. Consider firm *X* experiencing a cost increase or a rise in demand that leads it to raise its price. Once having observed firm *X*'s higher price, rival firm *Y* finds itself with stronger demand as some consumers substitute away from the now-more-expensive product of firm *X* towards firm *Y*'s product. Upon facing stronger demand, firm *Y* is induced to raise its price. There is an analogous logic when firm *X* lowers its price. Now firm *Y* experiences lower sales as customers move away from firm *Y*'s product to buy at the lower price offered by firm *X*. As soon as firm *Y* sees the change in firm *X*'s price, it will lower its own price.

When a firm considers adjusting its price in response to a change in some relevant factor, such as cost or demand, its pricing decision will then depend on when and how competitors will respond. As just explained, once rival firms learn of another firm's price increase, they will raise their prices due to their stronger demand. That price response will reduce the demand loss of the original firm from its price increases. Anticipating that its price increase will induce rival firms to raise their prices, the firm will further increase its price in response to a cost increase, compared to when it expects rival firms' prices to remain fixed. Analogously, if a firm experiences a cost decrease, it will lower its price, and rival firms will lower their prices upon learning of it. Anticipating that its price decrease will induce rival firms to reduce their prices, the firm will not lower its price as much in response to a cost decrease, compared to when rival firms' prices remain unchanged.

By this argument, when a firm experiences a change in cost or demand that calls for a price increase (or decrease), it will raise (or lower) its price more (or less) when the firm expects the delay in competitors learning of the price change to be shorter. Given that an HPE facilitates the exchange of price information among sellers, it reduces the time between when a firm changes its price and when competitors learn of that price change. Consequently, an HPE will result in larger price increases (such as in response to a cost increase) and smaller price decreases (such as in response to a cost decrease) and, therefore, higher average prices.

2. HPEs Involving List Prices

The preceding analysis most naturally applies to an HPE involving final prices (i.e., what buyers would pay), though it could also apply to

nonfinal prices (such as list prices) if higher nonfinal prices cause higher final prices. Now let us describe a new theory that shows how an HPE of nonfinal prices—such as list prices, surcharges, or posted prices (prior to the setting of rebates or discounts)—can be anticompetitive.[95] It will be shown that if firms have an agreement to exchange nonfinal prices, the anticipation of sharing those prices will induce them to set higher nonfinal prices, and those higher nonfinal prices will translate into higher final prices.

While the theory is not exclusive to an exchange of list prices, for ease of exposition, it will be described in terms of an HPE that has firms sharing their list prices. Consider a two-stage pricing protocol whereby list prices are selected (e.g., by senior managers) and then discounts are set (e.g., by pricing managers or sales representatives) to determine final prices. Thus, firms set list prices, share those list prices through the HPE, and, having learned competitors' list prices, set final prices (by, for example, determining discounts).

To understand how an HPE affects pricing incentives, consider a scenario in which firm *X* learns through the HPE that rival firm *Y*'s list price is lower than was anticipated by firm *X*. If the usual discounts are applied to firm *X*'s list price, firm *X* will find the resulting final price to be too high relative to firm *Y*'s final price, and thus see itself at a competitive disadvantage. However, it is not without devices to use the knowledge learned from the HPE. In particular, the firm can offer more discounts than normal off of its list price so that its final price is more competitive with the final price of its rival. It is precisely because the list prices are not final prices that sharing list prices is valuable, because it gives a firm an opportunity to respond to another firm's low list price by adjusting other elements of the internal pricing process, which determines its final price. It is this option that creates an anticompetitive effect on the setting of list prices. If a firm considers setting a low list price (and consequently a low final price), it anticipates that its low list price will be revealed to rival firms through the HPE, and, upon learning that information, those rival firms will respond by increasing discounts, thereby lowering their final prices in order to be competitive. This anticipated competitive response of rival firms weakens the incentive for a firm to set a low list price. As a result, an agreement to exchange list

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95 *See generally* Joseph E. Harrington Jr., *The Anticompetitiveness of a Private Information Exchange of Prices*, INT'L J. INDUS. ORG., 102793. For related work, see Maarten Janssen & Vladimir A. Karamychev, Sharing Price Announcements (Dec. 12, 2022) (unpublished manuscript) (on file with ResearchGate). *But see* Timo Klein & Bertram Neurohr, Should Private Exchanges of List Price Information Be Presumed to Be Anticompetitive? (Feb. 2023) (unpublished manuscript) (on file with SSRN).

prices discourages being aggressive in list prices, which then causes higher list prices and, consequently, higher final prices.

This theory of harm was used to evaluate the effects of an HPE on list prices among truck manufacturers in the EU (which is the case mentioned at the start of this Article).[96] As part of their standard pricing protocol, a truck manufacturer would choose a gross list price, which was exclusively for internal purposes as it was not shared with customers. A natural role of the gross list price in the internal pricing process was to act as a proxy for cost for the subsequent stages of the pricing process. The HPE had senior executives regularly meet to exchange gross list prices. By the above theory of harm, the HPE incentivized senior managers to set higher gross list prices, which then led lower-level employees to set higher final prices (as they inferred from a higher gross list price that cost was higher). As part of private litigation in The Netherlands, the Amsterdam Court accepted this theory of harm.[97]

B. *HPEs Facilitate Collusive Pricing*

A critical ingredient for firms to coordinate on supracompetitive prices is effective communication. It is communication that achieves the common understanding—or agreement—to raise prices from competitive levels and to maintain them at supracompetitive levels. Here we describe four ways in which HPEs can facilitate collusion by enhancing communication. First, an HPE can promote trust and shared goals, which are two pillars supporting effective communication. Second, the act of exchanging prices through an HPE can offer opportunities to do more than share prices. It can allow firms to discuss and agree on prices through either express or tacit communication. Third, an HPE can facilitate tacit

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96 *See generally* Commission Decision of July 19, 2016, *supra* note 1.

97 As noted by the Amsterdam Court:

> Because high-level consultations dealing solely with the gross price lists took place in the Truck Manufacturers' organisations, it was possible for the Truck Manufacturers to maintain the perception of full competition, both within and outside their own companies. . . . This theory of harm illustrates that the artificial gross list price increases, based on the appearance of cost increases resulting from the usual negotiation process on discounts, led to an across-the-board net cartel mark-up on the net final prices paid by customers. . . .
>
> This Court finds that the Harrington & Schinkel Report is conclusive and convincing.

Rb. Amsterdam 12 mei 2021, ECLI:EN:RBAMS:2021:2391 m.nt. (Retail Cartel Damage Claims S.A./Truck Manufacturers) (Neth.) (referring to an expert report submitted by Joseph E. Harrington, Jr., and Maarten Pieter Schinkel on behalf of Retail Cartel Damages Claims), https://carteldamageclaims.com/wp-content/uploads/2021/06/Translation-of-Trucks-Judgment-12-May-2021-002.pdf. [https://perma.cc/45ML-TGHG]

collusion using price signaling by creating more common information about firms' prices, which, as explained, will be conducive to price leadership and price matching. Fourth, an HPE serves to monitor firms for compliance with agreed-upon prices.

1. HPEs Develop the Foundations for Effective Communication Between Competitors

Collusion requires communication. Inheriting a position of competition, firms wishing to create a price-fixing cartel need to communicate so there is mutual understanding that they are to compete less by, for example, all charging a common higher price. Upon making that shift away from competition, communication is often needed to maintain it, which can entail adjusting a common price to changing market conditions and monitoring for compliance with those prices. Communication requires the exchange of messages and for those messages to be informative and credible (i.e., believed to be informative). We explain how HPE facilitates cartel-building communication.[98]

A seminal game-theoretic analysis established that the interests of agents must be sufficiently aligned for communication between them to be effective in the sense that the messages are informative.[99] Consider two agents—referred to as *A* and *B*—where *A* conveys a message to *B* (such as "raise your price and I will, too"), and *B* responds with an action (such as raising its price). If, say, the interests of agents *A* and *B* are entirely in opposition, then *A* will want to send a message that convinces *B* to take an action that benefits *A*, but, as their interests are in pure conflict, that means it necessarily harms *B*. For this reason, *B* should not believe any message coming from *A*; hence, communication is completely uninformative. Now consider the other extreme: the interests of *A* and *B* are fully aligned. If *B* takes *A* at their word (i.e., *B* "trusts" *A*), then it will be in *A*'s interest to be truthful because it will lead *B* to choose the best action that best serves its own interest, which also coincides with what is best for *A*; hence, communication is fully informative. Looking

98 This discussion focuses on the incentives for an individual to convey accurate and informative messages. This has been referred to as "calculative trust" in that it is based on an agent's calculation as to when it is in their best interests not to deceive or to be vague. This is to be distinguished from "emotional trust," which is based on a different set of driving forces. *See* Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 529–30 (2004). Emotional trust is also relevant to collusion but the point we want to make here is that an HPE facilitates the development of calculative trust.

99 Vincent P. Crawford & Joel Sobel, *Strategic Information Transmission*, 50 ECONOMETRICA 1431 (1982).

beyond these two extreme cases, when the interests of *A* and *B* are more aligned—in the sense that an outcome that is more attractive to *B* tends to be more attractive to *A*—*A* has a weaker incentive to deceive and messages are capable of being more informative.[100]

While an HPE does not cause firms' interests to be more aligned, it does the next best thing, which is to remind firms that their interests are (at least partially) aligned. As a joint activity designed to benefit all firms, an HPE is rooted in a "shared goal," which helps them recognize the commonality of their interests when it comes to pricing. In a competitive market, the canonical view is that firms compete for the business of customers; customers are the prize, and firms are contestants for that prize. By sharing prices to the exclusion of buyers, sellers are instead cooperating for the common interest of sellers. Consequently, this can lead them to view the world as sellers against buyers rather than as seller against seller. Participation in an HPE promotes the positive-sum game that firms face—all benefit from raising prices—rather than the zero-sum game—a firm takes market share from other firms when it lowers its price. This was infamously illustrated by Terence Wilson (of Archer Daniel Midlands) when he conveyed to fellow lysine cartel member Kanji Mimoto (of Ajinomoto): "[Buyers] are not your friend. They are not my friend. . . . You're my friend. I wanna be closer to you than I am to any customer. 'Cause you can make us . . . money."[101] By underscoring these shared goals, an HPE can facilitate effective communication and, ultimately, collusion.

Even when firms recognize that their interests are well aligned so that messages can be informative, there must still be mutual trust that messages will be believed. An HPE can build that trust. When firms report prices to each other through an HPE, which are then subsequently confirmed to be accurate, firms build trust that what they say about prices can be believed. Having truthfully exchanged the prices they are charging, have recently charged, or will be charging, firms become more assured should their discussions turn to proposing and agreeing on the prices to be charged. The development of trust helps coordinate firms' expectations that messages are informative and thus provides a basis for effective communication.

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100 *See id.*

101 Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Address to the OECD Competition Committee: Caught in the Act: Inside an International Cartel 7, at Tab 6 (Oct. 18, 2005) (transcript of cartel meeting in Maui, Hawaii, on March 10, 1994).

2. HPEs Provide Opportunities to Communicate to Coordinate Prices

In addition to HPEs facilitating price increases outside of a traditional price-fixing conspiracy, HPEs may naturally segue into such conspiracies. Though firms may have created a forum for the purpose of exchanging actual prices, that does not preclude their communications evolving into a discussion of proposed prices. Sharing prices can be a "gateway" to expressly agreeing on prices. It can be a slippery slope for a firm to go from saying what price it is charging, to what price it will be charging, to what price it should be charging, to what price all firms should be charging (thereby entering per se illegal territory). As noted by Judge Richard Posner, "when competitors start chatting on the phone about their prices, they are quite likely to veer into an actual attempt to fix prices. If the law permits them to talk about price, their conversations become the cover for their price fixing."[102]

Let us return to the case involving truck manufacturers in the EU. According to the EC, it was well documented that the truck manufacturers regularly exchanged gross list prices. It also went on to note that, on occasion, the truck manufacturers' communications went beyond sharing prices: "From 1997 until the end of 2004, the [firms] participated in meetings involving senior managers of all Headquarters . . . [where] the participants discussed and *in some cases also agreed [on] their respective gross price increases*."[103] This could well be a situation in which an HPE for sharing prices created a venue to periodically agree on prices.

HPEs also provide the opportunity to engage in communication, which could result in firms coordinating their prices. It is easy to see how sharing recently quoted prices or proposed price increases could lead to agreeing on prices. For example, a firm could say: "My thought is to quote $10 per unit and that seems like the right price." It is not much of a leap for another firm to infer that the firm may be suggesting it is the "right" price for *all* firms, so the message is an invitation for all firms to price at $10.[104] Or the HPE could be in the form of a private announcement of a price increase that would coordinate all firms enacting it.

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102 RICHARD A. POSNER, ANTITRUST LAW 171 (2d ed. 2001).

103 Commission Decision of July 19, 2016, *supra* note 1, ¶ 51 (emphasis added).

104 *See* Brief for the United States, *supra* note 66, at 75 ("Finally, exchanges of price information may be useful for establishing price-fixing agreements. The information conveyed from one competitor may serve as an 'offer' to fix prices at a particular level, and another competitor will be induced to 'accept' by charging the identical price if it can be assured—through a continuation of the program of information exchange—that all of its important competitors will do likewise.").

To illustrate HPEs that facilitate coordinated pricing without express communication of an agreement, we offer two cases: bananas and gasoline. The market involved in the first case is for imported bananas to be sold in northern Europe, where the primary companies are Chiquita, Dole, Weichert, and Del Monte. Due to high-frequency fluctuations in supply from banana-producing regions, companies set prices weekly. A company would set its "quotation" prices typically on Thursday mornings. The price paid by some customers was the quotation price or was determined by the quotation price according to a formula in their contract. Other customers would bargain on Thursday afternoon or Friday to receive discounts off the quotation price.[105]

The EC became suspicious of communications between Chiquita, Dole, and Weichert that occurred from January 2000 to at least December 2002. As noted in the decision:

> The parties engaged in bilateral pre-pricing communications during which they discussed . . . factors relevant for setting of quotation prices for the upcoming week and discussed or disclosed price trends and/or indications of quotation prices for the up-coming week . . . . Such communications took place before the parties set their quotation prices.[106]

Though there was no evidence of an express agreement with regards to prices, the EC viewed the communications as having the same end result: "By concerting in advance on quotation prices set weekly and in particular on the development of these quotation prices, . . . the parties coordinated their quotation prices before they were set, instead of deciding upon their prices independently."[107] By sharing proposed quotation prices and information related to quotation prices, the EC concluded that the HPE facilitated firms coordinating the quotation prices that customers faced.

The second case is quite different in terms of the mechanism. Rather than the back-and-forth private communications performed bilaterally between banana suppliers, it involved a single firm making an announcement in the form of a recommended price. The market was for retail gasoline in Norway. In August 2019, the Norwegian Competition Authority (NCA) opened an investigation of Circle K and YX, two of the major retail gasoline companies in Norway. The investigation stemmed from both companies posting recommended gasoline prices on their websites. The NCA claimed that this practice facilitated coordination among Circle K, YX, and other major gasoline companies in the setting

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105 These facts are from Commission Decision of 15 X 2008 Relating to a Proceeding Under Article 81 of the EC Treaty: Case COMP/39188—Bananas, 2008 (C 5955).

106 *Id.* ¶ 51 (footnote omitted).

107 *Id.* ¶ 105; *see also id.* ¶ 54.

of their retail prices. In October 2020, NCA accepted the proposed remedy of Circle K and YX, which was to end the practice of posting recommended gasoline prices on their websites for a period of five years.[108]

As part of their pricing protocols, each of the four major companies had a nationally recommended price relevant for all of its stations. Circle K and YX posted their recommended prices (along with a "valid from" date) on a publicly accessible website, while the other two companies internally communicated them to their stations. As described below, stations' prices almost always departed from the recommended price. Given that the recommended prices reported on the websites are then of little value to consumers, the online posting of recommended prices is effectively an exchange only among sellers.[109] That makes it an HPE. Let us now explain why it is anticompetitive.

Consider a typical day in which Circle K would "update" the recommended prices on its website. It would do so around 8:00 a.m. and change the "valid from" date to the current date. There were instances in which a recommended price was not changed, but the "valid from" date was still updated to the current date. In those cases, the reported change in price was "0 øre" (where øre is cents in Norwegian currency). The website would also state that the change was effective starting at 10:00 a.m. After Circle K made these changes on its website, YX would revise its website between 8:30 and 9:30 a.m. by matching Circle K's recommended prices and updating its "valid from" date to the current date. Turning to the actual prices charged at stations, Circle K and YX would change retail prices at 10:00 a.m. to the currently recommended prices at all stations. Later in the morning, Shell and Esso would start changing their stations' prices. An increasing number of stations would adopt the new prices over the course of the next few hours. Retail prices would remain at this new level for a few hours, after which stations would start lowering their prices below the recommended levels. Retail prices would decline over several days until, again around 8:00 a.m. on some day, Circle K would restart the price cycle by updating its "valid from" date and typically (but not always) changing its recommended prices.[110]

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108 Vedtak V2020-26—Circle K Norge AS—konkurranseloven § 12 tredje led, jf. § 10 og EØS-avtalen artikkel 53 [Resolution V2020-26—Circle K Norge AS—Competition Act § 12, ¶ 3, cf. § 10 and EEA Agreement art. 53] [hereinafter NCA Decision 2020], https://konkurransetilsynet.no/decisions/vedtak-2020-26-og-vedtak-2020-27-circle-k-norge-as-og-yx-norge-as-konkurranseloven-%c2%a7-12-tredje-ledd-jf-%c2%a7-10-og-eos-avtalen-artikkel-53 [https://perma.cc/L6MT-MRDG].

109 *Id.*

110 *Id.*

Circle K's communication practice is neither express communication nor price signaling and is properly viewed as non-express communication for which, like express communication, there is a clearly identifiable signal distinct from legitimate market variables. This signal is: *changing the "valid from" date to the current date*, which communicated to all gasoline companies to raise their prices to Circle K's recommended price. As prices would only gradually decline from that point, this coordinated move led to higher prices for consumers.[111]

3. HPEs Facilitate Price Signaling and Conscious Parallelism

Price signaling refers to coordinated pricing that is accomplished without communication beyond that which is conveyed through prices. The canonical situation is a firm raising its price, not because its cost is higher or demand is stronger, but as an invitation for all firms in the market to price at that level. If this invitation is properly inferred and accepted by a competitor, then it matches that higher price. These price changes are the messages—invitation to an agreement and acceptance of that invitation—so there is communication but not a traditional conspiracy.

Though such price signaling does not violate Section 1 so long as there is no horizontal agreement, an HPE is that horizontal agreement. To see how certain HPEs can make price signaling more likely to occur and to be effective, consider the challenges associated with price signaling. Suppose firm *X* contemplates raising its price with the hope that firms *Y* and *Z* will match the new higher price. The attractiveness of engaging in this act depends on the likelihood that firms *Y* and *Z* will match and the length of delay in them matching. As long as *X*'s price is higher and *Y* and *Z* have not yet matched, *X* is losing sales and earning lower profit compared to not having raised its price. There are two sources of delay from firms *Y* and *Z*. First, it may take time for those firms to learn that firm *X* has raised its price. The shorter is the time until those firms learn of *X*'s price increase, the sooner they can match prices and, therefore, the more profitable it is for firm *X* to raise price. Second, once having learned of firm *X*'s price increase, firm *Y* or *Z* may not respond immediately or may not respond at all. This could be due to a firm preferring not to raise its price, but it could also be due to uncertainty over what the other firm will do. Firm *Y* might be willing to match firm *X*'s higher price if it was

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111 For more details on this case, see Øystein Foros & Mai Nguyen-Ones, *Coordinate to Obfuscate? The Role of Prior Announcements of Recommended Prices*, 198 ECON. LETTERS 109680 (2021), and Mai Nguyen-Ones, Price Coordination with Public Prior Announcements in Retail Gasoline Markets (July 2019) (unpublished manuscript) (on file with Norwegian School of Economics).

confident that firm *Z* would do so. The uncertainty perceived by firm *Y* may be partly due to not being sure that firm *Z* is aware of firm *X* having raised its price. Thus, the more confident that firm *Y* can be that firm *Z* has observed firm *X*'s price increase, the more likely that firm *Y* will match firm *X*'s price increase. (And, of course, this logic applies as well to when firm *Z* is considering whether to match firm *X*'s price.) Furthermore, the more confident that firm *X* is that firms *Y* and *Z* are aware that each other knows of firm *X*'s price increase, the more likely that firm X will initiate this process by raising its price. For both reasons, more common information about prices among firms will make firm *X* more likely to pursue price signaling and, in addition, price signaling is more likely to succeed in raising all firms' prices.

With that as background, it is not difficult to see how HPEs can facilitate price leadership and price matching through price signaling. Consider an HPE that has firms report their current prices in real time and these prices are easily accessible to other firms but not to consumers. Given the value of knowing what competitors are charging and the ease with learning that information, it is reasonable for a firm to assume that any price change will quickly be common knowledge to all firms; hence, each rival firm observes the price change and knows that all other firms observe the price change. The HPE will not only shorten the delay in competitors learning of the price change, the HPE will also reduce the uncertainty among those competitors that other firms have learned of the price change. This makes it more likely that firms will match the price increase, which increases the incentive for the original firm to act as a price leader and raise its price.

The concern for HPEs facilitating price signaling was at the center of the *Informed Sources* case that occurred in Australia. Informed Sources is a company that collects and distributes real-time gasoline prices. For a fee, a retail gasoline company can join this service. In doing so, they agree to provide their own prices to Informed Sources and will have access to the prices of all other subscribers. Many of the leading companies chose to purchase the service. Even if the subscription service was not limited to sellers, it is reasonable to suppose that the fee for the service would be far in excess of the potential value to any individual buyer. For this reason, it is appropriate to treat it as an HPE for it is, in effect, a price exchange only among sellers. [112]

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112 The ensuing facts are from Australian Competition & Consumer Comm'n, 'ACCC Takes Action Against Informed Sources and Petrol Retailers for Price Information Sharing' (Media Release MR 212/14, August 20, 2014).

The Australian Competition and Consumer Commission (ACCC) pursued a case against Informed Sources and five subscribing companies on the grounds that the HPE facilitated tacit collusion through price signaling.[113]

Fuel retailers can use, and have used, the Informed Sources service as a near real time communication device in relation to petrol pricing: "In particular, it is alleged that retailers can propose a price increase to their competitors and monitor the response to it. If, for example, the response is not sufficient, they can quickly withdraw the proposal and may punish competitors that have not accepted the proposed increased price . . . ."[114] One of those companies agreed to not renew its subscription to the Informed Sources services and "not to enter into any price information sharing service agreement that is similar to the one operated by Informed Sources."[115]

4. HPEs Provide Monitoring to Stabilize Collusion

When all firms are coordinating on charging a price above the competitive level, any individual firm can raise its profit by undercutting that price. To be effective, a collusive arrangement must dissuade cartel members from undercutting the collusive price. This is typically achieved by monitoring firms' prices for compliance and then punishing when there is evidence of noncompliance.

An HPE can be an important part of a cartel enforcement regime, for price verification operates as a traditional form of cartel monitoring. HPEs are essentially a form of price verification, with co-conspirators checking each other's recent transactions to ensure that every cartel member has been charging the price fixed by the cartel.[116] HPEs can augment monitoring and aid in making collusion more effective.[117]

The effectiveness of an HPE cartel monitoring system would be undermined, however, if firms did not answer truthfully when asked by a cartel partner to report its most recently transacted prices. Some may

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113 *Id.*

114 *Id.* (internal quotations omitted).

115 Australian Competition & Consumer Comm'n, 'ACCC and Coles Express Resolve Petrol Price Information Sharing Proceedings' (Media Release MR 259/15, December 16, 2015).

116 *See* Brief for the United States, *supra* note 66, at 75 ("Exchanges of price information also are useful if not essential parts of a plan to 'police' agreements to fix prices. The exchange deters cheating, because other competitors would quickly discover the price reduction and retaliate against the price cutter.").

117 *See* Florian Wagner-von Papp, *Information Exchange Agreements*, *in* HANDBOOK ON EUROPEAN COMPETITION LAW: SUBSTANTIVE ASPECTS 130, 131 (Ioannis Lianos & Damien Geradin eds., 2013) ("[T]he operative part of *any* cartel agreement is the exchange of information that allows the identification of a self-enforcing equilibrium.").

argue that a firm that has deliberately undercut the collusive price in order to pick up more sales may be unlikely to accurately report its price when asked by a rival firm. After all, the same incentive that led a firm to cheat would lead it not to say that it cheated because it wants its competitors to continue to charge inflated collusive prices for as long as possible, thus allowing the cheater to realize higher sales. Despite this possible incentive to deceive, there are solid reasons why the rational price fixer would not lie. Lying to a cartel partner could unravel the cartel by destroying the trust that is necessary among cartel members. Moreover, getting caught in a lie is different than other deviations from the cartel agreement. For example, a cartel member may make a sale it wasn't assigned by the cartel in order to avoid looking suspicious by turning down a profitable sale. Or a cartel member may make a sale at below the cartel-fixed price because the salesperson was unaware of the cartel agreement and was simply trying to make a sale. Unlike misreporting the price it charged, these missteps do not involve lying to a co-conspirator's face, an act that could destroy trust and cause the conspiracy to unravel. A rational cartel member would realize that lying might generate a short-term gain but destroy the possibility of long-term cartel profits.

Regardless of whether an HPE based on firms self-reporting constitutes effective cartel monitoring, cartel enforcers can improve HPE as a monitoring device by utilizing a third party—such as Informed Services in the preceding case. Though a firm could deliver inaccurate information to a third party, there are several reasons to believe it will not occur. In order to provide real-time information on prices, a third party may need to be continuously connected to a firm's database. In principle, the database could have false information but that would probably require the involvement of low-level employees which many cartels avoid in order to reduce the chances of discovery. A second impediment to reporting false information is that the third party may also engage in auditing exercises—such as spot checks on prices in the field—to validate the accuracy of the information that is reported. Finally, a third party has a stronger penalty to wield should a firm provide false information. It could choose to bar the firm from future participation, which would harm it both if firms continued to collude but also if they should return to competition.

III. USING ECONOMIC REASONING TO CHALLENGE CURRENT

ANTITRUST DOCTRINE ON HPES

Although HPEs can injure competition in many ways, courts do not condemn HPEs as per se illegal. Courts have put forth three rationales to justify HPEs. First, an HPE can improve market efficiency. Second, an HPE can allow firms to compete more effectively. Third, an HPE can allow firms to verify customers' claims about other firms' prices. We will consider each of these arguments and show they do not provide a legitimate basis for HPEs. The conclusion of this Section is that no credible basis has been put forward for competitors privately exchanging their prices being procompetitive.

Before we proceed, some ground rules are in order when evaluating a procompetitive argument for an HPE. First, adoption of the HPE must be in firms' best interests, which typically means it increases their profits. A procompetitive theory that explains how the HPE does not harm consumers but does harm firms is a theory that is undermined by the facts. If firms have adopted the HPE then it must benefit them which means their conduct contradicts any procompetitive explanation that has the HPE harming firms. For example, an HPE that is purported to be procompetitive because it lowers firms' prices would (without some other effects) necessarily lower firms' profits and thus the firms' adoption of the HPE is evidence *against* that procompetitive theory. Second, an argument should be careful in not attributing any procompetitive benefits that arise only when the information exchange also encompasses buyers. Our focus is on information exchanges that by fiat or effect exclude buyers.

A. *Claim: HPEs Improve Market Efficiency*

1. Judicial Views

As noted, the Supreme Court in *Gypsum* rejected any per se rule against HPEs and embraced the rule of reason because, according to the majority, "[t]he exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."[118] Lower courts have uncritically accepted this assertion of efficiency as both precedent and

118 United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978).

received wisdom.[119] And although most judges have not examined the efficiency argument for HPEs, Judge Richard Posner has defended it. While acknowledging that HPEs can "foster collusive pricing," Posner nonetheless argued:

> It does not follow that all exchanges of price and related information should be forbidden in order to reduce the incidence of collusive pricing. . . . [S]uch exchanges may often yield significant social benefits, since, in general, the more information sellers have about the prices and output of their competitors, the more efficiently the market will operate.[120]

Despite this pedigree, the assertion that HPEs enhance efficiency is flawed.

2. Examination of Market Efficiency Claim

A practice or institution can improve market efficiency by resulting in more surplus-enhancing transactions, making for quicker transactions (so the surplus that is created can be consumed sooner), and lowering the costs from making transactions (e.g., due to reduced search or less extensive negotiation). There can indeed be such benefits from an information exchange of prices when buyers as well as sellers are included. Such an information exchange reduces buyers' search costs since prices are now more easily available to them. Negotiation delay is reduced as there is more common information between a buyer and a seller about a buyer's alternatives and thus less cause for disagreement. Reduced search and negotiation mean lower transaction costs and less delay in reaching a transaction, all of which improves welfare. However, those benefits are not realized by HPEs because they exclude buyers.

If there is an increase in market efficiency from an HPE, it must then be because it makes sellers more informed about market conditions. That can result in firms making more informed price decisions, which then result in more and quicker transactions. In principle, the sharing of prices could result in firms being more informed when a firm's price conveys some of what it knows about demand and cost. For example, consider that some firms may overestimate the strength of demand and set prices that

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119 *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191, 199 (2d Cir. 2001) (quoting *Gypsum*, 438 U.S. at 441 n.16); *In re* Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999) (same); Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n, 666 F.2d 1130, 1138 n.4 (8th Cir. 1981) (citing *Gypsum*, 438 U.S. at 441 n.16); Olean Wholesale Grocery Coop., Inc. v. Agri Stats, Inc., No. 19 C 8318, 2020 WL 6134982, at *5 (N.D. Ill. Oct. 19, 2020) (quoting *Gypsum*, 438 U.S. at 441 n.16).

120 POSNER, *supra* note 102, at 160.

are too high—thereby foregoing or delaying possible surplus-enhancing transactions—and other firms may underestimate the strength of demand and set prices that are too low—thereby selling to some consumers for whom the possible surplus would be higher if they bought from some other firm. If instead firms were to share their demand information, then all firms would have a demand estimate that is more accurate and consequently set prices more conducive to making surplus-enhancing transactions in a timely manner.

An HPE can result in the sharing of demand and cost information because a firm's price is a signal of what it knows about demand and cost. If a firm believes demand is strong, it will set a high price. If its price is then shared with other firms through an HPE, then they can infer from the high price that the firm must have information that demand is strong. In this indirect way, an HPE can facilitate competitors sharing demand and cost information.

In assessing this as a market efficiency rationale for an HPE, we then want to ask: does the sharing of information about market conditions improve social welfare? There is an extensive theoretical literature on the exchange of cost and demand information by firms with market power, and the results are ambiguous regarding welfare effects.[121] Furthermore, the sensitivity of welfare results to often unobservable and difficult to measure market traits precludes the use of the rule of reason: "In order to use the welfare results for competition policy purposes we would have to condition policy on the mode of competition and the precise structure of uncertainty in the market. Unfortunately, this is unfeasible . . . [and] a case by case evaluation is effectively impossible."[122] If the rationale for a rule of reason is that HPEs can either increase or decrease welfare because they cause firms to indirectly share demand and cost information, it would be better to make them either per se legal or illegal.

The preceding analysis presumed that the HPE did not affect the initial prices selected and just examined the effect on future pricing from firms sharing prices and thereby becoming more informed about demand and cost. However, anticipating that their prices will be shared and information will be inferred from them, HPEs will have the anticompetitive effect of incentivizing firms to charge higher prices.[123] By setting a high price and then sharing it through an HPE, rival firms will infer from the high price that the firm has information that demand is strong (for otherwise it would not have set a high price). Now believing

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121 A review of the literature is provided in KAI-UWE KÜHN & XAVIER VIVES, INFORMATION EXCHANGES AMONG FIRMS AND THEIR IMPACT ON COMPETITION (1995).

122 Kai-Uwe Kühn, Carmen Matutes & Benny Moldovanu, *Fighting Collusion by Regulating Communication Between Firms*, 16 ECON. POL'Y 169, 190 (2001).

123 *Cf.* George J. Mailath, *Simultaneous Signaling in an Oligopoly Model*, 104 Q.J. ECON. 417, 418 (1989).

that demand is stronger than originally believed, these rival firms will set higher prices, and that benefits the firm. The presence of an HPE gives a firm a strategic incentive to price higher in order to manipulate rival firms into believing demand is stronger so they will price higher.[124]

Moving beyond theoretical analyses, there are a limited number of experimental studies examining the effect of HPEs on market efficiency. In one experiment, sellers were forced to exchange prices and no statistically significant effect on prices was found.[125] In another experiment, a seller could choose whether to inform competing sellers of their price. Generally, they chose not to do so, but when they did, it was more likely to be when they set a relatively high price.[126] Commenting on the study, the author of a survey article observed:

> [P]rice sharing was at least partly driven by collusive intentions. It is as if sellers wanted to send a message to keep prices at a high level by informing each other about their high price quotes. When posting a relatively low price sellers were less likely to inform their rivals. . . . [T]here is no evidence that increased price communication among sellers reduced price dispersion, speeded up convergence or increased efficiency.[127]

In sum, economic theory and experimental evidence provide little support for the claim that HPEs enhance market efficiency.

B. *Claim: HPEs Allow Firms to Compete More Effectively*

1. Judicial Views

Related to the efficiency arguments for HPEs, Supreme Court Justices have asserted that HPEs should not be per se illegal because such

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124 If there is merit to HPEs because they make firms better informed of market conditions, it would be preferable for firms to directly share their cost or demand information rather than do so indirectly through prices because: (1) it eliminates this strategic incentive to price higher; and (2) it avoids the risk that sharing prices may spill over to discussing and agreeing on prices. *See supra* Part II. This alternative practice preserves any procompetitive benefit but reduces the risk of anticompetitive harm.

125 Steffen Huck, Hans-Theo Normann & Jörg Oechssler, *Does Information About Competitors' Actions Increase or Decrease Competition in Experimental Oligopoly Markets?*, 18 INT'L J. INDUS. ORG. 39, 41–42 (2000).

126 Georg Kirchsteiger, Muriel Niederle & Jan Potters, *Endogenizing Market Institutions: An Experimental Approach*, 49 EUR. ECON. REV. 1827, 1829 (2005).

127 Jan Potters, *Transparency About Past, Present and Future Conduct: Experimental Evidence on the Impact of Competitiveness*, *in* EXPERIMENTS AND COMPETITION POLICY 81, 92–93 (Jeroen Hinloopen & Hans-Theo Normann eds., 2009).

agreements can allegedly increase market competition. Recall that in his dissent in *Container Corp.*, Justice Marshall argued that HPEs should not be per se illegal because, he asserted, exchanging price quotes would "inform the defendants of the price they would have to beat in order to obtain a particular sale."[128] He contended that HPEs spurred competition by giving rival firms a clear price target to beat.[129] The majority in *Gypsum* seemed to embrace Justice Marshall's argument when they rejected the per se rule, asserting that HPEs can "render markets more, rather than less, competitive."[130]

2. Examination of Effective Competition Claim

It is true that "gathering competitors' price information" is consistent with individual profit-maximizing conduct.[131] Knowing a rival firm's price informs a firm as to the price it needs to set to take business from a competitor or to prevent a customer from being taken by a competitor. Hence, a firm would be able to compete better after learning rival firms' prices. However, by an analogous argument, a firm would not want competitors to learn its prices because that information would give them an edge in competition. Thus, this argument explains why a firm would exert effort to collect competitors' prices but does not explain why firms would agree to share prices. As such, it is not a procompetitive rationale for firms adopting an HPE.

Moreover, Justice Marshall believed that HPEs would increase price competition because rivals would know what price they have to *beat*.[132] But empirically, HPEs lead to—at most—price-matching behavior, not price-lowering behavior. In *Container Corp.*, for example, the firm that received the price quote from a rival charged the same price.[133] Similarly, in *Gypsum*, the firm requesting the price verification would generally *match* the price, not beat it.[134] Price matching does not benefit

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128 United States v. Container Corp. of Am., 393 U.S. 333, 342 (1969) (Marshall, J., dissenting).

129 *Id.*

130 United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978).

131 ABA SECTION OF ANTITRUST LAW, PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS 84 (2010) ("Evidence that the defendants shared price information does not prove conspiracy unless the plaintiff also shows that the defendants agreed to fix prices. Sharing price information, by itself, does not establish an agreement to set the same prices, because gathering competitors' price information can be consistent with competitive behavior." (footnote omitted)).

132 *See Container Corp.*, 393 U.S. at 341–43 (Marshall, J., dissenting).

133 Transcript of Oral Argument, *supra* note 42, at 19–20.

134 Transcript of Oral Argument at 7, *Gypsum*, 438 U.S. 422 (No. 76-1560) (statement of Daniel M. Friedman, Deputy Solicitor General).

consumers.[135] And, importantly, HPEs do not lower prices. To the extent that HPEs cause firms to raise their initial prices, matching those high prices makes consumers worse off than without HPEs.

C. *Claim: HPEs Allow Firms to Verify Customers' Reports about Other Firms' Prices*

1. Judicial Views

When arguing in the Supreme Court, antitrust defendants have sought to justify their HPEs as a necessary response to their customers falsely claiming that another seller was offering a lower price. For example, at oral argument in *Container Corp.*, defense counsel argued that defendants exchanged current price information because "they didn't trust the information when they got it from the buyer."[136] While playing a relatively minor role in *Container Corp.*, the specter of the lying customer was front and center of the *Gypsum* case. The defendants in *Gypsum* advanced two separate but related defenses for their HPEs. First, they argued that their price verification scheme was necessary to satisfy the meeting-competition defense against Robinson-Patman liability.[137] The Robinson-Patman Act condemns anticompetitive price discrimination, but the statute provides a seller can sell at a lower price to a particular customer if the seller is meeting competition because that customer has been offered a lower price by a rival seller.[138] The *Gypsum* defendants argued that their HPE was necessary to "verify[] the accuracy of customers' claims of lower prices purportedly offered by competitors in order to . . . comply with Section 2(b) of the Robinson-Patman Act by establishing a *bona fide* basis for extending a lower price to meet a competitor's reported lower price offer."[139] The gypsum firms claimed

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135 Brief for the United States, *supra* note 66, at 91 ("When seller *B* matches seller *A*'s price, the buyer receives no benefit: *B*'s price is the same as *A*'s.").

136 Transcript of Oral Argument, *supra* note 42, at 24 (statement of Whitney North Seymour, counsel for appellee-defendants) ("[A]ll of the defendants from time to time, when they couldn't get the information from their own records and they didn't trust the information when they got it from the buyer, would call up another manufacturer and ask him for his last price.").

137 Respondents' Joint Brief, *supra* note 92, at 11 ("[Price] verification was undertaken to avoid violations of the Robinson-Patman Act by satisfying its stringent requirements for establishing a good faith meeting competition defense.").

138 15 U.S.C. § 13(b).

139 Respondents' Joint Brief, *supra* note 92, at 19.

that rival-to-rival price verification was necessary because their customers habitually lied about prices.[140]

Second, and independent of their Robinson-Patman argument, the *Gypsum* defendants argued that "verification was employed to protect the seller against customer fraud or misrepresentation."[141] The defendants argued that they needed to exchange price information to "prevent being defrauded by lying customers."[142] They further asserted that "prevention of customer fraud was a lawful purpose for [price] verification."[143]

In both *Container Corp.* and *Gypsum*, the defendants argued that HPEs were necessary to verify consumer claims of lower prices.

2. Examination of Customer Verification Claim

In its negotiation with a firm, a customer might report that a competitor is offering a lower price on the hope that it will induce the firm to make a more attractive offer. That firm would certainly like to be able to verify the veracity of the customer's claim and, in principle, an HPE could perform that role. One such HPE is a reciprocal agreement between firms that allows any firm to communicate with a competitor to verify its price.[144] The question is whether an HPE will serve that role and, if it does, whether it is procompetitive.

A closer examination puts into doubt that HPEs can perform this price verification role. Consider firm *X* calling up firm *Y* to say: "I have a buyer who says you are charging only $10/unit. Is your price really that low?" If firm *Y*'s price is not that low, it will certainly want to tell the truth so as to not cause firm *X* to lower its price. Now suppose firm *Y*'s price is, in fact, $10 or less. Now, firm *Y* will want to lie and convey that its price is higher than $10 in order to prevent firm *X* from lowering its price. Given that firm *Y*'s response is the same regardless of its price, firm *X* should find firm *Y*'s response to be uninformative.

A firm does not want to report truthfully because that gives a competitor valuable information with which to take a firm's business. This point was already made in connection with discrediting the claim that an HPE allows a firm to compete better. A firm wants to inflate its

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140 United States v. U.S. Gypsum Co., 550 F.2d 115, 121–22 (3d Cir. 1977), *aff'd*, 438 U.S. 422 (1978). The defendants claimed that "purchasers of the gypsum board were notoriously unreliable and often were discovered to have lied about a competitor's offer in order to 'whipsaw' a price cut. There is evidence to support these assertions." *Id.*

141 Respondents' Joint Brief, *supra* note 92, at 11.

142 *Id.* at 19.

143 *Id.* at 43. The Supreme Court rejected this defense on the facts of the case. *See Gypsum*, 438 U.S. at 446–49, 446 n.22, 448 nn.23–24.

144 *See, e.g.*, Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028 (8th Cir. 2000).

price in the eyes of a competitor so as to cause its competitor to price higher than it would if it knew the truth. Given the incentive to deceive, one does not expect firms to engage in truthful communication, at least if they are competing.

But suppose firms have somehow managed to commit themselves to truthfully share prices so the HPE can be used to verify buyers' claims. We argue that such an HPE is anticompetitive because it is an agreement that unreasonably restrains trade by raising sellers' bargaining power over buyers. When a buyer claims that another seller has a lower price, the seller can verify that claim. In doing so, it reduces the ability of buyers to bluff in order to obtain lower prices. Let us examine this point in more detail.

There are a number of situations that can play out. We begin with when a buyer reports to firm *X* that firm *Y* is charging a low price when, in fact, firm *Y* is not doing so. With the HPE, firm *X* will learn the buyer's claim is false and therefore not lower its price. Consequently, the buyer will continue to buy from firm *X* at its original price. In the absence of the HPE, there are two possible outcomes. One is that firm *X* does not lower its price and calls the customer's bluff. In that situation, the outcome is the same as with the HPE, so there is no effect from the HPE. The other outcome is that firm *X* is sufficiently concerned with the possibility that firm *Y* does have a lower price such that it reduces its price in order to retain the customer. Now, the customer pays less and, given that price is closer to cost, consumer and social welfare rise.[145] In this scenario, the HPE is anticompetitive because it enhances sellers' bargaining power by removing the possibility of a buyer bluffing their way to a lower (and more efficient) price.

Next consider when a buyer claims to firm *X* that firm *Y* is charging a low price and, in fact, it is true. With the HPE, firm *X* would learn it is true and lower its price—perhaps not to firm *Y*'s price but low enough that the buyer prefers to stay than to incur any cost from switching suppliers. Thus, the HPE results in the buyer staying with firm *X* at a lower price and avoids any switching cost. That is an attractive outcome. Without the HPE, there are two possible outcomes. The first is that firm *X* lowers its price as it gives sufficient credence to the claim, in which case the outcome is the same as with the HPE. The second possibility is that firm *X* does not lower its price so the customer moves its business to firm *Y*. Compared to when there is the HPE, this situation results in a welfare loss in the form of the customer switching cost. The HPE allows

145 With market power, the firm is pricing above cost so any reduction in price that does not put it below cost will lead to more surplus-enhancing transactions.

the customer to get a lower price from firm *X* while avoiding the cost from switching suppliers.

With the exception of the last scenario, the HPE either lowers or does not change welfare. As regards the last scenario, note that it requires firm *Y* to have lowered its price, presumably to attract some customers away from firm *X*. However, the HPE undermines the incentive to do so because firm *Y*'s lower price will result in firm *X* responding with a lower price in order to retain the customers that firm *Y* is trying to lure away.[146] Consequently, firm *Y* fails in its attempt to increase sales through a lower price. While it is true that the HPE can enhance welfare when a firm lowers price to attract customers, the HPE undermines the incentive for a firm to lower price in the first place. The HPE is only welfare improving for a state of the world that the HPE itself makes unlikely to occur.

In sum, under competition, a firm has an incentive not to be truthful when a rival firm asks them to confirm a buyer's claim about the firm's price. That argument undermines the claim that an HPE has a legitimate basis because a firm can then verify customers' claims about rival firms' prices. If firms can commit themselves to be truthful—so that incentive to deceive is no longer operative—then an HPE generally thwarts buyers' effort to receive lower prices by increasing the bargaining power of sellers. In conclusion, the argument that an HPE is not an anticompetitive agreement because it allows a firm to verify customers' claims of a rival firm's price lacks a sound basis.

IV. STRICTER TREATMENT OF HORIZONTAL PRICE EXCHANGES

Given the insights from Parts Two and Three, it is time to revisit the Supreme Court's trilogy of cases applying the rule of reason to HPEs. There are many solid arguments for how HPEs can be anticompetitive but there is not a single solid argument for how HPEs can be procompetitive. This Part explains why American courts should apply a stricter antitrust standard for HPEs.

A. *Problems with Using the Rule of Reason for HPEs*

Current antitrust doctrine applies the rule of reason to HPEs. Part I explained how this doctrinal approach is questionable as a matter of precedent and logic. Part III applied economic reasoning to show that the

146 *See* Brief for the United States, *supra* note 66, at 74–75 ("The prospect of routine price-matching, one of the conceded purposes of the information exchange in which respondents engaged, therefore would deprive sellers of an important incentive to reduce prices." (citation omitted)).

judicial justifications for the rule of reason in HPE cases are flawed. This Section examines caselaw to provide additional reasons why the rule of reason is an inappropriate mode of analysis to evaluate HPE claims.

The current rule of reason approach to intercompetitor price exchanges provides little to no guidance for firms. To apply the rule of reason, the *Gypsum* Court asserted that "[a] number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication."[147] Beyond this ill-defined short list of factors, the Supreme Court's opinion in *Gypsum* gives little meaningful guidance on how to apply the rule of reason to horizontal price exchanges. What are the legitimate uses of horizontal price exchanges that would prevent antitrust liability from attaching? Beyond vague references to improving efficiency and helping competition, neither the Supreme Court nor the counsel for antitrust defendants have provided any efficiency reason for why rival companies needed to exchange current price information in order to bid on individual customers. Part III established that HPEs do not improve efficiency; nor do they increase competition. Indeed, Part II showed the opposite is true.

The rule-of-reason approach is exceedingly pro-defendant. Defendants overwhelmingly prevail in rule-of-reason cases,[148] generally winning their motions to dismiss and for summary judgment,[149] often because judges do not see anticompetitive effects.[150] Some of these cases involve claims of anticompetitive HPEs.[151] This is not surprising given

147 *Gypsum*, 438 U.S. at 441 n.16.

148 *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009). Carrier's figures do not include settlements. Plaintiffs bringing particularly strong rule-of-reason cases may negotiate significant settlements that do not show up in empirical research. But the rule-of-reason standard still undermines the plaintiffs' bargaining power during settlement negotiations.

149 *See* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1423 (2009) ("The empirical evidence reflects that most rule-of-reason claims never reach juries; rather, most are decided on motions to dismiss or summary judgment, and most (and in some surveys nearly all) antitrust plaintiffs lose.").

150 Christopher R. Leslie, *Disapproval of Quick-Look Approval: Antitrust After* NCAA v. Alston, 100 WASH. U. L. REV. 1, 44–46 (2022).

151 *See, e.g.*, Stephen Jay Photographs, Ltd. v. Olan Mills, Inc., 713 F. Supp. 937, 945 (E.D. Va. 1989) ("Because of the absence of a purpose or effect to restrain competition, or an agreement to restrain competition, the exchange of price information in this case does not offend Section 1 of the Sherman Act."), *aff'd*, 903 F.2d 988 (4th Cir. 1990); Cont'l Cablevision of Ohio, Inc. v. Am. Elec. Power Co., 715 F.2d 1115, 1119 (6th Cir. 1983) ("Accordingly, in the absence of a purpose or effect to restrain competition, or some other evidence of an actual agreement to restrain

that modern courts have applied the *Gypsum* assertion that HPEs "in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."[152]

In applying the rule of reason, courts do not treat HPEs as inherently anticompetitive. Many courts invoke standards and considerations untethered to competitive consequences. For example, the Ninth Circuit in *Supermarket of Homes, Inc. v. San Fernando Valley Board of Realtors*[153] affirmed summary judgment for realtors who engaged in an HPE among realtors, holding:

> If the exchange of price information constitutes reasonable business behavior the exchange is not an illegal agreement. In order to prevail, "plaintiff must demonstrate that the allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment."[154]

That is the wrong inquiry. Yet, in applying the rule of reason, the court did not focus on anticompetitive effects. Anticompetitive effects matter, not whether the defendants exercised good judgment.

Similarly, after the Second Circuit in *Todd v. Exxon Corp.* held that HPEs are evaluated under the rule of reason and remanded the case,[155] the District Court of New Jersey focused on market definition and market power, which are essentially a distraction.[156] Instead of directly analyzing whether the employers' exchange of salary information stabilized or depressed workers' wages, the litigation focused on whether decreases in salaries in the oil and petrochemical industry would cause employees to shift industries altogether, for example, to the pharmaceutical industry.[157] This approach was consistent with the Second Circuit's direction that the plaintiff would have to present "economic evidence regarding the cross-industrial elasticity of MPT [managerial, professional and technical]

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competition, we hold that the exchange of price data does not offend § 1 of the Sherman Act."); Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, No. CV 80-1888 PAR, 1983 WL 2199, at *7 (C.D. Cal. Sept. 1, 1983) ("Applying the rule of reason, a number of courts have considered the antitrust implications of the exchange of commission rates among real estate brokers in an MLS, and have found the practice to be lawful. This Court agrees with that conclusion." (citations omitted)), *aff'd*, 786 F.2d 1400 (9th Cir. 1986).

152 *E.g.*, Cason-Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603, 637 (E.D. Mich. 2012) (quoting *Gypsum*, 438 U.S. at 441 n.16).

153 786 F.2d 1400 (9th Cir. 1986).

154 *Id.* at 1407 (quoting Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 884 (9th Cir. 1982)).

155 275 F.3d 191 (2d Cir. 2001).

156 *In re* Comp. of Managerial, Pro. & Tech. Emps. Antitrust Litig., No. 02-CV-2924, 2008 WL 3887619, at *4–7 (D.N.J. Aug. 20, 2008).

157 *See id.* at *6–7 ("At issue is the interchangeability, from the perspective of an MPT [managerial, professional and technical] employee, of a job opportunity in the oil industry with, for example, one in the pharmaceutical industry." (quoting *Todd*, 275 F.3d at 202)).

employees" at trial.[158] This represents an unnecessary and cumbersome distraction from the only relevant issue: Did the defendants' exchange of wage information reduce wages below what they would otherwise have been but for the HPE? The rule of reason approach entails courts getting bogged down in extraneous side issues like market definition.[159] These inquiries derail courts from determining whether a HPE affected price.

Indeed, some federal judges write as though HPEs are per se legal. For example, a handful of courts have asserted that "[a]bsent an agreement to fix prices, there is nothing unlawful about competitors meeting and exchanging price information."[160] That is incorrect; the Supreme Court has condemned HPEs even absent an agreement to fix prices.[161] Despite this fact, some courts have asserted that "[u]nder *Sugar Institute*, a stabilizing effect due to price information exchange is permitted as long as competitors make independent pricing decisions."[162] The Supreme Court's opinion in *Sugar Institute*[163] did not insulate HPEs from antitrust liability, as shown by the fact that the Court condemned HPEs in *Container Corp*. and *Gypsum*, with the latter opinion noting that HPEs "have consistently been held to violate the Sherman Act."[164]

Moreover, the justifications for HPEs advanced by antitrust defendants are flawed. First, HPEs are not necessary to prove the meeting-competition defense of the Robinson-Patman Act.[165] After studying the legislative history of the Robinson-Patman Act, the Report of the Attorney General's National Committee to Study the Antitrust

158 *Todd*, 275 F.3d at 204 ("At trial, plaintiff would have to prove this theory with economic evidence regarding the cross-industrial elasticity of MPT employees.").

159 After a decade of active litigation, the case settled. *See Antitrust and Employment Pt. I*, 315 ANTITRUST COUNS. (ABA Section of Antitrust L., Chicago, Ill.), Mar. 2021.

160 *In re* Delta/Airtran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343, 1376 (N.D. Ga. 2017) (quoting Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1505 (11th Cir. 1985)), *aff'd sub nom.* Siegel v. Delta Air Lines, Inc., 714 F. App'x 986 (11th Cir. 2018); Sun Microsystems Inc. v. Hynix Semiconductor Inc., 622 F. Supp. 2d 890, 906 (N.D. Cal. 2009) (quoting Rutledge v. Elec. Hose & Rubber Co., 327 F. Supp. 1267, 1272 (C.D. Cal. 1971)).

161 United States v. Container Corp. of Am., 393 U.S. 333, 335 (1969).

162 *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 316 (N.D. Ga. 1993).

163 Sugar Inst. v. United States, 297 U.S. 553 (1936).

164 United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978) (first citing Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); then citing United States v. Am. Linseed Oil Co., 262 U.S. 371 (1923); and then citing United States v. Container Corp. of Am., 393 U.S. 333 (1969)).

165 *See* Brief for the United States, *supra* note 66, at 86–87 ("There is no need for a seller to discuss price with his competitors to take advantage of the meeting competition defense."); *id.* at 86–87 n.78 ("The Federal Trade Commission agrees with the Department of Justice that this is the proper interpretation of the Robinson-Patman Act. No court of appeals has held that a seller must 'verify' price offers with its competitor in order to take advantage of the meeting-competition defense." (citation omitted)).

Laws concluded that "the Section 2(b) [meeting-competition] defense should not permit collusive price-matching among sellers, and cannot legitimize otherwise unlawful pricing conspiracies."[166] The Supreme Court in *Gypsum* explicitly rejected the Robinson-Patman defense for HPEs, noting that "nothing in the language of § 2(b) or the gloss on that language in [prior Supreme Court cases] indicates that direct discussions of price between competitors are required. Nor has any court, so far as we are aware, ever imposed such a requirement."[167] In short, rival firms cannot violate the Sherman Act in anticipation of a Robinson-Patman claim.[168]

Second, the Robinson-Patman defense for HPEs is not particularly compelling, given that the government has effectively stopped enforcing the Robinson-Patman Act.[169] The FTC has brought one case since 1992, and the DOJ none.[170] At the same time, the Supreme Court has made it increasingly difficult for private claims to proceed or succeed.[171]

Third, the Robinson-Patman defense appears insincere. For example, the gypsum firms that justified their HPEs as necessary to comply with the Robinson-Patman Act had policies to destroy the very records that would establish their defense.[172] Notably, "Kaiser instructed

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166 REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 182 (1955).

167 *Gypsum*, 438 U.S. at 453–54 ("On the contrary, the § 2(b) defense has been successfully invoked in the absence of interseller verification on numerous occasions." (first citing Int'l Air Indus., Inc. v. Am. Excelsior Co., 517 F.2d 714 (5th Cir. 1975); then citing Cadigan v. Texaco, Inc., 492 F.2d 383 (9th Cir. 1974); then citing Jones v. Borden Co., 430 F.2d 568 (5th Cir. 1970); and then citing Nat'l Dairy Prods. Corp. v. FTC, 395 F.2d 517 (7th Cir. 1968))) (collecting cases).

168 *Id.* at 429–30 (holding that the Robinson-Patman Act provided no defense against antitrust liability if the practice's effect was to raise, fix, or stabilize prices); *cf.* Brief for the United States, *supra* note 66, at 89–90 n.81 ("A seller who doubts the truthfulness of a buyer's representations and desires to establish a meeting competition defense to price discrimination would not, for example, be free to burgle the buyer's office or wiretap the buyer's telephone in search of price information. There is no greater reason to allow the seller to violate the Sherman Act to obtain the information he seeks.").

169 Roger D. Blair & Christina DePasquale, *"Antitrust's Least Glorious Hour": The Robinson-Patman Act*, 57 J.L. & ECON. S201, S212 (2014) ("[P]ublic enforcement of the [Robinson-Patman Act] is nearly nonexistent.").

170 *Id.* at S212 & n.21; William E. Kovacic, *Creating A Respected Brand: How Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237, 258 (2015) ("The two U.S. antitrust agencies have brought one case to enforce the Robinson-Patman Act since 1989 and none since 2000."); D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1014 (2014) ("[F]ederal agency Robinson-Patman enforcement is dead, with only one government case brought since 1992.").

171 *See* Blair & DePasquale, *supra* note 169, at S212 ("[P]rivate actions appear to be less promising than they once were for plaintiffs.").

172 Brief for the United States, *supra* note 66, at 15 ("None of the corporations or employees involved in exchanging information maintained systematic records of the communications. Indeed, some of the companies instructed their employees or agents not to keep records and to destroy existing records.").

its employees to destroy any existing notes of competitive contacts and not to keep any more, in anticipation of possible 'complications.'"[173] Another gypsum firm rejected its attorneys' advice to maintain its price records.[174] At one point, U.S. Gypsum requested that its accountants at Arthur Andersen & Co. cease retaining relevant price records "and suggested that prior records be disposed of."[175] Perhaps more suspiciously, after being deposed in a private antitrust lawsuit, the vice president for sales administration of another gypsum firm "instructed its division managers to keep themselves 'legally clean' by not keeping notes of competitive contracts."[176] Moreover, when asked, gypsum sellers could not explain why they were destroying their records.[177]

The policy and practice of destroying such records are part and parcel of illegal price-fixing cartels.[178] Such behavior does not indicate an honest firm trying to make a meeting-competition defense under Robinson-Patman. In short, the Robinson-Patman defense to HPEs seems like a red herring because the firms in *Gypsum*, for example, affirmatively destroyed their records that they would need to make a meeting-competition defense.

In addition to the Robinson-Patman defense, firms have justified their use of HPEs as a necessary response to lying buyers. But this is not a defense under the rule of reason. A buyer's (false) claim that it can purchase the product elsewhere for less is simply part of the bargaining process. In their amicus brief in *Gypsum*, several states explained that the "'lying buyer' . . . is a normal condition of participation in a competitive market that is regulated by the economic laws of supply and demand."[179] Indeed, these lying customers may be an affirmatively positive aspect of a competitive market. Consumers may try to destabilize a price-fixing

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173 *Id.* at 15 n.18.

174 *Id.*

175 *Id.*

176 *Id.*

177 Transcript of Oral Argument, *supra* note 134, at 12 (statement of Daniel M. Friedman, Deputy Solicitor General) ("And when one man was asked, 'Well, if you needed this in order to protect yourself, to establish a Robinson-Patman meeting-competition defense, why didn't you keep any records?' He said, 'Well, I can't really answer to that, it just didn't seem necessary.'").

178 Leslie, *supra* note 15, at 1219–28 (describing the document policies of illegal cartels).

179 Brief for the States of California, Alabama, Arizona, Colorado, Connecticut, Indiana, Kansas, Louisiana, Maryland, Missouri, New Jersey, New Mexico, New York, North Carolina, Oregon, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin as Amici Curiae at 14, United States v. U.S. Gypsum Co., 438 U.S. 422 (1978) (No. 76-1560), 1977 WL 189304 ("In times of oversupply, buyers tend to dictate prices, and the so-called 'lying buyer' can get price concessions. In times of short supply, the sellers dictate prices and the 'lying buyer' is not a problem.").

cartel by claiming to receive offers of lower prices from other suppliers. For example, in attempting to destabilize the rayon cartel, "customers attempted to encourage defections by telling suppliers that others already had defected."[180] Thus, "[c]ustomers spread rumors of cheating, in order to induce it."[181] Price-fixing conspirators invest significant time addressing "how to handle customers who falsely claimed that they had been offered a better price."[182] One mechanism cartels may use is price verification schemes in which firms respond truthfully to cartel partners' inquiries about price quotes to specific customers. Ultimately, if the "lying buyer" defense were accepted, it could essentially make HPEs per se legal, which would likely result in increased prices for consumers.[183]

Finally, the rule of reason approach is also problematic because, as applied by federal courts in the modern era, it is inherently deferential. Federal judges often fail to appreciate the anticompetitive risks posed by HPEs. This creates a significant risk of false negatives.

B. *The Case for Per Se Illegality*

Under the per se rule, courts condemn some restraints as unreasonable as a matter of law. The per se category is reserved for "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."[184] If the per se rule applies, the defendants cannot argue that

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180 Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43, 62 (2006).

181 *Id.* at 63.

182 KURT EICHENWALD, THE INFORMANT: A TRUE STORY 222 (2000) (discussing meetings of the international lysine cartel).

183 *See infra* Part II; Michael M. Eaton, *The Robinson-Patman Act: Reconciling the Meeting Competition Defense with the Sherman Act*, 18 ANTITRUST BULL. 411, 427 (1973) ("There is, however, a great potential for abuse in any 'lying buyer' defense. Its applicability may therefore be somewhat limited."); *cf. Gypsum*, 438 U.S. at 456 ("As an abstract proposition, resort to interseller verification as a means of checking the buyer's reliability seems a possible solution to the seller's plight, but careful examination reveals serious problems with the practice.").

184 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958); *see also* Nynex Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998) (noting that some agreements are per se illegal because they "will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances").

their particular agreement is not anticompetitive or is supported by a procompetitive justification.[185]

Horizontal price exchanges have the hallmarks of per se illegality. First, HPEs have a "pernicious effect on competition." As demonstrated in Part II, HPEs put upward pressure on price even in the absence of an underlying agreement on prices. Moreover, if the rival firms have secretly colluded on transaction prices, an HPE would stabilize their illegal cartel arrangement by facilitating interfirm communications and providing monitoring for a cartel enforcement regime. Second, HPEs "lack . . . any redeeming virtue." Although the per se rule is only appropriate "when there is very little loss to society from banning a restraint altogether,"[186] HPEs do not serve procompetitive ends. As demonstrated in Part III, HPEs do not improve market efficiency or increase price competition. Indeed, they have the opposite effect.

Third, the Supreme Court has reserved per se condemnation for those restraints that courts have sufficient experience with.[187] In *Arizona v. Maricopa County Medical Society*,[188] the majority opinion explained that "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."[189] If a particular type of restraint is consistently found unreasonable under the rule of reason, that provides a strong argument for putting the restraint in the per se category.[190] The Supreme Court, as well as the lower federal courts, do have considerable experience with horizontal price exchanges. Indeed, the Court in *Gypsum* acknowledged that "[e]xchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not

185 United States v. Fischbach & Moore, Inc., 750 F.2d 1183, 1195–96 (3d Cir. 1984) ("The Supreme Court repeatedly has held that per se violations require no proof of anticompetitive effect to constitute a violation of the Sherman Act."); Polygram Holding, Inc. v. FTC, 416 F.3d 29, 34 (D.C. Cir. 2005) (noting that a per se unlawful restraint is "not susceptible to a procompetitive justification"); United States v. Microsoft Corp., 253 F.3d 34, 95 (D.C. Cir. 2001).

186 Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 33–34 (1984) (O'Connor, J., concurring).

187 United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.").

188 457 U.S. 332 (1982).

189 *Id.* at 344.

190 *See, e.g.*, Kreuzer v. Am. Acad. of Periodontology, 735 F.2d 1479, 1490 (D.C. Cir. 1984) ("For purposes of judicial economy, as the courts gained experience in the area of antitrust it became possible to identify certain types of recurring agreements which proved to be so consistently unreasonable that they could be branded illegal per se and the rule of reason inquiry dispensed with.").

per se unlawful have consistently been held to violate the Sherman Act."[191] The Court's admission is perplexing because if HPEs are "*consistently* . . . held to violate the Sherman Act,"[192] then that counsels in favor of per se illegality.

Although the per se rule may seem harsh, it is often efficient. As the Court explained in *FTC v. Superior Court Trial Lawyers Ass'n*[193]:

> [t]he administrative efficiency interests in antitrust regulation are unusually compelling. The *per se* rules avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable."[194]

Bright-line rules are easier for executives to follow and easier for courts to apply, ultimately conserving judicial resources.[195] A bright-line rule against HPEs would better deter these anticompetitive restraints in the first place.

Despite the case for treating HPEs as per se illegal, two barriers persist. First, because the Supreme Court has explicitly held that HPEs are not per se illegal, it would be exceedingly difficult to convince courts to apply the per se rule to this category of trade restraint. Second, the Supreme Court in *Gypsum* asserted that HPEs can sometimes increase efficiency and competition.[196] Ultimately, however, both of these concerns can be addressed by a compromise position: evaluating HPEs under the quick-look approach, as the following Section explores.

C. *Quick-Look Condemnation as a Compromise*

When the Justices crafted their opinions in *Container Corp.*, *Citizens & Southern National Bank*, and *Gypsum*, the Supreme Court had only recognized two modes of analysis for condemning restraints of trade as unreasonable: the per se rule and the rule of reason. In 1978, the same

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191 United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978) (first citing Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); then citing United States v. Am. Linseed Oil Co., 262 U.S. 371 (1923); and then citing United States v. Container Corp. of Am., 393 U.S. 333 (1969)).

192 *Id.* (emphasis added).

193 493 U.S. 411 (1990).

194 *Id.* at 430 (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

195 *See Maricopa Cnty. Med. Soc'y*, 457 U.S. at 354 ("Our adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy." (citing United States v. Topco Assocs., Inc., 405 U.S. 596, 611–12 (1972))).

196 *Gypsum*, 438 U.S. at 441 n.16. Although this assertion lacks supportive economic evidence and is disproven by economic theory, it is currently part of antitrust common law.

year as the *Gypsum* opinion, the Court reiterated in *National Society of Professional Engineers v. United States*[197] that there are "*two* complementary categories of antitrust analysis"—the per se approach for "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality" and the rule of reason approach for "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[198] The rule of reason was—and is—the presumptive mode of analysis.[199] By declining to apply the per se rule in the 1970s' HPE trilogy, the Supreme Court necessarily imposed a rule of reason approach by default.

In the mid-1980s, the Supreme Court set in motion the creation of a new middle mode of analysis in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*,[200] where the Justices claimed to apply the rule of reason to a restraint that restricted output and, thus, increased price. While claiming to eschew the per se rule, the Court rejected the defendants' arguments that their low market shares prevented liability—a traditional rule of reason defense—because "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output."[201] Then, in *FTC v. Indiana Federation of Dentists*,[202] the Court again claimed to apply the rule of reason while not shirking any "detailed market analysis."[203] Both opinions claimed to reject the per se rule but then precluded the defendants from making traditional rule of reason arguments. Lower courts interpreted these Supreme Court decisions as creating a third, middle mode of analysis in

197 435 U.S. 679 (1978).

198 *Id.* at 692 (emphasis added).

199 *E.g.*, Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151 (2021) ("Determining whether a restraint is undue for purposes of the Sherman Act 'presumptively' calls for what we have described as a 'rule of reason analysis.'" (first quoting Texaco, Inc. v. Dagher, 547 U.S. 1, 5 (2006); and then citing Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60–62 (1911))); *see also* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) ("Since the early years of this century a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis." (citing *Standard Oil Co.*, 433 U.S. at 31)).

200 468 U.S. 85 (1984).

201 *Id.* at 109.

202 476 U.S. 447 (1986).

203 *Id.* at 460 ("[T]he Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason.").

between the per se rule and the rule of reason: the quick look.[204] The Supreme Court adopted the lower courts' interpretation in *California Dental Ass'n v. FTC*,[205] holding that trade restraints can be condemned with a "quick look" when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[206] The Court explained that "quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained."[207]

It is now well-established that if the challenged restraint has a "great likelihood of anticompetitive effects,"[208] the court can use the quick-look approach to condemn the restraint if the defendant does not negate the presumption of anticompetitive effects or proffer a sufficient procompetitive justification for the restraint.[209] If the defendant can do so, "the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis."[210]

Courts employ the quick-look rule for restraints that could arguably be treated as per se illegal, but nonetheless warrant some additional scrutiny. Quick-look condemnation "applies in cases where *per se* condemnation is inappropriate, but where 'no elaborate industry analysis is required to demonstrate the anticompetitive character' of an inherently suspect restraint."[211] When employing the quick-look approach, courts presume that the restraint at issue harms competition,[212] and afford the

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204 *See, e.g.*, *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 274 (6th Cir. 2014) ("This Court has characterized 'quick look' analysis as a third type of category arising from the blurring of the line between *per se* and rule of reason cases." (citing Expert Masonry, Inc. v. Boone Cnty., 440 F.3d 336 (6th Cir. 2006))).

205 526 U.S. 756 (1999).

206 *Id.* at 770.

207 *Id.* (citing Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1020 (10th Cir. 1998)).

208 Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 831 (3d Cir. 2010).

209 *Id.* at 831–32 ("[E]ven where anticompetitive effects are obvious, 'quick look' condemnation is proper only after assessing and rejecting the logic of proffered procompetitive justifications.") (first citing *Cal. Dental Ass'n*, 526 U.S. at 771; and then citing N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 362 (5th Cir. 2008))).

210 *Id.* at 832 (quoting United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)) (first citing *Cal. Dental Ass'n*, 526 U.S. at 771; and then citing Bogan v. Hodgkins, 166 F.3d 509, 514 n.6 (2d Cir. 1999)); *see also Bogan*, 166 F.3d at 514 n.6 ("Under quick look, once the defendant has shown a procompetitive justification for the conduct, 'the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.'" (citation omitted) (quoting *Brown Univ.*, 5 F.3d at 669)).

211 *Brown Univ.*, 5 F.3d at 669 (first quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 (1984); and then quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986)).

212 Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1311 (10th Cir. 2017) ("[U]nder an abbreviated, 'quick look' rule-of-reason analysis, courts sometimes simply

defendants an opportunity to rebut that presumption.[213] Under the quick-look approach, plaintiffs need not define the market or prove that the defendants collectively possess market power,[214] which makes antitrust litigation more efficient.[215]

Courts have used the quick-look approach to condemn horizontal price-related restraints that fall short of per se illegal price fixing.[216] The Fifth Circuit in *North Texas Specialty Physicians v. FTC*[217] employed the quick-look approach to condemn a physician association's practice of asking its members to report their minimum acceptable fee, which the association used to calculate its "minimum contract fee" for "managed care contracts on behalf of its participants."[218] The court noted that these "practices [bore] a very close resemblance to horizontal price-fixing, generally deemed a per se violation."[219] By sharing their minimum acceptable fee, the defendants in *North Texas Specialty Physicians* agreed to exchange a form of price information, albeit one that is less precise than a traditional HPE.

The analysis in Parts II and III counsels in favor of treating all HPEs under the quick-look approach. It would be relatively straightforward to apply an abbreviated rule of reason to HPEs. An agreement among competitors to share their current pricing plans, including list or transaction prices, has obvious anticompetitive potential. As explained in Part II, HPEs are inherently suspect; they raise prices and can stabilize illegal price-fixing conspiracies.[220] Horizontal agreements to exchange prices bear the hallmarks of other agreements that lower courts have condemned using the quick-look approach: they are agreements related

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assume the existence of anticompetitive effect where the conduct at issue amounts to a 'naked' and effective restraint on price or output that carries 'obvious' anticompetitive consequences.") (citations omitted).

213 *Deutscher Tennis*, 610 F.3d at 830–31 ("Under 'quick look' analysis, the competitive harm is *presumed*, and 'the defendant must promulgate "some competitive justification" for the restraint.'" (emphasis added) (quoting *Brown Univ.*, 5 F.3d at 669)).

214 *Bogan*, 166 F.3d at 514 n.6 ("To avoid examining the relevant market, market power, and anticompetitive effect in all cases in which conduct does not clearly fit within a per se category, the Supreme Court has sanctioned an intermediate inquiry, known as 'quick look,' if the conduct at issue is a 'naked restriction.'" (quoting *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 109)).

215 *Id.* at 514; Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 502 (2009) ("Several quick look decisions conserve resources by omitting rule of reason style proof of market power.").

216 *See, e.g.*, Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36–38 (D.C. Cir. 2005).

217 528 F.3d 346 (5th Cir. 2008).

218 *Id.* at 353, 370.

219 *Id.* at 362.

220 *See supra* Part II; N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 374 (4th Cir. 2013) (applying quick-look condemnation to conduct that is inherently suspicious).

to price that have the effect of raising transaction prices. When courts apply the quick-look approach to HPEs, plaintiffs would neither have to define the relevant market nor prove anticompetitive effects; instead—because HPEs are intrinsically anticompetitive—the focus is on the defendants' proffered procompetitive justification for privately exchanging pricing information with their rivals.[221]

Under the quick-look approach, the defendants would be afforded the opportunity to explain why their arrangement is not anticompetitive. Defendants could, for example, argue that the particular HPE increased competition or prevented fraud. But, as Part III demonstrated, such arguments are easy to assert but hard to substantiate. Under the quick-look approach, the defendants would bear the burden of overcoming the presumption that their HPE was anticompetitive.[222] Mere assertions of efficiency would be insufficient. Courts should be suspicious about these oft-asserted, but seldom (if ever) proven, justifications for HPEs. If the defendants cannot proffer a credible, *evidence-backed* procompetitive justification for their HPE—which would entitle the defendants to a full-blown rule of reason inquiry—then their arrangement can be condemned with a quick look.[223] They have violated Section 1, and thus the plaintiffs are entitled to a remedy for their antitrust injuries.

1. Reconciling Quick Look with Precedent

Applying the quick-look rule to HPEs would be consistent with Supreme Court precedent. Although the quick-look rule did not exist at the time of the *Gypsum* opinion, the Court's analysis in *Gypsum* supports condemning HPEs under the quick-look approach. In the same footnote in which it eschewed the per se rule, the *Gypsum* Court noted that "[e]xchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not *per se*

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221 *See* United States v. Apple, Inc., 791 F.3d 290, 330 (2d Cir. 2015) ("This 'quick look' effectively relieves the plaintiff of its burden of providing a robust market analysis by shifting the inquiry directly to a consideration of the defendant's procompetitive justifications." (citation omitted)); Metro. Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n, 337 F. Supp. 2d 563, 572 (S.D.N.Y. 2004) ("Under a 'quick look' analysis, a plaintiff is relieved of its initial burden of showing that the challenged restraints have an adverse effect on competition because the anticompetitive effects of the restraint are obvious." (citing Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999))).

222 *See* Realcomp II, Ltd. v. FTC, 635 F.3d 815, 825 (6th Cir. 2011) ("Under a quick-look analysis, once a restraint is deemed facially anticompetitive, the burden shifts to its proponent for justification on procompetitive grounds." (citing Gordon v. Lewiston Hosp., 423 F.3d 184, 210 (3d Cir. 2005))).

223 *See Cal. Dental Ass'n*, 526 U.S. at 775–76, 775 n.12.

unlawful have consistently been held to violate the Sherman Act."[224] This consistent condemnation is a hallmark of per se violations.[225] The Supreme Court in *Gypsum* "conclu[ded] that exchanges of price information . . . must remain subject to *close* scrutiny under the Sherman Act."[226] The Court's language implies a heightened scrutiny for HPEs, and the quick-look rule is antitrust law's version of heightened scrutiny.

The quick-look rule would not change the result in HPE cases that found no antitrust liability, like *Cement Manufacturers*. As the Third Circuit explained in *Gypsum*, in holding that HPEs can violate antitrust law, the *Container Corp.* Court "distinguished *Cement Manufacturers* by pointing out that *Container* revealed no 'controlling circumstance, viz., that cement manufacturers . . . exchanged price information as a means of protecting their legal rights from fraudulent inducements.'"[227] The phrase "controlling circumstance" is equivalent to a procompetitive justification that would entitle the defendants to full-blown rule of reason analysis instead of quick-look condemnation.[228] Thus, the HPE in *Cement Manufacturers* would survive the modern-day quick-look rule because the HPE at issue addressed a particular form of customer fraud that imposed unique burdens on sellers.

In contrast, concern that buyers are lying about price offers elsewhere does not constitute a procompetitive justification that could save an otherwise illegal agreement. When the *Cement Manufacturers* opinion referred to "prevent[ing] the procuring of fraudulent contracts or . . . prevent[ing] the fraudulent securing of deliveries of merchandise"

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224 United States v. U.S. Gypsum Co., 438 U.S. 422, 443 n.16 (1978) (first citing Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); then citing United States v. Am. Linseed Oil Co., 262 U.S. 371 (1923); and then citing United States v. Container Corp. of Am., 393 U.S. 333 (1969)).

225 *See, e.g.*, Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344 (1982) ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."); L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 468 F. Supp. 154, 165 (C.D. Cal. 1979) ("The Per se rule is a judicial shortcut applied to those types of business agreements that the courts, after considerable experience, have found to be consistently unreasonable and therefore, plainly anticompetitive."); Christopher R. Leslie, *Tying Conspiracies*, 48 WM. & MARY L. REV. 2247, 2283–84 (2007) ("The per se rule is essentially a prediction about what would happen if the court applied a Rule of Reason to the type of restraint at issue.").

226 *Gypsum*, 438 U.S. at 459 (emphasis added).

227 United States v. U.S. Gypsum Co., 550 F.2d 115, 122 (3d Cir. 1977) (citation omitted) (quoting *Container Corp.*, 393 U.S. at 335), *aff'd*, 438 U.S. 422.

228 *See generally* Leslie, *supra* note 150. *See also Gypsum*, 550 F.2d at 123 ("Where the information exchange occurs under a 'controlling circumstance,' such as the purpose of preventing fraud in *Cement Manufacturers*, the exchange can be upheld under the Sherman Act, despite a proven or presumed effect on price.").

as a justification for rivals sharing information, the Court was not discussing the ordinary situation of buyers falsely claiming that they had received offers of lower prices.[229] Instead, the fraud in *Cement Manufacturers* involved a post-contract misrepresentation designed to take advantage of sellers' exceptional vulnerability in selling a uniquely perishable product. Federal courts have recognized that this is wildly different than consumers claiming cheaper prices elsewhere.[230] Notably, the *Gypsum* Court precluded interseller price verification from constituting a procompetitive justification under the "controlling circumstance" rubric.[231]

2. Curing Deficiencies in Price-Fixing Law

Some commentators may argue that—to the extent that an HPE operates as a cartel enforcement mechanism—the prohibition against price fixing is sufficient to address this anticompetitive effect of HPEs. This argument assumes antitrust litigation against cartels is effective. It is not. Because price-fixing conspirators employ multiple methods to conceal their conspiracies,[232] antitrust plaintiffs must generally rely on circumstantial evidence to prove that the defendants conspired to fix prices. While recognizing that plaintiffs can use circumstantial evidence, federal judges routinely make it harder—and sometimes impossible—for plaintiffs to do so. For example, courts often devalue circumstantial evidence if it is not accompanied by direct evidence,[233] and courts isolate each of the plaintiffs' proffered plus factors, depriving them of their probative value.[234]

Fortunately, the quick-look approach would help mitigate this problem in price-fixing cases involving HPEs by providing an alternative antitrust cause of action. This point is illustrated by *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*,[235] in which the Eighth Circuit affirmed summary judgment for price-fixing defendants despite the defendants admittedly engaging in parallel pricing and the plaintiffs presenting several plus factors, including factors related to cartel

229 Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 604 (1925).

230 *See Gypsum*, 550 F.2d at 123 n.9 ("Indeed, the *Container* opinion makes it clear that mere bad faith bargaining does not amount to 'fraud' in the *Cement Manufacturers* sense.").

231 *Gypsum*, 438 U.S. at 458 ("To recognize even a limited 'controlling circumstance' exception for interseller verification in such circumstances would be to remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby.").

232 *See* Leslie, *supra* note 15, at 1205–34.

233 *See generally* Leslie, *supra* note 18.

234 *See* Leslie, *supra* note 16, at 1618–47.

235 203 F.3d 1028 (8th Cir. 2000).

susceptibility, cartel formation, cartel management, and cartel enforcement, among others.[236] In particular, the plaintiffs showed how the defendants exchanged price lists and followed a price verification scheme in which rival executives confirmed prices to each other on specific sales.[237] A bare majority of the en banc court discredited this as "circumstantial evidence" that "bears no relationship to the price increases."[238] Indeed, the majority isolated and disparaged all the plus factors despite the plaintiffs' expert-written "econometric models which purport to prove that the price of potash would have been substantially lower in the absence of collusion."[239] Ultimately, in holding that the plaintiffs presented insufficient evidence of a price-fixing conspiracy, the *Blomkest* court made several fatal errors, including isolating each plus factor and denying them their collective probative value.[240] Consequently, the court reached the wrong result.[241]

If the *Blomkest* plaintiffs had challenged the HPEs directly as an independent violation of Section 1, a more appropriate result would have probably ensued. Although the Eighth Circuit affirmed summary judgment by claiming insufficient evidence of an agreement to fix prices, the majority acknowledged that there was an agreement to exchange prices.[242] That satisfies the agreement element of a Section 1 claim, shifting the antitrust inquiry to the second element of a Section 1 claim: Does the agreement constitute an unreasonable restraint of trade? Under the proposed quick-look approach, the HPE is facially anticompetitive, and the burden is on the defendants to prove that their HPE was supported by a procompetitive justification—a burden that price fixers would be unlikely to satisfy.[243] Consequently, the defendants would have been held liable for their anticompetitive agreement.

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236 *See* Leslie, *supra* note 16, at 1636–38 (discussing and categorizing the plus factors in *Blomkest*).

237 *Blomkest*, 203 F.3d at 1034, 1037.

238 *Id.* at 1033; *see* Leslie, *supra* note 16 at 1636.

239 *Blomkest*, 203 F.3d at 1033.

240 Leslie, *supra* note 16 at 1636-38.

241 *See Blomkest*, 203 F.3d at 1039 (Gibson, J., dissenting) ("The Court today rejects circumstantial evidence of conspiracy and requires direct evidence to withstand summary judgment in an antitrust case."); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 134–35 (2005) (critiquing *Blomkest*); Leslie, *supra* note 16, at 1636–38 (same).

242 *Blomkest*, 203 F.3d at 1033-34.

243 *See supra* Part III; *cf.* Cason-Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603, 631 (E.D. Mich. 2012) ("Certainly, it is telling that when Plaintiffs and their counsel invited various employees of the Defendant hospitals to suggest a pro-competitive justification for their exchange of information with their counterparts at other Detroit-area hospitals, none was able to do so.").

The *Blomkest* majority's approach is not an aberration. Many courts have improperly granted summary judgment to price-fixing defendants that have privately exchanged their confidential pricing plans. Courts routinely isolate HPEs as a plus factor and then deprive such exchanges of probative value.[244] For example, in *Chocolate Confectionary Antitrust Litigation*,[245] the Third Circuit affirmed summary judgment for chocolatiers that increased prices in parallel in the shadow of several plus factors, including possession of each other's non-public "advance pricing information," which the court discounted because "[t]he '*mere* possession of competitive memoranda' is not evidence of concerted action to fix prices."[246] In a prior opinion, the Third Circuit had cited Eleventh Circuit precedent as holding that the "[e]xchange of pricing information *by itself* is an insufficient basis upon which to allow an inference of agreement to fix prices."[247] Although HPEs represent an important plus factor, federal courts regularly isolate, diminish, or discount the probative value of HPEs as circumstantial evidence of an underlying price-fixing conspiracy.

Condemning HPEs under the quick-look rule would reduce the likelihood of actual price-fixing conspiracies escaping antitrust liability. Antitrust plaintiffs can bring separate claims of price fixing and agreements to exchange price information. The HPE is circumstantial evidence for the first claim, but proof of an HPE necessarily satisfies the agreement element for the second claim. Courts that are overly reticent to infer a price-fixing conspiracy from circumstantial evidence should be willing to condemn an HPE. This can convert false negatives into true positives.

3. Summary

Although horizontal price exchanges arguably satisfy the criteria for per se condemnation, Supreme Court precedent blocks lower courts from taking this approach. Nothing, however, prevents lower courts from applying the quick-look rule to condemn horizontal agreements to exchange price information. Given that HPEs pose significant anticompetitive risks and lack procompetitive justifications, HPEs should be subject to quick-look condemnation.

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244 *See, e.g.*, *In re* Citric Acid Litig., 191 F.3d 1090 (9th Cir. 1999); *In re* Baby Food Antitrust Litig., 166 F.3d 112, 126 (3d Cir. 1999); Leslie, *supra* note 16, at 1632–46 (discussing cases).

245 801 F.3d 383 (3d Cir. 2015).

246 *Id.* at 407–08 (emphasis added) (quoting *In re Baby Food*, 166 F.3d at 126).

247 *In re Baby Food*, 166 F.3d at 126 (emphasis added) (citing Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1505 (11th Cir. 1985)).

CONCLUSION

Agreements among rival firms to share their pricing plans facilitate supracompetitive pricing, tacitly or through explicit cartelization. Either way, because such horizontal agreements raise prices, they implicate antitrust law. Courts have applied the rule of reason to HPEs based on the assumption that HPEs can have beneficial effects. But these arguments are speculative and disproven by economic reasoning. Because HPEs have well-established anticompetitive effects and lack any well-established procompetitive justifications, they warrant harsher treatment under antitrust laws.

Because it is costly and time-consuming to bring antitrust litigation under the rule of reason, requiring a full-blown rule of reason analysis for all HPE cases could deter plaintiffs from bringing valid claims. Treating HPEs under the quick-look approach would not create an unreasonable risk of false positives. Defendants would have a reasonable opportunity to explain why their HPE does not entail anti-competitive risks and/or confers meaningful procompetitive benefits. Thus, ultimately, applying the quick-look approach to HPEs would achieve appropriate litigation outcomes more efficiently.