

# THE ECONOMICS OF OPEN PRICE SYSTEMS

By LEVERETT S. LYON *and*  
VICTOR ABRAMSON

Open price systems have been of interest to industrial groups and governmental authorities for the past two decades. They have been lauded as offering industrial groups an open market, an escape from the difficulties of secret pricing; they have been condemned as instruments of collusion and price fixing. Their development has been the concern of trade associations. The Federal Trade Commission trade practice conferences have been concerned with them. They grew rapidly in number and variety under the NRA. They have been the subject of important Supreme Court decisions.

This volume constructively considers open price systems in terms of the economic and social issues which they raise and in terms of the important specific problems which must be examined in considering the application of an open price system to any given industry. Following a significant presentation of the economic setting of the problem, the history of open price systems—under trade associations, the Federal Trade Commission, and the NRA—is reviewed. There is then presented an analysis of the much mooted questions of the effects of open prices on competition, stability, and large and small business units.

A major section of the book is concerned with the problems of constructing socially useful open price systems, in which the types of issues which experience has shown to be significant are presented and analyzed. The volume concludes with a chapter dealing with the applicability of open price systems to specific industries and of possible governmental relationships to the organization and operation of these systems.

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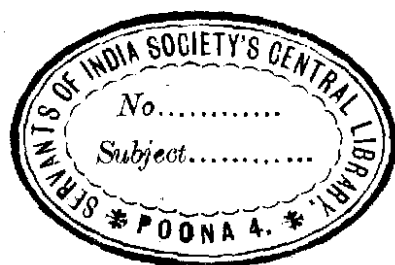
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LEVERETT S. LYON  
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VICTOR ABRAMSON

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## DIRECTOR'S PREFACE

This study was initiated as one of the series of studies of the National Recovery Administration undertaken by the Institute of Economics under the immediate direction of Leverett S. Lyon. With the passing of the NRA, Mr. Lyon reoriented the study in terms of current conditions in the fields of price policy, trade practices, and self-government in industry, in which he had earlier been working. Two books, *Advertising Allowances* and *The Economics of Free Deals*, had grown out of that work when in the summer of 1933 the center of developments in this field shifted to the National Recovery Administration. As deputy assistant administrator for trade practice policy at the NRA for a period, Mr. Lyon had an unusual opportunity further to study and analyze trade practices and their regulation.

*Advertising Allowances* and *The Economics of Free Deals* were pioneer expositions of forms of indirect pricing which have recently become of great interest to economists; the present volume adds a third unit in the general field of price and trade practices. It discusses the subject in terms of its development and economic implications but also, with a view to constructive aid to government officials and business men, it analyzes in detail the problems of constructing socially useful open price plans and makes suggestions for co-operation of trade groups and government in building them.

Harold G. Moulton and C. O. Hardy have acted for the Institute of Economics in reading the manuscript. The authors, however, are solely responsible for the analysis and the conclusions.

EDWIN G. NOURSE  
*Director*

Institute of Economics  
May 1936



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In concluding this study the authors are indebted to many persons, chiefly for the opportunity of discussing with them various aspects of the subject. Among those to whom specific recognition is due are the members of the Trade Practice Policy "Committee" of the NRA, which included at the time this subject was under discussion James E. Hughes, Milton Katz, Edwin B. George, A. Howard Myers, and W. H. S. Stevens. Corwin D. Edwards, formerly of the Consumers' Advisory Board of the NRA and later head of the Trade Practice Studies Section of the Review Division of the NRA, and Simon N. Whitney, of the Research and Planning Division and later of the Review Division of the NRA, have both been helpful in many discussions, the former lending specific aid in reviewing that part of Chapter IV which deals with the work of the Consumers' Advisory Board in attempting to analyze the effects of open price plans. Charles J. Brand, executive secretary and treasurer of the National Fertilizer Association, has read the entire manuscript; and out of his unusual experience with open price plans, as a code administrative officer and trade association executive, has offered many pertinent and helpful comments. Blackwell Smith, formerly assistant chief counsel, assistant administrator for policy of the NRA, and a member of the National Industrial Recovery Board, and now of the legal firm of Cotton, Franklin, Wright and Gordon, has also read the entire manuscript and has been helpful with comments, particularly in passing upon the accuracy and balance of Chapter III. Thanks are due also to Helen May Wheeler, formerly of the Brookings staff, to Ernest G. Draper, assistant secretary of Commerce, and to Hammond E. Chaffetz, special assistant to the attorney general of the United States.

LEVERETT S. LYON  
VICTOR ABRAMSON

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## INTRODUCTION

From the point of view both of industry and of government, open price plans as a device in the price-making process are at a particularly important stage. While such plans in one form or another have been in existence for more than two decades, interest in them, greatly stimulated by the NRA, is at a higher level than has been the case for a long period. Certain industries are anxious to continue the open price plans developed under the NRA with such improvements as can be made and such modifications as the expiration of the Recovery Act may make necessary. Others are considering the initiation of such plans. An effort to set forth the general issues of public policy which are involved in the organization of open price plans therefore seems appropriate at this time.

The development of open price plans effective in achieving objectives of public interest requires an analysis of the elements in such plans and a consideration of each of these elements in terms of the economic and social issues which it raises. It is with these general questions and, more specifically, with an attempt to point out certain criteria to be used in considering the economic effects of open price plans, that this book is concerned. Emphasis is directed toward the types of considerations that are important in deciding whether or not an open price plan is applicable to an industry and the factors that determine the precise form of the plan that will be most useful socially.

No attempt is made to apply the criteria set forth to specific industry situations. This task would require de-

tailed industry studies, and the analysis of certain materials concerning American industry not now generally available.

The authors of this volume regard it as a preface to the analysis of specific cases in which open price plans are being considered and to further studies of industries and industrial situations, of which many more must be made before the final word on the economic significance of open price plans and their relationship to the formulation of sound public policy in trade regulation can be written.

CHAPTER I  
THE ECONOMIC SETTING OF THE  
PROBLEM

The terms "open prices," "open price filing," "open price plans," "open price associations," and "open price systems" have been current in American business life for the past thirty years. They have been used more or less synonymously and with considerable ambiguity. In general, however, they have been applied to schemes, plans, or systems by means of which some or all of the individual members of an industry make available to one another (and sometimes to others as well) information concerning the prices at which their products have been sold, are being offered, or are to be offered.

Open price systems have been of great interest to business groups and frequently the concern of governmental agencies. The specific nature and form of these systems have varied greatly; their business and economic effects fully as much. They have frequently been the subject of adjudication by the courts.

Before the advent of the National Recovery Administration the formation of open price plans was largely the work of trade groups, but the NRA greatly stimulated the growth of such plans by furnishing a vigorous agency through which they could be formulated and put into effect with governmental sponsorship. The passing of the NRA removed this agency but not the issues with which open price plans were concerned. The industrial value and economic significance of such plans will present problems so long as business remains an important factor in American economic life.

To understand the business importance and the economic significance of open price plans it is necessary to comprehend the part which prices play in the general organization of our economic life. The rôle of prices is, in our system, of fundamental importance in guiding the allocation of available productive resources—natural resources, capital equipment, and labor power—among the various uses to which such resources may be applied. Every society must deal with this problem. Whatever the existing economic system—communism, socialism, capitalism, or fascism—there must be some way of deciding what proportion of the total supply of the effort of men and women shall be directed toward the building of more factories, the clearing of more land, the construction of more railroads, and what proportion to producing the almost infinite variety of consumers' goods or services. There must be, moreover, some way of deciding specifically whether available land shall be used to grow wheat, corn, or livestock; whether available factory space shall be used to produce clothing, hats, or shoes; and the like.

It is obvious that misdirection or misappropriation of resources could have the most serious effects upon the welfare of a society. If, to use an extreme illustration, all agricultural land were devoted to the production of wheat, scarcity of vegetables, milk, and meat would result—with consequent deleterious effects. If factories and labor power were for a considerable period directed only to the construction of other plants, there would be a "famine" of consumers' goods. On the other hand, the utilization of factories solely for the production of clothing, shoes, automobiles, or other consumers' goods would bring us presently to a great shortage of the plants and equipment by means of which goods are produced. A



continuous problem of any society is, therefore, not only to make *an allocation* of productive resources to various possible uses, but to make "*the best*" allocation of such resources.

For an individual living in isolation the problem of allocation of resources would be comparatively simple, although even for him not without its difficulties. Such an individual would need to decide how much of his time and energy to give to producing food and other goods and services for current consumption and how much to the construction of a cabin, storage houses, fences, and other "permanent" equipment. If he devoted too much energy to current needs, he might find his supplies or himself poorly protected. If he gave too much attention to building equipment, he might find himself short of food. No different in principle would be the problem of how much time he should give to producing any one of the many different types of currently consumed goods and permanent equipment.

To the extent that individuals in their economic living have relationships with one another, the problem of allocating productive resources becomes more complex. Wherever we find group life we find that a greater or less degree of specialization is in operation. But specialization must be co-ordinated. Wherever there is specialization, goods and services are produced in some degree for the consumption of others, and exchange is consequently necessary. For modern societies, in which specialization has been carried to great lengths, the task of integrating production in such a way as to bring about the best possible allocation of resources is indeed a difficult one.

In general terms, two plans have been devised and utilized by modern nations to accomplish this integration

of specialized activities in the production of economic goods. One is to rely in considerable measure upon a centralized authority. No country uses this method exclusively, but to the extent that it exists, some central planning group exercises a large degree of power to determine the various goods and services to be produced, to allocate resources and labor power to the different specialized activities required for the production of these goods and services, and even to allocate to individuals the goods and services to be consumed.

The second plan for integrating specialized activities places reliance for the most part on individual decisions. Under this plan individuals are left free to decide what goods and services they will purchase, how much of their incomes they will spend, what part they will save. Moreover, they are permitted, within limits, to make whatever disposition of their productive resources they may see fit and to undertake whatever enterprise they desire.

Historically speaking, it has been chiefly during the past century and a half that an important rôle in the organization of economic life has been assigned to individual decision. This development grew in part as a result of the effort to escape from the restrictions of mediaeval life, and from that mercantilistic control with which every American is familiar from his school-day studies of the American Revolution. Historically speaking again, confidence in this means of organizing economic activity developed coincidentally with the growth of democracy. Emphasis on individual decision in the allocation of productive resources and in the determination of production methods was a natural outgrowth of the desire to maximize individual liberty.

Economists, however, have stressed the social advantages of another aspect of individual enterprise in the organization of economic life. It has been their view that this plan, though by no means possible of perfection, would in large areas of industrial life<sup>1</sup> accomplish, better than any known alternative, a desirable allocation of the resources of society. Under this system producers, it is thought, will secure knowledge of opportunities for the employment of the productive factors, and competitive enterprise will work to adapt production to those market demands. It is a necessary part of this plan that individuals or groups be prevented from controlling prices and production. It is equally important, however, if the individual decision method is to operate effectively, that knowledge of buying and selling opportunities be available to as great a degree as possible.

The process of co-ordinating specialization by individual decision involves a continuous effort on the part of individuals to adapt themselves to the opportunities which confront them. These opportunities, never so good as one might wish nor so bad as is conceivable, present themselves as alternatives. In order that his choice of alternatives may be wisely made, each individual requires knowledge of the actions and attitudes of others. Before an individual who has goods or services to sell, or who is contemplating the production of goods or services, can act judiciously, he must have reasonable knowledge of the various existing opportunities. Similarly, in

<sup>1</sup> In the areas of so-called natural monopolies and in the production of certain services such as education and public health, reliance on individual enterprises is generally believed to be unsatisfactory. There is a continuous problem of determining the areas in which the rôle of individual enterprise may wisely be restricted and those in which it may wisely be retained or extended.

order that an individual considering the purchase of goods or service may decide discerningly, he should know the alternatives.

In such an economic organization, knowledge of prices at which goods and services can be bought and sold is vital to the making of choices. Prices in their various forms reflect the demands for goods and services and give expression to the forces of supply. Prices sometimes take the form of bids representing demands. They sometimes take the form of offers representing willingness to supply. In addition there are transaction prices which reflect the forces of both supply and demand. Those making price bids, of course, have certain judgments concerning available supplies; and those making price offers generally give some consideration to probable purchases at various possible prices.

Knowledge of prices of these sorts makes possible the comparison of various goods and services by both those who contemplate sale and those who are considering production. In addition, they provide vendors of labor power, resources, and capital with a means of evaluating alternatives, and at the same time constitute the basis of cost calculations to be compared with the prices of finished goods in determining production. As great a knowledge as possible of the prices at which goods and services can be bought and sold is consequently important to the effective operation of individual decision in determining the specialized activities which individuals will perform and the specialized uses to be made of resources. Making such knowledge available is a large part of what we may speak of as the organization of open markets.

To effect the organization of an open market is often a difficult task. Where trading is highly concentrated

geographically, where buyers and sellers are relatively few and products easily comparable, and where pricing methods are comparatively simple, little effort or organization is required to achieve the condition of an open market. However, with a large number of buyers and sellers greatly diffused, and with a vast diversity of unstandardized products and methods of pricing, considerable organizational activity is needed to create an open market. The planning and construction of those devices and agencies which will make available the necessary knowledge for the effective operation of individual enterprise calls for careful thought and great ingenuity.

The most effective open market mechanisms which have been devised are the so-called organized exchanges, illustrated by those selling such staple commodities as wheat, cotton, and listed securities. The organized exchanges have effected arrangements so that the influences of current offers and current bids are brought together at one point, or at a number of points in intimate contact with one another. Both buyers and sellers are consequently enabled to take action with a very extensive understanding of available opportunities.

It is not possible, however, to apply the principles of the organized exchange fully to all goods in all markets. There are many industries in which the commodities being sold are so lacking in possibilities of standardization, and the buyers and sellers so widely scattered, that the use of an organized exchange is all but impossible. It is only as the informational conditions of the organized exchange are approached, however, that buying and selling on the basis of individual judgments can operate most effectively to achieve a sound allocation of resources to various uses and a satisfactory distribution of goods in response to desire to buy.

Where the mechanical conditions of the organized exchange cannot feasibly be reproduced, various schemes have been devised for the purpose of giving the members of an industry and sometimes their customers a knowledge of prices within the industry. It is to such plans that the general term "open price system" has ordinarily been applied.

## CHAPTER II

### EARLY HISTORY OF OPEN PRICE SYSTEMS

The history of open prices systems shows them to have been a device of manufacturing groups. In this they are in contrast with the organized exchanges which have been developed essentially in the marketing of raw materials. Groups of manufacturers, seeking the ends served by the organized exchanges or certain other ends, as will appear below, have turned to open price plans of various types. Though there is some evidence of an earlier beginning, A. J. Eddy, a Chicago lawyer, is chiefly credited with having originated and developed the first open price systems in the United States. The Eddy plan was first applied in 1911 in the iron and steel industry and in 1912 in the lumber industry.

The development of the Eddy plan was a part of the movement of business men to adapt themselves to the vigorous enforcement of the Sherman Act which characterized the first decade of the century. Fear of prosecution under the anti-trust laws had led to the abandonment during that period of at least the more obvious forms of trade restriction, and had stimulated the wider development of statistical associations disseminating reports on stocks, production, orders, shipments, and prices, though even in these latter associations there existed, it appears, some trade restrictive influences.

The sharp decline of prices in the crisis of 1907, however, stimulated the efforts of business groups for stronger forms of price control. It was following this crisis, for example, that there developed in the iron and

steel industry the so-called Gary dinners, to which leading iron and steel producers were invited for the purpose of "talking over" the situation in the industry.<sup>1</sup> These continued, with some interruption, until the federal government in 1911 entered suit against the United States Steel Corporation for violation of the Sherman Act. Efforts by industrial groups to revive direct price control devices were, following this action, somewhat curtailed.

It was at about this time that Eddy developed the notion of the open price association. He was impressed with the worth of the dissemination of information relating to conditions of production and sale and believed that the work of the statistical associations, which distributed data largely in summary form, should be extended by provisions for more detailed reports, involving in many instances the identification of sellers. Eddy was of the opinion that discussions of future prices, such as those that took place at the Gary dinners, might lead to understandings in violation of law. He believed, however, that there was nothing illegal in permitting competitors to exchange information dealing with past transactions, or in discussing prices already being charged or quoted.<sup>2</sup>

Under the Eddy plan of open price systems, the first step was the organization of manufacturers into an as-

<sup>1</sup> With regard to these dinners, Judge Buffington in his opinion on the steel case stated: "Now to our minds the testimony taken as a whole makes the conclusion inevitable that the result of these meetings was an understanding about prices that was equivalent to an agreement. We have no doubt that among those present some silently dissented and went away intending to do what they pleased; but many, probably most, of the participants, understood and assented to the view that they were under some kind of an obligation to adhere to the prices that had been announced or declared as the general sense of the meeting." 223 Fed. 55, 160, affirmed 251 U. S. 417. See also Milton Nels Nelson, *Open Price Associations*, pp. 37-38.

<sup>2</sup> A. J. Eddy, *The New Competition*, pp. 120-23.



sociation. Indeed, the systems were commonly called open price associations. The association did not typically—perhaps ever—include all of the manufacturers of an industry. The purpose of the association was the reporting of prices. These were sent to some central body, whence they were disseminated. Where manufacturers produced goods to specification, the information filed included inquiries received, bids made, and contracts awarded. Inquiries were not disseminated for fear they might lead to collusive bidding, but a general bulletin of work in prospect was made up from these data and distributed.

The Eddy plan was designed primarily from the point of view of sellers.<sup>3</sup> Information regarding bids was sent only to those who submitted them, and not to other members of the industry or to buyers. Bidders were permitted to re-bid but were then required to report again. Bids were not exchanged on contracts for the government or other public bodies, as they accepted only one bid from each bidder.

In the case of manufacturers who sold to jobbers or retailers, there was dissemination of price lists, or of prices on past transactions. The reports varied in frequency from daily to monthly periods. Sellers were sometimes identified, buyers never. Where meetings were held there were no discussions of future prices, and members were free to change prices at will, without prior notification of any sort.

From the beginnings in 1911 there developed rapidly, under such names as co-operative competition, open door competition, and open price co-operation, various types of open price plans, ordinarily identified with trade associations, trade institutes, and trade bureaus. In

<sup>3</sup> Nelson, *Open Price Associations*, pp. 48-49.

addition to the exchange of information regarding prices actually quoted or charged, or bids filed, these open price associations carried on many other activities common to other trade associations. They exchanged data relating to terms of payment, manufacturing and selling costs, purchases, stocks, production, orders, shipments, returned goods, cancellations, advertising, and credit. They carried on work in the fields of traffic and transportation, trade practices, legislation, standardization and simplification, inspection and grading, industrial and scientific research, employees' relations, co-operative buying, and the like.<sup>4</sup>

While, as stated, it is probable that Eddy saw in his proposed open price associations essentially an informational device which, if it affected prices at all, would do so through improving knowledge rather than by stimulating collusive control, there is little doubt that, with the opportunities for direct control limited by the anti-trust laws, some manufacturing groups were attracted into organizing open price associations in the hope that by means of such associations they could achieve group control of prices.<sup>5</sup> Of somewhat different significance was the feeling on the part of certain manufacturers that if knowledge of prices by competitors were common, producers would in many instances refrain from cutting prices because of the fear that all would follow suit.

Whatever the desire that through open price plans the anti-trust laws could be avoided, there was clearly the hope on the part of some manufacturers that open prices would eliminate fraud and misrepresentation by

<sup>4</sup>Nelson, *Open Price Associations*, pp. 9-10, and 70 Cong. 2 sess., S. doc. 226 (*Report of the Federal Trade Commission on Open-Price Trade Associations*), p. 68. These two works may be reviewed for a more detailed treatment of the early history of open price associations.

<sup>5</sup>Nelson, *Open Price Associations*, p. 43, and *Report of the Federal Trade Commission on Open-Price Trade Associations*, pp. 4-9.

those buyers who sometimes mis-stated the price offers made to them, and by those manufacturers who sometimes made untrue statements to buyers concerning their own prices to other buyers and concerning their competitors' prices. It was further hoped that these plans would destroy "viciously" low bidding by competitors who stood no chance of securing a contract but who bid low merely to harm their competitors. Secret prices, rebates, and concessions, it was believed, might also be lessened or eliminated by open prices.<sup>6</sup>

Both the informative and restrictive aspects of open prices came early to the attention of the Federal Trade Commission. In its annual report for 1917, the Commission noted the advantages pertaining to the dissemination of trade information such as that carried on by open price associations but emphasized the fact that where such information was collected by trade associations it did not become available to other members of the industry or to the public generally. Further, the Commission deplored the tendency of these associations to engage in activities tending artificially to control prices and the channels of distribution. As a partial remedy it was recommended that trade association files be made public records and that the government take over the function of the dissemination of trade information.

Our entrance into the war interrupted this critical examination of the work of trade associations. The government found such organizations useful in directing the operations of industries to the prosecution of the war and even went so far as to encourage the formation of trade associations where none had previously existed. A number of the associations developed during this period included price collection and dissemination among their activities. A Federal Trade Commission investigation

<sup>6</sup> See references cited in note above.

in 1921, in which replies were received from 55 per cent of those addressed, indicated that by that time the number of open price associations had grown to at least 150. Estimates by other observers placed the number of trade associations operating some form of open price plan as high as 450.<sup>7</sup>

Following the war there was a refocusing of attention on trade practice problems. In 1921 the Supreme Court adjudicated an important case, handing down a decision on December 19 of that year.<sup>8</sup> This case, familiarly known as the hardwood case, was the first relating specifically to price and statistical work to reach the high court. In its decision the Court declared the activities of the American Hardwood Manufacturers' Association to be in unlawful restraint of commerce. Evidence was presented in the case at hand to show concerted action to maintain prices and curtail production. The Association had provisions for inspection of reports and for monthly district meetings. Moreover, the manager of the trade association, it was shown, published analyses of the statistics gathered and on occasions went so far as to advise the hardwood producers to curtail production and to wait for higher prices. It was not clear from the decision whether the Court's condemnation of the activities of the Association was based entirely on the evidence of concerted action to maintain prices and curtail production, or whether the mere dissemination of statistics of sales, shipments, products, stocks, and price lists, such as was being carried on by the Association, had been declared unlawful.<sup>9</sup> The Court did express the opinion,

<sup>7</sup> Nelson, *Open Price Associations*, p. 11.

<sup>8</sup> *American Column and Lumber Co. v. United States*, 257 U. S. 377.

<sup>9</sup> For more general discussions of these and the other cases referred to in this chapter, see William J. Donovan, "The Legality of Trade Associations," *Proceedings of the Academy of Political Science*, Vol. XI, p. 573;

however, that genuine competitors do not make daily, weekly, and monthly reports of the minutest details of their business to their rivals, nor do they submit their books to the discretionary audit, nor their stocks to the discretionary inspection of those rivals.

In 1923 the Court passed upon another instance of open prices in a case widely referred to as the linseed oil case.<sup>10</sup> This case involved the dissemination of information somewhat similar to that which had been required by the Hardwood Association. It was shown during the prosecution of the case that the linseed association had required adherence to filed prices, with a penalty for violations, and that all information was concealed from the buyers. The Court declared that the plan involved a necessary tendency toward the suppression of competition and was therefore a violation of the Sherman Act.

As a result of these two decisions, the opinion gained currency among lawyers, as well as among business men, that the mere collection and dissemination of statistical information had been declared unlawful. This view was furthered when the Attorney General, in correspondence with the Secretary of Commerce, he took the position that the dissemination of trade statistics by trade associations, except through the medium of some governmental body, was in effect illegal.<sup>11</sup> He indicated his feeling that

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Benjamin S. Kirsch, *Trade Associations, The Legal Aspects*, Chaps. I and II; and National Industrial Conference Board, *Trade Associations, Their Economic Significance and Legal Status*, Chap. VIII.

<sup>10</sup> *United States v. American Linseed Oil Co., et al.*, 262 U. S. 371.

<sup>11</sup> Donovan, *Proceedings of the Academy of Political Science*, Vol. XI, P. 574.

The Federal Trade Commission reported the following as the "gist" of one of the Attorney General's letters on this point: "I have no doubt that it is important that those engaged in an industry have general information as to the conditions of that industry, but I think that information should be distributed strictly through a responsible medium, like

the distribution of trade information should be permissible, if individuals were unidentified, if related only to past transactions, and if available to all interested parties; but emphasized the fact that the use made of the data was a determining factor, and that if restraint of trade resulted, the mere fact that dissemination was in the hands of the government did not legitimize the procedure. His attitude against dissemination by a trade body rested apparently on the assumption that where the data were confined to a limited group, or their dissemination administered by such a group, there was a strong presumption that the data were being utilized in restraint of trade.<sup>12</sup>

As a result of these decisions and interpretations, trade association work in the field of open prices was severely hampered. Business men sought a more definite determination of the legal boundaries to associative action. The Supreme Court decisions in the maple flooring<sup>13</sup> and cement<sup>14</sup> cases, handed down on June 1, 1925, clarified somewhat the status of the dissemination of price and other trade statistics.

A number of activities which many had feared were banned under the two previous decisions were in these latter decisions pronounced legal. The Court held that trade associations "which openly and fairly gather and

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your department; and I see no objection to its being gathered by an association provided it be strictly guarded and the association be prohibited from distributing it among its membership. This is the same view that I entertained when the communications were exchanged in February 1922; and it has since been strongly confirmed by decisions of the Supreme Court, and by investigations of a number of associations and the trial of cases involving associations." 70 Cong. 2 sess., S. doc. 226, pp. 21-22.

<sup>12</sup> See the preceding footnote.

<sup>13</sup> *Maple Flooring Manufacturers Assn. v. United States*, 268 U. S. 563.

<sup>14</sup> *Cement Manufacturers Protective Assn. v. United States*, 268 U. S. 588.

disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand . . . and who . . . meet and discuss such information and statistics without, however, reaching or attempting to reach any agreement or concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce."

The case made it clear that the mere collection or dissemination of information was not within itself illegal but was in fact desirable. It was, moreover, interpreted by some as indicating a continued disapproval of the withholding of collected information from buyers, of the identification of the figures of individual competitors, and of the interchange of information on other than past transactions. There was no definite pronouncement concerning the filing and dissemination of current price offers. Any attempt to influence the prices or production of competitors was again declared unlawful.

Following these several decisions, open price work by trade associations declined considerably. Of the 150 associations reported to be operating open price systems in the 1921 report of the Federal Trade Commission, only 33 were engaged in this work according to the 1929 report. The Commission in 1929 did, however, report an approximate total of 90 open price associations.

This arrested development—indeed even retrogression—of open price associations may be accounted for, at least in large part, by the limitations placed on the types of information that could be disseminated and the use that could be made of such information. It is certainly true that some of the Eddy type of associations, originating in the period prior to the Supreme Court decisions

limiting their activities, had developed certain of the older "price restrictive" interests now again condemned. The degree of price control which these associations achieved no doubt varied, and is in most cases indeterminate. In the hardwood case, for example, it was testified that the Association had little success in the direction of price control, being able to control only 28 per cent of the total hardwood production of the United States.<sup>15</sup>

During this period the Federal Trade Commission dealt with the problem of open prices in its trade practice conferences. These conferences consisted of meetings of industrial groups under the auspices of the Commission for the purpose of co-operating in the formulation of so-called trade practice rules for industry. These rules were necessarily within the framework of existing legislation and court decision. They consist of so-called Group I rules and Group II rules. The Group I rules are essentially re-statements of existing law. The Group II rules are comprised of regulations which, though not provided in law, are believed to be not contrary to existing law. They are regarded as not enforceable by the Commission. As such they are applicable only to the signatories; and even among those signing, compliance is wholly voluntary.<sup>16</sup>

The open price provisions approved in trade practice conferences have been confined to the Group II rules.

<sup>15</sup> Testimony of L. C. Boyle as reported by Milton Nels Nelson, "The Effect of Open Price Association Activities on Competition and Prices," *The American Economic Review*, June 1923, p. 270. To the extent that open price plans are devised chiefly with a view to avoiding the effects of competition, they are in contrast with the organized exchanges, all of which have been constructed for the purpose of introducing economy in sales operation and with the desire to facilitate *competitive* price determination.

<sup>16</sup> For a succinct statement of the history and procedure of trade practice conferences see *Annual Report of the Federal Trade Commission*, June 1935, pp. 6-8 and 95-97.



They have necessarily been in conformity with the Supreme Court's attitude concerning the dissemination of information, the identification of competitors, and the interchange of information on other than past transactions.

Of the 96 trade practice conference agreements in effect in June 1933, at which time major interest in trade regulation shifted to the NRA, approximately half made some provision for dissemination of price lists to customers. But in each instance the task of distribution was left entirely to the individual seller.<sup>17</sup> In most instances there was approval of the dissemination of terms of sale along with prices. Less than a tenth of the agreements made provision for dissemination to sellers, and these in each instance approved the distribution of only "proper and lawful statistics" or made specific declarations against the revelation of details of individual businesses or the dissemination of data regarding other than past transactions. One agreement declared in favor of having price data made available to all customers and prospective customers under substantially similar conditions.

It is worth while to make the observation that the employment of the devices of secret rebates, allowances, bonuses, concessions, benefits, unusual credits, and the like were condemned in about three-quarters of the agreements. In view of the fact that this condemnation appears in many agreements which do not have open price plans, and in view of the fact that in all but one instance<sup>18</sup> they appear with the qualifying condition that

<sup>17</sup> Based on an analysis of the provisions of trade practice conference agreements set forth in *Trade Practice Conferences*, Federal Trade Commission, June 30, 1933. The agreements presented in this document include the modification of rules made up to that date.

<sup>18</sup> The agreement for the flat glass industry.

there exist the intent and effect of injuring a competitor or substantially lessening competition, of creating a monopoly, or of unreasonably restraining trade, it seems reasonable to infer that the regulation was aimed at discrimination rather than designed to implement an open price plan. Yet it is apparent that deviations from announced prices by such indirect means as those condemned is injurious to an open price plan, and prohibitions of such methods one means of making open price plans more effective. (For a more extended discussion of this point, see page 97.)

## CHAPTER III

### THE NRA AND OPEN PRICE SYSTEMS

The next important phase in the development of open price systems came with the passage of the Recovery Act. The NRA extended the use of open price systems into many fields of trade and industry where they previously had not been employed, and developed more fully the existing open price plans. In all, some 422 open price plans, plus 29 bid filing systems (see page 139 for discussion) were provided in the codes.<sup>1</sup> Operation was not attempted in all the plans provided and, where operation was attempted, its effectiveness varied widely.

The Recovery Administration in its making of open price plans, as in all of its operations, proceeded upon the theory of voluntary codes. The underlying act provided that trade groups should take the initial action in suggesting the regulations which were to be embodied in codes.<sup>2</sup> With this opportunity, after three years of depression and falling prices, and with a law which granted, as did the Recovery Act, respite from the anti-trust regulations, it was but natural that business groups would bring forward many proposals for group controls over prices and production which would have been considered questionable under the anti-trust laws.

#### EARLY NRA POLICY

In the early months of code making, industry demands gained approval for open price systems, some of which included provisions for a waiting period between the filing of a price and the use of such a price in actual transac-

<sup>1</sup> See Appendix, p. 154.

<sup>2</sup> The procedure followed was based on Sec. 3a.

tions, and some of which included provisions for the identification of buyers and sellers.<sup>3</sup> Moreover, there were code provisions relating to group control over prices and production which exerted an important influence on the nature of the operations of many of the open price systems established under the NRA.<sup>4</sup> Only late in the code-making process, when official NRA policy began to declare against both direct and indirect group control over prices, did the notion of the utility of open prices as a device for the facilitation of effective competition assume an important part in shaping the character of NRA open price systems.

Criticisms of trade practice regulation, which developed early, to a considerable degree focused on the open price plans. From almost the very beginning of NRA there were complaints that the codes were bringing about "unwarranted" increases in prices. During the early months of code making these criticisms were overshadowed by the enthusiasm and faith which surrounded the experiment. The objections were, however, persistent and progressive, and as early as November 16, 1933, the NRA took formal notice of their existence. On that date the Administrator announced a forthcoming public hearing to investigate charges of "profiteering" under the codes.

These hearings were held in Washington on January 9, 1934. A majority of those who testified were purchasing agents, governmental and private; their major complaints alleged a uniformity of prices among bidders, and what they considered to be exorbitant increases in prices. These conditions they ascribed largely to the

<sup>3</sup> For a tabulation of the elements in NRA open price plans, see Appendix, p. 154.

<sup>4</sup> Among these provisions were those for fixing minimum prices and setting production quotas.

operations of open price systems, and particularly to the waiting periods in open price plans which they declared encouraged collusive price agreements. Complaints presented by the Consumers' Advisory Board followed along the same general lines. In addition, however, the Consumers' Board presented analyses of price movements and complaints of price increases in several important industries in which the codes authorized some form of minimum price fixing, or in which the Board believed there existed some degree of coercive and collusive control over prices.

Relatively little was added by these hearings to a genuine understanding of open prices under the codes. They consisted for the most part of allegations unsupported by careful observation or analysis. It was not possible on the basis of such evidence to determine clearly the economic effects of the codes. Further study was obviously required, and waiting periods in open price systems, having been the subject of the most widespread complaints, were singled out for early treatment.

The complaints against the waiting period in the open price systems of codes had been so strong, however, that some immediate action was felt necessary. Accordingly, on January 27, 1934, the Administrator announced that, pending completion of a study of open price associations, no further provisions for waiting periods would be approved in codes. It was further announced that such provisions in proposed codes not yet approved would be stayed for sixty days or pending completion of the study.

Early in February the NRA released a report on the price hearings which included, among the major types of complaints against code operations, the uniformity in prices and excessive price increases which had arisen apparently from the operation of open price systems in sev-

eral codes, particularly in those instances where a waiting period had been prescribed.<sup>5</sup> It was recommended that "the so-called 'waiting period' should probably be temporarily deleted from the majority of the open price provisions." The fear was expressed that intimidation and coercion, and uniformity of high prices, might result from the use of such a period between the filing and effective date of prices. A possible substitute was suggested in the form of price dissemination to customers and competitors, with the requirement that once quoted a price must apply for a given period of time. It was noted that knowledge concerning the other aspects of open price systems was inadequate to warrant definite conclusions, and a plan of further study was outlined.

As a part of the program of study, the Research and Planning Division, the Legal Division, and the Consumers' and Industrial Advisory Boards of the NRA were requested to submit memoranda on open prices. At the same time, more than a score of economists were asked to comment on the economic significance of open prices. In addition, "field days" for public comment on the codes were called for February 27 to March 3, 1934, and a conference of Code Authorities for March 5 to 8. It was hoped that there might result a better understanding of the effects of code operations, on the basis of which future policy could be formulated.

In a widely publicized memorandum of February 19 on *Suggestions for Code Revision*,<sup>6</sup> the Consumers' Advisory Board took the position that the difficulties involved in open price systems could not be dealt with merely by the elimination of the waiting period. The

<sup>5</sup> *NRA Release No. 3114*, Feb. 5, 1934.

<sup>6</sup> Reprinted in the Hearings before the Senate Committee on Finance, 74 Cong. 1 sess., Vol. I, p. 849.

Board cited evidence to indicate that price publicity, even without the waiting period, by identifying low price sellers, in some instances facilitated the use of pressure to coerce individuals into price agreements. As a remedy, the suggestion was made that the NRA indicate forcefully that price agreements, unless specifically provided in the codes, would not be tolerated. It expressed approval of the idea of price reporting, but held that reports should be confined to sales already made, and that the identity of the sellers should be kept confidential and only the range of prices be publicized. These limitations were regarded as essential if open prices were not to be used to facilitate collusive price agreements.

The "field days" for public comment and the Code Authority Conference for the most part developed only repetitions of previous criticisms. Those who sponsored open price systems, and particularly waiting periods, had, however, by that time more carefully marshalled their arguments. In addition, the Consumers' Advisory Board, in a preliminary report on one of its price studies, noted a tendency toward increases in uniformity of prices under the NRA. In general, however, these hearings and conferences brought forth little additional knowledge concerning the economic effects of open prices.<sup>1</sup>

The problem of open prices and waiting periods received further attention by the National Recovery Review Board, the so-called Darrow Board, appointed by the President on March 7 for the purpose of inquiring further into the operation of the codes. In the reports on 34 industries issued by this Board during May and June, open prices and waiting periods were among the devices indicated as instrumental in the promotion of

<sup>1</sup> For a summary of these hearings, see the extra NRA edition (Mar. 16, 1934) of *United States News*, Vol. 2, No. 11.

monopoly and the injuring of small business which the Board concluded to be present in the codes under consideration. The character of the Board's investigations, which consisted for the most part of hearings in which affected parties testified, was such as to result in a considerable discounting of the conclusions. Nor was the language of the report such as to stimulate confidence in the findings.

It had been the hope of the Administrator to develop out of the public and Code Authority hearings certain general formulations of policy to which exceptions would be granted on a showing by the petitioning industries that such exceptions were socially necessary in their particular situations. This contemplated change of procedure in code making was notable in that it represented a definite attempt to consider and draft the trade practice provisions of the codes in terms of general social considerations. It became clear from the hearings, however, that the magnitude and difficulty of the task of formulating policy had been underestimated. It became evident that there was insufficient understanding of the economic effects of the regulations in force, and of the issues of public policy involved. Accordingly a group was organized within the NRA for the purpose of determining the general social interest in contemplated programs of trade practice regulation, discovering the probable incidence of proposed controls in terms of these general social considerations, and drafting general policy on trade practices.

#### THE TRADE PRACTICE POLICY "COMMITTEE" OF NRA

An office order of April 9, 1934, provided for an "assistant administrator for policy" with three deputies, one being for trade practice policy. It was the function of these deputies to formulate policy recommendations.



Technically, the deputy alone was responsible for the recommendations, but to each was assigned an "advisory committee" consisting of a member of the Legal Division, a member of the Research and Planning Division, and a representative of each of the three advisory boards. In beginning the task of policy recommendation, the deputy for trade practice policy was informed, upon inquiry, that competitive enterprise was in line with the philosophy of the NRA.

The most immediate general issue placed before the deputy for trade practice policy and his advisory committee was the waiting period in the open price provisions of codes. These, as above stated, had been stayed in all codes containing them which had been approved since January 27. Industries having these stayed provisions in their codes were bringing pressure to bear for the relinquishment of the stay. A decision on this matter had already been postponed beyond the expected period, but the Administrator awaited the recommendations of the policy deputy.

At about the time the deputy on trade practices and his committee began their work, the reports of the Research and Planning Division and of the Consumers' Advisory Board on open price policy were completed. These reports resulted from the program of study referred to above. (See page 26.)

In the Research and Planning report, the suggestion was made that industries be permitted to exchange prices on past transactions, but that the buyer's name not be reported to the disseminating agency, and the name of the seller not be disseminated to buyers or competing sellers.<sup>8</sup> The opinion was expressed that the identification

<sup>8</sup> Permission to present this discussion of the report, which was not made generally available, was given by the Department of Commerce in March 1936.

of sellers was essential to give meaning to reports of current prices, but that identification in the case of past prices was usually for the purpose of facilitating coercion.<sup>9</sup>

It was recommended also that the exchange of current price lists be permitted, but that there be no waiting period, except where an industry demonstrated such a period to be essential to the elimination of grave abuses, or where customers joined with sellers in requesting it. As a safeguard, it was suggested that all price announcements be made public to buyers and to the government, immediately upon filing, in the hope that the moral pressure of buyers would prevent sellers from raising prices before putting announced price cuts into effect, and that the possibility of coercion would thus be minimized.

A position against the exchange of bids before the award of a contract was taken, on the ground that such a prohibition would protect buyers against price agreements among sellers. The question of the resultant incompleteness of sellers' knowledge of market conditions was not discussed.

A judgment was expressed against having the administration of open price systems concentrated in the NRA as distinguished from code authorities. There was a feeling that such forces as operated toward collusion and coercion could continue no matter what the disseminating agency, and that the central organization of NRA was ill equipped technically to undertake price reporting. Because of the difficulties of enforcement on a large and unwilling minority, open price provisions were recommended only for industries in which a majority of the industry favored them.

<sup>9</sup> No evaluation of these analyses will be attempted at this point. For a discussion of these problems, and the other problems raised in this chapter, see Chaps. IV, V, and VI.

In contrast with the Research and Planning suggestions, which had favored dissemination to sellers but only to the buyers to whom a given price applied, the Consumers' Board study advocated the widest possible dissemination of price information.<sup>10</sup> Along with the Research and Planning Division, however, the Consumers' Board emphasized the need for preventing the use of open prices as a device for price or production control.<sup>11</sup>

The Consumers' Board joined with the Research and Planning Division in favoring the protection of the identity of individual enterprises, but emphasized the need of having the administration of an open price system in the hands of a confidential agency which would preserve such identities secret, even from the members of the code authority. Contrary to the Research Division, the Consumers' Board suggested the use of a government agency where a confidential agency was not available.

The Consumers' Board report did not oppose the waiting period as strenuously as did the report of the Research Division. It suggested, in fact, the possibility that waiting periods might be permitted so long as sellers were not identified, and wherever the code authority was restrained from attempts at coercion contrary to its specific grants of power. It emphasized the need for continuing government supervision of open price systems, irrespective of the character of the administrative agency, and independent of the existence of a waiting period. This was presumably on the ground that any sort of price publicity might under some circumstances be conducive to coercion and collusive price agreements.

Early in May, the trade practice policy committee of

<sup>10</sup> The Consumers' Board study was included in the Hearings before the Senate Committee on Finance, 74 Cong. 1 sess., Vol. I, p. 923.

<sup>11</sup> The Consumers' Board suggested that if such controls were to be considered, separate action should be taken on the basis of their merits.

the NRA completed a policy recommendation on open prices. The "article" which this recommendation proposed for inclusion in codes of industries desiring open price plans was adopted without change and announced as official policy on June 8, 1934 in *Office Memorandum 228*. The open price article of *Office Memorandum 228* is shown below.<sup>12</sup>

### OPEN PRICE FILING

1. NRA policy favors properly drawn open price provisions in codes where desired by the industry. The attached draft Article reflects approved policy and should be substantially followed.

2. The objective is to achieve fair competition, based on knowledge of competitive factors to the fullest extent possible without unduly curtailing private initiative or destroying incentives to any individual legitimately to extend his business.

3. Where industries believe that some waiting period is essential in order to accomplish the objectives outlined, the matter will be treated on its merits as in the case of any proposed departure from announced policy.

### ARTICLE ———; OPEN PRICE

Section 1. Each member of the trade industry shall file with a confidential and disinterested agent of the code authority or, if none, then with such an agent designated by the Administrator, identified lists of all of his prices, discounts, rebates, allowances, and all other terms or conditions of sale, hereinafter in this article referred to as "price terms," which lists shall completely and accurately conform to and represent the individual pricing practices of said member. Such lists shall contain the price terms for all such standard products of the industry as are sold or offered for sale by said member and for such non-standard products of said member as shall be designated by the

<sup>12</sup> This office memorandum—which contained, in addition, policy declarations on sales below cost, accounting provisions, destructive price cutting, fixation of prices, and the declaration of emergencies—was based on some five policy recommendations dealing with the several subjects mentioned.

code authority. Said price terms shall in the first instance be filed within — days after the date of approval of this provision. Price terms and revised price terms shall become effective immediately upon receipt thereof by said agent. Immediately upon receipt thereof, said agent shall by telegraph or other equally prompt means notify said member of the time of such receipt. Such lists and revisions, together with the effective time thereof, shall upon receipt be immediately and simultaneously distributed to all members of the industry and to all of their customers who have applied therefor and have offered to defray the cost actually incurred by the code authority in the preparation and distribution thereof and be available for inspection by any of their customers at the office of such agent. Said lists or revisions or any part thereof shall not be made available to any person until released to all members of the industry and their customers, as aforesaid; provided, that prices filed in the first instance shall not be released until the expiration of the aforesaid — day period after the approval of this code. The code authority shall maintain a permanent file of all price terms filed as herein provided, and shall not destroy any part of such records except upon written consent of the Administrator. Upon request the code authority shall furnish to the Administrator or any duly designated agent of the Administrator copies of any such lists or revisions of price terms.

Section 2. When any member of the trade/industry has filed any revision, such member shall not file a higher price within forty-eight (48) hours.

Section 3. No member of the trade/industry shall sell or offer to sell any products/services of the trade/industry, for which price terms have been filed pursuant to the provisions of this article, except in accordance with such price terms.

Section 4. No member of the industry shall enter into any agreement, understanding, combination or conspiracy to fix or maintain price terms, nor cause or attempt to cause any member of the industry to change his price terms by the use of intimidation, coercion, or any other influence inconsistent with the maintenance of the free and open market which it is the purpose of this Article to create.

An understanding of this article requires a somewhat

detailed consideration of the analysis which underlay its several provisions. The basic general theory assumed was that fair competition required knowledge of competitive factors to the fullest extent possible, but without permitting coercion or collusive price fixing. Open price systems were regarded as facilitating devices to the achievement of fair competition in this sense.<sup>13</sup>

In recognition of the importance of methods of indirect pricing, the article called for the reporting, along with nominal prices, of all discounts, rebates, allowances, and all other terms or conditions of sale.<sup>14</sup> The provision of the article which required filing on only such standard products of the industry, and such non-standard products, as were designated by the code authority, placed rather important restrictions on the range of commodities subject to price reporting. Members of the industry were required to file on only those among the products subject to price reporting as were actually sold or offered for sale. It was the opinion of the policy deputy and his committee that, in view of the costs involved, price publicity should be confined to the more commonly manufactured products of the industry, and that the code authority could be trusted to determine the content of this classification.<sup>15</sup>

The open price article of *Office Memorandum 228* made provision for the administration of open price systems only by confidential and disinterested agents of code authorities. The notion weighed heavily with the committee that the co-operation of all industry members in filing their true prices could be best secured if the administration of an open price plan were in the hands

<sup>13</sup> The reader may be aided by turning at this point to Chap. VI which deals with the problems of constructing socially useful open price systems.

<sup>14</sup> For further discussion of this problem, see p. 96.

<sup>15</sup> For a further discussion of this problem, see p. 93.

of a confidential agency rather than the code authority as such—the code authority usually being made up of members of the industry. The possibilities of favoritism and coercion, it was thought, would thereby be minimized.

In the policy recommendation on which the article was based, several suggestions were made regarding the selection of the confidential agent. One proposal was that only governmental representatives, attached for example to the NRA or to the Federal Trade Commission or the Department of Commerce, should be appointed as confidential agents to administer open price systems. It was pointed out that under such circumstances there would be a greater assurance than otherwise of disinterested administration. It was suggested that existing regional governmental offices might thereby be utilized to facilitate expeditious and uniform dissemination, and to avoid duplication of facilities for distribution. As an alternative, it was suggested that confidential agents be under the direct supervision of some agency of the federal government. The appointment of government representatives as confidential agents was suggested in the recommendation but not provided in the article.<sup>18</sup>

The trade practice policy committee was impressed with the desirability of extending to as large an area of industry as was feasible that principle of the organized exchange under which all price offers, and bids as well, are publicly announced not only to all sellers but also to all buyers. They accordingly included in their policy recommendation on open prices a provision for the immediate and simultaneous distribution of price information to all members of the industry, and to all of their customers who applied therefor and who offered to pay

<sup>18</sup> For a further discussion of this problem, see p. 115.

the costs actually incurred in preparation and distribution. In recommending this provision, the committee stressed the necessity of dissemination to all prospective buyers as a means of enabling them to express their demands most effectively in the market, and of guiding production to the most effective utilization of resources. It was stated also that dissemination to buyers would reduce the possibility of price discrimination or collusive price agreements.

The limitation of dissemination to those buyers who applied was believed necessary partly because it would be difficult for any agent to be certain he knew all the customers of all members of the industry, and partly because distribution to all customers, even if they were known, would in many instances entail too heavy a burden, and perhaps result in dissemination to some who would never utilize the data. The further limitation of distribution to only those customers who offered to defray the costs grew out of the nature of the organization of the recovery administration machinery within each industry, which was industry operated and industry financed. It appeared unreasonable to the committee, and perhaps of questionable legality, to require that an industry should at its own expense, and perhaps at very large cost, be responsible for the dissemination of price information to all potential customers.<sup>17</sup>

The committee gave careful consideration to the question of the identification of sellers against which some had interpreted the courts as having ruled (see Chapter II). It was concluded that a general policy against the identification of sellers was inadvisable. Impersonalization of open prices was believed impracticable, for example, if open price plans were to be considered for the

<sup>17</sup> For a further discussion of these issues, see p. 120.



large area of industry in which branded merchandise is common. Where brands influence consumer judgment, it was thought to be impossible for prospective buyers to make intelligent comparison of price offers in the absence of identification. Moreover, there was the feeling that under such circumstances sellers could not accurately assess the competition confronting them without identified price offers. Identification was regarded as probably desirable also in those industries in which no standards for the comparison of products had been developed.

The contention that identification of sellers may facilitate coercion and price agreements was not overlooked. The committee concluded, however, that in view of the desirable social ends to be served by price publicity—to which the identification of offers was regarded as in some cases essential—the risks of coercion were not sufficient grounds for a general prohibition of identification. Direct and specific action in cases where evidence of coercion developed was recommended as preferable to any such general prohibitions. The recommendation was made, however, that wherever practicable, attempts should be made to work out plans for publicity of unidentified price offers, as a way of limiting the possibility of coercion. It was felt, for example, that in industries selling highly standardized products, unidentified price offers would probably be adequate.

On the crucial issue of the waiting period, the trade practice policy committee recommended in the negative. It was suggested that prices become effective immediately upon receipt thereof by the agency administering the system. In making this recommendation, the committee emphasized the fact that its decision was not based primarily on a conviction that a waiting period contributes seriously to the possibilities of price agreements

and coercion, but rather upon the belief that it was in the social interest that business men be free to give immediate effect to their judgments regarding the current conditions of the market, and to retain the possibility of gain through the quick realization of market trends.<sup>18</sup>

The trade practice policy committee was impressed with the desirability of taking action to avoid the possibility of buyers' misrepresentations.<sup>19</sup> The committee believed that if sellers were able to verify alleged price offers, they would be protected against untruthful representations of offers received, and thus from selling below the actual market. The discriminatory advantages obtained by certain buyers would thus, it was hoped, be minimized.

The solution of this problem ordinarily suggested was the use of a waiting period. The committee, however, believed it more satisfactory, in view of the disadvantages of the waiting period, to require merely that price terms should not become effective until received by the administrative agency. It was the intention of the committee that sellers should be given the right to make sales at newly filed prices after allowing a reasonable time for the receipt of the price data by the agent, and without waiting for the agent's acknowledgment. Any delay of price changes as a result of actions of the administrative agency were thus prevented, but it was made possible for any seller immediately to check the accuracy of any price quotation which a prospective buyer might declare to exist in the market. To prevent sellers from making offers at prices not yet filed, such offers to be open to acceptance after filed prices were correspondingly changed, the committee recommended that sellers not be

<sup>18</sup> For further discussion of this point, see pp. 122-35.

<sup>19</sup> For further discussion, see p. 135.

permitted to sell or to offer to sell except in accordance with filed price terms.<sup>20</sup>

One other matter—the problem of the so-called “price raid”—shaped the character of the open price recommendation of the trade practice policy committee. The committee believed that if sellers were permitted to announce prices which might be withdrawn before they became available to all buyers, the door to discrimination among buyers would be opened. To guard against this possibility, the committee recommended a provision that any filed price might not be advanced for a period of 48 hours. It was believed that this requirement, coupled with the provision that prices could not become effective until received by the disseminating agency, and the requirement that new price offers be immediately and simultaneously released to all competitors and customers, would minimize the possibilities of discrimination through price raids.<sup>21</sup>

The committee made no separate recommendation regarding bid filing systems; nor did it deal with the question of the area to which prices were to apply. Comparatively little attempt was made to set forth guiding principles by which the applicability of the recommended open price plan to any given industry could be determined.

Announcement of the new policy was followed almost immediately by a statement that its main purpose was to obtain uniformity in *future* codes. It was proposed in addition that industries under approved codes might undertake to bring them into line with the new policies. However, no doubt because such changes would have resulted in a modification of provisions which many indus-

<sup>20</sup> For a further discussion of this problem, see pp. 99, 136.

<sup>21</sup> For a more complete discussion of this problem, see p. 137.

tries regarded as highly valuable to them, relatively few industries with codes having conflicting provisions actually attempted to bring them into line with the new policy.

To have brought the open price provisions of codes into conformity with the newly announced policy would in many instances have required extensive changes.<sup>22</sup> In some cases, for example, approved codes provided for the reporting of only "prices," making no specific provision for the filing of all the myriad forms of indirect pricing. A number of approved codes required filing by all sellers on certain stipulated products, irrespective of whether or not they were actually manufactured. In more than three-quarters of the approved open price systems, administration was in the hands of the code authority or a trade association rather than some confidential agency thereof. In a few instances the sellers themselves were relied upon to publicize their prices.

Some approved codes did not require dissemination of the data collected. Others provided for dissemination only to sellers, and some only to certain types of sellers. In some instances the requirement was merely that the data should be made available for inspection, and even that on occasion was limited to sellers. Nearly three-quarters of the approved open price plans made no specific provisions concerning the identification of buyers or sellers. Typically, the codes called for the circulation or availability for inspection of filed prices, without any indication of whether or not the name of the seller was to be revealed. Almost half of the approved codes provided for a waiting period, varying in length from one to thirty days.

<sup>22</sup> For an extended picture of approved open price provisions in NRA codes, see Appendix, p. 154.

Moreover, whereas the open price plans of many approved codes were to be found side by side with provisions for various types and degrees of price and production control, NRA philosophy had been undergoing considerable change. The newly announced policy reflected this change; it expressed a desire to foster informed competition and to avoid discrimination.

#### THE NATIONAL INDUSTRIAL RECOVERY BOARD

By September 1934, at which time the National Industrial Recovery Board took over the administration of the NRA, considerable crystallization of public sentiment had developed against the price and production control provisions remaining in the codes. On December 17 the Board announced that a series of hearings would be held for the purpose of assisting in policy reformulation—the first of these meetings to relate to price control and price stabilization. Open prices was listed as one of the topics to be considered at this first hearing scheduled for January 9, 1935.

These hearings added little to the understanding of the economic effects of open prices. As in earlier cases they consisted, for the most part, of statements by interested parties.<sup>23</sup> There was much conflict of opinion. Some contended that price publicity resulted in the destruction of the small by the large, who became aware of new markets through the medium of the open price system. Price publicity was held responsible for "price wars" which were said to be the outcome of greater knowledge of competitors' actions. In contrast, certain representatives of retailers, wholesalers, and purchasing agents repeated the views which they had expressed on earlier occasions

<sup>23</sup> *NRA Release No. 9550, Jan. 9-12, 1935.*

—that price publicity was being utilized largely to facilitate group control over prices and was bringing about increases in and uniformity of prices. As to policy these latter groups urged the relaxation of interference with competitive prices, while others expressed a preference for even more certain controls than they found in open price plans.

Perhaps the most striking aspect of the hearings, however, was the widespread and growing interest expressed in open price systems among business groups. To some extent this interest centered in the purely informative possibilities of such systems. To a much greater degree, however, it appeared to reflect interest in the possibilities of open price systems, particularly those with waiting periods, as alternative to direct forms of price control which were no longer being seriously considered by the NRA and which, to some business groups at least, appeared to involve an undesirable degree of governmental supervision.<sup>24</sup>

- On April 24, 1935 the National Industrial Recovery Board made public its first declaration of new policy.<sup>25</sup> The announcement stated the general nature of approved price policy; made one specific declaration of policy—that relating to open price filing; and outlined the steps to be taken in the administrative application of policy.

The statement of general price policy reaffirmed the lines of approach to the problem of trade regulation laid down earlier in *Office Memorandum 228*. A desire to achieve so far as possible the circumstances of competitive prices and open markets was expressed. Emphasis was placed on the belief that long experience had indicated

<sup>24</sup> A counterpart to this development of interest in open price systems as an alternative to direct forms of price control is to be found in the earlier history of open prices. See p. 11.

<sup>25</sup> *NRA Release No. 11056, Apr. 24, 1935.*

the wisdom of leaving the control of production, except in certain rare instances, to the open market.

In the matter of open price filing, there was also a reaffirmation of the earlier policy declaration.<sup>26</sup> Open and competitive markets, typified by the organized exchanges where there is a convergence of the forces of supply and demand and where all transactions are a matter of public record, was established as the ideal to be achieved. Where organized exchanges are not feasible, it was held that an approximation of the conditions of an open market might be effected through a system of open price filing.

An impartial and confidential body, it was declared, should be the administrative agency. The immediate oversight of the government was recommended wherever a private agency was utilized. Emphasis was placed on the necessity for strict adherence to filed prices, and a requirement that all information relating to the quality of the goods and the terms of sale be reported along with prices was suggested. However, no declaration was made concerning the question of offers to sell at other than filed prices.<sup>27</sup>

The waiting period was condemned by the Board on the ground that it was likely to freeze a competitive process which should be kept active, and because future markets might thereby be unsettled as a result of the tendency to hold off orders during the waiting period when price declines were announced, and to accumulate

<sup>26</sup> The Board's policy declaration on open prices was more general, however, than the correlative pronouncement of the trade practice policy committee. No specific plan for general use was included. The need for flexibility of adaptation to special industry conditions was stressed.

<sup>27</sup> It may be recalled that, as a means of meeting the problem of buyers' misrepresentations, the open price article of *Office Memorandum* 228 had included the requirement that no offers of sale be made except at filed prices.

them when price advances were reported. The waiting period was further censured as tending to reduce the incentive toward the making of downward adjustments in prices because, it was believed, where there is a waiting period, price reductions do not become effective until competitors, by similar reductions, have an opportunity to destroy most of the sales advantage in such reductions.

Approval was given the principle that prices, once effective, should stay in effect for some reasonable minimum period.<sup>28</sup> Identification of sellers was sanctioned for those industries in which knowledge of the name of the seller was essential to a determination of the quality of the product or the quantity available. Dissemination to buyers, as well as to sellers, was recommended.

In dealing with the question of the products and industries to which open price filing might usefully be applied, this policy declaration went somewhat beyond earlier ones. Among the conditions making for difficulty in applying an open price system to an industry the following were listed: a difference in quality, character, and accompanying services so wide that the prices of a commodity are likely to vary with each sale; the existence of a great number of concerns and products in an industry; circumstances under which effective price changes are brought about through changes in the quality of the goods sold, rather than through changes in monetary price; conditions where the commodities are highly perishable and where there are great fluctuations in supply. Open price systems were regarded as being most feasible where clearly identifiable products and

<sup>28</sup> It may be remembered that the use of this device had been recommended by the trade practice policy committee as a means of dealing with the price raid problem. See p. 39.



frequent but not incessant price changes exist.

The difficulty of performance of an open price system was considered to be greater wherever trade is largely local in character, or wherever purchases are very infrequent. It was regarded as questionable whether any attempt should be made to apply open prices to industries where all the collateral transactions or circumstances modifying nominal prices could not be determined or effectively reported, or where adequate description or identification of a commodity could not be achieved. The view was expressed that open prices could be applied even to industries in which goods were not standardized, but where members of the industry had a practical knowledge of one another's wares, and where customers could be educated to at least the larger differences among grades and brands.

The wisdom of establishing an open price system in an industry was not, however, regarded as solely a question of feasibility. The Board recommended against the approval of open price filing in any industry in which there existed, or in which there appeared a possibility of the development of, some form of monopolistic restraint of trade. Fear was expressed that under such circumstances, price publicity would add to the dangers of monopoly. Reporting of past prices in summary form, price ranges, and sales volumes—all without any identification of the seller—were suggested for industries in which the technical problems of detailed publicity were too difficult, or where the dangers of price collusion appeared to be great.

Concerning the problem of discovering where such a degree of price collusion exists as to make an open price system socially undesirable, the Board commented only on price movements. It expressed the view that only

widespread, simultaneous, identical movements of prices, more rapid than the presumable adaptability of producers to knowledge of their competitors' activities, could be regarded as evidence of probable collusion. The point was made that mere uniformity of prices is not an indication of collusion; inasmuch as competition supposedly effects uniformity of prices in open markets, an approximation of uniformity could be expected where a properly maintained system of open prices exists.

The opportunity for the Board to outline new policy and to consider its application to codes was brief. Scarcely more than a month after the announcement of its first policy declaration, the Supreme Court declared against the constitutionality of the Recovery Act.

On June 14 Congress extended the life of the NRA in a modified form to April 1, 1936. In establishing the new NRA organization, created by executive order on June 15, the President provided for a Division of Business Co-operation, the function of which was to be to aid in the voluntary maintenance by trade and industrial groups of standards of fair competition, and the elimination of unfair competition in the employment of labor or in trade practices.

The NRA took immediate steps to work out some sort of co-operative relationship with the Federal Trade Commission, and on June 27 the acting administrator announced that the fair trade practices in the voluntary codes of fair competition would be put under the supervision of the Commission and that the NRA would limit itself to the labor provisions of these codes. By an executive order of September 26, 1935 "the President delegated to the Commission all his authority under the Recovery Act, as extended to approve trade practice provisions of voluntary agreements."<sup>29</sup>

<sup>29</sup> See Federal Trade Commission, *Annual Report*, 1935, pp. 7-8.

To the study of open price problems the NRA has made two important contributions. In its codes it has made available for study a far greater variety of open price plans than has ever before been available. The various forms and combinations of elements which may thus be examined give those interested in either an analysis or formulation of open price plans an extensive body of material. In addition, in its official work the NRA collected considerable data concerning the operations and effects of open price plans and contributed materially to the thinking on this subject. Beginning with comparatively little definite policy, its various studies and committees advanced the thought on the subject and went no small distance in formulating a fair working procedure. Moreover, the discussion of open prices by the business men concerned resulted in a much better understanding than had ever before been general of the possibilities, difficulties, and limitations of open price plans, and of their business usefulness and social significance.

#### SUBSEQUENT DEVELOPMENTS

The termination of the codes left interest in open price plans at a definitely higher level than had been the case when the NRA was inaugurated. Many industries were, when the code regulation ended, utilizing such plans in their daily transactions, and others were in various stages of organizing or modifying the plans which the codes had provided. Some trade groups (there is no means of knowing how many) were desirous of continuing in some form the plans which were in operation under the codes.

#### Business and Governmental Developments

Many of the NRA open price plans had merely reconstituted and reconstructed trade association open price

plans in existence before the codes, and had utilized trade association officials in the administration of the code plans. Without doubt, since the termination of the codes, a considerable number of trade associations have taken over the work of continuing in operation the code open price systems, and have made such adjustments as were called for by the expiration of the Recovery Act. There is no means available for knowing the number of instances in which trade associations have followed this practice or the nature of the modifications, if any, which they have made in the plans provided in the codes.

The passing of the NRA as an agency through which industry groups could organize open price plans witnessed a revived activity on the part of private agencies in aiding industries in this task. Such private agencies function as experts in providing the technical knowledge required for setting up and operating an open price plan, and in the legal problems involved. In some instances they undertake to act as the administrative agency for the collection and dissemination of data. They may be useful in organizing open price plans where adequate formal organization for such work does not exist in an industry. They may, moreover, act as an administrative agency for open price plans in industries which are too small to perform such services for themselves, or in which the use of some confidential agent appears desirable.

Further government co-operation in the organization or administration of open price plans appears, at least for the present, to rest in the hands of the Federal Trade Commission. Since the termination of NRA codes, there has been a revival of interest in the Commission's trade practice conference agreements. A number of industries have, since that time, submitted proposed trade practice

rules—and some of these proposed rules contain provisions for open price plans.

The policy which the Commission will follow in dealing with proposed open price plans it not yet disclosed. At this time no trade practice conference agreement involving an open price plan has reached the final stage of negotiation. For a discussion of the Commission's earlier dealings with open price plans, the reader may refer to pages 20-22. Whether the Commission will go beyond its earlier policies will depend upon its desires, the attitude of the courts in further interpreting the Commission's powers, and upon the success which attends current efforts to expand the powers of the Commission.

### The Sugar Institute Case

On March 30, 1936 the Supreme Court handed down its decision in the so-called Sugar Institute case.<sup>30</sup> This decision dealt with a number of points of importance relating to open price systems.

One point on which the Court expressed itself with some definiteness was that of the dissemination of information to purchasers and distributors. The information gathered by the Sugar Institute, some of which was disseminated to buyers and some of which was not, included, in addition to price lists, statistical data regarding melt, sales, deliveries, stocks on hand, stocks on consignment, stocks in transit, and volume of sugar moved by types of routes. The Court declared that these data, certain of which had been gathered and were nowhere available except through the Institute, should not be available to members of the Institute except as they were made "readily, fully, and fairly available to the purchasing and distributing trade." The Court did, how-

<sup>30</sup> *The Sugar Institute, Inc., et al v. The United States of America.*

ever, indicate that “. . . information may be received in relation to the affairs of refiners which may rightly be treated as having a confidential character and in which distributors and purchasers have no proper interest.” It, accordingly, on the ground of indefiniteness, held against that part of the decision of the lower court which had declared that in addition to the information specified above “any other statistical information of a similar character” should be made available to the purchasing and distributing trade.

A more significant subject of the Court's attention had to do with the type of data that could be disseminated. In this matter the lower court had left the defendants free to provide for immediate publicity as to prices and terms concerning only closed transactions. The Supreme Court, apparently influenced by the custom of the trade, modified this ruling. The Court said: “We think that a limitation to that sort of publicity fails to take proper account of the practice of the trade in selling on ‘moves’ . . . a practice in accordance with which the Court found that ‘the great bulk of sugar always was and is purchased.’ That custom involves advance announcements, and it does not appear that arrangements merely to circulate or relay such announcements threaten competitive opportunities.”<sup>31</sup> On the other hand, such provision for publicity may be helpful in promoting fair competition.”

This approval of publicity concerning prices in advance of sales was, however, accompanied by rulings against concerted action to sell only at prices so announced and against the requirement of adherence to such prices.

<sup>31</sup> It may be noted that no objection was raised against making price lists immediately available to *competitors* or against the identification of sellers in such dissemination.

In the matter of agreement or concerted action to sell only upon prices announced in advance of sale, the Supreme Court held with the lower court in disapproving that practice of the Institute. It held, however, in favor of permitting the use of the Sugar Institute as the agency to be used in the reporting and relaying of data concerning prices and terms of sale, a practice which the lower court had enjoined. The Court stated: "Such reporting or relaying . . . permits voluntary price announcements by individual refiners, in accordance with trade usage, to be circulated, and subject to the restrictions imposed by the decree [no requirement of adherence to prices so announced, nor any agreement or concerted action to sell only at such prices] does not appear to involve any unreasonable restraint of competition." Voluntary action in the dissemination of price data appeared even to be encouraged, the Court declaring: "Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes."

In disapproving that part of the open price plan of the Sugar Institute which required of its members adherence to their openly announced prices until new prices were announced, the Court, it appears certain, was strongly influenced by certain "supplementary restrictions" which the Sugar Institute had put into effect, allegedly for the purpose of securing adherence to filed prices and avoiding discrimination. These restrictions went beyond the mere requirements of the reporting of prices and adherence to such prices until changed. There were rules regulating the employment of brokers and warehousemen, limiting the number of consignment points, prohibiting quantity discounts, and restricting the use of a number of terms and conditions of sale,

some of which might have been used as a means of indirect pricing.

The Court held that "the 'basic agreement' [to sell only at openly announced prices in advance of sale] cannot be divorced from the steps taken to make it effective, and the requirements of the Institute must be viewed in the light of the particular opportunities which they cut off or curtailed. . . . The endeavor to put a stop to illicit practices must not itself become illicit. . . . The unreasonable restraints . . . imposed lay not in advance announcements, but in the steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be."

The restrictions which supplemented the basic requirement of adherence to announced prices thus appear to be of great importance in any effort to interpret this case. The weight which the Court apparently gave these restrictions and the manner in which they affect the basic agreement leave unclear the attitude which the Court would have taken to the plan if it had required announcements of price offers in advance of sale with adherence to such offers until new announcements were made, but had placed no restrictions on either forms of pricing or methods of sale.



## CHAPTER IV

### COMPETITION AND STABILITY UNDER OPEN PRICE SYSTEMS

The economic issues relating to open prices have centered about three principal problems: (1) the effect of open price plans on competition; (2) the effect of open price plans on stability, chiefly of prices and production; (3) the effect of open price plans on the competitive position of small business units. The first two of these problems will be discussed in this chapter, the third in the chapter that follows.

#### OPEN PRICE PLANS AND COMPETITION

Proponents of open price systems hold that open prices promote the general social interest by facilitating effective competition. They think, as we have seen, that where price information is generally disseminated, buyers are better able to give expression to their demands in terms of the totality of the market situation, and producers are in a better position to guide their production policies to the satisfaction of consumer demands. Secret and discriminatory pricing, they believe, may largely be avoided where all buyers and competing sellers are aware of price offers; and labor and capital are more certain to move to the most useful employments where such knowledge of market conditions is generally available.

On the other hand, the objection has been made that open prices impede effective competition. Open prices, it is said, may increase tendencies toward "following the leader" or "getting under the umbrella." Furthermore,

where there are strong collusive elements in an industry, the probability of actual price agreements may be enhanced. With more complete knowledge of the price offers being made by competitors, industry groups, it is said, are in a better position than otherwise to direct their activities in "price maintenance" to the points at which "cut prices" are being made, to verify rumors of price cuts that might lead to a wave of price cutting merely on the basis of the rumor, and to enforce whatever agreements might be made. Moreover, with more perfect price information, it is contended, there is greater probability that members of an industry who are in a position to do so will make price reductions designed to eliminate competitors, and to create some degree of monopoly.

No little of the disagreement concerning the effects of open price systems arises from the fact that different persons, in considering the matter, have in mind different types of open price plans and their application to different industrial situations. The effects of any\* given type of open price plan vary according to the industrial situation in which it is applied; and different types of open price plans applied to the same industrial situation have different effects. The conclusions drawn as to the economic effects of open price plans, accordingly, vary with the particular combination of open price plan and industrial situation under consideration.

A number of studies have dealt with the effects of open price systems on competition. Most significant among these studies are those made by Milton Nels Nelson,<sup>1</sup> the Federal Trade Commission,<sup>2</sup> Simon N.

<sup>1</sup> *Open Price Associations*, pp. 174 ff., and "The Effect of Open Price Association Activities on Competition and Prices," *American Economic Review*, June 1923, pp. 258 ff.

<sup>2</sup> *Open Price Trade Associations*, 70 Cong. 2 sess., S. doc. 226.

Whitney,<sup>3</sup> the Consumers' Advisory Board of the NRA,<sup>4</sup> the Research and Planning Division of the NRA,<sup>5</sup> and the Review Division of the NRA.<sup>6</sup>

These studies vary considerably in the types of systems studied, the industrial areas covered, the circumstances under which they were conducted, and the methods of analysis employed. In general they have contrasted price uniformity, price stability, and price movements in industries operating open price systems with the same aspects of prices in non-open price industries. In addition, some of them have analyzed direct evidences of restriction of competition in open price industries.

It may be said at the outset that none of these studies reached any very definite conclusions concerning the precise relationship of open prices to competition. They are significant, however, in displaying a number of possible methods of attack on the problem, in revealing the difficulties and limitations as well as the merits of the various approaches, and in pointing to certain general conclusions.

Nelson's study dealt with the effect of open prices on competition in the lumber industry. As a means of analyzing two questions bearing on these effects, Nelson

<sup>3</sup> "Competition under Secret and Open Prices," *Econometrica*, January 1935.

<sup>4</sup> *Experience with the Open Price Provisions of Approved Codes*, Hearings before Senate Committee on Finance, 74 Cong. 1 sess., Vol. 1, pp. 923 ff.

<sup>5</sup> The relevant data from this study are presented by Simon N. Whitney in *Econometrica*, January 1935.

<sup>6</sup> Willard L. Thorp and A. H. Caesar, with the assistance of F. W. Powell, *A Study of Open Price Filing in the Electrical Manufacturing Industry*, Work Materials No. 78; Simon N. Whitney, *Fertilizer Industry Price Filing Study*, Work Materials No. 67; and Enid Baird, *Price Filing under NRA Codes*, Work Materials No. 76. These two specific industry studies and the more general study of open price filing under the codes were released by the Department of Commerce, Division of Industrial Economics, in April 1936.

utilized data presented to the Supreme Court in connection with the hardwood lumber case discussed in Chapter II. He attempted to determine whether the members of the open price association within the industry were able to secure higher prices than members who were not part of the association, and to determine the degree of uniformity of prices among those who were part of the open price group.

Considerable difficulty was experienced in comparing prices quoted, because of variations in the kinds, grades, and thicknesses of lumber. The conclusion was suggested that open price work in that particular association "did not enable members of the association to exact higher prices as a group than outside competitors were able to exact, nor did their activities result in price uniformity." The extreme paucity of the data, however, restrained the author from regarding this conclusion as significant.<sup>7</sup>

Even had it been discovered that members of the association had received prices higher than those received by non-members, however, no certainty of restriction of competition could have been deduced. It is entirely conceivable under competition that those who have access to more complete data concerning the market will be in a position to secure more favorable prices.

It may be pointed out also that *uniformity* of prices as among competitors is not certain evidence of restriction of competition. Where there is greater knowledge of market conditions, as is the case when open price plans are put into effect, there will be less opportunity for price differences between substantially similar products even in the absence of collusive action. The very

<sup>7</sup> For example, data concerning the prices of only one non-member were available.

fact that price differences are generally known tends to cause them to be eliminated where there is competition. This is, of course, most likely to be true where all the members of an industry, and buyers as well as sellers, have access to data under an open price plan, and where such data can be readily and accurately interpreted and evaluated.

The Federal Trade Commission study of open prices was made under authority of a Senate resolution of March 17, 1925, commonly known as the McKellar resolution. The resolution stated that since open price associations may exert great influence in maintaining prices at an exorbitant level, the Federal Trade Commission was directed to report to the Senate the number and nature of open price trade associations and the extent, if any, to which such associations had the effect of maintaining among their members uniform prices to wholesalers or retailers, or of securing uniform or approximately uniform increases in such prices. The inference seems clear that such uniformities were to be regarded as indicating a greater or less modification of competitive forces.

The analysis of price uniformity was limited to one industry—lumber. No uniformity of prices was found in that industry. The Commission observed, moreover, that some degree of uniformity might legitimately be expected, and that to attribute such facts to conspiracy would require collateral evidence of price agreements.<sup>9</sup>

A much larger part of the Trade Commission study was concerned with an analysis of price stability in open price industries as compared with non-open price industries. Indexes of variability, based on the frequency and

<sup>9</sup> Federal Trade Commission, *Open Price Trade Associations*, p. 356.

size of price changes, were calculated for both types of industries. The conclusion was reached that stability of prices varied little as between open price industries and non-open price industries. Of equal significance, however, was the observation that the stability of prices appeared to vary more in accordance with other factors than with the degree of price publicity. A tendency for price stability to be positively correlated with the extent of processing and with the degree of proximity of the product to the consumer was noted.

Any attempt to determine the effects of open price systems on competition by a comparison of price movements in open price industries with those in non-open price industries will encounter a number of serious difficulties and limitations. There will be various effects. The degree and type of price publicity will differ as among industries. Moreover, there are many factors besides the presence or absence of an open price system which may cause movements of prices to differ as among industries. There may be strong monopolistic forces, entirely apart from any effect which open price systems may have, at work in some industries and not in others. Cost and demand conditions may vary more widely, or with greater frequency, in one industry than in another. Where these complicating factors exist, it is difficult to determine the separate effect of open price plans on price movements.

What may be called a "before-after" comparison in single industries offers a greater possibility of isolating the effects of open prices than comparisons of price movements in open price industries with those in non-open price industries. The use of this method involves comparing, within a single industry, price movements

before and after the inauguration of an open price system.<sup>9</sup>

Some use was made of the "before-after" procedure in the study by Simon N. Whitney referred to above. This study included an analysis and comparison of price movements in sugar for the five-year period preceding the organization of the Sugar Institute as an open price association in 1928, and for the five following years. The author discovered some increased uniformity and stability of prices, but he did not regard this as conclusive evidence of the effects of open prices.

The variety of quotations before the Institute was often more apparent than real, sales seldom being made at any quotation but the lowest. Thus the establishment of open prices merely meant that quotations were made in a more orderly and reliable manner, as a result of which the latent price uniformity . . . was brought to the surface. Similarly, the increasing stability may have been due to other aspects of the Institute's work (and partly to a declining range in the prices of raw sugar) rather than to price reporting.<sup>10</sup>

The study of the Consumers' Advisory Board of the NRA was an examination of *Experience with the Open Price Provisions of Approved Codes*.<sup>11</sup> As the title indicates, this study was limited to the special situation of coded industries. It necessarily reflected whatever circumstances were then affecting competition in those industries.

It is particularly difficult to arrive at very satisfactory conclusions concerning the effects of open prices through

<sup>9</sup> The Federal Trade Commission study discussed above pointed out the value of this method of analyzing the effects of open prices.

<sup>10</sup> Whitney, *Econometrica*, January 1935, p. 58.

<sup>11</sup> As already indicated, this study appears in Vol. I, pp. 923-38 of the Hearings before the Senate Committee on Finance, 74 Cong. 1 sess., pursuant to S. res. 79.

an analysis of NRA experience, or even to be certain of the effects of open prices as a major factor in such modifications of competition as the codes may have brought about. Not a few codes which provided for open price systems provided also for some form of direct or indirect control over prices. The separate influence of these controls, or their collateral relationships to open price influences on competition, is extremely difficult to isolate. Moreover, particularly during the early period of the NRA, there existed a somewhat widespread view that the maintenance of prices was an important objective of the Recovery Program. Not all business men were certain as to just how far code authorities were empowered to exert pressure to accomplish this end. The many and varied powers of code authorities may well have confused some of those interpreting their powers under open price plans. Furthermore, there are few data concerning the extent to which the influences current under the NRA were operating before the establishment of the codes, and hence little basis for isolating the special influence of the codes.

The Consumers' Advisory Board made use of two different methods of approach in attempting to analyze the effects of the open price provisions of codes on competitive conditions under NRA open price plans. Reports of pressure to raise filed prices, or to refrain from making contemplated price reductions, were requested from members of certain codified industries. In addition, an analysis was made of certain data concerning prices which were collected from public purchasing agents, and from such filed prices as could be obtained by requests addressed to code authorities.

In summarizing the results of the first method of approach, the report noted that an important group of



replies to the questionnaires of the Consumers' Advisory Board state that "in open price industries pressure is exerted either by code authorities, or by large competitors, upon enterprises which quote low prices," and again that "collusive activity is indicated in the 29 industries from which cases of such pressure have been reported . . . [and] in eight industries from which no cases of coercion have been reported." While these observations relate to coercion and collusion in industries having open price systems, the extent to which the open price plan was the essential or primary factor in the situation can not clearly be determined.

The difficulty of drawing definitive conclusions on the basis of the data analyzed was recognized in the Consumers' Advisory Board report in the statement:<sup>12</sup>

. . . Although open prices are markedly associated with coercive and collusive activity and with identical prices, the study does not indicate that open price systems must necessarily produce such results nor that only open price systems can do so. Complaints received by the NRA have cited cases of coercion and collusion in industries without open price systems; and this study has indicated, not only by absence of complaint but by evidence of intense price competition, that in certain open price industries collusive and coercive activities are not prevalent. . . .

In its analysis of price movements as evidence of collusion, the Consumers' Advisory Board study relied chiefly upon a comparison of the degree of uniformity of prices among competitors before and after the inauguration of an open price system. Some study of uniformity was made both for bids submitted to public purchasing agents and for prices filed in a number of open price industries. The report concluded that the degree of

<sup>12</sup> The same, p. 932.

identity in prices shown by the study of public purchasing agents "is very great" and that prices collected from code authorities and members of open price industries "likewise show a remarkable degree of identity."<sup>13</sup>

It was possible to make a considerable degree of comparison of the uniformity of prices before and after the inauguration of the codes in the case of bids submitted to public purchasing agents. The report did not indicate, however, the extent to which the increased uniformity in such bids may have been the result of code provisions which brought about a greater effectiveness of competition. The lack of comparable data for the pre-NRA period made impossible any extensive "before-after" analysis of the data collected from code authorities.

The report recognized the contention that price uniformity may be expected under open price systems as a result of the "keenness of open price competition."<sup>14</sup> The view was expressed, however, that in a considerable number of cases the price adjustments which were observed "do not suggest that intense competition prevails." An analysis of some of these situations indicates, however, that forces of competition might indeed bring about the conditions described as non-competitive.

As examples of one type of situation in which substantial price identity "seems inconsistent with the existence of keen competition," cases are cited in which information concerning prices was not made available to customers. It would appear, however, that even without the additional pressure which might come from dissemination of prices to customers, increased knowledge

<sup>13</sup> The report stated: "We have considered a bid identical in cases in which half or more than half of the bidders submitted bids which were exactly the same."

<sup>14</sup> The same, p. 929.

of the market on the part of producers might lead them to compete for business they were formerly losing because they were being underbid. Such competition would lead toward greater uniformity of prices.

A second type of situation which is suggested as a variant from what should usually appear under competition is that in which, in an open price industry, there is considerable concentration of identical prices above the lowest filed price. The point is made that "in price competition identity should usually appear by adjustment of prices to the lowest filed price." Moreover, it was suggested that where certain prices are below the concentration of prices, the tendency under competition will be for the concentration to move downward to the lower price, "unless the volume of sales at existing conditions is already satisfactory—a condition not yet frequent."

It must be remembered, however, that there are various degrees of perfection of market organization even when there is competition. Lack of knowledge of market factors on the part of some producers, or sluggishness of adaptation to such knowledge may exist, even where there are no forces restricting competition.<sup>18</sup> Under such circumstances one may find at any time that some producer, perhaps unaware of the prices of others, or acting without their knowledge, may be quoting prices below the majority of his competitors. Moreover, if it should be discovered that there has been an overestimation of potential demand or an underestimation of potential competition at any price, this price would probably be revised upward as soon as the error made itself clear.

<sup>18</sup> For example, in the study of the fertilizer industry discussed later in this chapter, it was discovered that price differences were often the result of delay in making formal announcements, a delay that sometimes arose because of the lack of immediate sales opportunities.

Price movements of this character might well occur under competitive conditions.

The question may well be asked, however, whether any *identity* of prices could arise in an imperfect market, if there were no collusive forces present. To the degree that the market is imperfect, these identities would not be expected. But in the sale of many products, certain areas of the market are far better organized than others; there is much more information, grèater understanding and possibility of use of information in one area or among certain producers than in other areas or among other producers who sell the same goods. It would be quite possible, therefore, in an imperfect market, particularly if an open price system were in operation, for identity of prices to be found among the better informed or the more competitively situated members of an industry, while other prices were being quoted by competitors who were not in the same position or under the same necessity for making a rapid adaptation to competitors' prices.

A third illustration of the Consumers' Board suggests that "when prices are open, competitive commodities which are not identical in kind and in conditions of sale do not need to be identical in price." This is unquestionably true. Yet it is a fact that there may be nominal price identity in physically non-identical products because actual price differences are being effected through differences in accessory services and other conditions of sale. This may occur even where competition is strong. On the other hand, it may well be that competition will, in some instances, force the prices of physically non-identical products to a practically uniform level apart from differences in terms of sale. This will tend to be true wherever many buyers regard one product as a practical substitute for another, even though the two

vary materially in color, size, taste, shape, package, or brand.

The point just made illustrates a major difficulty in any effort to analyze the significance of price differences and similarities among competitors. Differences in terms of sale and physical variations among competing products may lead toward *either* similarities or divergences of nominal monetary prices as among competitors, and to any degree of such similarities or divergences. Where such differences in products or conditions of sale exist, there is consequently no reason to expect any particular pattern of uniformity or divergence of nominal prices, irrespective of the extent of competition.

The Consumers' Board suggested, as a test of collusion, identical initial filings upon the inauguration of an open price plan. Identical filing as a test of collusion was later suggested by the National Industrial Recovery Board in instances in which such identity appears simultaneously in *revisions* by all or a large proportion of the producers within an industry, if these identical revisions take place more rapidly than producers can be expected to adapt themselves to knowledge concerning the activities of their competitors.<sup>16</sup> This latter test represents perhaps the strongest evidence of the existence of forces restrictive of competition that can be discovered from an analysis of price movements.<sup>17</sup> Identical prices have, however, at least one limitation as evidence of collusion when applied only to initial filings. Even under competition there is always the possibility of a certain number of identical *initial* filings as a result of competitive market factors. This would, of course, be least

<sup>16</sup> *NRA Release No. 11056*, Apr. 24, 1935.

<sup>17</sup> Stability of prices over long periods of time also may evidence the existence of forces restrictive of competition.

likely to be true in the case of goods manufactured to individual specifications.

The most general conclusions of the Consumers' Board study were in line with those which, as has been noted earlier, were reached in certain other studies; namely, that whatever the evidence that a relationship may exist between open prices and a restriction of competition, the effects of open prices vary with attendant conditions.

The report declared:

... the outstanding conclusion which emerges from the study is that the effects of open price systems differ according to the circumstances in which they are operated, the method of administration, the nature of the code authority, the nature of the product, the nature of the market and the other price provisions of the code. These differences are important. In one industry open prices have facilitated collusive price fixing; in another competitive price cutting. In one industry they have become an aid in reducing price discrimination, in another they have become a means of effecting it. In one industry they have increased the marketing difficulties of small enterprises; in another they have encouraged small producers to invade new markets.

In the study of the Research and Planning Division of the NRA,<sup>18</sup> it was found, on the basis of a year's experience under the NRA, that prices advanced more in industries with open price systems in their codes than in industries without such code provisions, but that prices in the uncodified industries advanced even more rapidly than in the codified industries. These facts were explained, however, as being the result of the differences in the commodities manufactured rather than of the existence or non-existence of open prices.

It was shown that in the six months preceding the inauguration of the codes, prices had advanced more rapidly in industries later to have open price plans than

<sup>18</sup> As summarized by Whitney in *Econometrica*, January 1935, p. 58.

in those industries which were not to adopt such plans. The explanation given for this, and for the fact that prices in open price industries rose more rapidly than those in non-open price industries during the first year of NRA, was that open price codes are found among the industrial commodities—such as iron and steel, electrical equipment, industrial machinery, and building materials—the prices of which were regarded as more sluggish than those of many other commodities. The greater rise of prices in uncodified as compared with codified industries was attributed to the fact that the uncodified industries studied were largely food industries, in which prices are generally more flexible than in industries producing highly processed commodities. It may be added that inter-industry differences in the rates of price increase may reflect merely differences in the rates of change in cost and demand factors as between these groups of commodities, rather than the influence of open price plans.

The study of the Research and Planning Division included also an analysis of the question whether open price plans increase the relative stability of prices. The conclusion reached was that there was no significant difference between price stability under open as compared with non-open prices.<sup>19</sup>

Of the studies made by the Division of Review of the National Recovery Administration, that by Thorp and Caesar dealing with open price filing in the electrical manufacturing industry is the most extensive for a single industry. It is in effect an examination of open price filing in seventeen industries, which are included in the larger group.<sup>20</sup>

<sup>19</sup> The same, p. 62.

<sup>20</sup> These industries include: rubber covered building wire, flexible cord,

The authors of this interesting and valuable record of price filing devote a considerable section of their general conclusions to the problem of "complex price structures" which their investigation reveals. They point out that this complexity adds to the other difficulties in determining the effects of the code—including the open price plan—on price behavior and related phenomena.

With regard to price changes, they say:<sup>21</sup>

All that has been said before, argues against the possibility of determining whether prices advanced or fell during the [code] period. . . . However, some conclusions can be drawn concerning direction.

There is no case of conspicuous price increase. . . .

In some cases . . . there was little change . . .

In other cases, there were reductions in sections of the price structure . . .

How much influence the presence of price filing had in affecting the course of prices, can only be a matter of speculation.

With regard to price flexibility their conclusion is:<sup>22</sup>

While the matter is not finally demonstrated, there is no evidence that prices were made less flexible by the price filing device. Probably in matters such as terms and conditions of sale, there were more variations as uniformity developed than would normally be the case.

As to coercion the writers report:<sup>23</sup>

The record shows almost no cases where filings were made and subsequently withdrawn, where it can even be suspected

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magnet wire, fractional horse power motors, electric arc welding, dry cells and flash lights, radio receiving tubes, sockets, domestic electric heating appliances, electric fans, food service equipment, laminated phenolic products, non-renewable plug fuses, portable electric tools, panelboards, pole line hardware, and industrial lighting equipment.

<sup>21</sup> Thorp and Caesar, *A Study of Open Price Filing in the Electrical Manufacturing Industry*, p. 181.

<sup>22</sup> The same, p. 184.

<sup>23</sup> The same.



that undue pressure was brought to bear. There are, however, instances (i.e. batteries) where individuals filed higher prices in the hope that the industry would advance to the higher level, but were disappointed in their hope and were forced to climb down again.

As to price leadership the authors declare:<sup>24</sup>

It is impossible from the record to make any adequate analysis as to the extent to which price policies were determined by some form of group decision rather than in complete individual isolation. Certainly the erratic behavior of most of the groups makes such a hypothesis quite untenable. On the other hand, it occasionally appears that certain sub-groups within the group considered have a degree of uniformity which may result either from competition or co-operation. In some instances, this may be the result of patent and license agreements and in others, of some form of parent-subsidiary relationship.

There is little evidence in the price filing record of dominance of the policies of any group by one or two companies, taking the timing of price filings as a basis. . . .

The introduction of price filing may also have had an effect upon the distributors and may have reduced discrimination. The authors point out that prior to price filing many companies engaged in separate bargaining with each customer, with no formal price structure in operation. The utilization of an open price plan is said to have brought about an increased use of classifications of customers, presumably providing for identical treatment of like customers, though "in certain groups the old system of individual discounts could not be overthrown."<sup>25</sup>

The open price plan further "gave impetus to the development of product standardization"—presumably an aid in the comparison of one sales offer with another.

"In some lines, it created for the first time a record of

<sup>24</sup> The same, p. 185.

<sup>25</sup> The same, pp. 178 and 183.

those enterprises engaged in the production of the particular products in a group; and the variety of products which each group produced."<sup>26</sup> It seems certain that such additional knowledge opened new opportunities to buyers and sellers.

The authors recognize fully the difficulties of determining the effects of the open price provisions as distinct from other factors operating at the same time. They say that "it should be clear that it is impossible to isolate the influence of price filing upon the price structure which existed prior to the code,"<sup>27</sup> and that "without records concerning price behavior in the past, it is difficult to evaluate the degree of price flexibility in these industries during the . . . [code] period."<sup>28</sup>

In general, the conclusion reached was: "As a device it [the open price plan] served primarily to lubricate the marketing machinery rather than to solve the basic economic problems of the industry. It proved to be no panacea. . . . On the other hand, many changes [in price structure] were brought about with little disorder or confusion, and there was some increase in uniformity. Undoubtedly it served to illuminate many of the particular problems in each group and possibly introduced more rationalization into individual price policies."<sup>29</sup>

The author of the Review Division's analysis of price filing under the fertilizer industry code reported some allegations of restrictions on competition arising from the expense of filing under the methods which were provided.<sup>30</sup> It was required that complete schedules of prices be filed with all competitors operating in any zone

<sup>26</sup> The same, p. 190.

<sup>27</sup> The same, p. 180.

<sup>28</sup> The same, p. 184.

<sup>29</sup> The same, p. 186.

<sup>30</sup> Simon N. Whitney, *Fertilizer Industry Price Filing Study*, p. 18.

in which sales were made. Thus a producer near a zone line, who might compete effectively across that line but only close to it, would find it necessary to supply schedules to all producers in the zone if he desired to sell in that territory. It was the expense of this distribution which was said to restrain sales which would otherwise have been made.

Any greater tendency toward price agreements that may have existed under the codes, the author ascribed, in part at least, to the general feeling that the anti-trust laws had been relaxed and to certain provisions of the codes other than the open price provisions.<sup>31</sup> The author found no evidence that the code authority attempted to influence prices.

An analysis of withdrawals of lower prices before their effective date indicated no reason to believe that there had been coercion. While the author concludes from a study of Bureau of Labor Statistics figures that "apparently there was no 'undue rigidity' of prices here under the code," he stresses the difficulty of discussing flexibility of prices in the absence of pre-code price lists.<sup>32</sup>

An increase in price uniformity was found to have occurred under the code. This increase, however, was regarded as being more apparent than real, partly because of the greater variety of forms of quotation used in the earlier period and partly because of a greater divergence of actual from quoted prices before the code.<sup>33</sup> The author reports that "the uniformity in prices and terms found under the code arose from the practice of 'price leadership.'" This leadership was explained as resulting from "the NRA ruling that a company meeting com-

<sup>31</sup> The same, pp. 21-26.

<sup>32</sup> The same, p. 28.

<sup>33</sup> The same, p. 29.

petition [before the full waiting period had expired] had to follow the precise terms of the price leader."<sup>84</sup>

The author of the study pointed out (as was true in the case of the electrical manufacturing industry) that conclusions concerning the effects of open prices in codes were weakened by the fact that the influence of the other code provisions and the general characteristics of the period could not be disentangled from the effects of the open price plan.<sup>84</sup>

The more general study of the Review Division, *Price Filing under NRA Codes*,<sup>85</sup> also reports difficulties in analyzing the influence of the code open price plans on competition. The study discusses the presence of a number of devices in the codes which complicated the effects of open price plans,<sup>86</sup> and the lack of adequate data concerning post or pre-code price movements.<sup>87</sup> This report, in addition to briefer consideration of price movements under the codes in a considerable number of industries, undertakes a somewhat detailed analysis of the effects of open price plans in the asphalt shingle and roofing industry and in the steel castings industry.

Concerning the asphalt shingle and roofing industry<sup>88</sup> the opinion was expressed that price publicity aided in the stabilization of prices.<sup>89</sup> It was noted also:<sup>90</sup>

Prices in the Asphalt Shingle and Roofing Industry were and are uniform. The treatment of price uniformity could almost start and stop with that sentence. On rare occasions and for short periods of time it is possible to find examples of lack of complete uniformity, but those instances are the exceptions

<sup>84</sup> The same, p. 49.

<sup>85</sup> By Enid Baird.

<sup>86</sup> The same, pp. 184-331.

<sup>87</sup> The same, p. 333.

<sup>88</sup> This section of the report was prepared by Frank Stocking.

<sup>89</sup> The same, p. 557.

<sup>90</sup> The same, p. 558.

rather than the rule. So perfect was this accord that generally there was absolutely no variation in prices, terms or conditions of sale.

It was again found impossible to secure data concerning the movement of prices prior to the origin of the open price plan, which was in 1926. The influence of the open price plan on the movement of prices was consequently impossible to discern. The effects of the open price provisions of the code were, of course, obscured also by the effects of the price control provisions of the code.

The section of the report dealing with the steel castings industry<sup>41</sup> found "that filings in most instances were not uniform in the early days of the code," but that they tended "to become more uniform, especially in the last eight months of the code period."<sup>42</sup> The report stated that there was some evidence of "follow the leader" practice in filing.

Identical revisions of prices were on some occasions filed simultaneously by a number of foundries. In several instances, it was reported, levels were stable during the entire period and uniformity practically complete from the start. The number of price changes was shown to have been greater in the early months of the code than later. Cases were found in which a filing of lower prices was withdrawn before the expiration of the waiting period. Again the influence of the open price plan on the movements of prices cannot be clearly distinguished.

It appears from the foregoing that precise generalizations concerning the relationship of open price systems to competition may not, on the basis of data now avail-

<sup>41</sup> This section was prepared by Walter G. Keim.

<sup>42</sup> The same, p. 666.

able, soundly be made. When inaugurated in any given industry, an open price system becomes but one of many factors affecting competition in that industry. The system may tend strongly to lessen competition or greatly to facilitate it.

An open price system in an industry may give aid to the maintenance or establishment of price agreements, and it may provide the basis of more informed action by competing monopolists. It may, on the other hand, promote more effective competition and perhaps even weaken the restrictive forces which are present in an industry. An open price plan may, for example, reduce the importance of or destroy the power of *buying* monopolies such as those which are believed to arise when some large distributor, having for some time been the sole outlet for a producer, is in a position to press an unduly low price upon that producer. With prices generally known, such a producer would be in a better position to demand the going market rate. It might be expected that if the low price which he was receiving were generally known, other distributors would seek to purchase from him at something nearer the general market price. Similarly, a *producer* who was in a monopoly position might, if his prices were generally known, find his position weakened by the opportunities which others, knowing his prices, would find available in the industry concerned.

The inauguration of an open price plan in an industry may cause prices either to rise or to fall. In an industry in which competitive forces are strong, the added publicity given to prices by an open price system may reveal to certain producers many instances of business lost through high prices. As a result prices may fall. On the other hand, if many new outlets are discovered through an open price plan, prices may actually rise.

If applied to an industry in which there exist competing monopolists or some degree of price collusion, the influence of an open price plan on prices will vary in somewhat similar fashion. If the profitability of maintaining relatively high prices is, through a better knowledge of the market, revealed to have been overestimated, prices may be reduced. If the possibilities of the market are found to have been underestimated, prices may be increased.

The utilization of an open price plan will also affect the prices of an industry to the degree that the publicity it gives limits discriminatory pricing,<sup>43</sup> or brings about a reduction of monopoly situations.

It is important to remember, moreover, that the effects of an open price plan upon competitive conditions in an industry depend in a most significant way upon the precise provisions of the open price plan itself. This topic is given extended treatment in Chapter VI.

The information necessary to determine the specific industries in which an open price system will operate to restrict competition and those in which it will operate to facilitate competition does not exist. The probability that open price systems will bring about restrictions of competition is, however, greatest where the other competitive factors in an industry are particularly conducive to such restriction. In general terms these factors are: (1) those which give a particular incentive to the making of price agreements; (2) those which tend to make possible the organization and maintenance of such agreements.<sup>44</sup>

<sup>43</sup> See Chaps. V and VI.

<sup>44</sup> The effect of an open price plan on competition in an industry in which some degree of monopoly exists—whether arising from such factors as the ownership of basic raw materials or patents, or from the possession of some widely accepted brand name or design—is difficult to determine. As we have seen, price publicity may weaken the position of

Among the forces creating a strong incentive to the making of price agreements none is more important than the existence in an industry of wide fluctuations in prices and profits. Fluctuations of this sort may be induced by such factors as heavy fixed costs or by great variations in supply and demand. The existence of a declining market for the products of an industry also creates a strong incentive to the making of price agreements. There is a similar inducement where goods are sold in large unit sales and infrequently, rather than in a continuous stream of small sales. In such cases each sale has a relatively great significance. Mistaken judgments of market conditions are not readily rectified; and there is, consequently, an urge toward unity of action. The incentives to some form of agreement are ordinarily greatest where the demand for a commodity is inelastic. Under such circumstances there are larger opportunities than otherwise for an enhancement of profits through restrictions of competition.

The successful organization and maintenance of agreements will probably be achieved most readily where the number of producers in an industry is small. In such cases divergent views are more readily reconciled. The problems of policing are simpler. Furthermore, restrictions on competition can be more easily maintained in industries difficult of entry. This is true whether the difficulty is caused by heavy initial capital equipment requirements, or by the time and expense involved in developing a market sufficient for the effective employ-

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a monopolist by bringing forth added competition, and it may reduce discriminatory pricing, or reveal that gain may come from a lowering of prices. It may, on the other hand, bring about a rise of prices, if greater possibilities of the market than were believed to exist are indicated, and it may perhaps result in even a further restriction of competition by exposing to attack the position of competitors.



ment of the most efficient means of production. The maintenance of agreements is easier also in industries for the products of which it is difficult to develop and introduce substitutes.

It is by no means certain that wherever there exist inducements to price agreements, or the possibility of organizing and maintaining them, the installation of an open price system will inevitably bring them into existence. Where these factors exist, however, there is greater likelihood that the introduction of an open price system will work toward a lessening of competition than in industries where they are absent.

A discussion of the relationship between open price systems and competition would not be complete without a consideration of the contention that open prices are socially undesirable in that they may lessen the incentive to make downward price adjustments. Where prices are secret, it is held, downward movements may occur more readily, because sellers may lower prices to some buyers without the knowledge of others, and because sellers, under such circumstances, may keep their competitors in ignorance of the prices with which they are competing for a longer time than would be possible if an open price system were in operation. Where prices are secret, it is said, reductions may be made to certain buyers when they would not be made to any if the existence of publicity made it necessary that the same price be given to all. Moreover, the fact that competitors may for a time be held in ignorance of price reductions enhances the gain from such changes, it is contended, and increases the likelihood that they will be made.

To these arguments is added another. It is said that price reductions begun as secret concessions to a limited number of buyers and obscured from competitors may,

as these become known to other buyers and to competitors, become pervasive—resulting in a lowered price for the product in general that might not have developed so readily under full publicity of prices.

On the other hand, it is contended that low prices, given secretly to certain buyers without the knowledge of competitors, will not as readily pervade an industry as would an open price, because of the more active competition that occurs where there is widespread knowledge of prices.

In evaluating these two points of view it appears that whereas prices to some buyers may be lower where there is secrecy than they would be if there were full publicity, the prices to certain other buyers are likely to be higher. Whether the adjustments which follow the introduction of an open price system will bring about a higher or a lower price depends upon whether the secrecy which previously existed promoted an over or an under estimation of the strength of the market.

Whatever the immediate or later effects of secret prices, they do, at the outset at least, tend to be discriminatory in favor of those securing the concessions. In addition, secrecy in price making invariably breeds mistrust, suspicion, and bad feeling. More fundamental, however, is the objection that where secret prices exist, an unwise allocation of productive resources may result, inasmuch as producers do not, under those circumstances, have full knowledge of market conditions.<sup>45</sup>

#### OPEN PRICE PLANS AND STABILITY

In the earlier pages of this chapter we have discussed the effects of open price plans on the stability of *prices*. In general, such studies as have been made indicate no

<sup>45</sup> For a further discussion of these points, see Chap. VI.

significant differences in price stability as between open price and non-open price industries. With regard to the question of *production* stability, the Federal Trade Commission's analysis of open price systems noted little difference in stability of output as between open price and non-open price industries.<sup>46</sup>

It should be pointed out that the basic social interest lies not in the reduction in individual industries of either the stability or instability of prices or production as such. Either form of price or production movement may be regarded as desirable to the extent that in the industries concerned, it represents an expression of supply and demand factors in the absence of coercive or collusive action. A stability of prices or production achieved through some form of monopolistic control is to be considered as inimical to the social good.<sup>47</sup>

Open price plans may serve socially desirable objectives through diminishing price fluctuations arising out of a misunderstanding of market factors, and through facilitating those price adjustments which give expression to the changing conditions of the market. This may or may not involve an increased stability of prices, depending upon the frequency of change in market factors, and the degree to which open price plans promote a greater promptness of readjustment to those changes.

With regard to the influence of open price plans on the stability of output, it may be said that where production is undertaken with a more complete knowledge of market conditions, there are likely to be fewer occasions

<sup>46</sup> Federal Trade Commission, *Open Price Trade Associations*, pp. 117, 358. For a discussion of the difficulties and limitations of such analyses in giving evidence of the economic effects of open price plans, see the previous section of this chapter.

<sup>47</sup> The questions of the desirability of stable *general* price or production levels, or of production stability achieved through more careful planning within the *individual* units of an industry, are not being discussed here.

for withdrawal from operation as the result of more complete understanding of the market. Hence there exists a probability of greater stability in production. Where, however, open price systems lead to collective control and greater stability of prices, and where demand is in process of change, an even greater instability of production than otherwise will be likely to occur. The failure to reduce prices as demand falls will reduce rather than stabilize production. Stability of prices will, moreover, under such circumstances delay the translation of technical improvements into increased sales.

## CHAPTER V

### OPEN PRICES AND SMALL BUSINESS

A third major issue concerning the economic effects of open price systems is their influence upon small business. While there are certain ways in which open prices are in some instances alleged to be advantageous to small business enterprise, it has been much more commonly argued that open price systems are detrimental to small business. The sources of these supposed injuries are several.

Perhaps the most common charge of injury to small business through open prices rests on the belief that open price systems remove from business operations a veil of secrecy which has been protective of small units. A certain number of business units do undoubtedly live by virtue of the fact that the lowness of their prices, or the exceptional services which they give, are not generally known. Some live by virtue of the fact that they are able to maintain higher prices than is generally known. With an open price system in operation, which includes all sellers and which provides for the identification of sellers and their prices, these situations are exposed and thus become open to competitive attack.

The effect of an open price system on small business units is said to take a special form when the larger concerns rely not only upon prices as a means of competing but also in a significant way upon wide brand advertising. It is pointed out that in such cases those units, usually the smaller ones, which do not rely upon brand advertising must maintain a price differential below

their larger competitors if they are to survive. This contention is based upon the supposition that if the prices of competing products are the same, buyers will purchase the widely advertised so-called "standard brands." The advantage of the larger concerns, where prices are the same, is believed to be even greater in instances in which, as a result of the large area served, or because of the distributive methods used, they are able, better than their smaller competitors, to provide such special services as emergency deliveries and warehouse facilities.

Stated more generally, these situations lead to the contention that small producers need to depend more on price to express their competitive advantages than do the larger concerns, which may more effectively utilize such factors as brands and certain types of special services. To the extent that an open price system, by disclosing price information, tends to bring about uniformity of prices, it is held, disadvantages to the smaller producers result.

In considering the validity of these contentions concerning the effects of open prices on small business units, it is necessary to distinguish carefully between *small* business units and *inefficient* business units. The fact that certain units may be disadvantaged by price publicity is evidence that open prices may harm the competitively inefficient rather than an indication that small business will be adversely affected. It may be true in some industries that genuine competitive advantages do rest with the larger organizations and consequently that secrecy of prices may provide a cloak of protection for the smaller units. On the other hand, the particular efficiency of large business runs often in terms of only the more routine or mechanical procedures of production and sale. Smaller units frequently are at a competitive

advantage where hand work, more intimate and careful personal attention, or some forms of special services, are found desirable.

A comparative analysis of corporate profits for the twenty-year period 1910-30 discloses some industries in which the smaller units earned, on the average, greater profits than the larger units.<sup>1</sup> Another analysis indicates that from 1924 to 1928, the earnings of large corporations fluctuated more widely than those of small ones, and that, though the large organizations were appreciably affected by the depression of 1927, the smaller corporations were not affected at all.<sup>2</sup> It was shown, moreover, that the earnings for large and for small corporate organizations were never far apart. A conclusion that in many industries the small units appear to have greater earning capacity than the larger ones is reached in still a third analysis of corporate profits.<sup>3</sup> The degree to which such conditions have been stimulated by the presence or absence of informed competitive conditions, or a determination of their precise causes, cannot be discovered, however, from the materials at present available.

A second injurious effect to small business from open price systems has been alleged on the ground that open prices tend to advantage integrated, and therefore presumably larger, concerns. To illustrate—in many industries there are some manufacturers who own their wholesale houses, while others sell through independent wholesalers. The integrated manufacturers may file with the administrative agency the same prices to wholesalers as are filed by unintegrated producers. The integrated

<sup>1</sup> H. B. Summers, "Rates of Earnings in Small Scale and Large Scale Industries," *Quarterly Journal of Economics*, May 1932.

<sup>2</sup> Ralph C. Epstein, *Industrial Profits in the United States*, p. 357.

<sup>3</sup> W. A. Paton, *Corporate Profits as Shown in Audit Reports*, Chap. V.

producer, through his owned wholesale house, may, however, come to the retailers with a lower price than an *independent* wholesaler can quote if he buys at the filed prices. The integrated wholesaler may be able to quote this low price, even though his costs of wholesaling may be no lower than the independent's, by having part of the cost absorbed in the "manufacturing division" of the integrated concern of which he is a part.

It is thought that by these means the position of the independent wholesaler, and along with him the independent manufacturer, is injured as compared with the integrated company. Where integration extends to retailing, the same analysis could be made regarding the independent retailer as compared with the retailer integrated with a wholesaler, or with a wholesaler-manufacturer combination.

In contrast with the contention discussed earlier, there is no implication here that the integrated units have any genuine competitive advantages in terms of costs, or of the special services which they may be in a position to render. The charge made against open price systems in these latter cases is based upon the misleading character of price publicity rather than upon the tendency of open prices to expose competitively inefficient units. In effect, the filed prices of integrated manufacturers to wholesalers are not accurate if there exists in fact an absorption of a portion of the wholesaling costs. Independent manufacturers who determine their pricing policies on the assumption that the filed prices of their integrated competitors are accurate may, because they do not file prices as low as they otherwise would, fail to gain the full advantage of their own competitive position. It is important to note in this connection that an open price system does not in these cases add to existing secrecy, inas-



much as integrated units can always maintain a large measure of secrecy for their intra-company transactions. Only if price publicity provides integrated units with an opportunity to use their secret prices in a way which will confuse their competitors more than would otherwise be the case can open price systems be regarded as having contributed to the competitive advantages of integration.

Integrated producers are likely to gain a special advantage from open price systems whenever these systems bring about some degree of price agreement. If, for example, there should develop in an industry group control over the prices of its basic raw materials, those who manufactured or distributed the products of the industry but did not produce the raw materials would be forced to pay the non-competitive price for the raw materials, while the integrated producers would have these materials available at the cost of producing them. A two-fold result would follow. The non-integrated manufacturer or distributor would be placed at a competitive disadvantage as compared with the integrated units, and the non-integrated companies producing the raw materials would as a consequence find their channels of distribution impaired. To the extent that group control over prices is induced by an open price system, the system operates to the advantage of integrated units.

It is possible that open price systems may, because of these various advantages which they may give to the integrated units, have a tendency to promote integration where it did not formerly exist. A non-integrated manufacturer, for example, might find it desirable to develop his own outlets with a view to bringing about the type of confusing price filing just discussed. On the other hand, if an open price system were put into effect, a manufacturer might build up his own outlets so that, although

he filed prices, he could escape giving information as to his actual prices. In this case his motive would be to avoid giving information to competitors rather than to confuse his competitors. Clearly both motives might influence a single individual at the same time. In addition, the possibility of avoiding the payment of monopoly prices, noted above, might constitute an incentive to integration.

In evaluating the contentions that open price systems advantage integrated units, or promote additional integration in industry, it must be realized that there is no clear evidence that small business is necessarily harmed by integration. In these contentions there exists a confusion between *large* and *integrated* units. It is conceivable that the unintegrated units may be larger than the integrated. Moreover, such integration as may be induced by open prices may proceed by way of the combination of existing small units. Furthermore, there does not appear to be any certainty that those small units which do not take advantage of the possibilities of integration will be any worse off than they were before, or indeed that they will be at a competitive disadvantage at all. It might well be that the units which remain outside of integrated concerns are those which can find no advantage in such consolidation. On the other hand, it is possible, of course, and in many instances undoubtedly true, that certain units remain unintegrated because they are so situated that they *cannot* become part of an integrated organization, even though such organizations have, in general, competitive advantages. Where this is the case, and where the units concerned are the smaller ones, it is reasonable to conclude that small business is to a greater or less extent harmed by any new advantages which open prices may give to integration. The materials

for detailed industry studies in these terms are not now available.

It is worth while to point out that where a trade is subject to minimum price control regulation as well as to an open price system as was the case under a number of NRA codes, it is extremely easy to confuse the effects of the open price system with the effects of the minimum price control. It is possible, where there is a provision for some form of minimum price control, for integrated manufacturers to quote the official minimum price to wholesalers, but actually to sell below it by permitting the wholesaling division to incur a loss which is absorbed in the manufacturing division. Unintegrated manufacturers, inasmuch as they do not have this method of avoiding the minimum price regulation, are placed at a competitive disadvantage.

In this case the advantage of the integrated manufacturer arises from the minimum price regulation rather than from the open price provision. Were there no restrictions on price making, this advantage of integrated concerns would disappear. In the case discussed earlier, integrated concerns could give misinformation, but they could not keep competitors who wished to do so from meeting their prices.

In contrast to the possible injurious effects of price publicity on small business, instances have been reported in which the existence of open prices has been of especial advantage to smaller units. There is a feeling in some quarters that such large buyers as department stores, chains, and mail order houses are sometimes in a position (where no open price system exists) to secure price concessions out of proportion to the economies involved, largely because of the pressure they bring to bear on manufacturers. Where there is full publicity of prices,

the likelihood that the larger buyers will be able to secure discriminatory price advantages is reduced. Sellers will need to justify their price differentials to all who purchase from them. They are, under such circumstances, less likely to yield to pressures to grant concessions to larger units. Moreover, the fact that their prices to the department stores, chains, mail order houses, and other large buyers, become generally known to other buyers, constitutes a defensive weapon in the hands of sellers against the pressure of the large and powerful purchasers.<sup>4</sup>

Open prices further benefit the smaller producers and distributors by providing them with price information which they could not afford to assemble independently. The larger units, because their costs are spread over a larger output, are better able to bear the expense of securing market data independently, and, with their far-flung offices, can often assemble the data more effectively. The more ready availability of this market information which an open price system provides may prove a real advantage to the smaller units. It was pointed out, for example, in the argument before the Supreme Court in the hardwood case discussed in Chapter II, that the smaller concerns, according to their letters to the Association, appeared to have benefited most from the better knowledge of market conditions provided by the open price system.<sup>5</sup> It was discovered that in the fertilizer industry under the NRA, the small units favored and did not oppose the open price plan established in the code, and that many new small firms entered business under the code.<sup>6</sup>

<sup>4</sup> For a further discussion of the influence of open prices on discrimination, see Chaps. IV and VI.

<sup>5</sup> Milton Nels Nelson, *Open Price Associations*, pp. 180, 192.

<sup>6</sup> Simon N. Whitney, *Fertilizer Industry Price Filing Study*, pp. 44-45.

The growth of commercial research agencies, of course, somewhat dispels the advantages of the larger units in collecting information. Through such agencies, both large and small units may secure a comparable service. Again, however, the effects of open prices will be governed by the precise provisions of a given open price plan, in this case being dependent upon the nature and policies of the disseminating agency.

It seems clear that considerably more than is known regarding the factors affecting the relative competitive positions of large and small business units will have to be discovered before the incidence of open prices on small business can be at all clearly and accurately determined. It is to be expected that the effects of price publicity on small business will vary from industry to industry and from unit to unit within an industry. Detailed studies will be necessary to arrive at an understanding of these specific effects.

Those who contend that open prices harm small business usually contend also that small business is, in and of itself, socially desirable. This raises a much larger issue. Much of the agitation for the preservation of small business has arisen out of a confusion of thought. Many base their contention for the preservation of small business on the assumption that the elimination of small business is identical with the creation of monopoly. It is obviously true that if the destruction of business units, whether small or large, proceeds far enough in any given industry, monopoly may be created. But if merely avoiding the creation of monopoly situations is desired, the diminution of small business may proceed far before the protection of the public interest becomes the occasion for social action.

If the preservation of small business is to be defended

on grounds other than the prevention of monopoly, there is need for demonstrating that there exist criteria of public interest to justify the condemnation of business units of large size. Even if grounds for such action could be discovered, the sheer administrative problems involved might well give one pause. The mere definition of "small business" is itself a difficult task. How small should a business be before it can be called small enough to be protected? Even were it possible, however, to decide upon the size of business units most desirable socially, there would remain the still more difficult problem of effectuating policy. The necessity of devising means for the protection of every existing "small" unit would arise, because it would be impossible to contend that any *one* small unit should be given preference over *another*. This would involve control over all the competitive forces that might injure small business units—a control that would perhaps include the prohibition of all of those practices of efficiency through which businesses tend to become larger, and that might extend even to the fixation of a legal maximum of capital, volume, number of plants or outlets, or other aspects of a business by which socially desirable size might be measured.

The mere size of industrial units has not in our country been a basis for legislation. There has been, however, in recent years at least, some development of sentiment favoring small business units. There may be reasons for determining upon the preservation of small business units as a desirable end within itself. It should be realized, however, that the preservation of such units through government action, when they could not otherwise survive, must presumably mean the support of economically inefficient units—that is, inefficient in the sense that consumers in competitive markets reject the

goods and services they offer, at the prices at which they are offered, in preference to the goods and services of their larger competitors. This is not to say that it is never socially desirable to preserve through government action what cannot survive competitively. But it should be emphasized that where protection is given economic units that cannot competitively justify their existence through the services they offer consumers, some other basis of public interest in their preservation should be clearly shown.

## CHAPTER VI

### PROBLEMS OF CONSTRUCTING SOCIALLY USEFUL OPEN PRICE SYSTEMS

In the preceding chapters we have attempted to outline the significance of pricing in our economic system, to review briefly certain important phases of the development of open prices in this country, and to examine some of the more important economic and social implications of open price plans. We shall turn now to a consideration of the problems which must be faced in attempting to devise socially useful open price systems.

The first question is: What is meant by a socially useful open price system? The answer is to be found in terms of the analysis which was presented in Chapter I. It was indicated there that a wide knowledge of market factors; on the part of both buyers and sellers, is essential to the most effective operation of individual enterprise in achieving a socially desirable organization of economic life. Considered in these terms, a socially useful open price system is one which gathers and disseminates data concerning those factors, accurately, completely, and with dispatch, to as many buyers and sellers as appears feasible and useful. There are, no doubt, many industries in which the effectiveness of competition might be furthered also by proper arrangements for labor exchanges, for uniform accounting systems, and for work in the fields of the grading, standardization, and labeling of commodities.

The problems of constructing an open price system will vary greatly in different industries. There exist as among industries, wide differences in the conditions of



production, the complexity of the products being sold, the conditions of sale, and the degree of competition. A most careful consideration of these special circumstances would be required to determine whether any open price system would be socially useful in a given industry,<sup>1</sup> and the particular plans appropriate to the industries in which open price systems would be useful.

A number of fundamental problems must be considered wherever an attempt is made to construct a socially useful open price system in any industry. Among them are the following: (1) the products on which filing is to be required; (2) the information to be filed; (3) the dissemination to be undertaken; (4) the agency which is to administer the system; (5) the apportionment of the costs of operation; (6) the determination of the prices to be reported—whether past prices, current offers, or future offers; (7) the possible misrepresentations of buyers; (8) the so-called “price raid”; and (9) the construction of bid filing systems. We may turn now to an analysis of each of these basic problems.

#### THE PRODUCTS ON WHICH FILING IS TO BE REQUIRED

The first general problem in the establishment of a sound open price system is the determination of the products of the industry on which reporting shall be required. An open price system could be organized to apply either to some, or to all, of the products of an industry. In experience, various plans have been tried. Under the NRA, for example, some codes required filing on all products of the industry, others on only standard products, or on standard and certain selected non-standard products. In some cases the products selected were specified in the

<sup>1</sup> See Chap. VII for a discussion of certain factors affecting the areas in which open price systems may be socially useful.

code. In other cases, decision was left to the code authority, or to a majority of the members of the industry.

It is not possible from an examination of available data to determine with any certainty general rules of wisdom applicable to all industries in selecting products for filing. The determination of the products on which price reporting is to be undertaken involves considerations of administrative feasibility, and of the costs involved relative to the gains expected from such reporting. These will vary from industry to industry.

More important perhaps is the fact that the exception or selection of certain products for price reporting may constitute a degree of protection from competitive forces, or may increase the competitive elements facing a given concern or group within an industry. In view of the pressures created thereby, it would probably be necessary to have the selection of products for reporting reviewed by some government agency, if the public interest in the matter were to be properly protected.

Even if use were made of a governmental agency, however, considerable experimentation would probably be necessary before the products of a given industry which might advantageously be admitted to, or omitted from, price publicity could be determined with any certainty. The suggestion may be made that the selection of products not be limited to those most highly competitive or most widely sold. It is the function of an open price plan to provide as much knowledge of market conditions as is feasible. Such knowledge may be most significant where, at the moment, there is least competition.<sup>2</sup>

<sup>2</sup>The importance of the competitiveness of the products in selecting products for reporting, on the other hand, was emphasized in a study of the operation of the open price plan in the electrical manufacturing industry. The authors of that study stated: "Some products . . . are sufficiently unique and definite to define an exact group of competitors."

It is important that any given seller be required to report on only those products actually handled. A requirement that all producers file on all the products selected for reporting—even though some do not handle all of those products—would obviously lead to fictitious filing. Misrepresentation of market conditions would result, and consequently confusion of both buyers and sellers.

#### INFORMATION TO BE FILED

It will be obvious that basic to the problem of constructing an open price system for the primary purpose of improving knowledge of market conditions is the determination of the type of information that shall be filed. In general terms, it may be said that information concerning prices should be reported, and such other information as may be necessary to make prices intelligible and comparable as among different sellers. In detail, however, the determination of what information should be made available is an exceedingly complicated problem. It may best be analyzed by breaking it into its several aspects and considering each of these separately. In determining what information is needed, it will be necessary to give attention to at least six factors: (1) prices and price terms and conditions of sale; (2) classi-

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On the other hand a group [of industries] . . . includes a large number of non-competing products and many companies which produce specialized items which compete with only one or two other companies in the group, if any. . . . The cases where price-filing seems to have operated with some effectiveness, are the groups where the concerns involved are clearly competitors . . . and not one created chiefly because of the necessities of a complete plan . . . for organizational purposes. Had all price-calls been limited to specific competing items rather than to broad classes of products, the process would have been much less expensive, less bother, and much more effective." Willard L. Thorp and A. H. Caesar with the assistance of F. W. Powell, *A Study of Open Price Filing in the Electrical Manufacturing Industry*, Work Materials No. 78, pp. 186-87.

fication and identification of customers; (3) identification of sellers; (4) identification and comparison of products; (5) buyers' bids; (6) other market information.

### Prices and Price Terms and Conditions of Sale

The data on prices and price terms essential to the making of informed business judgments would be comparatively easy to determine if industries limited their pricing simply to monetary terms. But this is not the case. The determination of what price data shall be filed is made a difficult task by the fact that there are in use in many industries devices which cause effective prices<sup>3</sup> to differ from nominal monetary prices, and which at times render extremely obscure the actual effective prices being charged, thereby facilitating secret and discriminatory price concessions. We may refer to these devices as indirect pricing methods. The many forms of indirect prices are well illustrated by free deals, advertising allowances, premiums, combination sales, trade-in allowances, discounts and credit terms, freight allowances, guarantees of various sorts, the making of sales on consignment, entertainment, payment of a customer's rent or taxes, the making of loans to customers, post-dating, and the purchase of a customer's products.<sup>4</sup>

These illustrations, and other examples of indirect prices, may be grouped into two general classes: two or more goods or services may be combined into a single

<sup>3</sup> By effective price is meant the resultant price after all discounts and allowances have been applied.

<sup>4</sup> *Advertising Allowances* by Leverett S. Lyon (1932) and *The Economics of Free Deals* by the same author (1933) are studies which analyze specific types of indirect pricing in detail and suggest their importance in competitive price making and for price theory.

transaction and priced at a lump sum below the total of the individual prices; or, supplementary transactions, contingent upon a major transaction, may be made at an especially favorable price.

It is of essential importance in an open price system that the prices *reported* reflect accurately the prices *actually charged*. Where current or future offers are reported, there should be no variance either above or below such offers without a new filing. But inasmuch as indirect pricing methods make the quotations of monetary prices an inaccurate reflection of the prices charged, it is obvious that some plan must be worked out to remedy the lack of accuracy which would result if monetary prices alone were reported.

Two alternative methods of achieving accuracy in price filing may be considered. One is to impose a prohibition against the use of the various forms of indirect pricing.<sup>5</sup> This method has the virtue of simplicity. If there were no indirect pricing methods, the reporting of monetary prices would give the price information desired. Monetary prices are more easily understood and compared than indirect prices.

But in practice the prohibition of indirect pricing methods raises serious problems. If an attempt were made to eliminate each form of indirect pricing, it would be necessary to discover each type of practice, to know the sort of regulation that would be effective in each case, and to be certain that no undesirable social consequences would result in the industries concerned. Attempts to eliminate indirect pricing by general declarations would create many uncertainties and ambiguities. There exists no clear

<sup>5</sup> A number of NRA codes made such prohibitions against indirect pricing schemes.

understanding or definition of the content of these practices. Many devices that appear to be used for the purpose of indirect pricing may in fact represent genuinely separate transactions not at all related to price concessions.<sup>6</sup> Great difficulties and inequities of administration would consequently be likely to result from any general prohibitions.

A further objection to the outlawing of indirect pricing methods rests on the social usefulness of these devices, rather than on any question of practicability. Indirect pricing often is an important device in lending flexibility to relatively rigid "standard prices" which are found particularly in connection with private brand commodities. Restrictions on indirect pricing would undoubtedly lead to a somewhat greater flexibility of the "standard price" but it is questionable whether a corresponding degree of price flexibility could be achieved without indirect pricing, in the industries where standard prices exist. In view of the large number of industries in which standard prices are common, it would appear of doubtful social wisdom to make general prohibitions against the use of indirect pricing methods.

The second method of dealing with indirect pricing in open price systems is to require the filing, along with prices, of all relevant terms and conditions of sale. Such filing supplies information from which an understanding of the various aspects of current, indirect pricing transactions could be obtained. For complete understanding, however, two additional requirements would be necessary: (1) where separate quotations are not otherwise available, the various elements which are being com-

<sup>6</sup> Advertising allowances, for example, are sometimes thought of as co-operative advertising expenditures, and sometimes as devices for achieving price reductions. Indeed, advertising allowances frequently accomplish both purposes. See Lyon, *Advertising Allowances*, Chap. II.

bined in a single transaction should, where possible, be separately priced in the report; and (2) a full description of the goods and services which are part of a combination or supplementary transaction should be given.

Price reporting cannot accurately reflect prices in an industry unless one or the other of these two methods of dealing with indirect pricing is employed. In devising an open price plan for a particular industry, it would be necessary to determine which is the more desirable requirement, or whether one plan could conceivably be applied to certain products of the industry, and the other to others.

As we have seen (page 51) the Supreme Court in the Sugar Institute case held against the requirement of adherence to filed prices and opposed certain restrictions to indirect pricing which the Institute had effected. Among the practices of the Institute related to indirect pricing which the Court enjoined were regulations affecting the sale of damaged sugar and frozen stock; manufacture under tolling arrangements; the giving of used bag allowances; the manufacture of private brands; the use of long term contracts; the use of the four payment plan; split billing; cash discounts; price guarantees; the sale of second-hand sugar or resales; the transifion and diversion of shipments; the use of privately chartered boats, pool cars and pool cargoes; and the use of brokers, warehousemen, and truckers.

Where there is no requirement of adherence to filed price offers many of the useful opportunities of an open price plan in providing knowledge of the market may be lost because the prices filed may not reflect accurately the prices actually charged. A ruling against the prohibition of indirect pricing methods may, however, as we have seen, in many cases serve socially useful purposes.

### Classification and Identification of Customers

Another aspect of the problem of determining the information that shall be available under an open price system is the classification and identification of customers. A manufacturer's prices are seldom, if ever, the same for all classes of buyers. Ordinarily, his customers are divided into such groups as manufacturers, contractors, wholesalers, retailers, and the like, for each of which different prices ordinarily obtain. The differences in the prices as among these various classes of customers arise from such factors as the different quantities purchased by different classes, the position of the buyer in the channels of distribution, the special trade relationships between individual buyers and sellers, and the like. Because of the existence of these differences in prices, there is need under an open price system for information on prices to various classes of customers.

Great difficulties arise in this connection. Inasmuch as different sellers find it convenient to use different bases for classifying their customers, and because of the difficulty of defining any classification unambiguously, even the filing of prices to various classes of customers would not provide the knowledge essential to informed action by buyers and competing sellers. For example, even if *A* reports that he offers to sell at certain prices to wholesalers, and certain other prices to retailers, it is not clear who is getting what. It is possible that *A*, because he has classified *B* as a wholesaler, is extending to *B*, who is by some regarded as a retailer, a far more favorable price than is generally realized by other customers and competing sellers.

The problem of the kind of information that shall be filed thus extends into the problem of the *proper* classification of customers. It has been suggested, as a means of



assuring accurate information regarding prices, that some central agency shall determine the classification of customers. That is, it is proposed that this agency shall have the power to set up the classes of customers that shall exist in the trade, and to determine what members of the trade shall be listed in each class.

This scheme has certain decided weaknesses. Where the power of classification is placed in the hands of some central agency, there is a strong tendency to limit the types of classes to those which already exist, and even perhaps to those which are already the more powerful ones in the trade. The result may be an undesirable rigidifying of the channels of distribution. Moreover, there is opportunity for the agency thus empowered to impose discriminatory classifications favoring certain types of buyers or sellers, or certain individuals.<sup>7</sup>

A more satisfactory solution appears to be the requirement that those filing prices and terms of sale shall file also a description of their classes of customers, and the names of their customers in each class.<sup>8</sup> Such a regulation has the merit of preserving full flexibility of classification by individual concerns. Moreover, under this plan the use of misleading classifications as a device for the making of secret and discriminatory price concessions would be difficult. Where information concerning the price offers to individual customers is widely disseminated, the possibility of unfair classification is limited by the possibility of incurring the ill will of other customers, and the retaliation of competitors. Where there is mo-

<sup>7</sup> In the Sugar Institute case (see page 51), the Supreme Court held as a restraint of trade the required use of a classification of customers determined by the Institute.

<sup>8</sup> Three NRA codes dealt with the identification of buyers, and these all prohibited the code authority from divulging the operations of any individual member. The other NRA open price plans neither required nor prohibited the identification of buyers.

nopoly, such discrimination may, of course, persist, though even here full publicity operates to minimize such practices.

Publicity as to the names of individual customers within a class, however, would often undoubtedly be opposed by many members of an industry, and would perhaps in many instances be impracticable. Sellers frequently object to revealing such intimate details of their business on the ground that competitors would gain a relative advantage thereby. Moreover, the sheer magnitude of the task of distributing this detailed information to all buyers and sellers would render it unfeasible in some industries. These difficulties would be mitigated somewhat in those industries in which producers sell in only limited areas and in which, accordingly, data would need to be reported to competitors and buyers only within those areas.

In some cases it is possible that a modified plan might be adequate to give the necessary information. The mere filing of classifications and customers' names might be required, together with a provision for inspection and for dissemination upon request—perhaps with a charge for the costs involved. There would be only a limited number of individuals with respect to whom any single buyer would have a genuine interest. Some would be too remote; others would be readily recognized as falling in a different classification. Sellers, of course, would have a wider interest, being concerned with learning details of their competitors' businesses which might prove useful in competition, but even their concern would be limited. If the availability of customers' names and their classifications were placed on an "inspection with dissemination on request" basis, some of the expenses of

distribution might accordingly be avoided, and that incurred would be more likely to be selective, on the basis of usefulness.

The objection of sellers to the disclosure of information regarding their business is, of course, not met by the modification suggested. This objection is significant in any industry in which such disclosures would seriously discourage enterprise and initiative. It is significant also where they would encourage coercion or lead toward price agreements.

The great variety of bases on which customers may be classified, and the difficulty of framing unequivocal definitions, give rise to one further problem. How can a *prospective* customer discover the classification, and hence the price, which a specific manufacturer would apply to him? It is not possible to circulate interpretations of individual customer classifications to all potential customers, or even to all the prospective customers of an industry. The most feasible solution appears to be that of having manufacturers make such interpretations upon inquiry. There should be required, in addition, some provision for making knowledge of these offers to prospective customers available to other known buyers and competing sellers.

#### Identification of Sellers

A further problem of determining the information to be available under an open price system is the identification of sellers. Knowledge of the identity of reporting members on the part of the agency administering an open price system is of course necessary in order that there may be certainty that all producers have filed their prices. The case for making such information available

to all buyers and competing sellers is not, however, so clear.<sup>9</sup>

There is always at least a potential danger in giving publicity to identified price offers. Where there is knowledge of the identity of sellers, any members of an industry who are inclined to exert influence toward price control are in a better position to do so. Those who quote low prices can be identified as well as those who violate any collusive agreements that may be made.

It is not possible to determine from an examination of the available data the industries in which publicity may wisely and safely be given to identified price offers. Certain general observations may, however, be made. There are circumstances in which the identification of sellers to buyers, as well as to the administrative agency, appears well-nigh indispensable if an open price system is to be attempted. Where the products manufactured vary considerably as among the units of an industry, or where brands represent an important item in determining buyer judgments, intelligent comparisons between price offers cannot be made in the absence of knowledge of the identity of the sellers. Identification of sellers has a diminished significance in industries in which the commodities are highly standardized and uniform as among sellers, and in which consumers do not regard brands as important.

In view of the dangers of giving publicity to the identity of sellers, the presumption must be against such identification. There may be industries in which an open price plan without identification would be ineffective,

<sup>9</sup> Fifty-two of the NRA open price plans required the identification of sellers in price dissemination. In eight codes identification was made optional, and in one code it was prohibited. In the remaining 302 open price plans, there were no provisions regarding the identification of sellers.

and where it would appear that identification of sellers would not tend toward price agreements. In such instances there would seem to be no reason for not permitting identification of sellers. In industries in which price information would be useless if sellers were unidentified, but in which such identification would appear likely to bring about collusive price control, there is reason to believe that the public interest would dictate against any attempt to inaugurate an open price plan.

#### Identification and Comparison of Products

A fourth aspect of the problem of determining what information must be available to give the knowledge desired through an open price system is the identification and comparison of the products for which prices are reported. The making of such comparisons requires means of identifying commodities, and at least a certain amount of knowledge concerning their content and composition. Where the goods handled by an industry are highly standardized, this problem is a comparatively simple one. But standardization, which makes possible the clear designation and easy comparison of products, obtains in only a comparatively small area of industrial life. In many industries a great heterogeneity exists. Yet, to make an open price system achieve its full possibilities, the information available must make possible for buyers and sellers the comparison of the commodities on which prices are being filed.

Where governmental standards have been developed and are either by regulation or by general acceptance applied, products can ordinarily be readily identified, and what are regarded as important elements of their content discovered. Under such circumstances, there may be reasonable certainty that the products on which a

price is being quoted will be of the same character for successive quotations, and that changes, when introduced, will be made known.

Private brands in considerable measure serve similar purposes. They greatly facilitate identification. Knowledge of the characteristics which the brand represents is not, however, as generally available as in the case of governmental grades.<sup>10</sup> Brands are often even less trustworthy in furnishing a certainty that successive units will be practically identical. This is true to the extent that those who control the brands vary the content of a product under a brand. If changes are indicated, no injury is done. It is necessary merely that buyers adjust themselves to a new meaning for the brand.

Owners of private brands could contribute considerably to the comparability of products if they would indicate similarities, as well as differences, between their own and competing products, and if all producers would hold their products consistently true to the brand, or make variations known. It is obvious that in this connection there is some opportunity for a program of gov-

<sup>10</sup> Even governmental grading usually falls short, and necessarily so in most cases, of giving *full* knowledge of content and composition. Federal wheat grades, for example, include such bases as texture, test weight per bushel, mixture, damage, moisture, and foreign material. However, protein content might be of primary significance to certain buyers. No grading system could grade *adequately* for taste and flavor of food products. Such a factor is, though perhaps of basic importance, essentially subjective. It is necessary to realize that because of these subjective elements, private branding is often fully as important as any amount of information or detail concerning chemical content. So long as successive units of each brand are the same, sampling of various brands is the consumer's best and most satisfactory guide to purchases in which personal taste is important and the unit expenditure is not great. In this manner, private brands may serve useful social purposes, even where there is government grading of the more objectively determinable elements of a commodity. If successive units are practically identical, private brands may be useful also because of the differing degrees to which different producers adhere to such government grades as do exist.

ernmental grading, and for the consideration of requirements concerning informative labeling. It should be said in passing, however, that any such program should proceed with great care lest it involve, particularly if standardization elements are introduced, obstructions to the introduction of new products or modifications of old ones.<sup>11</sup>

### Buyers' Bids

The social utility of an open price plan would in some industries probably be increased if buyers' *bids* as well as sellers' *offers* were disseminated.<sup>12</sup> Knowledge of potential sales opportunities at other than existing price offers might prove a stimulus where there is a stagnation of trade as a result of a spread between potential bid and asking prices. Such a condition frequently arises, particularly in a period of falling price levels. Knowledge of market possibilities at other than current prices should indeed be helpful in planning price and production policies at any time.

An open price plan including filing of buyers' bids, as well as filing of sellers' offers, would be most likely to be successful in industries manufacturing a standard product, because under such circumstances it would be relatively easy to identify a given bid with a specific article for sale. Although it might prove impracticable even there, the filing and dissemination of buyers' bidding is worth trial in such industries.

There is always, it should be noted, some danger that producers may be confused by the dissemination of buyers' bids. Bidders will probably be making purchases at

<sup>11</sup> No basis seems to have been demonstrated for government standardization where it brings such obstructions, excepting as the commodities eliminated are physically harmful.

<sup>12</sup> On the organized exchanges it is common to report the closing bid and offer, even though there may be considerable spread between them.

market prices, while at the same time making bids at other prices. The whole of the bids at other than market prices would, consequently, not represent an addition to the quantity demanded at the existing market price. On the whole, however, the probabilities are strong that dissemination of buyers' bids would provide a valuable addition to market knowledge.

These suggestions for dissemination of buyers' bids should not be confused with arrangements calling for dissemination of information on so-called "secret" bids by sellers. (See discussion of bid filing on page 139.) These latter plans are confined to situations in which products are manufactured largely or entirely to specification, and they relate only to sellers' offers. There has been much experience in governmental purchasing, as well as in private contracts, with bidding of this second type.

### Other Market Information

Whatever the precise characteristics of an open price system designed for a given industry, its effectiveness would in most, if not all, cases be enhanced if it disseminated, in addition to strictly price information, data concerning such market factors as production, shipments, sales, costs, unfilled orders, and stocks on hand. Such information should usefully supplement data on prices in aiding either sellers or buyers to make business judgments.

### DISSEMINATION TO BE UNDERTAKEN

A third major problem in constructing an open price system centers in the dissemination of information. In considering dissemination, three general questions arise: (1) what information shall be disseminated; (2) what



the degree of dissemination shall be; and (3) what the form of dissemination shall be. We shall consider each of these questions.

#### Information to be Disseminated

An open price system designed to facilitate the effective functioning of competition by making market information available to buyers and sellers should, speaking in general terms, disseminate all the information that it collects. The question of what information should be disseminated is therefore in large part, if not altogether, answered in determining what information shall be filed.

The only exception to this general principle is in the case of information which may be collected solely because it is necessary in the administration of the open price system. One such exception was noted in the preceding section, where it was shown that the agency administering an open price plan must have knowledge of the identity of sellers as a means of determining that reports are filed, even though in some industries there may be reason for not disseminating the identity of sellers.<sup>18</sup>

Aside from such cases, the collecting and administrative agency must be regarded as largely an intermediary for gathering and transferring price data. Contentions that this agency be permitted to collect data which it does not disseminate seem invariably, upon analysis, to be based upon a conception of an open price system for some purpose other than the facilitation of informed competition. Where open price associations gather and disseminate data on such market factors as production, shipments, sales, costs, stocks, and the like, the case for gen-

<sup>18</sup> There is, as we shall see, danger in some industries in having even the administrative agency know the identity of sellers unless the administrative agency is governmental in character, or is subject to government supervision.

eral dissemination to buyers as well as sellers is not, however, always so clear. This information is less likely to be of use to buyers. There can be no objection, however, to its dissemination to buyers at their own expense, if the data are to be made available to sellers.<sup>14</sup>

### Extent of Dissemination

Historically, as we have seen, open price systems were frequently the servants of trade groups. Their construction was indeed at times the major purpose in the formation of trade associations and, moreover, often represented one step in a general program of price control being undertaken by such groups. The policy as to the dissemination of price data naturally enough accorded with these purposes. The information filed was ordinarily made available only to sellers, and typically was limited to those who were members of the association.

The theory underlying NRA code making was that all members of an industry were involved regardless of their association affiliations and irrespective of specific assent to the code. This theory was applied in the collection of information, in that all members of the industry were required to report on the products selected. The policy with regard to dissemination, however, varied in different industries.<sup>15</sup>

<sup>14</sup> In the Sugar Institute case (see p. 49) the Supreme Court held in favor of making the data then available to sellers available also to buyers.

<sup>15</sup> A number of codes carried the provisions for dissemination to the point which is necessary in the construction of an open price system planned with a single view to its public usefulness. These codes provided some means by which not only members of the industry, but customers as well, could obtain the filed information.

Some 193 codes made price data available to all customers by permitting them to inspect the code authority's records. Only 2 codes, however, provided for sending price information to all customers; 92 provided for this service on request; and 91 required the payment of the

Useful social purposes can to some degree, and no doubt in some industries in large measure, be served even when dissemination is limited to sellers. Producers are in a position to guide their individual price and production policies more intelligently when they have a more complete knowledge of market factors. The full beneficial effects of open prices in terms of the larger social interest of intelligent and informed direction of production cannot be achieved, however, unless some provisions are made for dissemination to buyers. With full price information, buyers are in a position to take advantage of the most attractive price offers available, and can more readily make their wants known to producers. Producers, on the other hand, are better able to make their offers known to consumers, and can more accurately judge consumer demands. Under such circumstances the market operates more efficiently in guiding production toward the effective utilization of resources, in that the judgments of both producers and consumers are based upon more extensive knowledge.

Full information to buyers has further advantages of a character properly regarded as in the public interest.

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costs involved. In some instances dissemination to customers was provided by the requirement of the posting of prices or the stipulation that prices were to be published in certain designated trade periodicals. There were, however, 11 codes in which dissemination to customers was left to the discretion of the code authority, and 142 in which no formal provision of any kind was made for dissemination to customers. See Appendix, p. 154.

In 52 cases no formal provision for dissemination appeared in the code. In 8 cases dissemination was at the discretion of the code authority. In certain other instances, the data were provided upon request, or upon payment of cost, or provisions were made for inspection of filed prices. In about a quarter of the open price provisions of NRA codes, dissemination was called for to producers of similar products, or to members of the same region. Something more than a third of the open price provisions in NRA codes applied the industry theory, and required dissemination of filed information to all members of the industry.

It operates to render price discrimination more difficult, if not impossible.<sup>16</sup> Moreover, the possibilities of collusion and coercion among sellers will be lessened by announcements of prices to buyers. If prices become known to prospective buyers as soon as they do to competitors, it will be more difficult for other producers to induce an offerer of low prices to revise his prices upward. If an offer of a decreased price is made, and then withdrawn before it becomes effective or very shortly thereafter, it may arouse customers' suspicion, distrust, and ill will. As a result, it will be more difficult, where price offers are given full publicity, to coerce sellers into an immediate withdrawal of announced price reductions. Their defense against those who would coerce them is stronger, and their incentive to capitulate to demands for a revision upward is reduced. (For a further discussion, see page 128.)

While these statements express the ideal of full dissemination of all filed knowledge to all buyers and sellers, questions of cost and physical difficulties may in some cases make complete dissemination impracticable or undesirable.<sup>17</sup> Where the costs or technical problems of dissemination are such that, in view of the benefits to be received, full dissemination appears undesirable, price information may be distributed merely in summary form, or made available for inspection and sent directly to those willing to defray the expenses involved.

Summaries, however, would ordinarily require the presentation of data in unidentified form. We have seen that in some industries unidentified price data would be

<sup>16</sup> For a further discussion of this point see the treatment of the problem of buyers' misrepresentations and of the "price raid problem," pp. 135 and 138.

<sup>17</sup> It is said, for example, that there are some 2,200,000 farmer customers of the fertilizer industry.

of little or no aid either to buyers or sellers. In such cases, if the costs of dissemination are prohibitive, publicity would need to be limited to availability for inspection. There are, however, some industries—for example those producing highly standardized commodities—in which unidentified data may have a real value, and may impose no serious limitations on the knowledge of buyers and sellers.

### Form of Dissemination

Once the questions relating to the data to be disseminated and the extent of such dissemination are decided, there arises the question of the form of dissemination to be used. Various plans may be employed. Where dissemination is through some central, administrative agency, prices may be made available only for inspection, or they may be published in some generally available periodical, or they may be directly disseminated by mail, telegraph, or telephone. Open price systems may be designed, however, with no central agency for collection and dissemination. (For discussion, see page 119.) Reliance may be placed on individual sellers, by requiring them either to post or to publish their prices where all may gain knowledge of them, or to transmit them directly to buyers and competing sellers.

The proper form of dissemination will differ from industry to industry, from product to product within industries, as among buyers and sellers, and even for different buyers and sellers. The number and the degree of geographical distribution of buyers and sellers, and the volume of products and price offers, will vary as among industries. These variations will affect the costs involved in each method of dissemination; and these costs, together with the services which each form of dis-

semination will give, are the determining factors in the choice of method.

Where no central filing is used, and where dissemination consequently must be provided by the producers and distributors themselves, there is no assurance that all buyers and competing sellers will be treated alike, or, for that matter, that any will receive complete knowledge. Individual sellers may have much to gain by keeping their competitors, and even some of their customers, in ignorance of their various price offers, particularly where these may be regarded as discriminatory.

The posting of the data called for by an open price system, without any other means of dissemination, may in some instances be adequate to provide buyers with the information. It will, however, less frequently assure competitors of obtaining that information. The publication of prices, in addition to the posting of prices, is a more satisfactory method of price dissemination from the point of view of both buyers and sellers.

The requirement that price information be made available merely for inspection may work great hardships on those not situated in close proximity to the points of filing. Their costs and difficulties of securing information are thereby increased. Moreover, they cannot obtain this knowledge so quickly as those more favorably located, and will consequently suffer whatever disadvantages are inherent in the tardy receipt of price data. Where conditions of the market are changing rapidly, and in great degree, this handicap may be of considerable importance.<sup>18</sup>

<sup>18</sup> Quite unrelated to the problem of dissemination is the disadvantage of poor location, in relation to points of reporting, which arises in the matter of price filing. Those poorly situated find that their costs of filing are higher, and, moreover, that the speed of their filing, and hence the facility with which they may make price adjustments to changing

Direct dissemination, as contrasted with availability for inspection only, reduces the advantages of location with regard to the obtaining of information. In deciding the form of dissemination, however, consideration must be given to the factors of cost and utility. As we have noted earlier, there appears to be no reason for withholding direct dissemination, if interested parties are willing to defray the expenses involved.

#### THE ADMINISTRATIVE AGENCY

In organizing an open price system, it is necessary to place somewhere responsibility for the collection and the dissemination of data. The history of open price systems shows that various types of central agencies have been employed, and that sometimes open price plans have been operated with no central agency for collection and dissemination. In the latter instances, reliance has been placed upon a requirement that those concerned disseminate prices directly, or make them available by posting or publication.

The nature of the agencies selected to administer open prices plans has been determined by the character of the groups sponsoring the plan, and by their objectives. Those open price plans which were developed prior to the NRA were chiefly the work of open price or trade associations. Their major interest was in benefiting members of the association, and in some instances in making possible a greater or less degree of price control. The administrative agency, for both collection and dissemination, in these cases was most commonly some officer of the association concerned. There were, however, instances of the use of private agencies for this purpose.

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conditions of the market, is reduced. This observation is not applicable to an open price plan requiring reports on only closed transactions.

The open price plans approved in the trade practice conference agreements, under the guidance of the Federal Trade Commission, in each instance, as we have seen, placed reliance for the dissemination of price information on individual sellers. The Commission was concerned with the needs for price publicity but sought to avoid any aid to price collusion. It was, moreover, limited in its plans by the wholly voluntary character of the trade practice agreements.

The National Recovery Administration, reflecting the points of view of a large number of industrial groups, and working with a somewhat indefinite policy concerning competition, utilized a variety of administrative devices. By far the largest proportion of NRA open price provisions required filing with the code authority of the industry. Some few designated a trade association as the administrative agency, and a considerably larger number specified an impartial agency, either named in the code or chosen by the code authority or the administrator. In some instances central filing was not required, provision being made merely for direct exchange of prices among members, or for the publication of prices in trade periodicals, or for the posting of prices.

In planning the administrative agency for an open price system, the task of collection and dissemination of data may well be separated from the more involved duties requiring discretionary decisions such as, for example, whether there should be an open price plan in an industry; what products or parts of an industry such a plan should be applied to; and the proper plan for any single industry. Solutions of the latter type of problem involve the careful exercise of judgment and interpretations of public policy. The collection and dissemination of data is, on the other hand, a more routine task. Some



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advantage may accordingly inhere in the separate exercise of these two different duties.

The choice of an agency to act as the administrator of an open price plan, in the sense of a collector and disseminator of data,<sup>19</sup> should rest upon considerations of its efficiency in performing the task involved. In addition to a capacity for performing much routine work, knowledge of the special conditions of the industry, complete detachment from personal interest, and freedom from pressures that might lead to discrimination or collusion are necessary. There are, moreover, considerations of economy of operation. Various types of administrative agencies may be evaluated, assuming first that central filing and dissemination have been determined to be desirable.

The interest of an industry in an open price plan and the need for knowledge of the special problems and conditions of an industry in administering the plan would recommend that such administration should be entrusted to a representative or committee of the industry group.<sup>20</sup> Such a committee may, however, misuse its authority. There is a possibility that those members of the industry who administer the plan will secure information in advance of others. Furthermore, if an industry group is given charge of price filing and dissemination, it is placed in a position to influence other members of the industry regarding their price offers. Such a group has in its possession not only the price offers, but also the names of the offerers—for even though the names of sellers are not disseminated, they must, as we have seen, be at least

<sup>19</sup> For a discussion of the agency to decide the application of public policy, see Chap. VII.

<sup>20</sup> In the Sugar Institute case (see p. 51) the Supreme Court approved the use of a trade association as the collecting and disseminating agency under an open price plan.

reported. The semi-official position of such a group might lend it powers of coercion. Moreover, it might slow down price declines by delaying the publication of downward price revisions.<sup>21</sup> There is the further difficulty that the members of an industry may be so busy with their own affairs as to be unable to supervise carefully the operation of an open price plan.<sup>22</sup>

To some degree the objections that apply to the use of an industry committee as the administrative agency will be avoided by the use of a confidential agent. But this is true only to the extent that the confidential agent is limited to technical operations. It is obvious that such an agent, by strengthening tendencies toward agreements or by showing special favor to some units of the industry, may misuse his powers. There is the further danger that a private agency, given an exclusive right to collect and disseminate data so significant as open price information, might charge extortionate fees for dissemination.<sup>23</sup> If the agency were placed under government supervision, and given no authority to censor, modify, or influence filed prices, or to withhold their dissemination, the likelihood of impartial administration would be enhanced.

The use of a governmental agency for the collection and dissemination of information is the third possibility in the organization of an open price system. The per-

<sup>21</sup> Under the NRA there were some instances of attempted safeguards against these possibilities of abuse of power and inequitable administration. Some 55 NRA open price plans prohibited release of information to one member or members before others. Nine codes prohibited any comments by the agency in dissemination, and 53 prohibited the destruction of price records.

<sup>22</sup> This difficulty was observed by Thorp and Caesar in *A Study of Open Price Filing in the Electrical Manufacturing Industry*, pp. 189-90.

<sup>23</sup> This would, because of the pressure of constituent members under such circumstances, be less likely to occur where an open price system was administered directly by an industry group.

formance of this work by a governmental agency should give widespread industry confidence in an open price system, and should simplify problems of enforcement. The use of existing regional government offices in collection and dissemination might lend economy to operation. Dangers of price agreements would be minimized.<sup>24</sup>

There are, however, certain limitations to the use of a government agency in the collection and dissemination of open price information. There are dangers of inflexibility in operation and difficulties in arranging an adequate plan of finance and assuring continuity of administration. Moreover, the many different conditions of production and sale as among industries would require a technical staff perhaps beyond the proportions which the government would be likely to assemble. In view of these factors, and because of the special capacities of industry groups noted above, it is quite possible that where open price plans have been or are developed, and show an adequate regard for the public interest, the most practicable and effective operation might be attained through administration by the organizing groups or their agents, with an adequate degree of governmental supervision.

There are some industries in which filing and dissemination through any central agency will be regarded as undesirable. This may be true of such an industry as retailing, in which the trade of each unit is essentially local in character. Under such circumstances, because of the small area in which dissemination is necessary, and because of the relative ease with which buyers and competing sellers can ordinarily acquire the price information that concerns them, it may be entirely adequate to re-

<sup>24</sup> Educational programs, suggesting methods of using data on prices, stocks, sales, shipments, and the like, which an extensively developed open price system might make available, could also perhaps be best carried on by government.

quire merely the posting of prices at the place of sale, and, in some instances, a stipulation that prices be published in a manner that will make them readily available. In such cases, the work of a central agency, if any were needed, would be limited chiefly to inspection and enforcement.

Distribution of open price data by sellers may be regarded as desirable in some industries because of the speed and economy of this form of dissemination and because this procedure avoids the difficulties of arranging some form of assessment to meet the expenses of operating an open price plan and the temptation of a central agency to influence prices.<sup>25</sup> Where dissemination is entrusted to sellers, however, the dangers of inequitable administration noted above always exist (see page 114).

#### THE APPORTIONMENT OF COSTS

The principles upon which the costs of an open price system should be apportioned among the various parties concerned require careful consideration. In planning such allocation it is important to remember that there is a general social interest in the dissemination of trade information as well as a private interest on the part of those who hope to benefit thereby. The rule that appears best is to rely on private interest to pay the cost in every situation where the desired social ends seem likely thus to be accomplished. In this manner the costs may be assessed in some degree on those who benefit, and at the same time the waste involved in general dissemination, in which distribution may be made to some who have no use

<sup>25</sup> These reasons were advanced in support of dissemination by sellers in the fertilizer industry under the NRA. (Simon N. Whitney, *Fertilizer Industry Price Filing Study*, p. 12.) The code authority also received copies of filed prices and sent out lists of schedules filed with them so buyers and competitors could see how complete was their collection of schedules.

for the data, may be minimized. Where sufficient dissemination will not be accomplished by this means, there is justification for the operation of an open price system at least in part at public expense.

The extent to which provision will be made for the collection and the dissemination of price information, if reliance is placed entirely on the interests of individual buyers and sellers, will be limited by the judgments which those individuals make of the probable benefits to be received in comparison with the costs involved. Private interest will frequently, perhaps usually, be sufficiently strong to finance both the collection and dissemination of price information to the degree regarded as socially desirable. This fact will no doubt make it profitable for individuals or companies to enter the business of collecting and disseminating the needed price data on a fee basis. The more usual method will undoubtedly be to have the work done directly by the trade or open price association of the industry involved. In such cases, the operations may be financed out of the treasury of the association, or there may be special fees for the data distributed to the industry members or their customers.

There may be cases in which private interest will not bring about as wide a distribution of data as is desirable from a social point of view. In such cases it may be necessary to apportion to government some of the costs of distributing and collecting data. It seems probable, however, that in most instances government aid could be limited chiefly or entirely to the collection of data, dissemination at public expense not being carried beyond making the data available for inspection. Buyers and sellers, it may be expected, will ordinarily have sufficient interest in open price data to assure the achievement of a socially desirable degree of dissemination at their own ex-

pense, even though they may not be willing to bear the costs of collection as well. This dissemination may come about either through the direct examination of the data by buyers and sellers or their agents, or through the establishment of private or governmental reporting agencies which will disseminate the information upon the payment of a fee.

#### PAST PRICES, CURRENT PRICE OFFERS, OR FUTURE PRICE OFFERS

Perhaps the most controversial issue which has arisen in connection with open price systems has been the question whether the information to be available should include past prices, current price offers, or future price offers; that is, whether prices should be reported after transactions are made, approximately at the time they are made, or sometime in advance of the making of transactions.

The discussion of this issue has centered in large degree about the so-called "waiting period problem." The term "waiting period" has been applied to that period which elapses between the filing of a price offer and the time that offer may be made effective in actual sales transactions. To provide for a waiting period in an open price plan is, in effect, to provide for the filing of *future* price offers. As has been pointed out (see page 19), early Supreme Court decisions were interpreted by some as having declared the filing of other than *past* prices to be unlawful. Following these decisions and prior to the NRA, waiting periods in open price plans were accordingly viewed as illegal. Under the NRA, however, waiting periods were provided in a large number of open price systems.<sup>26</sup>

<sup>26</sup> Presumably under those provisions of the National Industrial Recovery Act which provided exemption from the anti-trust laws for approved code provisions.

Before examining the arguments for and against the waiting period it is desirable to explain the mechanics of such a period a little more fully. First, it may be pointed out that the requirement of an interim between the filing of price offers and the effective date of these offers may be applied to *all* revisions, or it may be applied only to *downward* revisions or only to *upward* revisions. The open price plans in NRA codes included waiting period requirements of the two former types. None applied the waiting period exclusively to upward revisions.

Next, it should be made clear that the length of the waiting period may vary to almost any degree. In the open price plans established under the NRA, for example, some waiting periods were as short as a day, others as long as 30 days. Ten-day and five-day periods were the most common. The frequency of price change characteristic of the industry and the time required to disseminate price data have been important factors in influencing the length of the waiting period, as has the desire to achieve some degree of price control.

Whatever the duration of the waiting period, wherever such a period exists, it is always necessary that provision be made to care for the desire of sellers to meet the newly filed price offers of their competitors. If one producer announced a price, to become effective at the end of the waiting period, his competitors would be at a disadvantage if, when announcing a price to meet his, they were obliged to wait the full length of the waiting period before their price became effective. If this were the regulation, those who filed later would be compelled to charge their former prices while the competitor who filed earlier would be, for a period of time equal to that between his filing and that of his competitor, in a position to sell at a lower price. This difficulty may be obviated by a provision permitting later filings which merely

meet, but do not go below, earlier ones, to become effective on the same date as those made earlier.<sup>27</sup> To meet the situation just discussed, open price systems may provide that any producer may sell at the lowest filed price regardless of his own actual filings. This type of provision has, however, the disadvantage of being confusing regarding prices actually being charged.

Even where no formal waiting period is specified in an open price system, one may exist in effect. For example, if there is a requirement that the receipt of a price change by the administrative agency be acknowledged, and that no sale be made at the new price until this acknowledgment is received by the price filer, there is in effect a waiting period of the length of time between the filing of the price and the time the acknowledgment is received. The length of this waiting period might be increased somewhat beyond that actually needed for acknowledgment if the administrative agency were tardy or negligent in its duties. Ready price adjustments might be obstructed also where there is a requirement that wherever a price change is made, even in a single item, a complete new price list must be filed. Such a provision interferes with the telegraphic filing of price reports, and hence may delay price changes.

A waiting period in open price plans has been contended for on the ground that it makes possible equality of opportunity to all buyers and sellers for effective adjustment of prices to market changes. There is a certain degree of validity in this position. From the point of view of sellers, it appears to be a fact that where no waiting period exists, those situated near the office to which

<sup>27</sup> Many of the NRA open price plans which included a waiting period included such a provision for the purposes indicated. See Appendix, p. 154.



prices are reported, and from which prices are disseminated, will be favored. Such sellers can both secure and file price information more quickly than those farther removed. Without a waiting period of such length that price information can be disseminated to all sellers in time for each to make a price adjustment which will become effective as soon as that made by the most favorably situated seller, those near the filing and disseminating office will be able to make effective adjustments to market influences more promptly than their competitors. For example, in the absence of a waiting period those near the disseminating office might make an adjustment to a newly filed price of a competitor before more remote competitors had even heard that such a price change had gone into effect.

A further argument for the waiting period, from the point of view of sellers, rests on the fact that a space of time between the announcement and the effective date aids in protecting sellers against possible false information regarding the prices of their competitors. Because a waiting period makes it possible for sellers always to know the existing price offers of their competitors, any allegations by buyers concerning offers received can be readily verified. (For a discussion of this general problem, see page 135.)

The importance of the waiting period in counteracting both the advantages of location, and the effects of false market information, varies with the frequency of price changes, and the size of unit sales—being most significant where price-making forces change frequently, and where unit sales are large.

From the point of view of buyers also, the waiting period has an advantage. It provides a time for the study and analysis of various price offers; and gives a greater

assurance that all will have an equal opportunity to purchase before offers are withdrawn.<sup>28</sup> The extent to which buyers actually gain by a waiting period depends in part upon the frequency of changes in market factors. If these factors are changing frequently, the waiting period may be helpful to some buyers, inasmuch as the time elapsing between the announcement of a price and the time it goes into effect is likely to give some buyers added opportunity to know of those changes, and to make purchases, before the offers are withdrawn. If market factors change only infrequently, a waiting period of moderate length would have less value in providing greater equality of knowledge of the market.

The gain to buyers from a waiting period is dependent also upon the size and frequency of purchases. If purchases are large and infrequent, mistaken judgments of the market are more serious than in cases where purchases are small and are made with considerable regularity. The waiting period, by providing a wider opportunity for buyers to have knowledge of low price offers while they are still effective, is accordingly more significant where unit purchases are large and infrequent.

In the case both of sellers and buyers, when open price plans provide no dissemination other than opportunity for inspection, the effectiveness of a waiting period in counterbalancing the advantages of location is diminished.

There are, however, certain objections to waiting periods where the purpose of an open price system is to facilitate effective competition. Waiting periods are likely to prevent business men from giving immediate effect to their judgment concerning current conditions of the market. To the extent that they do so, they reduce the

<sup>28</sup> Somewhat this same factor is involved in the price raid problem discussed below. See p. 137.

incentive to alertness and initiative, which is presumed to bring about a ready translation of technical advance into reduced prices. Further, to the extent that they interfere with the ready adjustment of prices to changing conditions of the market, they delay the adaptation of production to demand.<sup>29</sup>

The importance of avoiding obstructions to such variations of prices as market forces suggest is well recognized on the organized exchanges, where complete freedom to make price changes, without any form of prior notification, is provided. An open price system as a device for the organization of competitive markets defeats its purpose to the extent that it delays the ready adjustment of price offers to market changes.

One other significant objection to the waiting period in open price systems is the contention that the waiting period gives an opportunity to competitors to bring pressure upon a seller who has announced a reduced price, before any sales can be made at the newly announced price. The waiting period does no doubt afford such an opportunity. There is a question, however, whether pressure brought in this period is more significant than that brought at some other time. It does seem true that where there is a waiting period, tendencies toward coercive price maintenance are more likely to be effective than where a producer can give immediate effect to a price change. The prospect of gaining part of a competitor's

<sup>29</sup> A particular form of this interference was noted in the sale of "special mixes" in the fertilizer industry. As the prices for the whole range of mixes could not be filed in advance, sales were sometimes retarded from the time of inquiry for a special mix until the waiting period had expired on the filing of a price for that mix. (Simon N. Whitney, *Fertilizer Industry Price Filing Study*, p. 31.) This difficulty will arise wherever goods are produced to individual specification, or where the types of commodities that will be demanded cannot be determined in advance. For a discussion of the special problems of constructing an open price plan in industries in which goods are sold to individual specification, see the last section of this chapter.

trade by putting price reductions into effect before competitors can meet them creates an incentive to making price reductions which the waiting period destroys. With this incentive to price reductions lost, the inducement to break away from a price agreement is diminished. Furthermore, a waiting period weakens the defense of any producer against collusive influences. Producers who may make sales at reduced prices immediately upon announcement will have a greater incentive than otherwise to resist collusive influences—inasmuch as they will incur buyer ill will if, having made sales to some customers at a newly announced price reduction, they quickly readjust the price to a higher level.<sup>30</sup>

The various factors which must be considered for and against a waiting period make the question of the inclusion of such a period in an open price system one of extreme complexity. If it seems reasonably certain that the forces within an industry are such that a waiting period tends to weaken competitive forces or to cause collusion, the decision is clearly against the waiting period.

Aside from those cases in which collusion would be anticipated, a decision concerning the social utility of the waiting period involves a determination of whether a better allocation of productive resources will be achieved by the fuller knowledge of price offers which the waiting period may make possible, or by the ready adaptation of prices to market influences which the waiting period will obstruct.<sup>31</sup>

<sup>30</sup> It should be remembered that the identification of price offers facilitates coercion where circumstances are propitious even where there is no waiting period.

<sup>31</sup> Waiting periods, it should be noted, may be regarded as an unstabilizing as well as a rigidifying influence. The unstabilizing character of waiting periods rests in the fact that they tend to make goods flow

Where buyers and sellers are widely scattered, the making of a decision as to the desirability of a waiting period is particularly difficult. Under such circumstances, a waiting period, to permit full dissemination before sales are made, would have to be longer than in other cases. The interference of a waiting period with freedom to make price changes would thus be protracted. On the other hand, because of the lack of contact between competitors there may well be in this type of industry a particular need for the dissemination of price information before sales. The making of such a decision is difficult also wherever market influences, in terms both of supply and demand, vary sharply and frequently, making either the lack of prompt knowledge of the market, or the rigidities introduced by a waiting period, particularly disadvantageous to both buyers and sellers.

A first step toward a solution of this problem would lie in the limitation of the waiting period to the minimum time within which price information could be reasonably well disseminated. In those industries in which simplicity of designations of product and other factors make the use of the telegraph practicable, it may be possible to achieve adequate dissemination within a few hours, or a day at most. However, in those industries in which

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less evenly through the channels of trade than would otherwise be the case. If an announcement is made of a forthcoming higher price, there may result a vigorous wave of advance buying in an effort to "beat" the price raise. This may be followed by a period during which orders will lag or be at a standstill. Conversely, the announcement of a lower price, to be effective at the end of a waiting period, has a tendency to result in an abrupt cessation of orders. If this results in a lowering of stocks below the quantity regarded as normal, and if there is no reason to believe that further reductions are in immediate prospect, there may follow a "bulge" of orders for replacement. The total effect, therefore, as indicated, is to cause purchasing to take the form of a series of spurts and lapses as compared with the more steady and consistent movement that might otherwise have occurred.

market influences change many times within a single day, a waiting period of even several hours may interfere seriously with the ready adjustment of prices to such influences.

The case for the waiting period is perhaps best where goods are sold infrequently, or where sales are highly concentrated in brief periods. Initial quotations may under such circumstances apply to a large volume of business.<sup>22</sup> The full knowledge of price offers which the waiting period may give is consequently of enhanced significance. Errors of judgment in this type of industry are not so readily remedied as in cases where sales are distributed more uniformly throughout the year. Moreover, there is less likelihood of interference by waiting periods with the freedom of price movements where sales are concentrated in definitely known seasons, particularly if a waiting period is required only for initial filings.

In evaluating the desirability of a waiting period for any given industry, consideration must be given to the fact that there are certain offsets to the added knowledge of price offers which it affords. Changes in market factors may actually transpire during the waiting period itself. Moreover, it is impossible fully to judge buyer reactions to various price offers until prices become effective.

In view of these limitations, the added risks of price agreements which they introduce, and the fact that they delay the adjustments of prices to market forces, waiting periods, quite aside from legal considerations, must, with

<sup>22</sup> As examples of industries in which there is such concentration of buying and in which open prices are of special importance, the Federal Trade Commission cites among others the canning industry, woolen fabrics, carpets, and various dress goods. *Open Price Trade Associations*, 70 Cong. 2 sess., S. doc. 226, p. 78.

the qualifications noted on page 130, ordinarily be regarded as of questionable social value.<sup>33</sup>

Two other forms of price reporting remain to be considered. One is to limit filing to *past* prices. Where this method is employed, filing is required on only closed transactions. Prices are reported after sales have been made. In the light of such court decisions as have been rendered, it seems clear that the reporting of past prices can be handled in ways which do not constitute legal restraint of trade. If past price reporting is so organized or operated as to result in price agreements, it is economically undesirable whatever its legal implications. Otherwise, it may be said that the reporting of past prices would contribute materially to a knowledge of market conditions, to better business judgments, and to a better adaptation of supply to market demands. Such gains would be greatly furthered if reports of prices were accompanied by statements of quantities sold, and perhaps certain other data concerning sales or shipments.

A third type of price reporting, and one which might be used in conjunction with past price filing, would provide for the filing of what might be called current price offers. The general objective of this type of filing would be to provide sellers and buyers with a knowledge of *offers currently available* in the market. An examination of various industries might disclose a number in which this purpose could be attained by requiring that sales at

<sup>33</sup> A greater knowledge of the actual operation of waiting periods in open price systems may lead to the conclusion that the waiting period is of less significance than has generally been believed. It was found in the electrical industry, for example, that "the filings in many groups show not only a failure to file within the waiting period, but even delays of weeks before the new filing is met. The speed of reaction varies with the importance of the price change. Where it is a major change, it will proceed . . . with more rapidity." Thorp and Caesar, *A Study of Open Price Filing in the Electrical Manufacturing Industry*, p. 185.

new price offers be postponed until the offers are received by the administrative agency—not awaiting even an acknowledgment. Such a provision for the filing of current price offers, however, develops into a requirement for the reporting of future price offers wherever any considerable time is required in the transmission of a price report. Where this period is long, if it seems desirable to disseminate knowledge of current offers, there might be a requirement merely that all offers be transmitted as soon as made. The provision of full knowledge of currently available offers would, under such circumstances, be impossible without a waiting period.

In determining the social desirability of reporting current price offers, in addition to past prices, certain considerations are important. The first is similar to one already discussed above in connection with the waiting period. It involves a weighing of the relative advantages of the added knowledge of price offers provided by current price reporting against the greater freedom of action made possible where only past prices are reported. The reporting of current offers goes beyond the reporting of past prices in giving sellers knowledge of what their competitors are quoting. It thus adds to the information upon which they may base their price judgments. Moreover, by giving a fuller knowledge of what prices are available, it helps, as we shall see in the next section, in solving the problem of so-called “buyers’ misrepresentations” (see page 135).

The reporting of only past prices, on the other hand, gives a maximum of freedom of action to sellers, as no formalities whatever are required before price changes are made. In industries in which market forces change very frequently, adjustment to those changes will be



delayed by whatever time is required in the reporting of current prices.

A second important consideration concerns the effects of reporting current price offers on the incentive to make price changes, particularly downward adjustments. It seems reasonable to believe that if any given producer can for a time maintain a price below his competitors', he stands to gain, at least temporarily, not only a portion of the additional demand generated by the price reduction, but also perhaps even a portion of his competitors' trade. This possibility of gain constitutes an incentive to the making of downward price adjustments. However, the more quickly competitors become advised of price reductions, the more quickly they will be in a position to make a similar reduction and to share in the increased demand thereby generated. The reporting of current price offers as compared with the reporting of only past prices thus reduces the increased sales which any given producer can expect, in the beginning, from a downward adjustment of his price. Any one producer is thus less inclined to make price reductions than he would be if only past prices were reported.<sup>34</sup>

Whereas the reporting of only past prices gives perhaps the greatest incentive to price reductions, it may result in certain undesirable reductions, which the reporting of current prices would tend to prevent. In general, these arise from a lack of knowledge of price offers as among the various sellers and buyers concerned. If an individual working on the belief that his price will not be known for some time makes a downward price adjustment in the hope of securing added business, it is

<sup>34</sup> It should be noted that whatever objections can be made to current prices on this count can be made even more strongly against the reporting of future price offers.

probable that he may make a greater price reduction than he can maintain after his competitors become aware of the situation. His price will then presumably need to be readjusted upward. The result may be a greater fluctuation and instability of prices and production than serve any useful social purposes. In some cases, though this will not often be likely, it may even involve the individual who makes lower prices in the creation of new capital equipment which will presently prove to be ill advised. It appears further that such secret pricing may give to the concerns which follow them and to their customers an advantage which does not arise from any superior economy and one which they might not enjoy if market prices were known to all buyers and sellers.<sup>35</sup>

A third consideration has to do with the effects of reporting current price offers on tendencies toward price agreements. Any dissemination of *identified* price data—whether past or current—may in some industries add to the possibility of such agreements. However, where only past prices are reported, the gain from individual price reductions, and hence the inducement to break away from price agreements, is greater than when current offers are reported.<sup>36</sup>

In the light of the foregoing discussion, it would appear that wherever no forces tending toward price agreements exist and where market factors do not undergo extremely frequent change, there are contributions to be secured through including in an open price system, in addition to reports on closed transactions, provision for the reporting of current price offers. Such reporting, if

<sup>35</sup> For a further discussion of the relation of open prices to incentives to price change, see p. 77.

<sup>36</sup> For a discussion of the relation of future price reporting to price agreements, see p. 128. For a general discussion of the relationship of open price plans to price agreements, see Chap. IV.

properly organized and carefully administered, should in those instances further the possibilities of achieving the advantages of a well-organized open market. Where the conditions described do not exist, price reporting should not go beyond the filing of prices on closed transactions.

#### MISREPRESENTATIONS OF BUYERS

As was pointed out in Chapter II (page 14), sellers in organizing the earliest open price systems hoped to use them in part as a protection against the possible misrepresentations of buyers. Behind this purpose was the belief of sellers that buyers sometimes claim to have received offers lower than is actually the case. To the extent that such allegations are made, two consequences result: (1) those buyers who misrepresent price offers may secure a discriminatorily low price, as contrasted with other buyers; (2) to the degree that sellers are misled by misrepresentations, they may be inclined to sell generally at prices below those which they would otherwise have obtained.<sup>27</sup> It was believed that the introduction of an open price system in an industry would enable sellers to check the accuracy of buyers' statements.

The public interest, as well as that of the individual sellers involved, is served by an open price system which prevents prices from being below the competitive level. Where prices are below the competitive level as a result of ignorance of market factors, productive resources are not guided toward the best use. Manufacturers may withdraw some of their facilities from production or may fail to make additions to capacity where a fuller understand-

<sup>27</sup> While these observations center on the possibilities of avoiding too low a price, it should perhaps be repeated that business men who have wished to establish open price systems have often been as much interested in not having their prices too high as in not having them too low.

ing of market forces would have dictated otherwise. It is true that the influence of misrepresentation in this connection is likely to be only temporary, inasmuch as withdrawals from production or failure to replace capacity may be expected to result in a higher than competitive price. Nevertheless, misrepresentation is likely to be a factor of instability, and one which works against the best allocation of resources to productive use. The public interest in the other aspect of this problem—the possible discrimination among buyers—needs no elaboration.

The view has been expressed by some that if an open price system were adapted to the solution of the problem of buyers' misrepresentations there would be necessary a waiting period of such length that all offers would become known to all sellers before sales could be made at newly announced prices. The disadvantages of such waiting periods in open price systems have been noted earlier. It appears possible to meet this problem satisfactorily without the aid of such a waiting period. If there is a requirement for the reporting of *current* price offers in the manner discussed in the preceding section, sellers are in most instances in a position to check immediately the accuracy of any price offer which a buyer may declare to exist in the market.

To be useful in checking any possible misrepresentations of buyers which might arise, the reporting of current price offers would need to be accompanied by a requirement of adherence to filed prices until the reporting of new offers in one or the other of the two ways discussed on pages 131-132. This plan may, in mechanical terms, appear to be not in keeping with the decision of the Supreme Court in the Sugar Institute case (see page 51). But it is believed that, if unaccompanied by any restrictions on forms of pricing or methods of distribu-

tion, the reporting of current price offers in the manner suggested would not violate the underlying philosophy of that decision.

It has been contended that misrepresentations by buyers can be prevented by reporting only past prices. This, however, is doubtful. If only past prices are on file, verification cannot be made in time to influence transactions under consideration, nor can allegations of price offers ever be verified with certainty. An offer may be made without a sale's being consummated at that price. However, where the reporting of current price offers would interfere with the adaptation of prices to changing market influences, as would be the case where price offers change many times within a single day or even hour, such a plan would be impracticable. In such industries, reporting should be limited to only past prices.

#### THE "PRICE RAID PROBLEM"

Quite similar to the problem of possible buyers' misrepresentations, from the point of view of discrimination among buyers, is the so-called "price raid" problem. The term "price raid" is applied to the practice of some sellers of reducing their prices for the purpose of consummating a single transaction, and then immediately raising the price to the former level. It is pointed out that such temporary price reductions, often being limited to single buyers, are in effect discriminatory in that they are based on price offers not available to all buyers of a similar class.

This problem was clearly recognized in the making of certain NRA codes. The policy "committee" of NRA (discussed on page 28) suggested as a remedy the device of prohibiting the making of price increases for a certain specified period of time following the announce-

ment of a new price offer. Such rulings were made a part of *Office Memorandum 228*. These restrictions were designed to provide all buyers an opportunity to make purchases before a price advance could be made, thus preventing discriminatory, limited, price offers. Where prices are available only for inspection, or where dissemination is slow relative to the length of the period during which prices must remain unchanged, this remedy may be ineffective.

There is, however, some question whether a restriction of this sort is at all essential to the avoidance of discriminatory pricing where an open price system is in operation, and where price data are available to all buyers. There are many occasions on which producers may desire to make especially favorable price offers to single buyers. It is, for example, often advantageous and not necessarily discriminatory to make such offers to large buyers, to buyers who will feature the products, or for the purpose of introducing a product to a new buyer or in a new territory. Discrimination in pricing cannot be said to exist merely because all buyers are not placed on equal terms with regard to a price offer. What then can be regarded as the test of discrimination?

If knowledge of all price offers is made available to all buyers, and if competition exists among producers, the pricing practices of sellers will be restricted to those which can be justified to customers. Under such circumstances, a presumption must stand that any especially favorable price offers made to single buyers are not discriminatory, for where competition exists and buyers and competing sellers are informed, a seller stands to lose those customers against whom he discriminates. Accordingly, where an open price system is in effective operation, it would seem an unnecessary restriction on the free-

dom of sellers to require a period within which price increases were prohibited. It is doubtful whether such a restriction could do anything to avoid discrimination where it persisted even despite buyers' and sellers' knowledge of price offers.<sup>38</sup>

If it is the discovery by buyers of the existence of a sale at an especially low price, the pressure they consequently bring to bear, and the probable competition of other sellers that tend to limit the possibility of discrimination, the reporting of only past prices would be adequate to avoid the discriminatory type of price raid. For price information to be useful in this way, it may, in many instances, be essential that both buyers and sellers in each transaction be identified. It is obvious also that if open price systems are to be useful in restricting price discrimination, dissemination of price data to buyers, as well as to sellers, is important.

#### BID FILING SYSTEMS

While a large proportion of goods is sold in more or less standardized units, there are numerous situations in which products are manufactured to meet individual specifications. Not a little government purchasing, as well as that for much building and equipment, is of the latter sort. Where purchases are made in this manner, it is customary to ask for bids—that is, price offers—to meet the specifications of particular cases. The construction of open price systems to meet the needs of such situations raises certain special problems.<sup>39</sup>

<sup>38</sup> Such discrimination might occur under a monopoly situation, although, even under such conditions, publicity is likely to lessen discrimination.

<sup>39</sup> Open price plans in such situations are often called bid filing systems. The bids in these cases are made by sellers, as distinct from buyers' bids, discussed earlier. The NRA provided for some 29 systems of bid filing,

In most cases of bidding to meet specifications, sellers have less knowledge of current competitive conditions than when sales are for standard products. This arises from two facts. Where goods are sold on specification, products usually vary more from transaction to transaction than do standard products. Moreover sales on specification are likely to be less frequent, with the result that there may be important shifts in cost or demand conditions between sales.

Furthermore, in most cases in which goods are manufactured to specification there is great difficulty in remedying errors of judgment regarding the state of the market. In transactions of this sort a single sale may be a large part of a season's or a year's business. Moreover, in industries in which sales are made on specification, the less frequent recurrence of selling opportunities reduces the possibility of correcting errors of judgment on any particular sale.

These various factors cause data on *past* prices alone to be of a rather limited utility in the case of sales to specification. They may disclose mistakes without giving any guide to current action. Knowledge of offers which are currently being made would be of great service to bidders in the situation described and should result in a more intelligent allocation of resources to use.

There would be at least one other advantage to some

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utilizing almost exclusively the code authority or its impartial agent as the administrative body. In some instances there were provisions for filing only after closing dates—the final date for bidding. In others, even notification of intention to bid was required, and actual bids, of varying degrees of itemization and detail, were called for. Some codes required the filing of exact duplicate bids; others provided for only lump sum bids. In some codes, dissemination was required only after the closing date, and in others before. In certain instances the code authority was empowered to investigate bids made, on complaint of any member of the industry.



arrangement which gave sellers knowledge of current bids in situations of the type here being considered. In view of the limited knowledge which past prices give, it is particularly easy for buyers, in cases where rebidding is possible, to drive bids down by indicating that bids lower than those actually submitted have been received.<sup>40</sup> Knowledge of current bids would, it is believed, check this practice.

On the other hand, it appears to be true that certain of the same factors which in these industries argue for a knowledge of current price offers, argue also against it. Where sales are infrequent, the significance of each transaction is correspondingly great and there is accordingly a greater inducement to the making of price agreements. This inducement is the more likely to be effective in the type of situations here considered, inasmuch as the number of competitors is often relatively small, at least in terms of the number of bidders on any single contract. Furthermore, the infrequency of sales in these industries tends to simplify the problem of enforcing any price agreements which might exist.

In the light of these difficulties of so constructing a bid filing system that it may serve useful social purposes, it may be said that the inauguration of open prices in these industries must be approached with extreme care, and experimentation in them carried on with careful observation.

Where rebidding is not provided, as in the case of government purchases, consideration should be given to the possibilities of organizing for oral bidding, in contrast with the system of closed bidding which now prevails.

<sup>40</sup> This special form of the problem of buyers' misrepresentations is known as "bid shopping." For another discussion of buyers' misrepresentations, see p. 135.

Under a system of secret or closed bidding, inasmuch as the sellers presumably have no knowledge of one another's offers, a seller whose costs are considerably below those of any of his competitors may file a bid much lower than he would be compelled to make if the bidding were competitive and open. There appears to be no social gain in an arrangement which induces a seller thus to dispose of his product below the competitive price.<sup>41</sup> Such disposition not only has the tendency to misdirect resources; but, it seems safe to say, sales so made actually give the purchaser a discriminatory price in the sense that, as a result of the system of buying employed, he receives a lower price than can be obtained by those who must buy in an open market.

It is also possible under a system of closed and secret bids that even the lowest bid received may be higher than would be the case in open competition. A low cost producer, for example, being unaware of the closed offers of his competitors but anxious to obtain as good a price as possible, may submit a bid higher than that which actually secures the business and obviously higher than that which he would have submitted had he known what competitive necessity required. Open oral bidding would seem a possible means of remedying this situation, as well as that of unduly low bidding.

<sup>41</sup> The assumption here is that the seller's advantage does not arise from any monopoly position or from the possession of some special ability that cannot be transferred to other uses. To the extent that advantages arise from these causes, there may be no social loss in a competitively low price, provided no discrimination among buyers results, and provided the best use is made of such position or ability.

## CHAPTER VII

### APPLICABILITY AND GOVERNMENTAL RELATIONSHIP

In the preceding chapter the problems of constructing socially useful open price systems were analyzed. It would probably be possible, with sufficient time and effort, to construct an open price system for any industry which would, at least so far as the mechanics of operation are concerned, meet the tests of social utility. It does not follow, however, that open price systems can be socially useful in every industry.

In the first place, open price plans have a function only in those industries in which some degree of freedom of enterprise is regarded as socially desirable. It is fully recognized that there are certain industries in which a considerable degree of governmental control, perhaps extending even to complete ownership and operation, is more desirable socially than a competitive organization.<sup>1</sup>

Among those industries in which competitive enterprise is thought to be socially useful, there are unquestionably some in which the ordinary pricing practices already in vogue achieve in large part, or entirely, all of the desirable effects which might be gained by a formally organized open price plan. This is particularly true where trade is largely local, or where only a small number of buyers and sellers is concerned. In most retailing, for example, the practice of marking goods and

<sup>1</sup> The important problem of determining the industries to which varying degrees of governmental control should be applied and the bases for such control cannot be treated here. There is great need for more analysis of this subject, particularly in terms of specific industries.

of price advertising gives a large proportion of buyers reasonably good information as to prices. The use of "shoppers" to make comparisons—especially by department stores—gives sellers knowledge of their competitors' prices. In certain manufacturing industries also, price lists are so widely distributed by sellers that a knowledge of price offers is general.<sup>2</sup> While open price plans may in all these instances contribute something to the effectiveness of market organization, the expenses involved in any elaborate plan would probably not be justified in view of the slight gains to be achieved.

There are also, as was pointed out in Chapter IV, certain industries in which the utilization of an open price plan would strengthen potential tendencies toward monopoly, or price agreements, or support such a degree of monopoly or price agreement as already existed. In such instances the case is against the establishment or continued operation of open price systems.<sup>3</sup>

There are, on the other hand, certain industries in which the organization of open price systems is justified and socially desirable in view of the possibilities which they present for improving competition within the industry, for lessening discriminatory practices, or for reducing elements of monopoly or price agreement which may exist.<sup>4</sup>

<sup>2</sup> Even in some of these industries, however, there may be such use of indirect pricing as to lessen the effectiveness of nominal price lists in giving full knowledge of actual prices. See *Open Price Trade Associations*, 70 Cong. 2 sess., S. doc. 226, p. 76.

<sup>3</sup> The argument that social advantage might accrue from the encouragement of monopoly in certain areas of industry cannot be examined here. This is a subject needing further inquiry.

<sup>4</sup> It is sometimes contended, as a criticism of open price systems, that they render the making of market judgments more difficult by bringing into view complexities not before generally seen. The rôle of open price systems is, however, to gather and disseminate information concerning market factors. The difficulties that exist in the evaluation of these factors grow not out of the open price plans but rather out of the in-

In those industries in which it does appear that open price plans may be socially useful, conditions will be more favorable to their organization:

(1) To the extent that it is possible to classify and describe the products manufactured with such clarity that buyers and competing sellers can make accurate comparisons. Further efforts toward grading, standardization, and informative labeling may be made effective in developing an adequate degree of comparability of products and prices in some industries where such comparability does not at present exist.

(2) To the extent that the costs of collection and dissemination are low in comparison with anticipated benefits. In certain cases it may be found that even the compilation of lists of buyers and sellers is impracticable, if not impossible. In other cases it may be that the gathering and dissemination of data involve unduly heavy costs. The greater the variety of products, the more widely buyers and sellers are scattered, and the greater the frequency of price variations, the more costly the operation of an open price plan will be. Moreover, if the variety of products is extensive, individuals may be overwhelmed by the effort to peruse, much less to evaluate carefully, the price data which come to them under open price plans. In cases of a large number of products, of widely scattered buyers and sellers, or of frequent price variations, making full reports available for inspection, supplemented by general dissemination of summary analyses and dissemination of full reports on request, may represent a satisfactory alternative to the general dissemination of full reports. Such summary analyses, inasmuch as they do not identify individual sellers, may

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tricacies of the market situations and the limitations of human ability in judging the significance of those situations.

be socially useful even in cases where strong tendencies toward monopoly are present.

(3) To the extent that the members of an industry manufacture or sell a similar range of products. Where there are great differences as among the members of an industry in the range of products handled, it may become necessary for one member to file reports with a number of different open price agencies. This difficulty is likely to be greatest among wholesalers and retailers. It is likely to be minimized where the administration of all open price plans is in the hands of the government.

(4) To the extent that the competition in the industry is primarily competition in price. While competition is always to some degree a matter of price, nevertheless in some industries differences between the products of competitors may be so great and products so unique that matters of design far transcend price as a significant competitive factor. Under such circumstances, a knowledge of commodity characteristics is paramount to buyers in making judgments. Even in such cases, however, an open price plan would be useful. It would give buyers knowledge of the various offers in the market and would provide potential competitors with knowledge of the opportunities for manufacture or sale. The day to day significance of price information may, however, in these industries be of less importance than in those in which competition expresses itself primarily in price.

There are also industries in which the competitive effort is so largely expressed in changes in the product that such changes outweigh in importance the changes in price as a competitive factor. Under such circumstances a knowledge of price changes will not provide an adequate understanding of the market. Indeed, in an industry in which competition expresses itself largely in

changes in the quality of the product, it is difficult to provide a real knowledge of the competitive situation.

(5) To the extent that the open price plan is inclusive of the members of the industry. If some do not become a part of the system, they fail to make known their market position, while those of their competitors become exposed to competitive attack.

(6) To the extent that the plan will not bring about greater inaccuracy in price reporting than would otherwise have existed. Inaccurate reporting may lead actually to a further confusion of buyers and sellers than would otherwise have occurred and to discrimination against those who have reported their market position truthfully. The accuracy of price reporting is as much a matter of filing information concerning price terms, conditions of sale, and related transactions, as of reporting mere nominal monetary prices. Some degree of difficulty in securing accuracy in reporting may be expected in any system of open prices. This difficulty is likely to be most serious, however, where the degree of centralized supervision is least and where administration is in the hands of interested parties. In some industries there may be need of government backing to assure the accuracy of filed prices.<sup>5</sup>

(7) To the extent that the system will not bring about the introduction of new forms of indirect pricing, or of similar but differently branded articles, of such character as to create greater confusion concerning the actualities

<sup>5</sup> Of the fertilizer industry under the code it was observed in the study made by the Review Division of the NRA: "It is perhaps fair to infer tentatively that price filing can be enforced with reasonable success in this industry, if the efforts of the industry itself are backed by governmental authority, and that the costs of administration would be reasonable compared to those involved in enforcing the codes of many other industries." (Simon N. Whitney, *Fertilizer Industry Price Filing Study*, p. 44.)

of the market than would otherwise have existed.

(8) To the extent that members of the industry will not use the greater knowledge gained through the system as a special means to the underselling of their competitors, without adherence to the prices which they themselves may have filed.

We may turn finally to a brief consideration of possible governmental relationship to the establishment of open price systems. It is first necessary to be reminded that the establishment of open price systems involves important issues of public policy. An open price plan in an industry may, as we have seen, work either to restrict competition or to make the operation of competitive forces even more effective. Open price plans would necessarily be differently designed if they were to facilitate the achievement of informed competition than if they were to further a system of state cartels or some other form of economic organization.

It is therefore necessary in the beginning to have as a general basis of action a clear declaration of public policy on the nature of unfair competition. It is obvious that the determination of such basic public policy must arise from the action of appropriate legislative bodies as interpreted by court decisions. It cannot properly be determined by interested persons or groups.

Given a declaration of the public policy in line with which open price plans are to be devised, it is necessary to determine in the case of each industry for which such a plan is being considered whether or not an open price system can be so organized as to be consistent with that policy. It is at this point that the complexities of industries and the great variations between them, as well as the varied effects of different types of open price sys-



tems in any single industry situation, give rise to difficult problems. There is need in this connection for careful and detailed economic analysis to determine the probable effects of any particular open price plan for any single industry.

It is with the determination of whether a given form of open price plan in a particular industrial situation is in line with declared public policy that the courts deal in the specific open price cases which come before them. They are confronted with an open price plan in a given form and in a given industry. The problem they determine is whether in that form and in that industrial situation there is conformity to approved public policy.

In exercising this function, courts necessarily must act after the fact; that is, it is after the open price plan has been in operation in a given industry situation, and often for some time, that they are called upon to assess its proprieties and limitations. In making such an assessment after the fact, the courts are in a peculiarly favorable position, because they can secure evidence on the results of the operations of a specific open price plan in a given situation.

But, from the point of view of encouraging the rapid development of open price plans soundly conceived in the public interest, this procedure for testing the social utility of such plans has certain important limitations. Case by case determination through judicial review requires years before even a narrow field can be covered.<sup>6</sup> A decade and a half of Supreme Court decisions concerning open price plans has, as we have seen, left many significant questions unsettled.

<sup>6</sup> For a brief but penetrating discussion of this point, see Milton Handler, "Unfair Competition," *Iowa Law Review*, January 1936, Vol. XXI, No. 2, p. 259.

Industries may under such circumstances undergo great expense in organizing open price systems which later are declared illegal. For this reason, and because of a desire to avoid action of doubtful legality, there may result a delayed development of open price plans, even in those industries and in those forms in which they might prove socially useful. There is, moreover, a danger that socially undesirable open price plans may in some industries remain in operation for a considerable period of time.

It seems desirable, in view of these difficulties, to have industries lay proposed open price plans before a governmental agency which, working with a general declaration of public policy, is properly empowered and staffed to pass upon the probable economic effects and social utility of such plans, and indeed to aid in their sound formulation, before they are put into operation.

The gravity of the issues of public policy involved in the construction of open price systems is such that it is essential that the governmental agency participating in this work be impartial and that its membership have a tenure of office which will assure continuity of interpretation of policy and the absence of undue pressure.<sup>7</sup> Whatever the agency utilized to perform these functions, it is important, because of the nature of the analyses required in evaluating open price plans, that the membership of the agency be so chosen that ability to make economic judgments is as well represented as is capacity for legal decision.

The difficulties of forecasting the results of an open price plan, either in business or in social terms, are very

<sup>7</sup> The problems involved in empowering such an agency cannot be at all adequately treated here.

great. It seems desirable, therefore, to provide for such degree and kind of continuing observation by the co-operating governmental agency as will provide an understanding, in terms of declared public policy, of the effects of those plans which are put into operation.

It may be expected that with such a procedure as has been outlined—business groups contributing their special knowledge of industries and industrial problems, and a governmental agency contributing its broader outlook and testing proposed and operating plans on the basis of their conformity to public policy—socially useful open price plans could be constructed and maintained in many industries.

**APPENDIX**  
**TABULATION OF NRA OPEN PRICE PLANS**

NRA CODE PROVISIONS RELATING TO OPEN PRICE AND BID FILING SYSTEMS\*

Classified According to Code Division and Subject Matter Covered

Subject Matter	Food Division	Textile Division	Basic Materials Division	Chemical Division	Equipment Division	Manufacturing Division	Construction Division	Public Utilities Division	Finance, Graphic Arts, Amusement Division	Professions Division	Wholesale and Retail Division	Total
<b>Speed of Dissemination Required of Agency:</b>												
By mail.....	—	—	2	1	2	2	—	—	—	—	1	8
"Immediately" or "promptly".....	7	13	36	37	86	68	1	1	2	—	11	262
No provision.....	14	9	19	—	25	6	—	3	1	3	10	90
<b>Prohibition of Release to One Member before All.....</b>	5	1	8	5	13	17	—	1	1	—	4	55
<b>Identification by Central Agency of:</b>												
<b>Seller:</b>												
Mandatory.....	5	1	8	4	13	13	—	1	1	1	5	52
Optional.....	4	—	1	1	1	1	—	—	—	—	—	8
Prohibited.....	—	1	—	—	—	—	—	—	—	—	—	1
No provision.....	12	20	46	41	98	60	1	3	2	2	17	302
<b>Buyer:</b>												
Prohibited (past transactions)....	—	2	—	—	—	1	—	—	—	—	—	3
<b>Waiting Period Requirements:</b>												
<b>None:</b>												
Effective upon receipt by agency.....	6	5	15	8	18	17	—	2	1	—	10	82
Effective upon agency's acknowledgment.....	—	—	2	—	—	3	—	—	—	—	1	6
Effective even before filing.....	1	9	5	2	4	—	1	—	—	1	5	29
Code authority may establish.....	3	—	9	1	6	4(1s)	—	1	—	—	—	23(1s)
Before any revisions (no. of days)....	12(12s) <sup>b</sup>	3(1s)	14(7s)	3(1s)	61(55s)	33(27s)	—	3(1s)	—	3(2s)	8(6s)	140(112s)
Before decreases only (no. of days)....	—	11(9s)	21(9s)	37(28s)	31(11s)	26(14s)	—	—	2	1(1s)	5(2s)	134(74s)
Before increases only (no. of days)....	—	—	—	—	—	—	—	—	—	—	—	—
<b>Alteration of Waiting Periods:</b>												
<b>Shortening:</b>												
To meet competitor's reduction effective upon same date:												
Whether or not below.....	1	8	5	10	44	10	—	—	—	—	2	80

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If not below . . . . .	2	3	20	23	34	37	—	—	—	—	3	122
If filed before certain time . . . . .	—	—	4	2	5	2	—	—	—	—	—	13
Code authority may shorten . . . . .	—	1	5	2	15	4	—	—	—	1	1	29
No provision . . . . .	9	3	10	5	13	13	—	3	2	3	8	69
Code authority may lengthen . . . . .	—	—	1	1	1	—	—	—	—	—	—	3
<b>Minimum Period Between Revisions:</b>												
Before any changes (no. of days) . . . . .	—	—	—	—	—	1	—	—	—	—	1	2
Before increases only (no. of days) . . . . .	5	1	8	5	13	14	—	1	1	—	4	52
Before decreases only (no. of days) . . . . .	—	—	—	—	—	—	—	—	—	—	—	—
Limitation on number of changes . . . . .	—	—	—	1	—	—	—	—	—	—	—	1
<b>Filed Price and Effective Price:</b>												
Must sell at filed price . . . . .	20	8	38	10	80	48	—	5	1	4	20	234
May sell above filed price . . . . .	1	18	27	39	38	34	1	—	2	1	9	170
May meet lowest filed price . . . . .	5	2	1	—	2	8	—	1	—	1	2	22
May sell special goods below . . . . .	2	5	1	—	4	1	—	1	—	—	2	16
<b>Area of Price Uniformity:</b>												
Regional variations permitted . . . . .	3	—	6	6	2	4	—	—	—	—	4	25
Code sets up regions for price reporting . . . . .	—	—	7	1	—	1	—	—	—	1	4	14
Code authority may set up regions for price reporting . . . . .	3	—	—	4	—	—	—	—	—	—	5	12
Code requires uniformity in all regions . . . . .	—	—	3	—	—	1	—	—	—	—	—	4
<b>Prohibition of Comments by Agency in Dissemination . . . . .</b>	8	—	—	—	—	—	—	—	—	—	1	9
<b>Destruction of Agency's Price Records Prohibited . . . . .</b>	5	1	8	5	13	15	—	1	1	—	4	53
<b>Adjustment of Bids when Prices Increased:</b>												
Bids must be increased . . . . .	—	—	1	—	1	—	—	—	—	—	—	2
Must be registered but not increased . . . . .	—	—	4	—	4	3	—	—	—	1	—	12
<b>Substitutes for Central Filing:</b>												
Members must post prices . . . . .	1	1	1	—	—	—	—	—	—	1	—	4
Members must exchange prices directly . . . . .	1	—	—	—	—	—	—	—	—	—	—	1
Prices must be sent to customers . . . . .	—	—	—	—	—	—	—	—	—	—	—	—

<sup>a</sup> This table is, in rearranged form, a reproduction of one presented in *Report on the Operation of the National Industrial Recovery Act*, Research and Planning Division, NRA, February 1935. The authors collaborated with the Research and Planning Division in planning the categories for this table. The count is entirely the work of the Division.

<sup>b</sup> The letter *s* indicates that the provision was stayed by administrative order.

NRA CODE PROVISIONS RELATING TO OPEN PRICE AND BID FILING SYSTEMS\* (Continued)

Subject Matter	Food Division	Textile Division	Basic Materials Division	Chemical Division	Equipment Division	Manufacturing Division	Construction Division	Public Utilities Division	Finance, Graphic Arts, Amusement	Professions Division	Wholesale and Retail Division	Total
Must publish prices in trade periodicals.....	1	—	—	—	—	—	—	—	—	—	—	1
May not sell below reported prices.....	2	1	1	—	—	—	—	—	—	—	—	4
<b>Filing of Sealed Bids:</b>												
<b>Establishment of system:</b>												
Code provides details.....	—	—	2	—	2	4	12	—	—	—	—	20
Code authority to set up rules.....	—	—	2	—	—	—	7	—	—	—	—	9
<b>Depository with which filed:</b>												
Code authority.....	—	—	2	—	2	1	1	—	—	—	—	6
Impartial agent named by code authority.....	—	—	—	—	—	1	9	—	—	—	—	10
Estimating bureau.....	—	—	—	—	—	2	—	—	—	—	—	2
Some other agency.....	—	—	—	—	—	—	2	—	—	—	—	2
<b>Time of filing:</b>												
Before closing date (no. of days in advance).....	—	—	1	—	1	3	6	—	—	—	—	11
After closing date.....	—	—	—	—	—	1	—	—	—	—	—	1
No provision.....	—	—	1	—	1	—	6	—	—	—	—	8
<b>Information to be filed:</b>												
Notification of intent to bid.....	—	—	1	—	2	—	1	—	—	—	—	4
Exact duplicate bid.....	—	—	2	—	2	3	12	—	—	—	—	19
Lump sum bid only.....	—	—	—	—	—	1	—	—	—	—	—	1
Itemized quantities.....	—	—	—	—	—	1	1	—	—	—	—	2
Other data.....	—	—	—	—	—	—	—	—	—	—	—	—
<b>Time of opening by depository:</b>												
Upon receipt.....	—	—	—	—	1	2	—	—	—	—	—	3
After closing date (no. of days after).....	—	—	1	—	1	1	12	—	—	—	—	15
No provision.....	—	—	1	—	—	1	—	—	—	—	—	3
<b>Time and extent of dissemination:</b>												
<b>When opened before closing date:</b>												
Released before closing date.....	—	—	—	—	1	—	—	—	—	—	—	1
Released after closing date.....	—	—	—	—	—	2	—	—	—	—	—	2

When opened after closing date:	—	—	—	—	—	—	1	—	—	—	—	1
Available for bidders' inspection	—	—	—	—	—	—	11	—	—	—	—	14
Sent to all bidders.....	—	—	1	—	1	1	—	—	—	—	—	3
No provision.....	—	—	1	—	1	1	—	—	—	—	—	3
Code authority to investigate bid upon complaint of member.....	—	—	—	—	—	1	8	—	—	—	—	9
<b>Total Number of All Codes.....</b>	<b>29</b>	<b>97</b>	<b>87</b>	<b>70</b>	<b>164</b>	<b>123</b>	<b>23</b>	<b>14</b>	<b>16</b>	<b>8</b>	<b>78</b>	<b>709</b>
<b>Office Memo No. 228 Incorporated.....</b>	<b>5</b>	<b>—</b>	<b>8</b>	<b>5</b>	<b>11</b>	<b>13</b>	<b>—</b>	<b>1</b>	<b>1</b>	<b>—</b>	<b>4</b>	<b>48</b>
<b>Establishment of System:</b>												
Mandatory.....	19	26	60	29	74	63	—	6	2	5	20	304
At discretion of code authority.....	3	3	6	22	45	18	1	—	1	—	7	106
By majority vote.....	—	2	4	—	37	10	—	—	1	—	2	56
<b>Abandonment of System:</b>												
At discretion of code authority.....	—	2	—	7	10	—	—	—	2	—	1	22
By majority vote.....	—	—	—	—	1	—	—	—	2	—	—	3
<b>Degree of Compulsion on Mem- bers to File:</b>												
Obligatory.....	22	31	65	51	121	82	1	6	3	5	27	414
Optional.....	—	—	—	—	—	1	—	—	—	—	2	3
Optional—lowest filed price im- puted.....	—	—	2	21	1	—	—	—	—	—	2	26
Certain members exempted.....	—	1	1	—	1	—	—	—	—	—	—	3
<b>Agency with Which Information is Filed:</b>												
National code authority.....	13	20	46	40	99	50	1	3	2	3	14	291
Regional code authority.....	2	—	7	—	—	1	—	2	—	2	8	22
Trade association.....	1	8	4	6	6	2	—	—	—	—	3	30
<b>Impartial agency:</b>												
Named by code.....	—	—	—	—	—	8	—	—	—	—	—	8
Named by code authority.....	6	1	9	5	19	27	—	1	1	—	4	73
Named by administrator.....	5	1	8	3	10	12	—	1	1	—	3	44
<b>Buyers Concerning Whom Mem- bers Exempted from Filing Information:</b>												
By implication.....	—	—	2	6	4	3	—	—	—	—	1	16



NRA CODE PROVISIONS RELATING TO OPEN PRICE AND BID FILING SYSTEMS\* (Continued)

Subject Matter	Food Division	Textile Division	Basic Materials Division	Chemical Division	Equipment Division	Manufacturing Division	Construction Division	Public Utilities Division	Finance, Graphic Arts, Amusement Division	Professions Division	Wholesale and Retail Division	Total
<b>By code:</b>												
Governments.....	1	—	—	3	—	—	—	—	—	—	1	5
Certain large buyers.....	—	—	—	—	2	—	—	—	—	—	—	3
Others.....	1	1	—	2	1	1	—	—	—	—	2	7
<b>Products Respecting Which Information Must be Filed:</b>												
All products.....	12	15	27	13	27	27	—	6	—	2	17	146
Code authority to prescribe.....	3	1	—	22	49	11	1	—	2	1	4	94
Determined by majority.....	—	1	—	—	37	6	—	—	1	—	—	45
Standard products only.....	1	3	4	5	19	11	—	—	—	1	2	46
Standard and selected non-standard products.....	3	1	9	2	12	14	—	—	1	—	3	45
Code specifies certain products.....	1	1	3	1	1	4	—	1	—	—	1	13
Code excludes certain products.....	2	1	1	2	3	1	—	—	—	—	2	12
No provision.....	2	7	22	8	14	20	—	—	—	1	4	78
<b>Information Which Must Be Filed:</b>												
<b>Prescribed by code:</b>												
Prices only.....	1	4	5	4	7	3	—	2	—	1	3	30
<b>Items in addition to prices:</b>												
Terms and/or conditions of sale.....	19	21	47	45	95	64	—	3	3	4	24	325
Discounts.....	15	18	40	43	104	71	1	2	1	2	16	313
Allowances.....	5	7	22	15	25	25	—	—	1	1	12	113
Rebates and/or commissions.....	3	4	16	6	22	22	—	1	1	—	4	79
Other items.....	2	5	13	12	23	22	—	2	2	1	7	87
Names of customers.....	—	—	9	—	6	3	—	—	—	—	—	18
Past prices only.....	—	2	—	—	1	—	—	—	—	—	—	3
Code authority may alter data required.....	1	—	2	—	2	—	—	—	—	1	—	6
Code authority prescribes data required.....	3	—	—	—	—	—	—	—	—	—	—	3
Code authority prescribes reporting form.....	1	1	1	28	7	19	—	—	—	—	2	59
<b>Number of Price Lists to be Filed:</b>												
Enough for all members.....	—	3	9	3	15	14	—	—	—	—	—	44
Enough for members and customers.....	—	—	—	—	2	1	—	—	—	—	—	3



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