

# Substitution of practical cooperation for the risks of competition in Antitrust Law

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**Abstract:** Despite all of factors, an oligopolistic market in theory should not exist. This article maintains that there is not a fine line between parallel action and concerted practice. Primarily this is because innocent parallel behaviour does not naturally require any sharing of information or meetings between the undertakings, only a deliberate attempt to coordinate efforts would naturally require this contact. Therefore, there is a basic and manifest difference between the two. What is more, even when there are alternative explanations produced by undertakings for apparent concerted effort, we must consider what is more likely in an oligopolistic market: deliberate coordination to lessen market uncertainty, or innocent social meetings between competitors. The former is plainly more likely.

**Keywords:** Article 101 of the Treaty on the Functioning of the European Union, EC Competition Law, European Economic Community, Commission Decision EEC/84/405, Agreement in Antitrust Law

*'An issue to arise from the Court's jurisprudence concerns behaviour which may in fact be a normal consequence of an oligopolistic market. There is clearly a very fine line between innocent parallel behaviour, which is acceptable and indeed commercially prudent, and the knowing 'substitution of practical cooperation for the risks of competition.'*

Middleton, Rodger & MacCulloch  
Cases and Materials on UK and EC Competition Law (2nd ed.) at p.211

Discussion and critical examination the above statement with reference to authoritative sources (i.e. legislation, case law, the Commission's decisions, and contemporary academic opinion).

## Introduction

This question concerns Article 101 of the Treaty on the Functioning of the European Union. Article 101(1) prohibits, '...all agreements between undertakings, decisions by associations of undertakings, and concerted practices, which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition...' Article 101(2) declares that any agreements or decisions prohibited by virtue of Article 101(1) are automatically void. The meaning of the prohibition was considered by the European Court of Justice in 1972 in its decision in *Imperial Chemical Industries v Commission*.<sup>1</sup> The court decided that the purpose of Article 101(1) was to prohibit forms of coordination, which have not reached the stage of an agreement, but which knowingly substitute practical cooperation between the undertakings with the risks of competition.<sup>2</sup> Providing further guidance in 1975, the European Court of Justice in *Coöperatieve Vereniging Suiker Unie v Commission*<sup>3</sup> explained that each economic operator is expected to act independently. Therefore, any direct or indirect contact between operators, the object or effect of which is to influence actual or potential competitors to act in a way which the other operators have adopted, is unlawful.<sup>4</sup>

As Gerard Conway notes in his recent textbook on European Union law: 'One of the issues that arises is how to distinguish between a concerted practice, which implies some sort of deliberate coordination, from the natural behaviour of the marketplace. This is especially so in oligopolistic markets where competitors in close competition will naturally copy each other's actions (known as 'parallel behaviour') for fear of losing business.'<sup>5</sup> For example, if a leading airline company decided to moderately increase prices of their tickets because of increased costs flowing from security risks associated with terrorism, and other leading airline companies followed suit because they felt that it was then commercially safe and prudent to do so, this is natural parallel behaviour: companies following the behaviour of other companies. The question is when this behaviour would become a concerted practice designed to keep the prices of airline tickets higher than they could be were the companies to operate exclusively independently.

<sup>1</sup> [1972] ECR 619.

<sup>2</sup> Ibid (n.1).

<sup>3</sup> [1975] ECR 1663.

<sup>4</sup> Ibid (n.3).

<sup>5</sup> G Conway, 'EU Law' (Oxford University Press, Oxford 2015) 565.

This article shall assess this question in two sections: the first will consider the argument that the Court of Justice has developed a clear and firm way to distinguish between parallel behaviour and concerted practice, the second section will consider the difficulties in distinguishing between these behaviours. It is the thesis of this essay that, in general, the Court of Justice has developed a logical and firm difference between concerted practices and innocent parallel actions. This is primarily through the Court's focus on identifying various ways and means that undertakings can deliberately coordinate their behaviour, such as through sharing information. This makes concertation manifestly different to parallel action because the latter does not require any contact between firms, whereas the former does.

### Parallel Behaviour and Concerted Practices

In their textbook on competition policy, Clarke & Morgan (2006) argue that the style of prohibition found in Article 101 has now been in effect in European Treaties for several decades. Indeed, the same prohibition is found in Article 85 of the Treaty Establishing the European Economic Community signed in 1957. These decades have given the Court of Justice ample time to define and interpret the prohibition without undue vagueness. Clarke & Morgan (2006) acknowledge that individual cases will always produce difficulty, but they suggest that the jurisprudence is as clear and definite as can realistically be expected. They mention the case of *Imperial Chemical Industries*<sup>6</sup> as being especially helpful.<sup>7</sup>

In his opinion in this case, Advocate-General Mayras identified several factors which indicated a deliberate concerted practice rather than unwitting parallel behaviour. The first was that ten manufacturers of dyestuffs uniformly increased their prices three times over four years; by 15% in 1964, 10% in 1965, and 8% in 1967. The second indicator was that several of the firms pre-announced their price increases, and the third indicator was that there was evidence of meetings between the firms.<sup>8</sup> In fairness to Clarke & Morgan (2006), this is a strong list of indicators. The fact that this occurred among ten separate firms over a period of four years and by a uniform amount is strong evidence of some concertation. If it was mere parallel action - one firm naturally responding to another - it is unlikely that the price increases would be so exact over such a long time. Without concertation, at least one firm might have been expected to keep itself more competitive by maintaining the lower prices. The preannouncement of prices and meetings were also plainly designed to make the other undertakings aware of how much to increase their prices by.

Therefore, the suggestion in this question that it is difficult to distinguish between rational parallel action and unlawful concerted practice appears overstated. It is by no means beyond the wit of human beings to look upon the facts of a case and to identify factors which suggest some attempt at coordination between undertakings. For example, if innocent parallelism was occurring in *Imperial Chemical Industries*, there would have been no need to pre-announce the price increase; one undertaking could have increased their prices, and the others would have naturally followed after the event. The fact of pre-announcement is an obvious means of actively coordinating behaviour.

However, it is worth noting the decision of the Court of Justice in *Ahlstrom v Commission*<sup>9</sup> in 1985. In this case, the Commission alleged that large producers of chemicals were involved in concerted practices between 1975 and 1981. Particularly, the firms adopted a practice of setting their prices quarterly in dollars in advance and there was a relatively free exchange of information on prices between the firms.<sup>10</sup> In this way, the concerted behaviour was similar to that in *Imperial Chemical Industries*; especially by pre-announcement of prices. But by contrast to *Imperial Chemical Industries*, the Court of Justice in *Ahlstrom* decided that pre-announcement of pricing was explainable as a result of pressure from buyers for a stable price for the chemicals, rather than a desire to reduce competition among the firms. Moreover, the Court found that price competition between the undertakings did occur because there was still the possibility of each firm reducing its quarterly rates for individual customers that they wished to please.<sup>11</sup> Therefore, even though pre-announcement of prices might be an indicator of concerted practice in some cases, it equally might be natural reaction to customer pressure in others. As such, it is somewhat hasty to declare that concerted practices are plainly distinguishable from natural parallelism; this would depend on the facts of the case.

While this is true, it must be accepted that there were very specific and unusual facts at play in *Ahlstrom*; especially since price competition continued to exist despite the pre-announcement. Typically, this would not be so. In *Commission v Anic Partecipazioni SpA*,<sup>12</sup> for example, the Commission investigated possible concerted behaviour among large chemical producers. The Commission found that the firms were meeting on a regular basis to discuss price quotas, and that uniform price increases were taking place after these meetings. The Court of Justice determined that, where there is sharing of sensitive price information among undertakings, there must be a presumption that they take account of it in an anti-competitive way.<sup>13</sup> Consequently, outside of the specific facts of *Ahlstrom*, the pre-announcement of prices and the sharing of information among undertakings will be a strong indicator of concerted

<sup>6</sup> Ibid (n.1).

<sup>7</sup> R Clarke & E Morgan, 'New Developments in UK and EU Competition Policy' (Edward Elgar Publishing, London 2006) 126.

<sup>8</sup> Ibid (n.1).

<sup>9</sup> Case 89/85 [1993] ECR I-1307.

<sup>10</sup> Ibid (n.9).

<sup>11</sup> Ibid (n.9).

<sup>12</sup> Case 49/92 [1999] ECR I-04125.

<sup>13</sup> Ibid (n.12).

practice. Therefore, Clarke & Morgan (2006) appear to be correct in suggesting that, by now, the courts have developed several strong indicators to distinguish between concerted practice and innocent parallelism.

This argument is reinforced by the Court of Justice's decision in *T-Mobile Netherlands v Commission*.<sup>14</sup> In this case, T-Mobile had a one off meeting with its distributors to discuss pricing and sales, but it was conceded even by the Commission that this had no detrimental effect on price competition in the market. Even so, the Court decided that since there was the sharing of price information, the meeting had the object of influencing distributors on their pricing and violated Article 101 on this basis.<sup>15</sup> This case demonstrates how strongly an indicator of concerted practice that the Court takes sharing of information to be. Here, the discussions over pricing had no effect on the undertakings and, yet, there was a violation of Article 101. As such, we can regard *Ahlstrom* as a case based on its specific facts; typically, sharing of price information will be regarded as evidence of concerted practice. Therefore, Clarke & Morgan (2006) appear quite correct to suggest that the Court has developed clear indicators of concerted practice and it is not overly difficult to distinguish between concertation and innocent parallelism; meetings between the undertakings, sharing of sensitive price information, combined with mirrored actions, can provide classic and clear evidence of unlawful concertation.

### Troubles of Identifying Concertation

This section will seek to demonstrate how the situation might be more nuanced and complex than that suggested above. Particularly, it will consider the reasons why it could be very difficult to distinguish between innocent oligopolistic parallel behaviour and unlawful concerted practice.

Diana Duca (2011), the managing director of a European competition law firm in Italy and commentator on competition law, argues that the key question under Article 101 is, '...to what extent, if any, parallel behaviour in an uncertain market is the result of a meeting of minds or whether, on the contrary, it is the result of the autonomous will of each undertaking.'<sup>16</sup> In an interesting continuation of her argument, she makes reference to game theory and suggests that, if being ignorant of the actions of other operators will produce a worse result for each operator because this ignorance leads to a substantial loss of profit, the likely outcome is one of two possibilities; the operators will, over time, match each other's behaviour to reduce the market uncertainty, or the operators will simply find a way to cooperate. Because they are not able to expressly agree on fixing prices through a written contract, the operators will find more subtle ways to cooperate through trial and error; such as periodic release of price information, for instance. Therefore, without an express contract and over time, the operators end up acting as if they had such an express agreement.<sup>17</sup> Duca's comments are relevant here because they demonstrate that, in an oligopolistic market, parallel behaviour and concerted practices are, in theory at least, equally likely outcomes of uncertainty. Therefore, if the competition authorities do not find evidence of pre-announcement of prices or meetings such as those considered above, it may well be highly difficult to decide whether innocent parallelism is occurring or an unlawful action, because both are equally likely.

Duca (2011) emphasises this point by noting several alternative explanations for uncanny parallel conduct apart from unlawful concertation. One such alternative is so-called 'price leadership' by one undertaking. This can come in two forms; the first being 'dominant price leadership', where the undertaking with the largest market share alters its pricing and other undertakings in the market naturally follow suit to match the prices of the leading firm. The Commission in its Decision in *Zinc Producer Group*<sup>18</sup> in 1984, determined that such uniform changes to pricing would not be regarded as evidence of concertation. The second type of price leadership is so-called 'barometric price leadership', where an undertaking is not the largest by market share, but is widely accepted as being the leading operator in terms of changing prices based on consumer demand and market changes. This firm would alter its pricing structure, causing the other undertakings to naturally follow suit.<sup>19</sup> Therefore, the waters are muddied further; not only can unlawful concertation be just as likely as innocent parallel behaviour, even if the competition authorities believe that concertation is occurring, there can be relatively simple alternative explanations put forward by the undertakings.

However, this conclusion should not be taken too far. As Duca (2011) herself concedes: 'The conclusion could be quite different if additional evidence is adduced, such as evidence of contacts between undertakings or an exchange of information.'<sup>20</sup> This is a key point and Duca (2011) should have dealt with it more extensively than she did. After all, for unlawful concertation to occur, the undertakings must make contact somehow; just copying each other's behaviour through parallel action is not unlawful, so the undertakings must be using some identifiable method to exchange information or to make contact. Apart from the two indicators of pre-announcement of prices and meetings that we identified in the first section, case law from the Court of Justice has identified several other indicators. In the case of *Suiker Unie v Commission*,<sup>21</sup> for example, the Court determined that contact between competing undertakings could occur indirectly through a firm supplying goods to one of the undertakings transferring information on

<sup>14</sup> Case 08-08 [2009] ECR I-04529.

<sup>15</sup> *Ibid* (n.14).

<sup>16</sup> <<http://duca-ilm.ro/?p=149>> accessed 31st March 2022

<sup>17</sup> *Ibid* (n.16).

<sup>18</sup> Commission Decision EEC/84/405 of 6 August 1984: C-IV/30/350 OJ L 220 [1984].

<sup>19</sup> *Ibid* (n.16).

<sup>20</sup> *Ibid* (n.16).

<sup>21</sup> C-40/73 [1975] ECR 1663.

pricing to another undertaking, especially where first firm was aware that this information could be transferred.<sup>22</sup> This means of making contact was also identified by the United Kingdom Competition Appeal Tribunal in the case of *JBB/Allsports v Office of Fair Trading*,<sup>23</sup> which held that when one competitor makes its price changes known to a supplier, and that supplier informs another competitor of the price changes in order to influence the competitor to match the prices, all three parties would fall under Article 101 for concerted practices with an object of undermining competition, if the original undertaking could reasonably foresee that the supplier would share such information.<sup>24</sup>

Moreover, the Commission in its Decision in the *Optical Fibres* case,<sup>25</sup> suggested that if the firms participated in a joint venture on some commercial project, this could provide a means of exchanging price information.<sup>26</sup> In paragraph 55 of the Commission's Guidance on Article 101, it mentions that undertakings which share a common board member could exchange information subtly through this individual as well.<sup>27</sup> The point is that there are many means of identifying unlawful concertation because some deliberate, albeit subtle, contact must occur between the firms. Therefore, there is not a thin line between concertation and parallel action; they are manifestly different in that parallel action is merely the unprompted following of a competitor's behaviour to avoid uncertainty in the market, whereas concertation contrary to Article 101 involves some identifiable, deliberate contact. Whether this is through a shared board member, or through a joint venture project, or through a supplier, or pre-announcement of prices, some deliberate coordination will be identifiable because this contact is required to produce the concertation. Without the contact, it would not be unlawful.

Having said that, just as there can be alternative explanations for parallel behaviour as identified by Duca (2011), there can also be alternative explanations for the sharing of information, which do not involve concerted practice. In paragraph 61 of the Commission's Guidance on Article 101, for instance, it is noted that a firm may act unilaterally and publish its pricing data, but if thereafter there is parallel action, the undertakings can reasonably be deemed to have seen the pricing information and used it. On this basis, the Commission would regard there to be a strong case for a violation of Article 101.<sup>28</sup> This appears to be a very stringent and curious statement. The Commission is suggesting that even where there is no unstated expectation of sharing information among undertakings, even where there is no unstated expectation that the other undertakings will increase their prices, each undertaking can still be guilty of unlawful concertation. In this case, parallel action is just as likely as concerted practice; after all, the undertakings may have become aware of the price information that was released, and only increased their prices to match the activities of that one undertaking. There could be no deliberate conduct whatsoever and each undertaking's behaviour could be explained as being parallel action. Consequently, in the Commission's example in its Guidance, we do have a relatively plain instance where it is difficult to determine whether this is an innocent parallel response or deliberate coordinated action.

In their article on similar provisions in American competition law, Kovacic & Marshall (2011) argue this point more widely, suggesting that it will always be difficult to distinguish between parallel action and unlawful coordination in an oligopolistic market. This is because, even if undertakings pre-announce their prices, share information through meetings, share a board member, and are engaged in a joint commercial venture, this is only circumstantial evidence rather than direct evidence of coordination. Therefore, there will still be a great deal of uncertainty associated with it.<sup>29</sup> A meeting between the directors of two undertakings in the same industry could occur because they attended the same university, for example, and they wish to reminisce, and an undertaking could pre-announce a price rise to fully prepare their customers for the cost and to explain the undertaking's reasoning for the price increase. As such, Kovacic & Marshall (2011) are correct to suggest that even the indicators of concertation that are said to distinguish it from parallel action such as pre-announcements, joint ventures and meetings, can be vague given the appropriate factual circumstances.

This is a fair point, but it is always possible for human intelligence to invent alternative explanations for any event, the real question is what is the more likely explanation. In an oligopolistic market where a small group of firms are interdependent, meetings between firm directors and the sharing of information between undertakings, is more likely to be related to a deliberate attempt to coordinate behaviour, especially when this contact is followed by near uniform increases in prices. Therefore, it is maintained that despite alternative explanations for meetings and sharing of information in individual cases, where there is some contact between undertakings which is followed by a price increase, the more likely explanation of the contact is that it was a deliberate attempt to coordinate behaviour.

This section has sought to demonstrate that, contrary to the claim in this question, there is a basic difference between parallel action and unlawful concerted behaviour. Innocent parallel action does not require any contact whatsoever between the undertakings, all

<sup>22</sup> Ibid (n.21).

<sup>23</sup> Case Number 1022/1/1/03 < <http://www.catribunal.org.uk/237-586/1022-1-1-03-JJB-Sports-PLC.html> > accessed 31st March 2022

<sup>24</sup> Ibid (n.23).

<sup>25</sup> Commission Decision EEC/86/405 of 14 July 1986, Case IV/30.320 OJ L 236 [1986].

<sup>26</sup> Ibid (n.25).

<sup>27</sup> Communication from the Commission, Guidance on Article 101 of the Treaty on the Functioning of the European Union: Official Journal of the European Union, C-11/13.

<sup>28</sup> Ibid (n.27).

<sup>29</sup> W Kovacic & R Marshall, 'Plus Factors and Agreement in Antitrust Law' (2011) 110 Michigan Law Review 393.

it requires is undertakings to match each other's behaviour. Meanwhile, it is a basic requirement of unlawful concentration that there is some contact between the undertakings, whether through meetings or pre-announcement of prices or shared board members. Even where this contact has theoretical alternative explanations or real alternative explanations in individual cases, the likelihood is that the contact is an attempt to coordinate behaviour. Therefore, this section has established that there is no fine line between parallel action and concerted practice; each requires manifestly different things.

### Conclusion

This question claimed that there is a fine line between innocent parallel action and unlawful concerted behaviour by firms under Article 101 of the Treaty on the Functioning of the European Union. This essay sought to discuss this theory in two sections: the first identified various indicators by which the Court of Justice has conceptually separated parallel action from unlawful concerted practice. This is primarily through identifying ways and means that firms can coordinate their activities, such as via meetings or pre-announcement of prices. Given that innocent parallel action requires no such contact whatsoever, these are logical ways of identifying attempts at coordination between undertakings.

The second section discussed the claim that, by contrast, it can be difficult to distinguish between lawful and unlawful conduct. The first argument by Duca (2011) was that both are equally likely in an oligopolistic market; in a state of uncertainty where ignorance of another undertaking's actions lead to a loss of profit, other undertakings will naturally match the behaviour of the others through parallel action, or will seek to identify subtle ways of coordinating their actions to lessen the uncertainty. Therefore, there can be no particular presumption that either parallel action or unlawful concertation is more likely, which makes it very difficult to identify what is actually occurring without strong evidence of coordination. Moreover, Duca (2001) reminded us that even for very uniform price increases, there can be innocent explanations via price leadership, making it even more difficult to distinguish between lawful and unlawful action.

The Commission's Guidance on Article 101 further demonstrated that, especially where one undertaking acts unilaterally to publish information, it can be exceptionally difficult to determine whether the other undertaking's increase in prices was a mere parallel reaction to this knowledge, or whether it was part of some expected coordination between the firms. Moreover, even when we find additional evidence such as meetings between directors or the pre-announcement of price increases, this at best is circumstantial evidence of coordination, rather than absolute proof of it. Despite all of these factors, this essay maintains that there is not a fine line between parallel action and concerted practice. Primarily this is because innocent parallel behaviour does not naturally require any sharing of information or meetings between the undertakings, only a deliberate attempt to coordinate efforts would naturally require this contact. Therefore, there is a basic and manifest difference between the two. What is more, even when there are alternative explanations produced by undertakings for apparent concerted effort, we must consider what is more likely in an oligopolistic market: deliberate coordination to lessen market uncertainty, or innocent social meetings between competitors. The former is plainly more likely.

Consequently, the conclusion of this article is that the claim in this question is false. There is not a fine line between parallel action and unlawful concerted practices.

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