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CONCERTED PRACTICES: CONCEPT AND EVOLUTION

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Abstract. The doctrine of concerted practices has been developed over several decades of jurisprudence. To grasp this doctrine in a coherent and structured manner is essential for understanding cartel enforcement under Article 101 TFEU. This article shows that the evolution of concerted practices could be divided analytically into six distinct stages. Some important precedents have been adopted at each stage. We capture them by the succinct formulation of "rules". The entire set of "rules" concisely represents the doctrine of concerted practices. We then turn to their critical reflection. A fuller picture of concerted practices emerges, revealing important weaknesses in the doctrine: (i) an apparent lack of new conceptual developments, which could be partially explained by the rule that enabled imprecise qualification of cartel infringements as agreements "and/or" concerted practices; and (ii) rebuttable presumptions and notions of passive participation or tacit acceptance of collusion gradually turned into a sui generis prohibition of exchange of information, which is hardly compatible with the definition of concerted practices or even violates the presumption of innocence. The doctrine of concerted practices was shaped before the age of the internet and virtual competition, which makes it fairly outdated for addressing emerging issues of algorithmic collusion. We could expect a resurgence of interest in the fundamentals of the concept and forthcoming new conceptual developments.

Keywords: concerted practices, tacit acceptance of collusion, exchange of information, rebuttable presumptions, cartel enforcement, the EU competition law.

Introduction

The concept of concerted practices is at the forefront of cartel enforcement under Article 101 TFEU. It catches the most sophisticated cartels that cannot be qualified as cartel agreements. However, despite more than 50 years of development of jurisprudence, the doctrine of concerted practices has not seen major new improvements for quite a while: (i) the concept itself is defined rather vaguely, which results in legal uncertainty (Odudu, 2006, ch. 4); (ii) the distinction between concerted practices and conscious parallelism remains the classic puzzle in antitrust law (oligopoly problem) (Petit, 2013); and (iii) in the ever sophisticated and diversified business world and digital economy, antitrust scholars face a challenge to offer workable solutions on how to deal with collusion by algorithms (Gebicka & Heinemann, 2016). Meanwhile, courts, especially national ones, apply the precepts of concerted practices formulated decades ago without much critical reflection.[2]

The existing competition law literature covers various aspects of concerted practices, but usually in a fragmented manner (e.g., Whish & Bailey, 2015). The purpose of this article, then, is to provide a more coherent analysis of the Court of Justice of the European Union's (CJEU's) case law, with some critical reflections. Understanding how the concept evolved is crucial for practical purposes when courts have to apply it. The analysis in this article

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[2] The concept of concerted practices is an exclusive and autonomous concept of the EU competition law. Thus, national courts or competition laws cannot apply it more stringently than is allowed under Article 101. To that effect, see Regulation 1/2003 (2003, Article 3(2)).

should also be useful for further research on concerted practices due to the orderly presentation of jurisprudence and the ensuing discussion.

The article begins with the exposition of concerted practices, discussing their origins, purpose, definition, and constitutive elements. Then, it shows how the concept evolved in the CJEU's case law. Thus, the primary method is an analysis of case law. It appears that the whole evolution of concerted practices could be divided into six distinct stages. At each stage, some important precedents have been adopted that shaped the current meaning of concerted practices. Each precedent is followed by the formulation of a "rule" that helps to quickly grasp what a particular case has contributed.

1. The concept of concerted practices

1.1. Legal origins

The legal origins of concerted practices trace back to the U.S. antitrust law notion of "concerted actions". The Supreme Court of the United States early on interpreted that "concerted actions" prove the violation of §1 of Sherman's Act, which prohibits any "contract", "combination", or "conspiracy" that restrains trade or commerce. Kaplow (2013, pp. 77–92) provides a review of early case law in the U.S., showing that the term "concerted actions" was first used in the Interstate Circuit (1939). Despite the linguistic difference, concerted practices and concerted actions refer to the same idea – that competition can be restrained by actual conduct, rather than by a formal contract.

Under the competing theory, concerted practices primarily emerged due to French law ("actions concertées"). The 1953 executive decree in France prohibited concerted conduct under national law for the first time in Europe, and the French delegation participated in the drafting of the 1957 Treaty of Rome (Ducourneau, 2013). On this ground, it is claimed that U.S. antitrust law must have played only an indirect role in the adoption of concerted practices.

The competing theory is seriously flawed and cannot be accepted. As pointed out by AG Mayras (1972, p. 669), in France there had been no relevant case law on the subject. It is also based on incorrect facts: the term concerted practices firstly appeared in Article 65 of the Paris Treaty (1951) rather than in French law. Hence, U.S. antitrust law must have instigated the adoption and formation of concerted practices in EU competition law.

It is worth mentioning that the concept of "abstraktes Gefährsdungsdelikt" from German criminal law helped to characterize concerted practices, which is "[…] an offence consisting in the creation of a state of affairs which is dangerous, where no specific danger need be statutorily defined" (AC-Treuhand, §107). We can only speculate whether initial legislation was modelled upon this concept, but concerted practices could certainly be understood as a species of "abstraktes Gefährsdungsdelikt", because cartels as such pose in abstracto danger for competition, as maintained by the EC (AC-Treuhand, §107).

1.2. Legal purpose

The purpose of concerted practices depends on the model of cartel enforcement. There are two of these. The American model is based on a unifying concept of "agreement" that covers all forms and shapes of collusion (Shapiro & Kaplow, 2007, p. 25). The European model is based on the bifurcation of a conceptual scheme into cartel agreements and concerted practices. Both concepts are distinct and autonomous, although they may serve the same underlying goal. Insofar as all legal concepts must have their purpose or reason for existence (*raison d'être*), we must first understand the specific legal purposes of having concerted practices in Article 101.

Purpose 1: cartel agreements did not exhaust all possible cases that prevent, restrict or distort competition. One purpose of concerted practices, therefore, is to catch the remaining cartels ("Plan B"). In particular, concerted practices should catch collusion with the least direct incriminating evidence.

Purpose 2: concerted practices could be understood as the boundary concept which defines the scope of Article 101. The exact scope of Article 101, however, remains unclear, causing trouble for effective cartel enforcement (Odudu, 2006, ch. 1).

1.3. Legal definition

The classic legal definition of concerted practices is the following: "[…] a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition". Furthermore: "By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behavior of the participants" (*ICI v. Commission*, 1972, §64).

In comparison with cartel agreements, concerted practices are a less formal form of practical coordination; concerted practices refer to and should be inferred from actual conduct, but the definition is silent on the "meeting of the minds" criterion,[3] suggesting that concerted practices are somewhat more tangible than agreements. Insofar as the difference between agreements and concerted practices lies in the "degree" or "intensity" of collusion, we could conceive concerted practices as the more basic concept: any concerted practice may potentially turn into a cartel agreement, but not the reverse.

The contrast between agreement and concerted practices in the definition is not sharp. Agreements may be oral and informal ("gentleman's agreement"), so it is unclear how concerted practices differ from them. AG Mayras observes that the "dividing line between agreements and concerted practices cannot be easily determined", and the concept needs to be "built up from the first principles" (AG Mayras, 1972, p. 669). This difficulty reinforces the position that a single unifying concept would perhaps be sufficient (note: from an economic point of view, harm to welfare does not necessarily depend on a form of collusion – cartel agreements, concerted practices, and even lawful conscious parallelism could approach monopoly prices).

1.4. Constitutive elements

By constitutive elements, we mean intrinsic properties that characterize concerted practices and must be present in every case (*T-Mobile*, 2009, §48). They are: (i) common will (mental consensus); (ii) common conduct; and (iii) causality between common will and conduct.[4] Both agreements and concerted practices employ subjective and objective elements. This contributes to a conceptual difficulty in making a distinction between the two. Abstract constitutive elements of concerted practices alone do not provide sufficient clarity. We must turn to the analysis of actual cases to understand what concerted practices entail.

2. The evolution of concerted practices

For expository purposes, I distinguish six distinct stages of evolution. I begin with a formulation of a legal rule, which emphasizes the importance of that particular case. The collection of these rules represents the doctrine of concerted practices. The selected set of cases is comprehensive insofar as it contains the major precedents to date.

2.1. Stage 1: Distinct types of Article 101 infringements

Decision: *Consten and Grundig* (1966)

Rule: *Both horizontal and vertical cartel agreements, concerted practices, or decisions of associations are prohibited under Article 101 insofar as they prevent, restrict, or distort competition either by object and/or by effect.*

[3] The phrase "knowingly substitutes" in the definition does not necessarily imply "with mutual consent".

[4] Some commentators, such as Lorenz (2013, p. 86), alternatively distinguish constitutive elements into: (1) mental consensus; (2) contact between undertakings; (3) substitution of cooperation by competition; and (4) causal link between (1) and (3). The difference, however, is merely in preferences for analysis.

In *Consten and Grundig*, the CJEU established the typology of cartel infringements. Each substantive category under Article 101 – decisions by associations, agreements, and concerted practices – may refer to either horizontal or vertical relationships that could violate competition law either by object and/or by effect (*Consten and Grundig*, 1966, p. 342.). The court also clarified a necessary condition that Article 101 infringement presupposes at least two separate undertakings, ruling out the possibility of applying Article 101 to unilateral conduct (p. 340); and that national intellectual property laws, arguably any national laws, cannot justify Article 101 infringement (p. 346).

The case concerned a vertical agreement between Grundig (supplier) and Consten (distributor), whereby the distributor undertook (i) not to purchase competing goods from any other suppliers, and (ii) to refrain from deliveries outside its exclusively designated territory. Market sharing violates Article 101 "by object".

2.2. Stage 2: Characterization of concerted practices

Decision: *Dyestuffs* (1972)

Rule: *Cartel agreements and concerted practices are two distinct forms of collusion. Concerted practices, in comparison with cartel agreements, are a less intense form of collusion, which manifests itself as practical cooperation by which undertakings intend to substitute the risk of competition. Concerted practices imply intent or awareness.*

The direct application of concerted practices begins with the *Dyestuffs* case. The CJEU found a violation of Article 101 in a market where the 10 largest European producers made three successive, almost simultaneous price increases between the years of 1964–1967 in five European markets. Cartel participants used advance announcements on prices, which made the market artificially transparent and facilitated price-fixing.

(1) The CJEU formulated the current definition of concerted practices. To recap, the most salient features of concerted practices are: first, concerted practices are a distinct and *the least intense form of collusion* that do not amount to a cartel agreement; second, *the concept refers to conduct* – it is defined as *practical cooperation* that could be inferred from observable market conduct (*Dyestuffs*, 1972, §65).

(2) The CJEU also invoked that legal analysis of concerted practices should be complemented by economic analysis: an *overall assessment* implies a consideration of *legal and economic* context, which takes into account the nature of a product, market volume, size, the number of undertakings operating in a particular market, etc.

(3) The CJEU finally sent a clear message that the concept of concerted practices is a working tool for catching illegal collusion: simultaneous price increases and advance announcements will not be tolerated, even though competitors refrained from establishing a cartel agreement properly.

Decision: *Sugar Cartel* (1975)

Rule: *Concerted practices do not require proof that undertakings worked out an actual plan of collusion. Every undertaking must determine its market policy independently. Neither direct nor indirect contact is allowed between them insofar as it reduces market uncertainty or discloses actual or intended conduct in that market. Undertakings have a right to adapt themselves intelligently by taking into consideration legal and economic context.*

Shortly after *Dyestuffs*, the CJEU had a second opportunity to clarify the concept of concerted practices in the *Sugar Cartel* case. Based on written evidence of communication, the CJEU found that some sugar producers from Belgium and the Netherlands engaged in concerted practices. In Belgium, at the time, there was an oversupply of sugar and prices were lower than in the Netherlands, which, by contrast, faced a shortage of sugar and prices were relatively high. Thus, the concerted practices were such that Belgian producers would export sugar only to designated producers from the Netherlands. In that way, the producers in the Netherlands gained control over prices in the Netherlands, and the risk of uncontrolled import from Belgium was significantly mitigated. The

Sugar Cartel is a classic example of market partitioning. A strict stance on any form of contact between competitors on strategic matters provided an impulse for later developments qualifying exchanges of information as "by object" infringements.

2.3. Stage 3: Boundaries of concerted practices

Decision: *Rolled Zink* (1984)

Rule: *Concerted practices cannot be inferred, provided there are one or more alternative explanations of observed, allegedly collusive, conduct. Concerted practices should be the sole explanation if Article 101 infringement is to be found on this ground.*

The case involved concerted practices related to parallel imports of rolled zinc. Two zinc producers located in Germany and France were among the largest in Europe. Prices of rolled zinc were substantially higher in Germany than elsewhere in Europe, therefore it was profitable for other undertakings to re-export zinc from cheaper jurisdictions (Belgium) back to Germany (parallel imports). This was exactly what one Belgian undertaking did: it purchased rolled zinc at a significantly lower price from the aforementioned suppliers on the promise that it would resell it exclusively in Egypt or elsewhere in the Middle East. However, instead of upholding its promises, the Belgian producer stored rolled zinc in Belgium and then re-exported it back to Germany to maximize profits. Once parallel imports were detected by the German and French producers, they almost simultaneously ceased deliveries to the Belgian producer.

The EC alleged that the German and French producers engaged in concerted practices to protect the German market from parallel imports. The nearly simultaneous cessation of zinc sales to the Belgian producer was not the only evidence. Specifically, the EC proved that the producers of rolled zinc concluded a contract, whereby each undertook an obligation of reciprocal assistance in case of shortage of zinc. However, the court rejected both leading arguments by the EC and vitiated its decision. This case is important for understanding the limits of concerted practices.

(1) The court introduced a new legal defence that concerted practices could be constituted only if there are no other plausible explanations of the facts at hand (*Rolled Zinc*, 1984, §16). The undertakings adduced evidence that the nearly simultaneous cessation of deliveries of zinc was motivated not by the aim to protect the German market from parallel imports, but rather by the Belgian producer's failure to pay in time for the deliveries. The court found this a sufficient alternative explanation, which helped undertakings to avoid the inference of concerted practices.

The legal defence of "no competing" explanations relates to a burden of proof. Based on the court's reasoning, given there is at least one plausible alternative explanation, concerted practices cannot be inferred. However, this is closer to a standard of proof "beyond reasonable doubt" rather than "on the balance of probabilities". The actual standard of proof for concerted practices likely lies somewhere in between. It would be inappropriate to require proving concerted practices beyond a reasonable doubt – not only because EU competition law does not belong to criminal law, but also because competition cases importantly depend on economic analysis, which, depending on assumptions, may cause economists to provide incompatible, or even conflicting, expert opinions.[5] It is not the mere existence of alternative plausible explanations that should invalidate legal inference of concerted practices, but rather, the most plausible explanation should always prevail.

(2) The court confirmed that there is no absolute ban on cooperation between competitors. The clause of reciprocal assistance between competitors in cases of serious disruptions of production was considered legitimate, and the EC's central argument that it "institutionalizes mutual aid in lieu of competition" was rejected. The court considered the clause so wide and vague that it was insufficient to restrict competition (*Rolled Zinc*, 1984, §35). The allowance of contractual relationships between direct competitors outside Article 101(3) justification or

[5] Later, in *Wood Pulp* (1993), for instance, at least two economists provided radically different opinions and explanations of given facts.

research and development arrangements is dangerous because the nature and contents of cooperative contracts depend on self-assessment and cannot be known or controlled before their implementation by antitrust authorities; this is why similar mutual aid setups between competitors should be an exception rather than a rule. Nevertheless, the judgment clarifies that the principle of independent conduct, as developed in previous case law, is not absolute. The court did not engage in a more detailed analysis of the contract; thus, the criteria of "wideness" or "vagueness" were fairly arbitrary. The *Rolled Zinc* case is the first example where undertakings successfully rebutted allegations of concerted practices in oligopoly.

Decision: *Wood Pulp* (1993)

Rule: *Concerted practices cannot be inferred given parallel conduct could be explained by oligopolistic tendencies within a sufficiently transparent market (conscious parallelism). Pricing similarity does not suffice for proving collusion.*

The *Wood Pulp* case concerned the distinction between concerted practices and conscious parallelism. The case is peculiar in that the judgment addressed a large part of the entire industry, comprising forty-three undertakings (40 firms and 3 associations). The central issue was whether a price similarity and advance quarterly price announcements of wood pulp in a trade press during the years 1975–1981 constitute concerted practices. These allegations were rejected. The court relied on the previous rule formulated in the *Rolled Zinc* case that there are no concerted practices unless it is the sole explanation of seemingly collusive conduct. Several points deserve a separate discussion.

The legality of advance price announcements. The practice of publicly announcing future prices may be considered an exchange of information, yet the court found this practice legitimate insofar as price announcements were addressed not so much to other competitors but to customers, who wanted to know prices far in advance because wood pulp formed an essential part of the costs of their final product (paper) (*Wood Pulp*, 1993, §64). Advance price announcements therefore in themselves do not constitute concerted practices. Simultaneous conduct could evidence concerted practices, but: "In determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct" (*Wood Pulp*, 1993, §71).

Here we see the first clear expression of the *conscious parallelism defence*, which is central against allegations of tacit collusion (concerted practices) in oligopolies. The court did not elaborate on what exactly constitutes an alternative plausible explanation, but taking into consideration the subsequent reasoning by the court, it should rely on sound economic rationale. The underlying logic by the court is consistent with the idea that "by object" infringements depend more on a legal assessment rather than economic analysis, and *vice versa* – inferences of "by effect" infringements primarily require sufficient economic evidence.

The role of economic analysis. The court used at least two economic expert opinions (1990, 1991) and, based on them, concluded that, considering market transparency, oligopolistic tendencies, the similarity of wood pulp prices, and parallel advance price announcements could be explained alternatively to the EC's proposition that they were due to concerted practices (*Wood Pulp*, 1993, §75-–126). The *Wood Pulp* case embodies the "more economic approach" in EU competition law (Motta, 2004, pp. 211–219).

2.4. Stage 4: Agreements and/or concerted practices

Decision: *Polypropylene Cartel* (1991)

Rule: *The EC is entitled to qualify infringement of Article 101 as cartel agreement and/or concerted practices. This constitutes the notion of a single and complex infringement.*

The EC found a cartel in the petrochemical industry, which lasted during the years of 1977–1983. The cartel operated based on secret meetings, allocation of markets, a series of price initiatives, and setting production quotas and minimum prices. Rhône-Poulenc was a relatively small producer, which was sold in 1980 and therefore was

fined for the period of 1977–1980. Based on written evidence – the minutes of a meeting – and proven regular participation, the CJEU concluded that Rhône-Poulenc, in the presence of other cartelists, supported a price increase (*Polypropylene Cartel*, 1991, §44, 57). The cartel was complex and involved many undertakings and many episodes with different levels of participation, so the EC decided to qualify the whole infringement as agreement and/or concerted practices. This imprecise qualification had never been invoked before. The most important legal issue was whether such a qualification should be allowed. The court confirmed the qualification and established the notion of a single and complex infringement (*Polypropylene Cartel*, 1991, §127). Its implications for Article 101 enforcement are profound.

The possibility to use a dual and less precise qualification greatly reduces the EC's burden of proof. Data shows that almost all cartel cases are now qualified in such a way (Jablonskis, 2021). On further occasions, the EC elaborated that the concepts of cartel agreements and concerted practices are fluid and may overlap (*CRT Glass Bulbs*, 2011, §37). The dual qualification contains some problems:

(1) The dual qualification is entirely a judicial invention. The concept of a complex infringement is not established in the Treaty and was adopted primarily on practical considerations. Besides such legitimacy issues, it shows how little understanding there is on the conceptual matter of delimiting agreements from concerted practices. Up until now, the CJEU did not articulate a workable distinction. The problem has been avoided altogether by resorting to a "convenient" solution, making the distinction unimportant for practical purposes.

(2) We should recognize the merits of complex infringement in that it (i) alleviates the EC's burden of proof and (ii) eliminates potential errors in the qualification of collusive episodes; but it also has some practical drawbacks. Perhaps the most important is the increased difficulty for suspected undertakings in defending themselves. Specifically, undertakings have to reject all possible allegations of agreement and concerted practice. Additionally, the court must now engage in an extensive analysis of both agreement and concerted practice. The point is that a principal justification of procedural efficiency does not necessarily apply when one includes consideration of private undertakings and courts. This shortcoming is slightly mitigated by the requirement for the EC to state reasons clearly, but the clarity and sufficiency of a statement of objections are frequently contested. The more precise qualification would reduce this trouble (recently, antitrust lawyers have observed an increased length of decisions [Odudu, 2022]), which could be explained by the necessity for undertakings to invoke all defences: "when it is not entirely clear what the EC alleges, then it is safer to invoke all defense arguments". The more precise qualification of cases would also facilitate narrowing down the scope of disputes.

(3) The dual qualification is inherently superfluous. To find Article 101 infringement, it is sufficient to prove either cartel agreement or concerted practices. The EC, having investigatory powers at its disposal and especially the rights to ask for information and make down raids, is in a position to choose whether to proceed with a case and how to qualify it. Considering weighty cartel fines, should not the standard of the EC's decision be higher than the current "safe approach"? The reason for the use of dual qualification is straightforward: if the EC fails to prove an agreement, at least it could prove concerted practices. Ultimately, we notice a curious practice, when in the vast majority of cases the EC tries to prove both agreement and concerted practices.

(4) The imprecise qualification arguably interferes with the proper development of both agreements and concerted practices. The court enforces the doctrine of single and complex infringement, which is a judicial creation, instead of providing legal guidance on agreements and concerted practices as two fundamental concepts in Article 101. Focusing on a single concept per case, rather than on an unclear admixture of both, would arguably allow us to expect doctrinal improvements and higher quality decisions. On a more speculative level, one could also wonder whether dual qualification did not contribute to the emerging legal issues of applying Article 101 to algorithmic collusion, where clearly the agreement requirement is not satisfied, while the doctrine of concerted practices to this day heavily relies on the "old" definition and underlying propositions, starting from the pre-internet *Dyestuffs* (1972) and *Sugar Cartel* (1975) cases. The argument here is that in the absence of dual qualification, the EC would have been compelled to think more seriously about the scope and contents of concerted practices.

Prediction

The following prediction seems likely: *concerted practices should eventually become a leading concept to tackle cartels*. To see this clearly, recall that cartel enforcement under Article 101 TFEU started with an understanding that concerted practices and agreements are distinct concepts (*Dyestuffs*, 1972). From the focus on cartel agreements, case law gradually converged into "and/or" dual qualification, and the third evolutionary step, one could anticipate, should be just concerted practices. The main reason for this prediction is the following: given the current explanation that concerted practices are a less intense form of collusion, why bother proving cartel agreement, which must have a higher standard of proof? The burden of proof for cartel agreement must be higher since by definition concerted practices do not reach the stage of an agreement. Given this reasoning, concerted practices are a more fundamental concept than agreements, with the broadest scope in Article 101.

2.5. Stage 5: Strict prohibition of contact

Decision: *John Deere* (1998)

Rule: *The system of exchange of information in a highly concentrated market (oligopoly), which excludes consumers, and enables market participants to observe each other's market positions or strategies, constitutes a violation of Article 101. The EC is not obliged to prove actual anticompetitive effects when it demonstrates potential anticompetitive effects.*

The UK tractor market consisted of 8 suppliers, holding a market share of over 80%. They agreed to use the information exchange system to share information on tractor sales. The CJEU found that such a system could potentially harm competition: it could improve transparency in a closed oligopoly and enable firms to identify strategies, including individual sales; therefore, the agreement violated Article 101. The case is interesting for several reasons.

First, it clarified that the term "oligopoly", in the context of competition law, should be understood fairly broadly; the finding of "oligopoly" depends on particular market characteristics rather than on sheer number of undertakings. *Second*, the legality of an exchange of information could also depend on whether it is open to consumers; the court made a crucial distinction between the *Wood Pulp* (1993) case, where no violation was found since exchanged information was available both for suppliers and consumers, and the present case, where it was available only among suppliers. *Third*, the court clarified the "by effect" class of infringements by saying that anticompetitive effects could be either *actual or potential*. Accordingly, in both "by object" and "by effect" infringements, it is not necessary to demonstrate actual harm to competition.

Decision: *Anic* (1999)

Rule: *The causality between illegal exchange of information and market conduct must be presumed, given: (1) an undertaking actively or passively participating in an illegal exchange of information; (2) and it remains active in that market. Such an undertaking is liable for Article 101 infringement unless the presumption is rebutted (Anic presumption).*

In the petrochemical industry with four major incumbents ("big four"), several undertakings systematically met to discuss production quotas and prices of polypropylene. Anic was a relatively small firm and participated less intensively in these meetings. There was also no evidence whatsoever that Anic had implemented the collusive policy. However, the CJEU held Anic fully liable for Article 101 infringement and came up with an important rule – Anic presumption (see the rule above and original wording in *Anic* [1999, §121]).

The critique of Anic presumption

The presumption is hardly possible to rebut. Consider that once an undertaking becomes aware of any information, it becomes permanently or almost permanently aware of it. One cannot simply expect amnesia, especially if the information is useful for optimal market conduct. The recipient of information, in principle, cannot control what

the other party communicates. Thus, any legitimate meeting in an association may end in presumed liability for all participants, even for those that had no anticompetitive intentions. Apart from public distancing or reporting collusion to an antitrust authority, it seems impossible to truly dissociate from exchanged information. Although this rule is regarded as a presumption, in practice, it decisively incurs liability based on contact. The presumption has been also contested as incompatible with the presumption of innocence (Abenhaïm, 2016).

The presumption assumes more than it should. The subjective elements of intent and awareness are necessary for finding a violation of Article 101 (*Anic*, 1999, §83, §87, §88, §89, §94, §98, §100, §130, §206). However, intent is difficult to establish, especially when an undertaking does not implement collusion. Anic did not adhere to collusion, yet it was not sufficient to disprove an intent to collude. It follows that Anic presumption not only assumes that an undertaking took into consideration exchanged information but also that it intended to collude. Ultimately, Anic presumption assumes all 3 constitutive elements of concerted practices (see the previous section) rather than a single element of causality.

We should note, however, that the judgment did go so far as to establish that concerted practices, taken as a whole, could be entirely without collusive conduct. A particular undertaking could not follow a collusive scheme and yet still be liable for Article 101 infringement given that other undertakings put concerted practices into effect. Put differently, *Anic* judgment does not fully answer a more fundamental question of whether concerted practices could be entirely of an intellectual nature.[6]

In essence, *Anic* judgment reinforced the doctrine of single and complex infringement developed in the *Polypropylene Cartel* (1991) case: it is sufficient to participate, even passively, in at least one episode of collusion to bear full responsibility for a whole infringement.

Decision: *T-Mobile* (2009)

Rule: *The causality between illegal exchange of information and market conduct must be presumed, given: (1) an undertaking actively or passively participating in an illegal exchange of information; and that (2) it remains active in that market. Such an undertaking is liable for Article 101 infringement, even if the exchange of information took place on a single occasion (meeting), unless the presumption is rebutted (T-Mobile presumption).*

The mobile telecommunications market in the Netherlands was an oligopoly of 5 undertakings, who discussed in a single meeting standard dealer remuneration for phone subscriptions. The central legal issue was whether a *single meeting* between rivals could constitute a concerted practice. The court thoroughly summarized previous jurisprudence on concerted practices and improved on Anic presumption, which is referred to as the T-Mobile presumption (the rule above and original wording in *T-Mobile* [2009, §62]).

The CJEU initially conceived concerted practices as concerted actions (conduct). That is, concerted practices imply conduct that could potentially be realized in a market: such as price-fixing, market partitioning, etc. Yet exchanges of information (meetings, contacts) by definition are not conduct that could potentially be realized in a market. Following the argument, they should not, by themselves, constitute concerted practices.

Contact between rivals is an important *preliminary step* before putting what has been discussed into practice. That is, exchanges of information should be considered *a part of* concerted practices, but *not the whole* concerted practices. It would be reasonable to require at least some manifestation of concerted practices in actual market conduct by at least one cartel member to justify an inference of legal liability for passive cartel participants. This refers back to our previous problem: could concerted practices be of a purely intellectual nature? This exact question has not been directly considered in the CJEU's case law. I would argue that it would be too wide an

[6] Consider, for instance, an imaginary meeting of incumbents A, B, C; they all discuss future pricing policy, but when it comes to putting that policy into practice, nobody actually does what it promised. The question *Anic* judgment does not solve is whether such "cheap talks" or purely intellectual collusion still counts as Article 101 infringement, or, alternatively, if it requires that at least one of incumbents somehow actually benefits from putting collusion into practice.

interpretation, which would be neither linguistically nor conceptually consistent with the current CJEU definition of concerted practices.

Importantly, Anic and T-Mobile presumptions are used in practise as if they are *sui generis* substantive norms. Cartel enforcement depends critically on them and is modelled around the underlying principle that undertakings should act independently, rather than on the concepts of agreements or concerted practices. The presumptions, in terms of importance, are comparable to that of a single and complex infringement.

The opposing view should be also considered. Against the proposition that Anic and T-Mobile presumptions became *sui generis* substantive concepts besides agreements, decisions of associations, and concerted practices, are their status as *rebuttable presumptions*. To the best of my knowledge, I am not aware of a single case where firms contested them successfully. Even if there are some, they must be exceedingly rare. Abenhaïm (2016, p. 414) reports that "Since the inception of the requirement, public distancing has been mentioned in 46 cases, actually invoked in 10 of these cases, and ultimately accepted in none". To extend the reasoning that a successful rebuttal is hardly possible, consider:

(1) If a company claimed that it did not follow what has been discussed in a single meeting between competitors, the court would maintain that it does not matter since under Article 101 actual harm is not required in the category of infringements, which by object prevents, restricts, or distorts competition. Therefore, this defence would not suffice.

(2) If a company, alternatively, adduces some evidence that it publicly distanced itself and was against exchanges of information in a meeting, this is equal to saying that an infringement still has been made but legal liability should not be applied thanks to public distancing. Put differently, an infringement is still presumed, only a company is released from paying fines. Clearly, there is a difference between the statements "there was no infringement" and "an undertaking is not liable for an infringement". Consequently, a single meeting would still constitute an infringement (concerted practice).

(3) The proposition that the presumptions are comparable to substantive, rather than procedural rules, could be confirmed by the fact that national competition authorities and courts cannot disregard them, since they follow directly from Article 101 itself (*E-turas*, 2016, §33). The EU Member States have a procedural autonomy to freely regulate procedural matters unregulated by the EU competition law, given they respect the principles of equivalence and effectiveness (*E-turas*, 2016, §32). We should deduce that the presumptions are inherent properties of concerted practices, rather than procedural rules.

(4) Public distancing is a problematic notion on its own. Consider that if one undertaking could public distance itself, then all of them could, but it would lead to an absurd situation (*reductio ad absurdum)* where nobody is liable and strategic information has still been exchanged. There must therefore be some structure for who is released from liability and who is not. This is achieved, for example, through leniency rules, but this would bring us to our previous point that an infringement is still constituted since in leniency submissions competitors confess that they made an infringement. Therefore, public distancing, without reporting to an antitrust authority, is a complicated matter – it remains a grey area with little guidance from the CJEU.

Concluding remarks on the strict prohibition of contact

The *T-Mobile* case provides the strictest legal stance towards an exchange of information to date. Although the CJEU speaks of a rebuttable presumption on causality between a single exchange of information and subsequent market conduct, the presumption, more realistically, is as a substantive *sui generis* prohibition in addition to agreements and concerted practices. The CJEU deduced the presumption not so much from a concept of concerted practices, but rather from an underlying general principle of independent conduct under Article 101.

The presumption that undertakings will take into consideration exchanged information is a natural fact, rather than something that could be rebutted. The difficulty or even the impossibility to rebut the presumption is the

main critique against the merits of the judgment. Ultimately, it paved the way to a current enforcement paradigm, where an exchange of information, in almost all cases, operates as smoking-gun evidence of Article 101 violation.

2.6. Stage 6: Most recent developments

Decision: *E-Turas* (2016)

Rule: *Passive participation in, or tacit acceptance of collusion, is a sufficient ground for liability under Article 101. Presumption of innocence prohibits attribution of liability under Article 101 unless it is proven that an undertaking was aware of collusion and failed to publicly distance itself (assumed consent). A determination of whether an undertaking was aware of collusion is a matter of fact.*

Many travel agencies in Lithuania were selling travel offers through an online booking platform administered by E-turas. The platform had an integrated email system. In response to competition concerns from travel agencies, E-turas sent a global email to all travel agencies with a message stating that discount offers will be capped automatically at a maximum of 3% to "normalize" competition and preserve commissions. The national competition authority alleged that travel agencies engaged in concerted practices by tacit acceptance of discount caps that eliminated discount competition. The case reached the CJEU for a preliminary decision.

(1) The court invoked the presumption of innocence (*E-turas*, 2016, §38–41). *First*, it cannot be automatically inferred, from the mere participation in the platform, that all travel agencies became aware of the message to cap discounts (factual question). *Second*, undertakings must have a realistic opportunity to rebut the presumption that they became aware of the message. We see the similarity between the *E-turas* and *T-Mobile* cases, as they both relate to a single episode of exchange of information: in *T-Mobile*, a single meeting; in *E-turas*, a single message. However, *E-turas* is a far more lenient judgment: due to the presumption of innocence, it cannot be automatically inferred that all platform participants became aware of the message. In this respect, the *E-turas* ruling mitigates the strict *T-Mobile* stance on an exchange of information. The presumption of innocence is a valid defence for passive undertakings that could show their unawareness of collusion.

(2) However, the court also invoked *passive participation* (tacit acceptance) in collusion as a sufficient ground for legal liability. To escape fines, passive participants must publicly distance themselves from anticompetitive initiatives or report them to an antitrust authority. Otherwise, they encourage collusion and therefore are liable for Article 101 violation (*E-turas*, 2016, §28 and the references therein).

The notion of passive participation calls into question the behavioural nature of concerted practices: is cause and effect between concertation and subsequent conduct necessary for concerted practices? Recall that the CJEU initially developed concerted practices as "concerted conduct"; and concerted practices imply causality between concertation and subsequent conduct (*Dole*, 2015, §125 and the references therein). Although the Anic and T-Mobile presumptions enable infringements to be proved without evidence of harmful effect, they still *expressis verbis* speak of cause and effect between concertation and subsequent conduct.

Passive participation is not directly related to any active conduct – it is all about encouragement or assurance for others (assumed consent). If the *Anic* and *T-Mobile* cases presumed that an undertaking *itself* must have taken into account strategic information obtained in an anticompetitive meeting for determination of *its own* conduct, then in *E-turas* passive participation goes a step further by imputing legal liability even in the absence of cause and effect between concertation and subsequent market conduct. Simply stated, liability for passive participation does not assume putting into effect concerted practices. This leads us to the notion of *indirect causality*, which complements the Anic and T-Mobile presumptions on *direct causality*. Undertakings cannot remain passive in the face of a collusive initiative, even though they have evidence of the absence of a direct link between cause and effect (between their concertation and their own market conduct).

Conclusions

1. The CJEU rejected a literal reading of concerted practices as "concerted actions" or "practical conduct" that must manifest themselves in factual market behaviour. Specifically, concerted practices do not presuppose concrete anticompetitive effects (*Anic,* 1999, §124). Although the CJEU defines concerted practices as intentional "practical cooperation that substitutes for the risks of competition", such a characterization does not correspond to the actual application of the concept, leading to legal uncertainty and discrepancy between the legal definition and its application.

2. The discrepancy between the current definition and its application indicates that a workable definition of concerted practices is missing. This issue has been bypassed with the judicial invention of "single and complex infringement", relieving the EC from a legal burden of qualifying specific collusive episodes as either cartel agreements or concerted practices; the imprecise qualification of collusion as a cartel agreement and/or concerted practices suffices. I proposed that allowing such an imprecise qualification reduced legal certainty and affected, if not forestalled, the proper development of concerted practices.

3. The "single and complex infringement" has been deduced from the assumption that Article 101 covers all types of collusion, supposing that all technical differences between cartel agreements and concerted practices, for practical purposes, are immaterial. This deduction is somewhat problematic. It leaves unexplained why Article 101, by original design, does not use a single general term for collusion. It also contradicts the principle that each concept in Article 101 has a distinct and autonomous function.

4. The CJEU gradually established a strict "by object" prohibition of contact between competitors. It became, arguably, the new sui generis type of infringement, standing on equal footing with agreements and concerted practices. However, this approach faces serious legitimacy issues associated with *Anic* (1999) and *T-Mobile's* (2009) "rebuttable" presumptions, which seem to have never been successfully challenged in practice. This difficulty could be explained by the intellectual (informational) nature of contact-based prohibition – once competitors become aware of exchanged information, they cannot become unaware of it, leaving only two options: (i) to publicly distance themselves; or (ii) to report illegal contacts to antitrust authorities. These are, however, not specific rebuttals of the presumptions, but separate legal defences available for any type of cartel agreement or concerted practices. These points reinforce legal concern as to whether these presumptions are compatible with the presumption of innocence.

5. The CJEU considered the presumption of innocence in the *E-Turas* case (2016), but the judgment did not bring much improvement: the court required only to additionally check whether firms become factually aware of contemplated concerted practices. Thus, if an undertaking (i) becomes factually aware of contemplated concerted practices and (ii) does not publicly distance itself or report to an antitrust authority, then it commits Article 101 violation regardless of whether concerted practices have been implemented. We end up with the same legal result as before – mere perception of contemplated concerted practices equals liability.

6. The doctrine of concerted practices was primarily formed before the internet era. The major academic concern now is that concerted practices, as expounded here, might be inadequate to address algorithmic collusion in digital markets, especially where algorithms replace inter-firm contact (exchange of information). The concept stands at the boundary of Article 101 and has the broadest scope. Thus, we could anticipate new conceptual developments (revisions) shortly.

References

Abenhaïm, M. (2016). Public distancing and liability in cartel cases: Does distance lend enchantment?. *World Competition 39*(3), 413–429.

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4 June 2003.

Decision of CRT Glass Bulbs, CASE/COMP39605, 19 October 2011.

Ducourneau, J. (2013). Origins of 'concerted practice'. *European Union Competition Law*. Retrieved from: https://www.eucomplaw.com/origins-of-concerted-practice/.
Gebicka, A., & Heinemann, A. (2016). Can computers form cartels? About the need for European institutions to revise the concertation doctrine in the information age. *Journal of European Competition Law and Practice*, *7*, 431–441.
Jablonskis, M. (2021). Strategic leniency: Insights from game theory and empirical evidence. *Vilnius University Open Series*, No. 6, 68–85.
Judgment of "Eturas" UAB and Others v. Lietuvos Respublikos konkurencijos taryba, Case C-74/14, ECLI:EU:C:2016:42, 21 January 2016.
Judgment of AC-Treuhand AG v. Commission of the European Communities, Case T-99/04, ECLI:EU:T:2008:256, 8 July 2008.
Judgment of Ahlström Osakeyhtiö and others v. Commission of the European Communities, Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, ECLI:EU:C:1993:120, 31 March 1993.
Judgment of Commission of the European Communities v. Anic Partecipazioni SpA, Case C-49/92 P, ECLI:EU:C:1999:356, 8 July 1999.
Judgment of Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission of the European Communities, Case C-29/83, ECLI:EU:C:1984:130, 28 March 1984.
Judgment of Coöperatieve Vereniging "Suiker Unie" UA and others v. Commission of the European Communities, Case C-40/73, ECLI:EU:C:1975:174, 16 December 1975.
Judgment of Dole Food Company, Inc. and Dole Fresh Fruit Europe v. European Commission, Case C-286/13 P, ECLI:EU:C:2015:184, 19 March 2015.
Judgment of Établissements Consten S.à.R.L. and Grundig-Verkaufs GmbH v. Commission of the European Economic Community, Case C-56/64, ECLI:EU:C:1966:41, 13 July 1966.
Judgment of Imperial Chemical Industries Ltd. V. Commission of the European Communities, Case 48-69, ECLI:EU:C:1972:32, 14 July 1972.
Judgment of Rhône-Poulenc SA v. Commission of the European Communities, Case T-1/89, ECLI:EU:T:1991:56, 24 October 1991.
Judgment of T-Mobile Netherlands and Others, Case C-8/08, ECLI:EU:C:2009:343, 4 June 2009.
Judgment of John Deere Ltd v. Commission of the European Communities, Case C-7/95 P, ECLI:EU:C:1998:256, 28 May 1998.
Kaplow, L. (2013). *Competition policy and price fixing*. Princeton University Press.
Lorenz, M. (2013). *An introduction to EU Competition Law*. Cambridge University Press.
Motta, M. (2004). *Competition policy: Theory and practice*. Cambridge University Press.
Odudu, O. (2006). *The boundaries of EC Competition Law: The scope of Article 81*. Oxford University Press.
Odudu, O. (2022, March 25). Do competition agencies harm welfare?. *Concurrentialiste*. Retrieved from: https://leconcurrentialiste.com/odudu-welfare/.
Opinion of AG Mayras, Judgment of Imperial Chemical Industries Ltd. V. Commission of the European Communities, Case 48-69, ECLI:EU:C:1972:32, 14 July 1972.
Paemen, D., & Blondeel, J. (2017). Appealing EU cartel decisions before the European courts: Winning (and losing) arguments. *Business Law International*, *18*, 155–183.
Petit, N. (2013). The oligopoly problem in EU Competition Law. In Lianos, I., & Geradin, D. (Eds.), *Handbook on European Competition Law: Substantive aspects* (pp. 259–349). Edward Elgar Publishing.
Shapiro, K., & Kaplow, L. (2007). *Antitrust*. National Bureau of Economic Research, Working Paper 12867. Retrieved from: https://www.nber.org/system/files/working_papers/w12867/w12867.pdf
The Treaty Establishing the European Coal and Steel Community (1951). Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0022
Whish, R., & Bailey, D. (2015). *Competition law*. Oxford University Press.