COMPETITION POLICY AND CONSUMER PROTECTION POLICY: IS DISCLOSURE OF INFORMATION A CONTROVERSIAL ISSUE?

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ABSTRACT
The paper aims at investigating the potential tension between competition policy and consumer protection policy with regard to information disclosure. The issue of disclosure of information is discussed in a law and economics perspective, both in the context of consumer protection law and in the context of competition law. Potential inconsistencies seem to disappear as we analyze more in detail the type of information which is relevant in the two contexts and what consumer protection law and competition law respectively mean by transparency of the market.

1. INTRODUCTION
In perfectly competitive markets resource allocation is efficient and consumer welfare is maximized. Economic markets, however, are almost never perfectly competitive; rather, they subject to a wide range of imperfections. On the supply side, monopolies, cartels, unfair market practices, unsafe and defective products; on the demand side, poor access to markets, lack of purchasing power, imperfect information. Competition law and consumer protection law address many of these problems.

It has been argued by Tunney\(^1\) that, even though the relation between competition law and consumer law is often presumed to be self evident because of the similarity in the underlying goal – enhancement of consumer welfare – the two branches of law are not fully compatible. As they get closer, in Tunney’s opinion, inconsistencies may emerge. He suggests that the issue of commercial information and transparency of the market in competition and in consumer law areas is “a potentially problematic one and demonstrates the possible tension between the two sets of legal rules”.

Tunney’s assertion is surely interesting and spurs further investigation on possible inconsistencies between two areas of law which have always been considered fully compatible. However, I think that, as we analyze more in detail the type of information which is relevant in the two contexts and what competition and consumer law mean by transparency of the market, the claimed tension disappears.

The application of economic discipline to competition law and consumer protection law highlights different underlying rationales behind the two: competition policy should focus on the structure of markets and the options – price, quality, quantity – available to consumers, whereas consumer protection policy should focus on the

\(^{1}\) Tunney (2002).

structure of the transactions and, in particular, on the match between what consumers expect and what they ultimately receive\textsuperscript{2}.

Consumer protection law emphasizes the need to provide information to consumers in order to improve the quality of the negotiations and it heavily favors information disclosure, sometimes forcing businesses to disclose information about their products and practices\textsuperscript{3}. Sometimes these requirements might be not needed because firms voluntarily disclose this kind of information. Sometimes raising the amount of information might only harm small businesses, or consumers, but can we argue that these standardized disclosure duties have any effect on competition between firms in the market?

Competition law looks with suspicion at market transparency because it may restrain rivalry between competing firms; more specifically, competition law often condemns the exchange of information between firms since the information sharing agreements increase the likelihood of collusive behavior in the market. The literature presents two different views on information sharing among competitors. One view supports exchanges because they lead to better informed strategies which enhance the efficiency of the firms and of the market as a whole; another condemns exchanges as practices that facilitate collusion. Whether information sharing produces welfare improvements through efficiency gains or welfare losses through collusive practices is not only a question of considerable relevance for antitrust authorities, but it also the fundamental to evaluate the potential tension between competition policy and consumer protection policy on information disclosure.

In order to appraise the economic value of information we have to depart from the model of perfect competition where information is assumed to be perfect and the market completely transparent. For consumers, information is essential because informed consumers can make informed choices, protect themselves against bad deals and, thus, contribute to the functioning of a free market economy. For the firms, information gets its value as we assume that demand and behavior of the competitors are not easily foreseeable. The distinction between transparency for the firms and transparency for the consumers is crucial because the former may help collusion whereas the latter is essential for competitive markets. Both aspects must be taken into account.

2. DISCLOSURE OF INFORMATION IN CONSUMER PROTECTION LAW

2.1 Consumer information

It is universally recognized that informed consumers are essential for the well functioning of a free market economy. In effective economic markets, consumers fulfill two critically important roles through their purchasing decisions: they satisfy their own needs as individuals and their collective decisions ensure the competitiveness of suppliers. Competition, in turn, facilitates the most efficient allocation of resources. Therefore, consumers who can make informed and rational choices contribute to the optimal allocation of resources\textsuperscript{4}.

\textsuperscript{2} See Gomez (2003).
\textsuperscript{3} Scott and Black (2000).
\textsuperscript{4} Mitchell et al. (2001).
The price system plays a key role in market economies. Prices reflect and transmit the underlying value of the resources, conveying information; secondly, they constrain behavior of economic agents who buy and sell depending on the information they get. Most of the times, however, information cannot be conveyed through the price system, like in the cases of information about quality. If there is no way for buyers to learn about the sellers’ quality, then all items will be sold at the same price. If sellers of good quality items cannot distinguish themselves from sellers of low quality items, only the latter ones will find it profitable to stay in the market and high quality items will be driven out of the market.

An economic analysis of consumer transactions provides a basis for both determining the scope of consumer protection problems and assessing appropriate policy responses. The object of consumer protection legislation is basically to identify bad deals for consumers - like excessive prices, discrimination, unclear terms and defective products - . Once a bad deal is detected, “economic analysis then turns to an assessment of causality. This is a familiar question from the economic analysis of competition policy, where the principal inquiry is to identify which market structures lead to non-competitive pricing.”

2.2 Consumer information problems

The main reason why consumers need protection lies in the consequences of imperfect information. As we have see before, the economic analysis of consumer transactions demonstrates that the real problem of unequal bargain power between consumers and sellers does not have to do with the structure of the market, but is basically a problem of information asymmetries. The difference is particularly large when sellers have professional knowledge or when it is too costly for consumers to gather information because they use the market only occasionally, like in the case of credence goods.

Wein presents an exhaustive survey on the informational problems that consumers face. He explains why market failures can occur and suggests market solutions in the light of neoclassical information economics.

Generally consumers can search for information which is relevant for their transactions themselves. They will shop around for a product until the marginal benefit from information is larger than the marginal cost of gathering it. It is almost never in the interest of the consumer being fully informed.

In this process of evaluation of benefits and costs, several market failures are possible.

First, as mentioned before, consumers can always shop around and acquire the relevant information themselves in case the information concerns prices; when asymmetric information is about quality, problems of adverse selection and moral hazard may destroy markets altogether or lead to low price, low quality “lemons” markets. The danger of adverse selection is quite irrelevant for search goods because

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5 Hayek (1945).
7 Hadfield et al. (1998).
8 Wein (2001).
9 Stigler (1961).
the consumers can evaluate quality before the purchase, while it is significant in case of experience goods and, most of all, in case of credence goods, for which quality assessments are even difficult ex post. Moral hazards are forms of ex post opportunistic behavior due to the fact that one party cannot control or evaluate the other party’s action once the deal has been made. Moral hazards on the consumer side are particularly likely in long last contractual relationships because of hold-in situations.

Second, information is a public good and its non-excludability character may discourage producers from providing it because, once disclosed or tested by some consumers, no others would ask and pay for the information.

Third, since collecting information causes positive externalities, consumers have no incentive to make the effort of gathering it because, if they did not, they could still benefit from the information gained by others – free riding problem.

Forth, information production and dissemination may have the characteristics of natural monopoly. Especially if the acquisition of information requires special skills or equipment, individual consumer’s research is not feasible.

Fifth, sometimes the product and information about the product are provided jointly because it is too difficult or too expensive to provide them separately.

Finally, it is difficult to describe benefits of information without disclosing it at all and for disclosed information no one is willing to pay anything – Arrow paradox.

Informational problems thus create imperfections in product markets. If consumers are imperfectly informed, even small sellers can enjoy informational market power and charge monopolistic prices.

2.3 Market solutions and public solutions to consumer information problems

Market solutions as well as public solutions help to solve consumer informational problems.

Market solutions include screening activities by the consumers, the use of market intermediaries which specialize in collecting and processing information, signaling activities like warranties, reputation and advertising.

Consumers may try to get information to judge the quality, which is, however, more and more difficult because of the increasing complexity of modern production processes. Furthermore, consumers can use tests to learn about the quality before the purchase. Intermediaries specialized in collecting and disseminating information can help consumers, especially when information costs are very high, but this is likely to generate further problems: consumers must be able to evaluate the quality of the information supplier, which end up creating the same problems that consumers have in the first place; moreover, usually intermediaries sell information and service jointly.

Warranties are a powerful instrument to signal quality. Grossman concludes that high quality products are offered with warranties while bad quality products are not.

10 Think about health insurance contracts: as a consumer gets old, it is very difficult for him to leave his insurer and enjoy better offers on the market; insurance companies may then take advantage of this limitation and increase premiums during the contract period.

Even if this conclusion needs further specifications, the basic role of warranties is undisputed.

Reputation mechanisms also provide good solutions to overcome problems of moral hazard and adverse selection. Again, in order to reach equilibrium where only high quality suppliers operate on the market, several assumptions on the products, suppliers’ costs and behavior have to be fulfilled.

Advertising is the easiest way to transfer information about the products. Of course, truthful statements on quality have to be expected only if consumers can actually verify it. Several economic models prove than firms may signal quality by the mere fact of advertising: in fact, only high quality producers can recover the advertising costs in the long run because of certain re-buying\textsuperscript{13}.

As far as public solutions are concerned, the government can improve consumer knowledge by (a) removing information restraints - private and governmental restrictions to advertising -; (b) ensuring truthful information and prohibiting false and misleading advertising; (c) prohibiting agreements not to split the provisions of a service and the evaluation of the service; (d) establishing uniform metrics to enable consumers to better compare products; (e) regulating the transactions directly by establishing standards and mandatory disclosure rules on information, keeping in mind that the need of disclosure requirements depends on the sellers’ incentive to voluntarily disclose - if information is readily available elsewhere, the required disclosure is unnecessary-. 

2.4 Consumer protection policy and the emphasis on information disclosure

Besides the problems created by imperfect or asymmetric information, it has to be mentioned that a second basic reason that justifies consumer protection law is found in people’s deviations from rational behavior. It has been proved that people’s reasoning often violates the assumption of rationality: individual judgments are influenced by the way a set of alternatives is presented, by overconfidence, by the difficulty of dealing with probabilities, by the disregard of opportunity costs and sunk cost, just to mention some.

This framework led to two basic policy responses.

First, consumer protection law primarily focused on trying to correct the information imbalance between consumer and seller mandating disclosure. More specifically, consumer protection law policed the information conveyed to consumers by sellers, required disclosure in easily understandable and comparable way and provided information through public sources or information intermediaries.

Disclosure regulation goes one step further than simple trade descriptions: it mandates the provision of certain types of information which can be revealed through product labeling, advertisements or term of sale - standardized quantities, requirement of unit pricing and so on -. Mandatory disclosure does not guarantee quality or prices, but rather makes sure that all the relevant information is given and is understandable to the consumers. It is aimed at reducing the information gap between buyers and sellers.

\textsuperscript{12} Grossman (1981).

\textsuperscript{13} In this sense, advertising works as a sort of reputation mechanism.
about the parameters relevant to the transactions and to reduce the complexity of the information available so that consumers can easily compare features and make informed choices.

Second, where consumers – or some of them - were unable to use properly the information “due to a lack of sophistication or educational or other barriers, direct regulation of transactions was recommended”\(^{14}\). Such regulation resulted in mandatory contract terms and minimum quality standards, for instance licensing, input instruction not to use dangerous inputs, and restriction on entry in several liberal professions.

### 2.4.1 Mandatory disclosure vs. regulation

From a law and economics perspective, disclosure requirements have to be preferred to direct regulation of consumer transactions. Law and economics scholars have insisted that regulatory intervention is not a “free lunch” and it is not always in the best interest of all consumers. Informational remedies are often likely to be more effective solutions to informational problems compared to mandatory contract terms or regulation on product and prices. Nevertheless, minimum quality standards are necessary in some cases, especially when the risks associated with bad quality are relevant and control on the market entry does not ensure enough protection. Legal control over the terms included in standard form contracts are justified in case of low valued transactions and high information costs\(^{15}\).

The basic assumption is that information rules have to be preferred whenever possible because:

- they leave greater room of choice to the parties who, once properly informed, are able to make rational wealth maximizing decisions;
- they are cheaper to implement and enforce compared to other forms of regulation;
- it is much easier to reach consensus on information rules rather than on specific contents.

### 2.4.2 The scope and the content of mandatory disclosure

Consumer legislation is the earliest area in which mandatory disclosure has been applied as an instrument to protect individual rights\(^{16}\). Economic rationales for mandatory disclosure evolved primarily in the area of security law, following the observation that information about issuers and analyses of security prices had the characteristic of public good and, as such, it was subject to underproduction. Early legislation obliging businesses to disclose information was applied also to product labeling. Later on, mandatory rules have also been advanced in health care and insurance law with the primary purpose to educate consumers about their rights, but also to facilitate choice and enhance competition. Nowadays the ambit of mandatory

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\(^{14}\) Hadfield et al. (1998).

\(^{15}\) When consumers have no incentive to get informed, evaluate and compare contract terms, a lemon market for those terms can emerge: “good” terms are driven out of the market.

\(^{16}\) Merkt (2001).
disclosure is very wide, including information about the quality of products or services and prices. More in detail, disclosure regulation laws in the area of consumer protection mandate the disclosure of information about:

(a) safety - labeling of drugs or dangerous consumer products like household cleaners;
(b) quality - grade labeling, compositional labeling, symbols which indicate compliance with standards fixed by public bodies;
(c) quantity - declarations of minimum weight or average weight;
(d) origin;
(e) use;
(f) contractual terms;
(g) nature of the business - black lists of businesses that have been convicted of a consumer protection offences;
(h) post-contractual rights;
(i) price information;
(j) credit rates.

Regulators increasingly turn to disclosure as a less threatening and more cost effective alternative to direct regulation, encouraged also by changes in economic theory. Modern information theory describes more and more complex ways in which information affects the dynamics of market and also recognizes that the cost of becoming informed is an unavoidable component of market transactions. Modern industrial organization is characterized by an explosion of models, generating a variety of predictions about market outcomes, frequently quite sensitive to the assumptions made. The main implications of these developments, however, are always the same: (a) information problems are independent of market structure; (b) information asymmetries play a key role in bargaining.

2.4.3 The current consumer protection policy on mandatory disclosure

The information principle is the dominant principle of EU consumer law. The importance of the duty to disclose has been emphasized in all Consumer Protection Programs and Action Plans of the Commission and it also clearly expressed in Article 153 of the Maastricht Treaty:

“In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests”.

17 For an exhaustive description of all types of information, Scott and Black (2000).
18 “Forcing businesses to divulge information about their products, practices and processes, under threat of a criminal sanction, is now a popular technique of modern consumer legislation”. Scott and Black (2000).
19 Hadfield et al. (1998).
The Communication of the Commission, “Priorities in Consumer Policy” (1995) for instance states: “inadequate information lies at the root of many consumer problems so if proper information can be presented many consumer difficulties can be overcome”.

Disclosure information rules are often accompanied by a transparency requirement which demands that information - often the specific terms of a consumer contract - is given in plain and intelligible language. At a more general level, however, the information principle requires that misleading or untruthful information is kept away from consumers.

Information plays an important role especially in consumer contract law. Mandatory disclosure is an established feature on regulatory regimes and it is likely that it will remain an important legislative device.

The Court of Justice “most strongly advocates for mandatory disclosure laws favoring information regulation over more restrictive control and prohibition”\(^{20}\). The priority of information disclosure is made clear in the Cassis de Dijon case. German law banned the French cassis from the German market with the intent to protect consumers from being cheated on the percentage of alcohol present in drinks labeled “liquors”. The Court held that proper labeling was sufficient: disclosing information to the consumers and left them the chance to evaluate the offers on the market, provided, in the Court’s opinion, enough protection.

Even after the Cassis de Dijon case, the Court has repeatedly stressed the importance of mandatory disclosure in protecting the market and its participants.

The “Commission follows a less principled approach”\(^{21}\); many Directives in the field of consumer protection include information disclosure requirements aimed at informing consumers about the nature of the goods and services as well as the price to be paid for them. A considerable part of the information requirements are warnings about potentially hazardous foods or other products for the health and safety of consumers.

EU Directives can be divided in disclosure-only Directives, where mandatory disclosure is the exclusive remedy for protection of markets and parties - Employee Contract Disclosure Rights Directive, plus several Directives in the area of security regulation - and hybrid Directives, where mandatory disclosure is mixed with prohibitions and other rules – Directive on Distance Contracts, Directive on Doorstep Sales, Directive on Unfair Terms, Directive on Package Travel and Directive on time-sharing - \(^{22}\).

Directive 93/13/EC on unfair terms requires parties to disclose the content of all contractual terms, including the main subject matter and the price: these terms are never unfair as long as they are clearly stated plainly and intelligibly in the contract\(^{23}\).

\(^{20}\) Merkt (2001).
\(^{21}\) Merkt (2001).
\(^{22}\) Directive on misleading advertising (84/450/EC amended by the Directive on comparative advertising (97/55/EC), Directive on package travel, package holidays and package tours (90/314/EC), Directive on the protection of consumers in respect of distance contracts (97/7/EC); Directive on the indication of the prices of products offered to consumers (98/6/EC); Directive on consumer credit (93/13/EC).
\(^{23}\) Art. 4 “Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language”.
“Transparency, not equitability, is protected”\textsuperscript{24}. Both at a formal level and at content level, transparency is thought to be indispensable for the contract to be effective because the contract is binding only if the parties have well understood each other.

Revocation rights are increasingly present in the EU directives, not only in distance and doorstep contracts, but also in consumer credit and insurance contracts. They can also be interpreted as information rights because they allow consumer to re-think about their choices and so to get informed about competing offers after the purchase. Nevertheless, even though revocation rights may somehow be seen as tools to gain information \textit{ex post}, the rational behind them is different: usually they do not protect uninformed consumers, but physiologically weak consumers - unprepared, taken by surprise -.

Rules about whether a product meets the required standard, as the ones present in Directive 99/44/EC on Distant Sales, can also be interpreted as information rules. Provided that the seller gives proper information about the quality, he can offer any quality.

The Directive on Misleading Advertising 84/450/EC could also be interpreted as granting the right to truthful and non deceptive information. It has been amended - Directive 97/55/EC - to include comparative advertising because: “comparative advertising, when truthful and non deceptive, is a source of important information to consumers and assist the in making rational purchase decisions”.

The fundamental role played by information is clear in the recent Directive 2005/29/EC on Unfair Commercial Practices. Article 6 states: “A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct (...)”.

Disclosure rules in the financial services area are particularly stringent. Consumer credit providers are burdened with very detailed disclosure requirements. The main goal of credit rate disclosure is to redress part of the information asymmetries between consumers and those who offer credit by making it easier for the formers to know how much they actually paying for the credit and to compare more easily alternative forms of credit.

In the U.S., the Consumer Credit Act of 1974 prohibits credit advertisements conveying false or misleading impression to consumers and, more importantly, oblige those who offer credit to disclose the true credit charge being imposed. Together with the interest rate, also consumer’s obligation to pay other charges associated with credit transaction - such as setting up fees, insurance premiums, documentation charges and maintenance agreements - have to be stated clearly. All these charges added up give the total cost of credit which is expressed as an annual percentage rate\textsuperscript{25}.

Similarly, in the EU, Consumer Credit Directive 87/102/EC prescribes disclosure on two fundamental parameters: the annual percentage rate and the total cost of credit. The first enhances transparency on the price of the credit, which is the key parameter

\textsuperscript{24} Wolf (2001).

\textsuperscript{25} Scott and Black (2000).
for competition in this type of contract. The second helps the consumers to see whether, on the whole, they can afford the credit.

Other information requirements are present in the Payments Directive -97/5/EC-, Investment Service Directive - 93/22/EC - and Insurance Directives - life and non life -.

2.4.4 A special emphasis: price information

Price information is crucial to consumers because it is essential to comparative shopping. Despite the importance of price information, mandatory price disclosure is relatively recent.

The U.S. Supreme Court has afforded protection to price information - more generally, to commercial speech - under the First Amendment of the Constitution. In Virginia State Board of Pharmacy v. Virginia Citizen -1976- the plaintiff-appellees, the citizen of Virginia, attacked the prohibition of price advertising imposed to the pharmacists of the state by their code of conduct. As a result of this prohibition, drug prices varied strikingly from outlet to outlet even within the same locality. The Court stated that freedom of speech ‘necessarily protects the right to receive. (…) Even an individual advertising, though entirely ‘commercial’, may be of generic public interest. (…) So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable’.

Section 4 of the Price Act of 1974 suggests that the Secretary of State may adopt regulations securing that prices are indicated and how the prices ought to be indicated, which may include unit pricing. So far only two sets of regulations have been made compulsory to display the total selling price of products and services on sale: one concerns the licensed drinks sold in public houses, restaurants and hotels; the other is the petrol prices at the gas stations.

In the Directives of the European Union, the requirement about price disclosure is given special emphasis.

A general requirement to inform consumers about prices is contained in the Directive 98/6/EC, which applies to all movable goods. The main purpose of the Directive is to ensure that the selling price and unit price - the price per unit of measurement - are indicated for all products offered by traders to consumers. The general obligation to indicate selling and unit prices can significantly improve the ability of consumers to evaluate and compare prices and make informed market choices on the basis of simple comparisons, thus fostering competition between undertakings and products. The selling price must be unambiguous, easily identifiable and clearly legible (Article 4). The obligation to indicate the unit price can also be waived by Member States, for a transitional period, if it constitutes an excessive burden for certain small retail businesses26.

26 Unit pricing disclosure is meant to assist consumers to compare values. Businesses oppose unit pricing because they claim that there are costs and administrative problems in determine it, that it may be misleading if unsupported by other information and finally that only a minority of consumers will use it.
It is worth noting that, while in the Virginia Board of Pharmacy the US Supreme Court emphasized the importance to consumers of price information establishing that businesses may advertise prices, the European Community Directive seems to go further mandating the price disclosure.

The Directive 98/6/EC is just one example of disclosure requirements imposed by the European Commission in order to assist consumers in making market decisions. Many other examples of price disclosure requirements permeate the directives in the area of consumer protection. As we have seen before, Directive 87/102 on consumer credit provides that the consumer should receive, among other contract obligations, adequate information on the annual percentage rate of charge for credit, which is basically the “price” of the credit for consumers. A requirement to indicate the price can be found also in Directive 90/314/EC on package travelling and Directive 97/7/EC on distant contracts.

3. DISCLOSURE OF INFORMATION IN COMPETITION LAW

3.1 The exchange of information between firms

It is not infrequent that competitors decide to exchange information with one another. Information can be exchanged in a variety of different ways: explicit agreements, through trade associations or articles in the press or trade journals.

Information sharing agreements may be beneficial because the more information on market conditions – demand, level of capacity that exists in the industry and so on – the easier it is for firms to make efficient production and marketing decisions. The availability of information can also increase the number of firms operating on the market. At the same time, as we have seen in the previous section, buyers benefit from more information about products and prices, they can make informed choices and thus promote competition. Transparency, in this view, “has to be encouraged”.

Nevertheless, information agreements can pose problems for competition authorities. The essence of competition is that economic operators act independently; if firms share information about their market strategies, such pricing policies and production plans, it is easier for them to coordinate their behavior on the market.

Actually evidence suggests that consumers use unit pricing when available and it leads to significant changes in the purchasing decisions.

27 Article 3.2: “When a brochure is made available to the consumer, it shall indicate in a legible, comprehensible and accurate manner both the price and adequate information concerning: (a) the destination and the means, characteristics and categories of transport used; (b) the type of accommodation, its location, category or degree of comfort and its main features, its approval and tourist classification under the rules of the host Member State concerned; (c) the meal plan; (d) the itinerary; (e) general information on passport and visa requirements for nationals of the Member State or States concerned and health formalities required for the journey and the stay; (f) either the monetary amount or the percentage of the price which is to be paid on account, and the timetable for payment of the balance; (g) whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation”.

28 Article 4.1: “In good time prior to the conclusion of any distance contract, the consumer shall be provided with the following information (...): (c) the price of the goods or services including all taxes; (...).”

The problem of competition authorities is to distinguish between potentially beneficial information sharing agreements and exchanges that seriously facilitate collusive behavior.

### 3.2 The theoretical literature on information exchange

“The theoretical literature provides two different sets of reasons for competition policy to be concerned with information sharing agreements between firms. The first corresponds to the welfare consequences of information exchange in static models of competition. The second corresponds to the dynamic implications of information sharing, principally in terms of sustaining collusion”\(^{30}\).

#### 3.2.1 Information exchange in static oligopolistic markets

Clarke\(^ {31}\), one of the first authors who analysed the firms’ incentives to share private information about an uncertain variable of the market using a static model, underlined a strong correlation between exchanged information and collusion, claiming that sharing private information could be interpreted as unambiguous evidence that firms were illegally colluding to restrict output levels. More recent economic models of static competition have proved that firms can exchange information in a great number of circumstances also within a competitive framework. According to the current view in this field\(^ {32}\), there is no general theory regarding the incentives of firms to share private information; rather, the results depend crucially on the specific assumptions of the models.

Sharing information is not always a rational strategy. There are two basic effects that determine the willingness of a firm to exchange information. First, each firm is better informed about the prevailing market conditions, which is presumably profitable. Second, the homogenization of information among firms leads to a change in the correlation of the strategies. These two effects may be reinforcing or countervailing depending on the type of competition - Cournot competition - quantities - or Bertrand competition - prices - and the type of uncertainty - common or idiosyncratic shocks to demand or to costs -. The welfare impact on consumers and society of information sharing can be positive or negative, again depending on the market characteristics.

Therefore, the static economic models are not very helpful in drawing antitrust policy conclusions because results depend crucially on the specific assumptions of the models. Antitrust authorities should base their decisions on detailed information about the industry which are often difficult to observe and even more difficult to prove in front of the courts. Nevertheless, a first conclusion that we can draw from static models of competition is that the presence of information sharing cannot be seen a prima facie evidence of collusion.

\(^{30}\) Kühn and Vives (1995). Static models assume only one period: firms decide if they want to disclose private signals about demand or costs before receiving them and then compete setting prices or quantities. Dynamic models consider the interaction among firms over time: prices and quantities produced in one period convey information about past costs or demand and are useful signals of future market conditions.

\(^{31}\) Clarke (1983).

\(^{32}\) For a summary, see Raith (1996).
3.2.2 Dynamic aspects of information exchange

Dynamic models of competition and collusion provide further reasons why competition authorities should be concerned about information sharing among firms: these models show that exchanging information may have a fundamental role in reaching or sustaining a collusive agreement.

It is universally recognized in traditional industrial organization literature that improving information about competitors’ actions is a powerful instrument to sustain explicit or tacit collusion. Firms can reach a collusive outcome either through explicit agreements or by anticipating other firms’ strategies over time and behaving accordingly - tacit collusion or conscious parallelism -. Since collusive agreements cannot be legally enforced, a necessary condition for the stability of the agreements is the efficient detection and punishment of individual deviations from the agreed price. Exchange of information on each party’s commercial behaviour allows to set up a mechanism to catch possible deviators; it therefore represents the most credible disincentive to cheat and the most effective tool for sustaining a collusive agreement.

3.2.3 The nature of the information exchanged

Different kinds of information have different collusive potential. An exchange about past sales and prices are more dangerous, from a competitive point of view, than exchanges about demand conditions or costs. As already mentioned, firms faced with demand and cost uncertainty may be better able to tailor their output and pricing decisions to actual market conditions if they possess information over it, possibly improving also their internal efficiency. However, these benefits may easily be achieved by aggregate statistics: exchange of individual data is much harder to justify on efficiency grounds. The degree of aggregation of the data is another key determinant in the analysis: in all the circumstances in which aggregate market data are not sufficient to verify the conduct of competitors, the frequent exchange of private firm-specific data is a fundamental tool to sustain collusive agreements.

3.3 Communication and collusion

Information exchanges would not be a problem for the competition authorities if they could always detect collusive behavior. However, collusion between firms is notoriously difficult to prove in court: explicit collusion is hard to catch and tacit collusion, by definition, is characterized by the absence of concrete evidence. The analysis of antitrust cases shows that the collusive agreements often go along with information exchange mechanisms, sometimes organized by industry trade associations.

Since communication plays an important role in almost any collusion case, Kühn even suggests focusing only on observed communication between firms to fight illegal

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33 Restrictive agreements are prohibited by both the Sherman Act, sect. 1 and by the Treaty of Rome, Art. 81(1).

34 Kühn (2001).
agreements between firms. Antitrust authorities usually rely on the evaluation of price and sales patterns, but market behavior is not always verifiable in court: sometimes available data do not allow to infer collusion and, if so, results may depend crucially on the specifications of the econometric model which has been used. On the contrary, exchange of information between firms is notoriously highly correlated with collusion, rarely occurring in its absence and much more easily observable and verifiable in court. Therefore, in Kühn’s opinion, restrictions on communication may be “among the most powerful instruments to fight collusion”. Kühn basically proposes to revaluate the legal approach to collusion which is based entirely on the concept of co-ordination between competitors. The economic approach to collusion focuses basically on the level of prices – close to monopoly prices – and the mechanism which prevents colluding firms from secretly undercutting such high prices and increasing their market shares batten on the other members. On the contrary, there is no collusion in the legal sense if firms have not communicated\(^{35}\). Although the legal approach appears meaningless in light of economic theory because tacit collusion is proved to have the same effects of explicit collusion, it is surely based on more concrete and verifiable evidence and, thus, more useful for enforcing legal rules.

Even if one disagrees with Kühn’s extreme view of focusing only on communication, competition policy intervention seems reasonable if the prohibition of certain kinds of information exchanges makes it more difficult for firms to collude tacitly.

### 3.4 Current competition policy of information exchange

In many antitrust cases exchanges of information are ancillary to anticompetitive agreements - explicit agreements -. In others competition authorities deal with “naked” exchanges of information, i.e. agreements that have as their only object the sharing of information among participants.

In the US an agreement concerning only the exchange of information can be challenged only if it restricts competition and helps reaching an agreement on prices. US antitrust traditionally is reluctant to apply \emph{per se} condemnation rules, and this is also true for information sharing agreements. A basic principle is that collusive practices have to be demonstrated; there are no cases in which the pure existence of an information exchange has been condemned as a violation of the Sherman Act.

One of the first antitrust cases which dealt with information exchange, the American Column case (1919), shows what the Supreme Court means by artificial transparency created by information sharing.

The trade association of the hard wood industry - American Hardwood Manufacturers Association (AHMA) -, engaged in a practice that was, at that time, fairly common: it

\(^{35}\) Kühn quotes part of the judgment of the European Court of Justice on the Dyestuff case to illustrate the typical legal definition of collusion: “Although every producer is free to change his prices taking into account in so doing the present and foreseeable conduct of his competitors, nevertheless is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other’s conduct regarding the essential elements to that action such as amount, subject matter, date and place of increases.” The statement can be interpreted as stating that there is no collusion in the legal sense if the producers simply act in a parallel way. Kühn (2001).
collected and distributed monthly to its members not only reports on market conditions, but also extremely detailed sales reports showing buyer’s name, destination, and selling price. Through a centralized system of collection of price and practices information, the members of the association were substituting competition with co-operation. For the first time, the Department of Justice challenged information sharing agreements such as the one operated by AHMA and declared them illegal under the Sherman Act.

The Supreme Court has not always been coherent with this conclusion, but more recently the decisions have showed greater sensitivity to economic theory on information agreements: individual firms data should not be shared and exchanged data should be made available also to consumers to avoid ‘unfair bargaining advantages’ for sellers. Even if information agreements are deemed presumptively illegal where the market is oligopolistic, there seems to be no per se rule against the exchange of information, rather a rule-of-reason approach is applied.

On the contrary, in the EU, an agreement to exchange information can be either considered only part of a restrictive agreement which violates Art. 81(1), but can also be regarded as a direct infringement of Art. 81(1) and so declared illegal per se. According to the European approach, competition policy assessments depend on three basic factors: (a) nature of the information exchanged, (b) market structure, (c) whether the information exchanged is shared with consumers or not. It is worth noting that this approach is greatly in line with the economic analysis about information sharing agreements.

Potential colluding firms usually exchange information about firm-specific sales volumes, market shares and quoted prices, what antitrust authorities call “sensitive information”. Therefore it is contrary to Article 81(1) to provide competitors with detail information about data that would normally regarded as “confidential”, whereas statistical or aggregate information which enable firms to build a better picture of the demand and cost conditions in the industry without identifying individual companies it is permissible. Moreover, as for the U.S., the effect of an information sharing agreement should be considered less serious where consumers, as well as sellers, have access to the information in question.

Collusion is then particularly likely in oligopolistic markets with homogeneous products. Each firm knows that its decisions have an effect on every other firm. At the same time, they know that they can achieve higher profits by co-operating rather than by competing. As described before, exchanges of information are a powerful tool to reach and sustain collusion and this is why they are credited by the Commission with an almost general anticompetitive attitude. The link between oligopoly structure and

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36 Some years later, in Maple Flooring Manufacturers’ Association vs. U.S. the Supreme Court reached the opposite conclusion. See Poster, Antitrust Law, 2001 for a critique of these two cases.
38 See cases Wood Pulp (1984), Fatty Acids (1986), UK Agricultural Tractor Registration Exchange (1992). In more recent antitrust cases on collusion, information exchanges on prices, sales volumes and market shares were found only as a complementary practice to explicit collusive agreements – see cases Plasterboard and Methionine (2002), Sorbates (2003), Choline Chloride (2004), Industrial Thread, Industrial Bags and Rubber Chemicals (2005).
per se prohibition is made explicit in the UK Agricultural Tractor Registration Exchange decision40. According to the Commission, “the exchange restricts competition because it creates a degree of market transparency between the suppliers in a highly concentrated market which is likely to destroy what hidden competition there remains between the suppliers in that market on account of the risk and ease of exposure of independent competitive action. In this highly concentrated market, 'hidden competition' is essentially that element of uncertainty and secrecy between the main suppliers regarding market conditions without which none of them has the necessary scope of action to compete efficiently”.

The Commission considered that the exchange of detailed information about retail sales and market shares broken down by product, territory and time periods was a per se infringement of Art. 81(1) in the oligopolistic U.K. tractor market and further continued: “uncertainly and secrecy between suppliers is a vital element of competition in this kind of market. Indeed active competition in these market conditions becomes possible only if each competitor can keep its actions secret or even succeeds in misleading its rivals. This reasoning, however, in no way undermines the positive competitive benefits of transparency in a competitive market characterized by many buyers and sellers. Where there is a low degree of concentration, market transparency can increase competition in so far as consumers benefit from choices made in full knowledge of what is on offer. It is emphasized that the United Kingdom tractor market is neither a low concentration market nor is the transparency in question in any way directed towards, or of benefit to, consumers.”

The Commission here clearly distinguished between exchange of information in concentrated markets and exchanges in competitive markets characterized by many buyers and sellers: in the latter case, circulation of information in the marketplace may promote competition, since also consumers can enjoy the benefits of market transparency.

The decision stressed that only transparency in favor of the consumers may be pro-competitive, while transparency among undertakings may have anticompetitive effects and be tolerated only as a collateral effect of the former. In another judgment, the Court of First Instance made clear that in competitive settings market transparency may foster competition; what matters is that consumers are not excluded from the flow of information41.

3.5 A special mention: the exchange of information on future prices

Most of the literature on exchange of information between firms focuses on the exchange of information of past prices and past volumes of sales. Nevertheless competition policy places a special emphasis on the exchange of future prices and future production plans. A basic intuition is that communication of future strategies, especially price announcements, can help competitors to coordinate themselves on a

41 “(...) On the other hand, the Court considers that, as the Commission argues this time, general use, as between main suppliers and, contrary to the applicants contention, to theirs sole benefit and consequently to the exclusion of other suppliers and of consumers, of exchange of precise information, on a highly concentrated oligopolistic market, is likely to impair substantially the competition which exist between traders”. Court of First Instance, Oct 1994, case T35/92, in European Court Reports, 1994, II, 957.
collusive equilibrium. Economic theory has not provided convincing arguments to support this intuition. Besides the literature on the topic, however, it is hard to find good reasons for a firm to communicate competitors its future market conduct other than an attempt to look for cooperation.

In the analysis of information sharing about future variables an important distinction has to be made: an exchange of private sensitive information excludes any possible benefit for the consumers because it is not informative nor binding; on the contrary, price announcements which bind the firm to the price announced, for instance advertisements which set maximum prices for the products, are surely beneficial and thus harder to challenge on competition basis.

The fundamental distinction between private information and information publicly available to consumers is apparent in the case US vs. Airline Tariff Publishing Company. US Courts have always been reluctant to condemn price announcements of future prices as anticompetitive because of the potential benefit to consumers in comparing prices. US case law clearly distinguishes between price announcements that may have positive effects and those with collusive potential. The Supreme Court dealt several times with this topic\textsuperscript{42}, but US vs. Airline Tariff Publishing Company (ATPCO) represented surely the landmark case for the treatment of price announcements in the U.S. law\textsuperscript{43}.

ATPCO is a joint venture of all the major US airlines. Through a central database, ATPCO collects, organizes and disseminates information about fares for almost all US air companies. At the time of the proceedings, ATPCO provided a precious forum for airlines to communicate their price strategies: using the clauses of First Ticketing Date (“FTD”) and Last Ticketing Date (“LTD”), airlines used to adjust their fares depending on the offers of the competitors before the prices became actually effective for the consumers\textsuperscript{44}. In particular with FTDs, quoted fares did not represent any commitment to consumers because air companies could withdraw the offers anytime before the specified date. Having no commitment value, the government concluded that FTDs and LTDs were just a device used by the companies to signal that they wanted a fare implemented or removed. This mechanism was deemed equivalent to direct negotiations among firms about price strategies and thus it was condemned as a collusive practice under the Sherman Act.

The Department of Justice was careful to distinguish between price announcements which represented a commitment to consumers from announcements that were used just as a device to negotiate indirectly final prices. The government did not condemn price announcements per se, but the mechanism of FTDs and LTDs which allowed companies to fix prices and coordinate their commercial strategies. FTDs and LTDs did not provide any benefit for consumers: fares were extremely unreliable and misleading. Neither the purpose nor the effect of FTDs and LTDs was to protect consumer from unanticipated fare changes. The Competitive Impact Statement of the case states clearly “with little reason to rely on the accuracy of the ticket dates,

\textsuperscript{42} See for instance Sugar Institute v. United States (1936) or Ethyl Case (1984).
\textsuperscript{43} Kühn and Vives (1995).
\textsuperscript{44} First Ticketing Date (FTD) indicated a future date at which a fare was supposed to become available for purchasers. A Last Ticketing Date (LTD) indicates a future date at which a current fare is supposed to expire.
consumers are harmed far more by the coordinated pricing that ticket dates facilitate than they are benefited by the information those dates contain.”

The proposed Final Judgment did not prevent the airlines from advertising current fare information to consumers or from offering fares for which travel could only begin in the future, but it established that fares had to be currently available for consumers. The use of last ticketing dates is still possible today, but under limited conditions: FTDs have to be properly advertised in media and they have to be “designed to directly reach a meaningful number of likely potential consumers”. These requirements ensure that announcements about fares are really addressed to consumers rather than to competitors.

A similar distinction is made in the European Wood Pulp case, one of the richest cases in terms of forms of information exchange. In December 1984 the Commission found wood pulp producers to have violated Art. 81(1) by colluding on price announcements and transaction prices. Another, independent violation of Art. 81(1) was found in the exchange of price information among firms.

The Court of Justice repealed large part of the decision of the Commission. The Court concluded that the system of price announcements in the wood pulp industry “could be regarded as a rational response to the fact that both buyers and sellers needed information in advance to limit their commercial risks”. The Court welcomed the opinion of economic experts who pointed out that markets with homogeneous goods in equilibrium tend to have almost a uniform price, irrespective the market structure or the degree of collusion. Experts also provided evidence that customers considered the price announcements as ceiling prices for future transactions: the main pressure for prior price announcements was coming just from the paper producers who used wool pulp as their main input. Price announcements, in the Court’s opinion, could be regarded as a consequence of a “natural degree of transparency in the market rather then the result of an artificial transparency created by the pulp producers”.

Besides the mechanism of price announcements, the wood pulp producers communicated among themselves privately about planned prices; evidence of these meetings was sufficient for the Court to uphold the collusion charges in some cases. It was the communication before the price announcements that was eventually considered contrary to Article 81(1), not the practice of the price announcements itself.

50 The Commission stated: “this exchange of information was not only part of the concertation of prices but was also part of an independent infringement of Art 85(1)”.

I QUADERNI DEL GRIFFE, ANNO II, 2006 20
In the Wood Pulp case the connection between competition issues and consumer protection issues is more faded; anyway, we can draw an analogy with US vs. Airline Tariff Publishing Company. In both cases there was evidence of both public price announcements that became effective for consumers and announcements that were simply communication devices among firms. The public price announcements in the Wood Pulp case correspond to price announcements without restrictions on the dates of the ATP case. Private communication of future prices among firms that were not commitments to maximum prices, on the contrary, served a similar role as the price announcements with first and last ticketing dates. As we will see more in detail in the next section of the paper, the European Commission would have had a stronger case if it had carefully distinguished these two types of pre-announcements - as done by the Federal Trade Commission - and if it had focused primarily on direct information sharing on prices among firms.\(^{51}\)

In the Wood Pulp case the Commission argued that price announcements and information exchange made the market “artificially transparent”\(^{52}\). Yet it would be difficult to define a “normal level” of market transparency to use as a benchmark in competition policy decisions: results would be largely arbitrary.\(^{53}\)

4. IS THERE REALLY A TENSION BETWEEN COMPETITION LAW AND CONSUMER PROTECTION LAW?

4.1 Information disclosed and transparency

Tunney argued that one of the proofs of the little dialogue that competition law and consumer protection law have had so far is the neglected tension between disclosures of information in the two contexts. He states that: “the purpose and philosophy of competition law are not unknown. Neither is the objective of consumer law. The respective role of consumer information in these two contexts and the different approaches are relatively clear”.\(^{54}\) The statement, in my opinion, is not properly correct or, at least, needs further specifications. I would agree on the fact that competition law and consumer protection law have different approaches to information disclosure and to market transparency, but I would not speak about “tension”.

Transparency is an extremely broad concept. When talking about market transparency, we have to specify what we mean by it: is it transparency about prices? Costs? Product characteristics? Is the information flow on the firm side or on the consumer side? What are the effects of improving transparency in each side? Is it good or bad? Can we systematically answer this last question?

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\(^{51}\) Kühn and Vives (1995)

\(^{52}\) “The price transparency which exists is artificial and results from the collaboration of the KEA members among themselves and also with other producers. […] The system of quarterly announcements of prices which were mostly identical for KEA members and identical or closely similar to other producers' prices helped establish this artificial transparency and is further evidence of a concerted practice which is contrary to Article 85”. (OJ L85/1 1985)

\(^{53}\) Kühn and Vives (1995): “We believe that such a benchmark of “normal transparency is not well-grounded in economic analysis and that attempts to base competition policy decisions on such concepts will lead to arbitrary results”.

\(^{54}\) Tunney (2002).
Consumer protection law promotes transparency on the demand side. Disclosure of information requirements are aimed at correcting market failures rooted in scarce or asymmetric information about, basically, quality and safety of the products. As we have seen, disclosure regulation mandates information about inputs, quantity, origin, use of the products, contractual terms and post-contractual rights, information about safety of potential hazardous goods and about quality of experience and credence goods. Price information is also very important because it enables consumers to make comparisons and thus informed choices.

One of the fundamental economic justifications for disclosure regulation in the sphere of consumer protection is the positive effect of consumer information on the competitiveness of the market. Lack of information or misleading information distorts purchasing decisions and harms the competitiveness of the market as a whole.

Transparent, in the consumer protection context, means either formally easy -referring to sentence length and layout - or easy to understand - referring to the comprehensibility of the content -. Transparency, at formal and content level, is deemed essential for any contract to be effective.

Competition law fights transparency on the supply side, specifically the exchange of information about private, firm-specific market data which renders the market artificially transparent primarily for the firms. The transparency which raises concerns for the antitrust authorities is the result of information sharing among firms about individual market shares, volume sales and quoted prices. Except for the prices, this is not the same kind of information which is deemed relevant for consumers. The main reason of this concern is the potential collusive effects of the information exchanges. Data about expected production or past production may be useful for the firms ex-post, once exchanged, at the competition stage: the former to coordinate strategies or share markets, the latter to possibly verify the compliance of all participants at collusive agreements.

The distinction between the effects of increased information on the two sides of the market is crucial: information flows on the firms’ side tend to harm competition facilitating coordination of market behavior; improved information on the consumers’ side, on the contrary, is likely to intensify competition. Both sides should be considered before concluding about the desirability of increased transparency.

4.2 Efficiency as a touchstone

The literature on information exchange between firms has correctly enlightened that the fundamental question to be answered is: what is the potential of the communication on coordinating firm behaviour? What are, on the contrary, potential efficiency-enhancing effects of the communication?

Kühn indicates three possible efficiency defenses to information sharing: first, communication may contain useful information for consumers; second, it may be a way for firms to exchange information about market data; third, it may represent a commitment relative to consumers for instance to a maximum price55.

4.2.1 Public vs. private information

The distinction between private and public communication is crucial. Private means exclusive to the firms, public means available also to potential buyers.

Private communication about firm-specific market data increase only transparency for the producers and it is presumed to facilitate collusive behavior.

In UK Agricultural Tractor Registration Exchange the Commission stressed the confidential nature of the information exchanged: the information was not available to purchasers, but only to the parties in the agreement. This shows that, “if the availability of the information is asymmetric, an infringement of Article 81(1) is more likely: the private enhancement of market transparency between competitors raises concerns that improved public transparency may not”.

Within the ambit of private communication, however, an important distinction has to be made: detailed information about past quantities and volume sales is a useful, if not necessary, device to sustain collusive equilibria; information about cost and demand conditions may be beneficial because firms may use that information to take more efficient production and marketing decisions.

4.2.2 Future prices

Private communication between about future prices and production plans has a significant coordinating potential and few redeeming efficiency effects. On the contrary, public communication concerning future prices is likely to have efficiency-enhancing effects that make general bans counterproductive, particularly if it commits firms towards potential buyers.

Price advertising, for instance, is beneficial because it increases market transparency for the consumers and, in turn, the degree of competitiveness in the market. When consumers cannot observe the prices directly or it is much costly to compare them, monopoly pricing is possible also if firms do not coordinate their strategies, simply because they have no incentive to compete for consumers. Therefore, price advertising, by increasing transparency on the consumer side, increases the degree of competitiveness in the market. At the same time, advertising increases transparency on the supply side, making the strategies of the competitors more observable which may, in turn, facilitate collusive agreements on prices. However, if price advertising helps consumers to make informed choices and prevents monopoly pricing, the potential collusive effect of price announcements appears to be of secondary

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58 Diamond (1971).
59 It is often assumed that in competition sellers generate information for consumers through advertising their products. This assumption, however, disregard the current advertising practice: modern advertising is more about presenting the positive characteristics of a product, sometimes in a very evocative and abstract terms, it does not allow real comparison about products of different brands. At the same way, people who is supposed to provide information to consumers reducing their cost and effort in discovering important features of the products, like salesmen, travel agents or retailers, often lack the proper training and are as ignorant as consumers about the products.
importance relative to the potential benefit for the consumers and for the economy as a whole\textsuperscript{60}.

The different nature of the transparency about future prices for customers as opposed to transparency for consumers was clear in the Wood pulp case, even though neither the Commission nor the experts, at that time, have carefully distinguished between the issues of market transparency for consumers and market transparency for firms\textsuperscript{61}. US vs. Airline Tariff Publishing Company made clearer the difference between price announcements not combined with commitments to consumers from public price announcements – in particular in the trade press. The former, being unreliable and misleading, exclude any potential benefit for consumers.

Both cases seem relevant to catch the connection between the competition and the consumer protection perspectives. Any private communication has no plausible direct positive effects on consumers. On the contrary, commitments towards consumers may lead to substantial efficiency gains.

\subsection*{4.2.3 Independent institutions vs. trade associations}

In his survey on consumer information problems and solutions to overcome them, Wein suggests that published data may be used as a further support for the reputation of the firm. Another point worth noting is that we must distinguish between independent institutions that collect and disseminate consumer information, potentially supported by the state, and centralized information systems organized, for instance, by trade associations. The production and exchange of information through intermediaries may enjoy advantages of economies of scale and scope, but, as demonstrated by case law, it also constitutes a favorable set for collusion.

\subsection*{4.3 Information vs. communication}

Another truly important message emerges from the Wood Pulp case: the European Court of Justice ruled that the fact that the wood pulp producers announced prices before those prices came into effect was not, in itself, sufficient to infringe article 81(1). From this stance we can conclude that, to violate article 81(1), undertakings must have agreed on exchanging information. It is not sufficient that they can simply obtain information about each other’s behavior, for example though press or discussions with customers: a necessary ingredient for a violation is a voluntary exchange agreement\textsuperscript{62}.

The legal approach to collusion based entirely on the concept of co-ordination between competitors rather than simply on information exchange loosens even further the potential tension between competition policy and consumer protection policy on information disclosure.

\subsection*{4.4 A law and economics perspective on disclosure duties}

\textsuperscript{60} Kühn and Vives (1995).
\textsuperscript{61} Kühn and Vives (1995).
\textsuperscript{62} Whish (2001).
Apart from the potential tension with competition law, mandatory disclosure requirements which permeate consumer protection laws have been often criticized, especially by law and economics scholars. They have claimed that economic criteria seem to be completely absent in the formulation of mandatory disclosure duties in the legislative context and also in case law. Cost and benefits of such regulatory intervention are not always fully evaluated and weighted.

Mandatory disclosure might be needless, if the market by itself produces a sufficient amount of information. This particularly holds in cases of information about quality. The principle existing model of voluntary disclosure developed independently by Milgrom and Grossman in 1981\(^63\) claims that, in equilibrium, sellers reveal information as if the disclosure was compulsory because, if they do not, buyers infer the lowest possible level of quality\(^64\).

Moreover, disclosure requirements, especially if very broad, may have some drawbacks. Sellers, fearing suits where the plaintiff, in case of bad events, claims that material information was not disclosed, may choose to disclose an excessive amount of information in the first place, which may be not only costly, but also difficult to process by consumers. So, at least when voluntary disclosure is costless, consumer protection law should not intervene\(^65\). On the contrary, when disclosure is costly, businesses may be deterred from providing information voluntarily because of the cost of producing and disseminating information, but, most of all, because the non-excludable nature of the information. In addition, disclosure duties that impose uniformity in one or more variables relevant to a transaction generally have the disadvantage that they induce producers or suppliers to shift quality efforts on the variables included in the standard at the expense of others left out. The required disclosure might also replace other precious information that the producer or supplier would have revealed. Finally, mandatory disclosure rules may create costs that the producers, in turn, will pass on the consumers increasing the final prices. Consumers will ultimately pay for the increased protection.

As a result, mandatory disclosure regulation should be used only when distortions created by the initial information disadvantage at least offset the costs and distortions created by the strategic response to disclosure laws\(^66\).

There is a strong school of thought who believes that consumers are adequately protected by the operation of the market system and by contract law. “The strongest advocates of the market system are the members of the Chicago school”\(^67\). They believe that consumers can discipline producers through the market and that competition results in better products and contract terms. The market is thought to bring about more efficient results than any government regulation. Nevertheless, the analysis of the Chicago scholars fails to take into account the possible deficiencies in the operation of the markets, which, in the context of consumer protection, are basically due to imperfect or asymmetric information. As we have seen, consumers can easily protect


\(^{64}\) This is the famous “unraveling result”.

\(^{65}\) Grossman (1981). It is true, however, that even in case costless disclosure, producers may be self-interested in withholding information since consumer ignorance may further oligopoly power.

\(^{66}\) Hadfield et al. (1998).

\(^{67}\) Scott and Black (2000).
themselves in the case of search goods because they can acquire information from repeated purchases, but, in cases of experience goods, consumers might find difficult, or costly, to get information about the products because of the occasional nature of the purchase. Often the reality of standard form contracts is not of competing sellers offering more and more favorable terms to win the race, but of consumers being forced to accept contracts with disadvantageous terms.

Apart from the possible market failures, there are also limits to the effectiveness of contract law in protecting consumers because they frequently do not take initiative to enforce their legal rights or they are not even aware of them. Sometimes consumers may not recognize that they have been adversely affected by a trade practice; sometimes the impact of wrong-doing may occur only in the future; sometimes the offences are so complex and diffused to require a class action.

Government intervention seems then justified in some circumstances. The remedy for a particular market failure must be different, depending upon the problem to be solved\(^68\). From a law and economics perspective, market solutions, such as increasing the amount of information available to consumers and ensuring competition between firms, are more desirable than direct regulation. In case problems are caused by monopoly power on the supply side of the market, competition law can provide a remedy. If the market failure derives from lack of information on the demand side independently from market structure, then regulation should intervene to fix information imbalances through mandatory disclosure, or, when this turns out to be ineffective, through substantive mandatory law\(^69\).

### 4.5 Potential tensions in the perspectives

Some tensions between competition policy and consumer protection policy are possible, but they are tensions in the underlying perspectives. From a competition policy point of view, markets with low barriers to entry, low sunk costs, many rivals, and rapid rates of entry and exit will tend to conform to the model of a perfectly competitive market and thus deliver the best outcome for consumers. “Yet, from a consumer protection perspective, such markets may still present some of the most severe information problems that consumers confront”\(^70\). Competition law fights abuses of dominant position and agreements that distort interaction in the marketplace, but consumers are often harmed by the consequences of imperfect or asymmetric information in the transactions, which are independent from the structure of the market.

Hadfield, Howse and Trebilcock suggest considering first whether the market in question is competitive, imperfectly competitive, or non-competitive. In very imperfectly competitive or non-competitive markets, problems of consumer protection may be better addressed through competition policy or economic regulation. Consumer protection law, as distinct policy area from competition law, should focus

\(^{68}\) Harlief (2004).  
\(^{69}\) This is the case, for instance, of standard contract terms. Information asymmetries are unavoidable, especially if consumers conclude this type of contracts only occasionally or once in a lifetime. The asymmetries are usually difficult to cure and justify mandatory substantive rules. Compulsory standards of minimum quality or performance are sometimes needed when health or safety is involved.  
\(^{70}\) Hadfield et al. (1998).
on the quality and the cost of consumer information. Consumer protection problems are more likely to arise “where information costs are relatively high or the value of information is perceived to be relatively low”.

They make the example of the market for cigarettes. Even though manufacturers compete among themselves for market shares, they have a “common incentive not to disclose information about the risks that derive from smoking as long as those risks apply to all cigarettes”. There may not be structural features that suggest anti-competitive behavior with respect to information; still it can be the case that some forms of strategic behavior - e.g., fraud, deception or deliberate suppression of known material and low-cost information by individual sellers - are used by sellers to unduly increase the information costs to consumers. The greater the extent to which consumers misperceive the costs and benefits of a transaction based on their general expectations, the more likely it is that there is a problem that may require consumer policy intervention.
5. CONCLUSIONS

Consumer protection policy is organized around the central importance of information in consumer transactions. Imperfect or asymmetric information is the essence of the need for consumer protection policy.

Tunney argues that the philosophy of maximizing consumer information, predicated by consumer protection law could provide a fertile soil for cooperative behavior in oligopolistic markets. Therefore, he suggests “caution against the automatic assumption of the invariably beneficial nature of the obligation on producers to disclose information”.

Competition law condemns information sharing agreements between firms as they potentially create “artificial” transparency in the market and facilitate collusive strategies. Competition authorities do not challenge increased transparency on the consumer side, but rather are interested in the artificial transparency that firms create through information exchanges about data from which they can infer the rivals’ market strategies. The content of the disclosure is, therefore, also different in the two contexts. Competition law is basically concerned with disclosure of enterprise related information, specifically with data about individual firms’ performance such as past prices, volume sales, market shares. Consumer policy, on the contrary, mandates disclosure of product related information: safety, quality, quantity, origin, use of the products, contractual terms and post-contractual rights.

Theoretically it can be true that mandatory disclosure requirements allows competing firms to be better informed on each other’s market strategy. However, at least in the case of price disclosure, the risk of collusive behavior appears to be of secondary importance compared to the potential benefits of price advertising for consumers.

Particularly important to catch the connection between the competition and consumer protection perspectives is the communication between firms about intended future pricing behavior. Public price announcements – like advertising – which are binding to consumers are an essential part of the competitive process and should not challenged. Mere private communication among firms on future pricing strategies is harder to justify on efficiency grounds and is usually condemned as restrictive agreement. Both American and European competition authorities practice is quite in line the findings of economic theory.

From a law and economics perspective, the application of competition law and the regulation of information should have higher priority than mandatory substantive contract law. Until now, however, “there is no principled approach to the application of mandatory disclosure and the priority of disclosure over substantive regulation”71. Neither legislation nor academic discussion has formulated general and common rules and principles regarding mandatory disclosure. What is needed is a comprehensive approach embracing different regulatory contexts “in order to apply mandatory disclosure in a more focused manner more specifically and effectively than today”72.

71 Merkt (2001).
72 Merkt (2001).
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