EU CONCERTED PRACTICES & US CONCERTED ACTIONS: BEYOND WILLIAM H. PAGE’S PROPOSAL

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ABSTRACT:
The recent analysis developed by professor William H. Page on the US notion of concerted actions raised the idea to develop an article that examines in-depth the EU meaning of concerned practices and that skein of US doctrines that focus on several phenomena running from facilitating practices to invitations to collude, plus factors and agreements to exchange information. According to professor Page, the current definition of concerted actions misses the opportunity to use inter-firm communications as the discriminating factor between cases of collusive pricing practices and cases of interdependent parallel behaviors that result in the same market price. To the contrary, the current EU definition of concerted practices accomplishes this purpose. By characterizing strategic inter-firm contacts as one of its building blocks, this notion supplies antitrust enforcers with a theoretical tool that tells lawful oligopolistic interdependence apart from unlawful collusive conduct. Yet, the current EU definition of concerted practices does something more. By encompassing a very strong presumption—that firms exchanging strategic information cannot do anything else but accordingly shape their internal decisions as to prices—this notion catches cartels that appear only from these strategic inter-firm contacts, regardless of their price market conduct. Therefore, the current EU notion of concerted practices is a very powerful prosecuting tool that, as such, deserves to dialog with the US antitrust tradition. Having analyzed the US case law about interdependence, parallelism and exchanges of information, we hence discuss whether and how to bridge the EU and US experiences.

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I. INTRODUCTION

In this article we undertake a valiant (not to say reckless) effort—we attempt to bridge the EU concept of concerted practices to the many approaches and doctrines that gravitate around the quite unusual US notion of concerted actions. Two strong motivations feed our commitment. First, the never-totally-satisfied demand for effective tools to fight against cartels and, in particular, against cartels in oligopolistic markets—the most subtle ones. Second, the increasingly need for a more intense and genuine dialog between the EU and the US traditions—a dialog that too often is burdened by preconceptions and bias.

At a first glance, even comparing the two experiences—the task here at hand—seems impossible. Article 101 of the Treaty on the Functioning of the European Union (“Article 101”) names concerted practices. Section 1 of the Sherman Act (“Section 1”) does not use the term concerted actions—only a few courts and scholars mention it. Yet, at a closer look, US courts forge many approaches and doctrines to face the same issues that today—having struggled with the interpretation of Article 101—EU antitrust institutions lead under the EU umbrella label of concerted practices. Namely, through the concept of concerted practices EU antitrust institutions can catch cases of collusive parallelism—distinguishing them from pure oligopolistic interdependence—as well as cases of strategic inter-firm communications that presumably affect firms’ internal decision-making processes. By combining together their approaches to facilitating practices, invitations to collude and plus factors, US courts may accomplish the first of this goal, at least. Thus, a comparison between the two experiences is possible and—away from preconceptions—it shows that the current EU and US experiences are not very different one from the other.

None of them considers mere parallelism enough to prove the existence of an arrangement within the meaning of antitrust law. With some minor differences, both EU and US enforcers apply the so-called parallelism plus doctrine and consider inter-firm communications as one of those plus factors that may tell oligopolistic interdependence apart from collusive conduct. In addition, in the both jurisdictions inter-firm contacts may further form the subject matter of separate arrangements—i.e. arrangements to exchange information—that both EU and US enforcers judge considering whether they entail a reasonable restriction of competition. Finally, on the both sides of the Atlantic Ocean antitrust enforcers may jump from exchanges of strategic information to price fixing arrangement—proved the existence of strategic inter-firm contacts they can conclude as to the existence of a price fixing arrangement.

What is peculiar of the sole EU experience is that such jump is inherent to the notion of concerted practices. In EU a concerted practice to fix price may exist even regardless of firms’ market practices—just because firms have exchanged information as to their future prices and strategies. At least, this is the principle that EU antitrust institutions affirmed dealing with the most recent cases of blatant cartel. Conversely, in the US a jump in these (automatic) terms does not exist. True some courts, given evidence of market parallelism and increased market price, held that a price fixing arrangement may be derived from an exchange of information when the latter leads irresistibly to the former. Yet—as far as we know—no court has ever elaborated any general principle stating that a firm that takes part to an exchange of strategic information is presumed liable of price fixing.

1 For the sake of simplicity, the paper uses the word arrangement to address all the kinds of conduct that may fall under Section 1 and Article 101, because it is not a statutory word in either of the two jurisdictions.

2 See, e.g., PHILIP E. AREEDA & HERBERT HOVENKAMP, VI ANTITRUST LAW. AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶1429a, (2d Aspen Publishers 2003) (defining interdependence as the state of affairs in which each agent’s action depend on his perception of how others will act).

3 See, e.g, 257 U.S. 377 (1921).
In short, the paper discusses the benefits and costs that flow from these diverse approaches and tries to bridge the EU and US experiences, moving from the brilliant proposal that professor William H. Pages has already elaborated as to the US notion of concerted actions.

After this brief introduction, the paper is thus divided into four further parts.

In part II, having outlined Article 101 (see 2.1), we discuss the complex interpretative path that brought EU antitrust institutions to forge the current notion of concerted practices. In the ’70s, parallelism was the starting point of any prosecuting strategy not focused on agreements as well as the crucial element of the notion of concerted practices—the element that distinguished the concept of concerted practices from that of agreements. Yet, to find a concerted practice out of parallelism further evidence of collusion was however necessary, because since then a general principle holds unquestioned in the EU jurisdiction—parallelism alone cannot amount to a concerted practice (see 2.2). Then, at the end of the ‘90s, EU institutions added an element to their approach. Because the cases driven under scrutiny regarded the mere exchange of strategic data, they held that a concerted practice exists even in the lack of evidence of parallelism, by presuming that the information exchanged allowed firms shaping accordingly their subsequent market conduct (see 2.3). Such a presumption dramatically changed the prosecuting strategies of EU antitrust institutions so as the general understanding of what concerted practices means. Hence, the current EU notion of concerted practices is quite different from the one applied in the ’70s and the one elaborated in the ’90s. Nowadays, a concerted practice exists when a firm receives strategic information from its rivals and does not take public distance from it. In these cases EU antitrust institutions presume, against a rebuttal that firms are hardly capable of providing, that all firms use those strategic information inside their own offices to shape their decision making processes, even when their subsequent market practices are not parallel (see 2.4).

In part III, we analyze the benefits and costs that such a notion of concerted practices entails. We discuss the pros and cons of three interpretative determinations—namely: (1) the decision to morph inter-firm strategic contacts into one of the building blocks of concerted practices and, notably, of concerted practices to fix price, share markets, or partition customers (see 3.1); (2) the choice to set a formal threshold for finding out whether a firm takes part to these strategic contacts (see 3.2); and (3) the will to conceive a very drastic presumption about the internal use of the exchanged strategic information (see 3.3).

In part IV, we analyze the US context of concerted practices or actions. Having noticed how unusual the notion of concerted actions is for US courts and scholars—just a few of them use it (see 4.1)—we strive to find the US functional equivalent of the EU notion of concerted practices. On this purpose, we analyze many doctrines and approaches that, taken altogether, cover the many issues that fall under the EU notion of concerted practices. Notably, US courts and scholars acknowledge the problem of oligopolistic interdependence as well as a twofold need—the need to prevent the suboptimal performances typical of oligopolies and the need to distinguish interdependence from collusive behaviors, once those suboptimal performances already took place (see 4.2). Therefore, the US courts and scholars focus on facilitating practices (see 4.2.1) and invitations to collude (see 4.2.2) to prevent firms from realizing those suboptimal performances and on plus factors to tell cases of arrangements from oligopolistic interdependence (see 4.2.3). In particular, bearing the EU experience on the backdrop, we analyze these diverse doctrines focusing on exchanges of information, even in the form of separate agreements to exchange information (see 4.3).

Finally, in paragraph V, we try to bridge the EU and the US experiences. At the end of this paper, we acknowledge that the main difference between the EU and US experiences lies in the ease with which the two jurisdictions establish presumptions favoring plaintiffs—i.e. lightening their burden of proof.
II. EU CONCERTED PRACTICES TO FIX PRICES—THE COMPLEX INTERPRETATIVE HISTORY OF THIS TERM

2.1 Article 101: The Puzzling Problem of Concerted Practices

Article 101 of the Treaty on the Functioning of the European Union—i.e. the functional equivalent of Section 1 of the Sherman Act—includes three paragraphs. The first is made of two parts. The former contains the notion of arrangement—i.e. it addresses “agreements between undertakings, decisions by associations of undertakings and concerted practices”—the latter contains the prohibition—i.e. it condemns all arrangements that “may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.” The second paragraph sets out nullity as the sanction that applies to forbidden arrangements. The third holds lawful the arrangements that, though prohibited pursuant the first paragraph, satisfy altogether the four conditions that it lists.

In practice, Article 101 applies to collusion whatever form it takes, i.e. regardless of any distinction between the notions of agreements, decisions by associations of undertakings and concerted practices. Because its main aim is preventing elusion, Article 101 is concerned with “agreements, or [with] any comparable form of concertation or coordination.” Therefore, the only essential division that matters is that “between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between [the] types of collusion [that Article 101 names].” For example, when dealing with oligopolistic markets, what EU antitrust institutions must find is an effective (and efficient) way to distinguish oligopolistic interdependence from collusion, i.e. to tell cases that cannot be driven under Article 101 apart from cases where firms do something to substitute coordination for the risks of competition.

However, on the theoretical level, EU antitrust institutions have always struggled to define the three notions of agreements, decision by associations of undertakings and concerted practices separately one from the other. In particular, over time two interpretative issues have seriously affected the elaboration about concerted practices—the topic of our paper. First, similarly to US courts, EU antitrust institutions have always had to deal with the relationship between collusion and parallelism—the two building blocks of the notion of concerted practices—without a consistent pattern, but taking in consideration the diverse factual scenarios driven under their scrutiny. Similarly, the same relation between collusion and parallelism was analyzed by the US and scholars. Second, the EU institutions have always wanted to frame the class of concerted practices as a catch-all device to grasp the species of collusion that do not amount to agreements—i.e. those species of collusion which “are distinguishable [...] from

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4 See, e.g., European Commission, Case No. COMP49/92P—Commission/Anic, 1999 ECR I-4125 [hereinafter, Anic] ¶108. Accordingly, current antitrust enforcers and practitioners deem that it makes little sense drawing a difference between agreements and concerted practices, since legally nothing turns on such a distinction.

5 As argued by AG Vesterdorf in Rhône-Poulenc, a historical interpretation of Art. 101 would favor an expansive reading of the terms so to cover all kinds of arrangements and avoid any loop in the scope of the application. Opinion of Mr. Vesterdorf Acting of Advocate General, in Rhône-Poulenc v. Commission, Part D(1)(3)(c), ECR II-927, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989TC0001:EN:PD. See also, e.g., Anic, ¶112.


7 As observed by AG Reischl in Heintz, the conceptual distinction between agreements and concerted practices is “an unimportant argument of classification...” See Joined cases 209 to 15-218/78, Heintz van Landewyck SARL and others v Commission, 1980 E.C.R., 3125, 3310. See also, e.g., Anic.

8 See footnotes ___ and the accompanying text.

9 See Decision IV/31.149, 1986 O.J. L 230, § 87, where the Commission stated that the notion of concerted practices is a tool «to forestall the possibility of undertakings evading the application of Article [101] by colluding in an anticompetitive manner falling short of a definite agreement»; see also, Case 48/69, Imperial Chemical Industries Ltd. v Commission, 1972, E.C.R. 619 [hereinafter ICI], § 64 (concerted practices must grasp a species of collusion that is “something different” and, notably, ‘something less’ than the one that agreements catch). See, e.g., Anic, ¶131-133; Case C-8/08, T-Mobile Netherlands
agreements... by their intensity and the forms in which they manifest themselves.”

Yet, over time, this latter effort has become increasingly difficult because, decision after decision, the EU antitrust institutions have interpreted the notion of agreements more broadly. 

Today what matters to characterize something as an agreement is just firms’ joint intentions to do that something — regardless the form that this meeting of minds takes, the matter of the arrangement, the specific practices endorsed in its furtherance, or the effectiveness of these practices.

Therefore, we discuss developments that have affected the notion of concerted practices without forgetting the relationship between collusion and parallelism and taking into account also the need to distinguish concerted practices from agreements.

2.2 The Early Years: Parallelism First, Further Evidence of Collusion After

Finally, in the ‘70s, after a few years of silence, the European Court of Justice said something on as to the notion of concerted practices. Since the Court was asked to review some cases of blatant parallelism, i.e. cases where parallel price increases, coordinated export bans, and sequential refusals to deal were at stake, it established a principle that holds unquestioned since then – parallelism alone cannot amount to a concerted practice within the meaning of Article 101. Because of oligopolistic interdependence, a concerted practice to fix price, to partition the market, or to share customers exists only when parallelism results from a previous (or contemporary) episode of collusion, i.e. when firms knowingly substitutes practical coordination for the risks of competition. Firms that only “adapt themselves intelligently to the existing and anticipated conduct of their competitors” do not give rise to any form of arrangement falling within the scope of Article 101.

The outlined approach of the European Court of Justice determined two consequences. First, it confirmed the approach embraced by the European Commission until then, which is still into force today in the European Union, and in the United States—namely to find a concerted practice out from parallelism, any prosecuting authority must look for circumstantial evidence ruling out the case of oligopolistic interdependence. These pieces of evidence may vary from


10 See, e.g., Antic, ¶131; T-Mobile, ¶23
12 See Case T-41/96, Bayer AG v Commission, 2000 E.C.R. II-03383, ¶173 (holding that an agreement consists only in “a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties’ intention... is expressed”); Case C-41/69, ACF Chemiefarma, 1970 E.C.R. 661, ¶112; Joined Cases 209/78 to 215/78 and 218/78, Van Landewyck and Others v Commission, 1980 E.C.R. 3125, ¶86; Case T-7/89, Hercules Chemicals v Commission, 1991 E.C.R. II-1711, ¶256.
15 See, e.g., Sugar, ¶172. This principle, which is now recognized as fully consistent with the economic thinking, has been restated also in the most recent T-Mobile, ¶33.
16 In the US the same reasoning was developed by courts and celebrated scholars as Baker, Kovacic and Posner and it is analyzed in Part IV.
inter-firm communications, whatever forms they take,\textsuperscript{18} to the so-called endogenous factors, i.e. elements suggesting that concertation was the only plausible explanation of the observed parallelism. On the theoretical level, the holding of European Court of Justice clarified that 
\textit{collusion} was a building block of the notion of concerted practices other than parallelism. As well as agreements, concerted practices had to catch firms actively substituting cooperation to market hazard.

Yet, at that time, parallelism had still a chief function within the boundaries of the notion of concerted practices. Not only, in practice, it was the starting point of any prosecuting strategy, adjudicating and reviewing activity, but also, on the theoretical level, parallelism distinguished concerted practices from agreements.\textsuperscript{19} The notion of agreements was met even when firms did not implement their meeting of minds, while the notion of a concerted practices could not be held complete in the lack of such implementing market conduct. In other words, at that time the following scheme held true:

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Notions of & Collusion & Parallelism \\
\hline
Agreements & X & \Ø \\
Concerted Practices & X & X \\
\hline
\end{tabular}
\caption{Building Blocks}
\end{table}

\textbf{2.3 Adding a Piece of the Puzzle: Strategic Contacts First, Parallelism After}

The Polypropylene Appeals\textsuperscript{20} represented the perfect occasion for the European Court of Justice to overturn its point of (re)view. It debated whether a concerted practice to fix prices could exist in the lack of parallel market practices\textsuperscript{21} when it was proved that the involved firms had disclosed to their rivals strategic information, among which their future plans.

The answer of the Court was twofold. If, on the one hand, it upheld that a concerted practice “implies, besides undertakings’ concerting together, subsequent conduct on the market, and a

\textsuperscript{18} The phenomenology of inter-firm contacts is obviously incomplete and fragmented. For instance, inter-firm contacts may result from nods and eye contacts or consist in oral and written declarations; they may be direct, or mediated via third subjects, such as independent agencies and associations of undertakings; they may use private channels, such as mails, e-mails, phone calls or closed meetings, or public channels, such as TV interviews and newspapers announcements; they may address very specific topics or general issues; they may belong to a pattern of subsequent contacts or they can be isolated.


relationship of cause and effect between the two," on the other hand, the Court maintained that "subject to proof to the contrary, which the economic operators concerned must adduce," the rivals taking part in the exchange of strategic information and remaining active on the market are presumed to take into account the information received to determine their conduct on that market.

Such an answer produced two significant consequences. First, it lowered the burden of proof cast upon the Commission and other prosecuting authorities who enforce Article 101. From that moment onwards they were exempted from showing whether the ascertained collusion was further put into practice, or had actually affected market price and output. Second, the Court’s answer shifted the focus of Commission’s investigative and prosecuting efforts towards the very same episode of collusion – the exchange of strategic data – that was presumed to produce parallel practices. In other words, if collusion and parallelism were still the two building blocks of concerted practices, the possibility to presume the latter drove the spotlight on the former.

This change of perspective reversed the common understanding of what concerted practices were supposed to be. Before the Polypropylene Appeals that notion pivoted around parallelism—parallelism comes first, further evidence of collusion after; after those rulings the concept of concerted practices hinged on the strategic contacts that may trigger parallelism in—strategic inter-firm contacts come first, parallelism then. Thus, let’s focus on these contacts and on the changes that the interest for them cause to the interpretation of the other building blocks of the current notion of concerted practices.

2.3 The Building Blocks of the Bidirectional Notion of Concerted Practices

2.3.1 Inter-Firm Communications and Strategic Inter-Firm Contacts

Nowadays, in the European Union inter-firm communications and strategic inter-firm contacts may be typified in diverse ways, which are not strictly alternative one to the other. First, and as hinted before, inter-firm communications can be conceived as pieces of circumstantial evidence from which antitrust enforcers may infer that the observed parallel market conduct resulted from an episode of collusion. When authorities enforcing Article 101 try to find a concerted action out of parallelism, inter-firm contacts can work—as they do in the United States within the boundaries of the plus factory doctrine—especially together with other factors to show that the observed parallelism does not amount to a form of oligopolistic interdependence.

In addition, and like what happens in the United States, inter-firm communications can be characterized as the subject matter of separated arrangements, i.e. as agreements to exchange those information, or as situations where firms happen to exchange them. In contrast to the previous case, in those cases what is at stake is not the existence of a species of collusion—the

22 See, e.g., Anic, ¶118, 124; Hüls ¶161, 165 (further holding that “the very concept of a concerted practice presupposes conduct by the participating undertakings on the market,” such as parallel price increases, sequential refusals to deal, or coordinated import bans).
23 See Hüls, ¶162; Anic, ¶121; and Westfalen, ¶103 (emphasis added).
24 See footnotes ___ and the accompanying text.
25 See footnotes ___ and the accompanying text.
arrangement indeed is evident—EU authorities must decide, as well as US courts do, the rule for judging those exchanges of information. In this regard, the EU Commission recognizes that “information exchange is a common feature of many competitive markets [that] may generate various types of efficiency gains: it may solve problems of information asymmetries, improve firms’ internal efficiency through benchmarking, reduce consumers’ search costs. Therefore, generally the anticompetitive nature of information exchanges depends on the effects that they produce on the market”—translated in the US terms, we would say that it is subject to the rule of reason—but for the case of strategic contacts.

Strategic inter-firm contact are “any direct or indirect contact between [undertakings], the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor, or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.” Nothing good may come from strategic inter-firm contacts: they are capable of reducing economic agents’ ignorance as to their rivals’ market behaviors, affecting their independent decision-making processes and, thus, reducing that business hazard that should characterize competitive markets. As a consequence, European antitrust law strictly forbids strategic inter-firm contacts, because unfettered competition exists as long as “each economic operator . . . determine independently the policy which he intends to adopt on the common market.” When these strategic inter-firm contacts are characterized as the subject matter of an arrangement, a red light turns on—the first paragraph of Article 101 applies without (and regardless of) any further inquiry as to the effects that the exchange produces on market price and output. In the US terms, we would say that here is applied a per se ban.

But strategic inter-firm contacts may be characterized in a further way, which is peculiar of the EU antitrust elaboration. Strategic inter-firm contacts can be conceptualized as the first building block of concerted practices to fix prices, or to partition markets and share customers. Already in ICI, the Commission recognized that under Article 101 “there is a common will not only when the undertakings come to an understanding as to their conduct on the market” as it happens in the case of the properly said agreements, “but also when they deliberately ensure that there can be no lack of knowledge about their future conduct by keeping each other informed,” as it had happened in the case of concerted practices at stake. Similarly, in Züchner the Commission held that, for a concerted practice to exist, “it suffices for those concerned to inform each other of the amount of charges actually imposed by them or contemplated for the future; for the object or effects of such contacts is to influence the level of the charges imposed by the competitor or, at least, to eliminate uncertainty on the part of the competitor as to the

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27 See footnotes 23 and the accompanying text.
29 See European Commission, supra note 24, at §57.
30 In turn, these effects vary according to many variables, among which: (1) the kind of data exchanged, which may be differently strategic, aggregated, recent, or accessible; (1) the kind of the exchange happened, which can be assessed highlighting whether (3) it was more or less frequent; (4) it occurred in a competitive or oligopolistic market; and (5) it addressed the general public, consumers included, or a limited number of business subjects. For a detailed description of each of these criteria, see European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, O.J. 2011 (C11) 1, ¶86-94.
31 See, e.g., Sugar, ¶174-175; Ahlström, ¶64; Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, Cimenteries CBFR and Others v Commission, 2000 E.C.R. II-491 (hereinafter, Cement), ¶1852.
32 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, supra note 24, ¶61, ft. 46.
33 See, e.g., Sugar, ¶173; Züchner, ¶13; Ahlström, ¶63; Hüls, ¶159; Anic, ¶116; Westfalen, ¶121; GDF Suez, ¶212.
level of charges imposed by the first party.”

More recently, in Cement, where a market partitioning offence was at stake, the Court of Justice affirmed that “any direct or indirect contact between economic operators of such a kind as to disclose to a competitor the conduct that the economic operator concerned has decided upon or envisaged on the market... constitutes a concerted practice.”

In short, because EU institutions may qualify inter-firm communications in diverse ways, today these institutions often conceive strategic inter-firm contacts as that exact form of collusion that concerted practices should catch. By doing so, they succeed in defining that, notwithstanding the broad notion of agreements, some form of collusion are ban as concerted practices. Whereas the latter address that species of collusion that takes the form of strategic inter-firm contacts, agreements capture any other form of cooperation which consists in the convergence of wills on a specific subject and which is supported by some sort of legal, economic or moral bound.

2.3.2 Presuming the Parallel Internal Use of the Exchanged Strategic Data

Any card game is said to be hopelessly compromised if a player shows (voluntarily or not) one of her cards to her adversaries—from that moment onwards those rivals will not be capable of taking their gaming decisions regardless of the card shown them. Likewise, competitors that get to know their rivals’ strategic intentions cannot do anything else than taking into account that information and use it to conceive their strategies. At least, this is what nowadays EU enforcers end to establish by developing the presumption of parallelism introduced by the Polypropylene Appeals. Namely, in many cases following these Appeals the European antitrust institutions, once ascertained the participation of one or more firms to anticompetitive business meetings, maintained that each involved firm:

not only did pursue the aim of eliminating in advance uncertainty about the future conduct of its competitors but also, in determining the policy which it intended to follow on the market, it could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings. Similarly, in determining the policy which they intended to follow, its competitors were bound to take into account, directly or indirectly, the information disclosed to them by the applicant about the course of conduct which the applicant itself had decided upon or which it contemplated adopting on the market.

At a first glance, this statement does not seem equal to a mere presumption of market parallelism—EU enforcers do not presume that firms will simply undertake the same market practices because of the data exchanged. Otherwise, they presume something more. They presume that, once strategic contacts occurred, rational firms will use the acquired information within their own offices to shape their decision making processes and, then, undertake parallel market conduct.

35 See, Züncher, at 2027.
37 To be sure, another more sweeping choice could be that of reforming the first indent of Article 101 by substituting the words agreements and concerted practices with a one-fits-all expression such as arrangement. By doing so, the prosecuting advantages that come with the present notion of concerted practices could be got lost.
38 See, e.g., Hüls, ¶162; Anic, ¶121; Rhône-Poulenc, ¶123; Joined cases T-202/98, T-204/98 and T-207/98, Tate & Lyle v Commission, ¶58; and Westfalen, ¶103.
This details makes a tremendous difference. On the theoretical level, it changes the second building block of the current notion of concerted practice—it does not consist in market parallelism anymore, but in the parallel internal use that firms may do of the strategic data acquired though the exchange occurred. In practical, the presumption of internal use makes the allegation of concerted practices almost unbeatable, because the presumption in itself is very difficult to rebut.\textsuperscript{40}

Probably, showing that the exchanged data never achieved the persons in charge with the definition of the firm’s market strategies could work as a viable rebuttal. But—for sure—what cannot disprove such presumption is “the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose.”\textsuperscript{41} A concerted practice to fix prices exists even independently from the specific market practices that firms undertake after having taken part to strategic inter-firms contacts. These practices are utterly immaterial whether they are consistent or not with the exchanged data, because in both cases those practices \textit{have been however decided on the bases of the gathered information}. For instance, without the received strategic data even a firm that does not comply with them could have performed better than what it really did. In short, even in the lack of any evidence of parallel market behaviors and of any evidence of potential negative effects on consumer welfare, no one could exclude that the gathered strategic data affected firms’ independent decision making processes. In the recent Bavaria case, even though the defendants claimed that they determined their market conduct autonomously, the Court of Justice stated that a party did not increase its prices according with the data exchanged

\begin{itemize}
\item is not sufficient to prove that the [defendants] never took into account the information exchanged at the meetings in question in order to determine their conduct on the market as they wished.\textsuperscript{42}
\item But if even a practice that is not consistent with the exchanged information cannot rebut the presumption introduced by the Polypropylene Appeals, then we are witnessing a sort of \textit{de facto} abolition of the element of parallel market behaviors. Nowadays what seems to remain is a notion of concerted practices that, as a matter of theory, is still made of two building blocks – i.e. collusion in the form of strategic contacts and parallel behavior—but that, as a matter of practice, is met by showing the occurrence of the sole first element and presuming that parallelism takes the form of parallel internal use.\textsuperscript{43} Indeed, EU courts have often held that
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\item in order to prove that there has been a concerted practice [to fix prices], it is not necessary to show that the competitor in question has formally undertaken, in respect of one or several other competitors, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market. It is sufficient that, by its statement of intention, the competitor eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect from it on the market.\textsuperscript{44}
\end{itemize}

\textsuperscript{40} See Alborn-Llorenz, \textit{supra} note \textsuperscript{___}, at 866.
\textsuperscript{42} Case T-235/07, Bavaria, 2012 ECR 226, ¶179-180.
\textsuperscript{43} See, e.g., Alborn-Llorenz, \textit{supra} note \textsuperscript{___}, at 847-848; and Wessely, \textit{supra} note \textsuperscript{___}, at .
\textsuperscript{44} For the irrelevance of conduct implementing concertation, also when – given the evidence of contacts – the conduct is inconsistent with the very same idea of concertation. See, e.g., \textit{GDF Suez}, ¶¶247-248, 355; \textit{Guardian}, ¶ 45; \textit{Cement}, ¶1852; \textit{BPB} ¶182; \textit{Denki Kagaku}, ¶67; \textit{BASF}, ¶242; \textit{Hercules}, ¶260, and more recently case T-360/09, E.ON Ruhrgas and E.ON, 2012, not yet published, ¶163.
And, by doing so, EU courts accomplish a further purpose. They make the practical enforcement of both agreements and concerted practices depend on the existence of mere collusion, i.e. independent from the practices taken in their execution, and consistently with the idea that, at the end, what Article 101 has to forbid is only the sole act of colluding. In other words, as a matter of facts, today the subsequent table holds true:

Table 2

<table>
<thead>
<tr>
<th>Notions of</th>
<th>Building Blocks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreements</td>
<td>X</td>
</tr>
<tr>
<td>Concerted Practices</td>
<td>X, in the form of strategic contacts</td>
</tr>
<tr>
<td></td>
<td>Ø, presumed and in the form of an “internal use” aimed at changing firms’ decision-making processes</td>
</tr>
</tbody>
</table>

As we will see, the current notion of concerted practices may work as a powerful prosecuting tool. Yet, EU courts do envisage a way to avoid the charge of concerted practices to fix prices, market quotas or customers shares – they ask firms that materially received strategic information to take public distance from, or to manifestly opposing to, it.

2.3.3 Public distance/manifest opposition

EU case law on concerted practices has often witnessed the case of a firm that announces its future prices (or output/customer quotas) to its rivals during a private meeting. Differently, it does not constitute a concerted practice within the meaning of Article 101(1) the case of a company makes a unilateral announcement that is also genuinely public, unless an invitation to collude can be however framed as it may happen when the first announcement is followed by public announcements by other competitors, not least because strategic responses of competitors to each other’s public announcements could prove to be a strategy for reaching a common understanding about the terms of coordination.

At one extreme, if rivals expressly accept to charge the same future prices, or offer other kinds of responses that fall short of clear and explicit approvals of the received solicitation, EU enforcers readily find out a price fixing agreement—not to mention the arrangement to exchange strategic information—regardless of either the conduct carried out in its furtherance, or its real effects on market price and output. Indeed, as said above, Article 101 prohibits the act of colluding as such, thus even though no party ever executed it that an express verbal

45 See footnotes and the accompanying text.
46 Differently, it does not constitute a concerted practice within the meaning of Article 101(1) the case of a company makes a unilateral announcement that is also genuinely public, unless an invitation to collude can be however framed as it may happen when the first announcement is followed by public announcements by other competitors, not least because strategic responses of competitors to each other’s public announcements could prove to be a strategy for reaching a common understanding about the terms of coordination.
47 To be sure, the anticompetitive nature of some unilateral forms of disclosure may be ambiguous: some do not result in an unlawful arrangement even though accepted, others lead to legitimate forms of collaboration. Yet, antitrust enforcers cannot pursue only clear invitations to collude, but for supporting equally clear elusive business choices. Therefore, a case by case analysis is required.
48 See, e.g., Cement, § 1849, where the Court of First Instance held that reciprocity is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it.
49 Consider that the two characterizations may well overlap. See, e.g., Commission Decision, 12 October 2011, Case No. COMP/39.482 Bananas, § 54 where the Commission observed, «The object of pre-pricing communications between competitors … was to reduce uncertainty as to the conduct of the parties with respect to the quotation prices … The commission considers that these communications gave rise to a concerted practice by which they coordinated quotation prices for bananas». 
acceptance is enough to complete the notion of an arrangement, or no market performance changes as a consequence of the collusion.

At the other extreme, if rivals reject verbatim the anticompetitive offer and abstain from taking any practice compliant with it, if in the US the invitation to collude theory and Section 5 of Federal Trade Commission Act (FTCA) still applies, EU enforcers must come to the conclusion that the solicitor and its rivals did not achieve a form of arrangement about either the exchange of information, or the fixing of prices.

However, moving away from these clear-cut extremes, EU courts consider the verbal refusal of the invitation to collude crucial and overriding in comparison to any act that follows the reception of the received pieces of information. In sum, according to EU institutions what neutralizes the evil of a solicitation to collude is that rivals take (genuine) public distance from, or manifest their opposition to, the gained information. Since cartels’ likelihood is seriously undermined when competitors do not give their rivals reasons to believe that they are intended to subscribe the invitation and comply with it, only rivals’ clear statements that they do not wish to receive such strategic data, or that they do not want to participate to the cartel, or in meetings of a professional association which served as a veil for unlawful concerted actions, are the quintessential tools to exclude concertation. But differently, a firm that makes its rivals believe that it has subscribed the results of their anticompetitive meeting and that it would act in conformity with them encourages them to act in a way that is harmful to competition, in case in order to deviate from the collusive equilibrium that the rivals will realize.

Therefore, taking part to a meeting with an anticompetitive purpose counts as a reciprocal contact, even when the participation is limited to the mere passive receipt of the exchanged strategic data. Analogously, the choice to keep silence, to not take part in all the aspects of the anticompetitive course of action, or to walk away from the private meeting does not ban EU institutions from finding out the existence of a concerted practice. Thus, in EU even “a situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can [...] constitute a concerted practice.”

Consequently, in the European Union a firm addressed by an invitation to collude but intended to escape an allegation of collusion should “put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs,” or to have informed the administrative authorities. Its (even passive) attendance at a meeting will be construed as tacit endorsement of an anticompetitive

50 See, e.g., Case C-510/06 Archer Daniels Midland v Commission, 2009 ECR I-1843, §§119-120; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland and Others v Commission, 2004 ECR I-123, § 81; and Case T-9/99, HFB and Others v Commission, 2002 ECR II-1487, § 137.
51 See, e.g., Westfalen Gassen Nederland, ¶103, (arguing that “the notion of public distancing as a means of excluding liability must be interpreted narrowly”); Case T-61/99, Adriatica di Navigazione v Commission, 2003 E.C.R. II-5349, ¶138. For a discussion of the history of the requirements that must be satisfied in order to demonstrate successful public distancing see, e.g., David Bayley, Publicly distancing oneself from a cartel, WORLD COMPETITION 177 (2008).
52 See, e.g., KME, ¶¶94-95; Mannesmannrohren, ¶¶277-278.
53 See, e.g., Tate & Lyle, ¶¶54-58 and Rhone-Poulenc, ¶ 122-23.
54 See e.g., Archer Daniels, ¶120.
55 See, e.g., Cement, ¶1849 (holding that the condition of reciprocity that inter-firms contacts require “is met where one competitor discloses its future intentions, or conduct on the market, to another [and] the latter requests it or, at the very least, accepts it”). Similarly, see also, Opinion of Advocate General Kokott, Case C-8/08, T-Mobile Netherlands, 2009 E.C.R. I-4529, ¶54.
56 See e.g., E. ON, ¶176; Archer Daniels, ¶120; Aalborg Portland, ¶81; and HFB and Others, ¶137. Before, in the Polypropylene cases, the European Court held, on appeal, that a participating undertaking would have to demonstrate that it had clearly indicated to its competitors that its participation in those meetings was without any anticompetitive intention and in a spirit that was different from that of the other participants – see Hüls, ¶155 and Antic, ¶90.
57 See, e.g., Cement, ¶¶82-84, where the Court held that, “failure to report to the administrative authorities effectively encourages the coordination of the infringement and compromises its discovery.”
practice resulting from coordination between undertakings. Stretching this finding further, it would appear that if an undertaking receives an unsolicited telex, email or fax from a competitor disclosing, for example, pricing intentions and suggesting collusion, the only safe course of action for the undertaking would be to disassociate itself from the information or to inform the competition authorities. In the US, instead, according to the invitation to collude theory, firms receiving the solicitation to collude would not be liable of any infringement, but for a proactive behavior on their side. Rather, the solicitor would be liable of violating Section 5 of the FTCA.

II. BENEFITS AND COSTS OF THE CURRENT NOTION OF CONCERTED PRACTICES

On the basis of what said above, we can conclude that the present notion of concerted practices is a powerful and effective prosecuting tool against naked restrictions of competition. Without increasing over deterrence, this notion grants a dramatic prosecuting advantage to the authorities applying Article 101—an advantage that, namely, rests with the following interpretative determinations. First, the decision to morph inter-firm strategic contacts into one of the building blocks of concerted practices and, notably, of concerted practices to fix price, share markets, or partition customers; second, the choice to set a formal threshold for finding out that a firm take part to these strategic contacts; and third, the will to conceive a very drastic presumption about the internal use of the exchanged strategic information.

3.1 The Metamorphosis of Strategic Inter-Firm contacts

When called to establish whether an arrangement exists antitrust enforcers (should) bear to mind the distinction between, what makes an arrangement as such and, what pieces of evidence can be used to infer whether that arrangement occurs. While the former is a theoretical issue that has to do with the definition of what an arrangement is, that is to say, with the identification of the building blocks of the notion of an arrangement, the latter is instead an evidentiary issue, which has to do with the (few or manifold) indicia from which enforcers can understand, with different degrees of persuasion, whether the identified building blocks occurs. When one of those evidentiary elements—say, a practice that actually facilitates the creation of a cartel and that is difficult to hide—is morphed into a constitutive element of the notion, antitrust enforcers can deem the notion completed without lavish in further efforts. And, obviously, on the prosecuting side such a result is particularly appreciable especially when firms, once got used to the per se prohibition of price fixing agreements and the like, try to realize cartels with covert devices and to hide any direct evidence of them.

Clearly, such a prosecuting strategy cannot always been accommodated. Consider, for example, the case of parallel practices occurring in oligopolistic markets—strong is the temptation to elevate some pieces of evidence to the status of building blocks of the notion of an arrangement. When one of those evidentiary elements—say, a practice that actually facilitates the creation of a cartel and that is difficult to hide—is morphed into a constitutive element of the notion, antitrust enforcers can deem the notion completed without lavish in further efforts. Yet, whereas this last is an issue that falls within the scope of the evidentiary issue, the issue addressed in the text crosses the boundary between the evidentiary and the theoretical levels.

58 A further and different issue should, then, be to understand the quantum of evidence that is enough to infer in a conclusive way whether the regarded arrangements occurs.

59 Which, by the way, are the most frequent ones, because to make a cartel in an oligopolistic market is easier.

60 Not to say that strong is the temptation to morph one single piece of evidence in a smoking gun. Yet, whereas this last is an issue that falls within the scope of the evidentiary issue, the issue addressed in the text crosses the boundary between the evidentiary and the theoretical levels.

61 See, e.g., ICI, ¶66.
firms reached no arrangement within the meaning of Article 101. But what about the decision of morphing strategic contacts—and not other evidentiary elements—into a constitutive and necessary element of the notion of concerted practices? There are two reasons, at least, that justify the choice of the EU institutions.

First, in the case of strategic communications the risk of making serious false-positive mistakes and contradicting what economics teaches—a risk that is very high in case of parallelism—is instead quite low. It is actually difficult to envisage the case of firms privately and frequently exchanging strategic data not to harm competition, but for pro-competitive reasons.

Second, as to the choice of focusing on strategic inter-firm contacts and not on other evidentiary elements, consider what the Turner-Posner debate together with the economic literature on real-world cartels reveal as to the rarity of perfect oligopolistic interdependence. Strategic inter-firm communications are effective second best tools that firms frequently use to achieve collusive equilibria without making their wills converge on factors, such as prices and output, that condition competition in a much more overt way. Therefore, the choice to focus on these contacts in lieu of other evidentiary elements allows antitrust authorities to go straight to one of the most dangerous and most hideous practices that help creating cartels.

The above arguments lead immediately to the second side of the metamorphosis, i.e. to the choice of considering price fixing and the like as the subject matter of a concerted practice that reveals itself via the sole exchange of strategic information.

Facing inter-firm strategic contacts, enforcers may ask on which subject matter firms actually meet their minds: whether they decide to exchange their data or whether they aim at passing beyond this step so to coordinate their prices. Again, when dealing with cartels strong is the temptation to follow the second option. Enforcers are willing to jump from strategic communications to price-fixing arrangements and the like just because firms that got used to the per se prohibition of price-fixing agreements seek to approximate collusive results via less blatant anticompetitive behaviors, i.e. via practices that, as inter-firm communications, do not require firms to achieve a real consensus on output and prices. Hence, characterizing an exchange of strategic information as the first block of an arrangement to fix prices, limit output,
or partition markets deters an effective facilitating practice that firms use quite often, allowing antitrust enforcers to catch price-fixing arrangements with the *mere* showing of strategic inter-firm contacts, i.e. with lower prosecuting efforts and expenses. As a matter of facts, this scenario arises when it is difficult to show directly the existence of a price-fixing arrangement. Indeed, when the existence of a naked restriction is blatant, its gravity is so absorbing that any discussion about a possible further arrangement on the inter-firm contacts that probably have triggered the investigation is quite useless. In those cases, indeed, EU talk about a complex arrangement articulated in subsequent steps: the exchange of information to achieve the collusive equilibrium, the naked restriction, and the exchange of information to defend such equilibrium from deviations.

Again, this result that does not rise any serious threat of over-deterrence. As long as the label “strategic inter-firm contacts” is limited to those contacts that are able to reduce firms’ independence in deciding their market conduct, no virtuous or neutral business behaviour risks to be unjustly punished.

Instead, we would have reached a different result, if antitrust enforcers *jumped* not from exchanges of strategic information to price fixing arrangement, but from inter-firm communications whose reasonableness were to be discussed to *per se* prohibited price fixing arrangements. In this second scenario, indeed, in face of a very strong prosecuting advantage, the risk of over-deterrence would be higher, in detriment of some forms of contacts that, as above said, may produce pro-competitive effects.

### 3.2 The Formal Threshold

The rule of manifest opposition has a great advantage – it is neat and simple. If they want to, firms can immediately understand and respect the rule by uttering some words of disproval as to the exchange of strategic information that is taking place. When advocated, antitrust authorities can easily apply the rule to pick up the sole firms that voluntarily took part to the strategic contacts. In short, the rule of manifest opposition gets a greater degree of certainty about the law and saves resources otherwise spends to enforce the law. In addition, as hinted before, it helps destroying the mutual trust that should exist among the parties of a cartel. Even before any antitrust intervention, once a firm takes public distance from an invitation to collude, none of its rivals—event the solicitor—will invest in the cartel, because there will be a honest deviator, at least.

But is this rule accurate? Since it amounts to a formal requirement—a mere declaration of public distance—two contradictions are possible. On the one hand, firms actually taking part to the exchange could easily elude it. They could declare their manifest opposition, acquire immunity from any allegation of cartel but, then, taking advantage from that cartel by either contributing to realize it or deviating from it. On the other hand, firms that do not utter any word of opposition are however deemed parts of the exchange, even when they do not really want to. Actually, the first scenario is not plausible. If a firm assisting to an exchange of strategic information manifests its opposition, its rivals will probably abandon their collusive projects. Therefore—put aside that its rivals will be however subjected to a proceeding for having infringed Article 101—the firm will never have the opportunity to take a conduct that, in practice, contradicts its manifest opposition. As to the second scenario, the rule of manifest opposition exists just to offer to honest firms a simple tool to call themselves out of strategic contacts. Therefore, away from the case of ignorant firms, also the second scenario is highly implausible.

Yet, in the wake of this latter observation, one could argue that the rule of manifest opposition is over-deterrent. Actually, it is hard to find any redeeming virtue in not manifestly opposing to a meeting where rivals disclose strategic information. Therefore, the rule does not strike down any procompetitive practice. Rather, it is a drastic and severe rule. In a context,
like the European one, where some entrepreneurs can still have bad habits as to the manners in which business relationships should be managed, the rule of manifest opposition has a clear “pedagogical” meaning – it sweeps very broadly, also hitting ignorant firms and firms whose intention to harm competition is not really strong, just to convey the message that strategic information can never be disclosed. Probably, if EU institutions could condemn only the invitation to collude, as US courts may do through Section 5 of FTCA, they would not need to be so harsh towards the ones to receive strategic information.

### 3.3 The Drastic Presumption

Presuming the sole occurrence of parallel market practices would have lowered dramatically prosecutors’ burden of proof and shifted the focus of antitrust enforcement towards those cheap talks, spoken assurances in secret meetings, or covert conversations involving industry members that firms use to facilitate and dissemble their coordination. This choice would have already entailed an efficient and effective use of the scarce resources available to the authorities applying Article 101, enabling them to centre their attention on the practices that are really dangerous and difficult to hide.

Yet, current EU antitrust institutions do something more—they presume that the firms taking part to the occurred exchange of strategic information use the latter to change their internal decision making processes about prices, output and the like. Therefore, if those firms do not succeed in calling themselves out from the occurred exchange of strategic information, they cannot rebut the presumption of parallelism even showing that their strategies are not consistent with the information exchanged and are unable to harm consumer welfare. Granted that in doing so they obviously achieve the above-mentioned prosecuting advantage, is there any risk of unfairness and over-deterrence?

Broadly speaking, presumptions are thought to capture *id quod plerumque accidit*, i.e. what happens in the great majority of cases. As long as we believe that firms are rational agents that shape their decisions on the basis of the information that they get to know, endorsing this EU presumption sounds drastic and severe, but not unfair. If it was for the neoclassic paradigm, the EU presumption should not admit any rebuttal—an exchange of strategic information among rational competitors *always* implies that the information taken into consideration will be used to shape market conduct and, thus, either to realize a cartel or to deviate from the cartel that rivals want to realize.\(^{71}\) Instead, today’s EU presumption can be still rebutted by firms showing that those in charge with the business decisions do not hear anything of the exchanged information.

Furthermore, the presumption does not undermine any pro-competitive behavior. Again, there is nothing good in taking part to strategic inter-firm contacts and the class of strategic information is so well defined that no firm would stop pro-competitive exchanges of data because of the current notion of concerted practices.

That said a clarification seems however due to debunk the seriousness of the presumption here at stake. In practice, EU antitrust institutions have always applied this presumption in cases of *blatant cartels*—cases of leniency applications, prolonged parallel practices and complex forms of coordination. Actually, they have always used the presumption against those firms that, though clearly benefitting from the existing collusive equilibrium, argued to have walked on-part in only one or a few of the scheduled conspirational opportunities. Therefore, granted that the presumption has been uttered in the terms above-mentioned, we really do not know whether forms of coordination against those firms that, though clearly benefitting from the collusive equilibrium, argued that they walked on-part in only one or a few of the scheduled conspirational opportunities.

\(^{71}\) See IV PHILIP E. AREEDEA & HERBERT HOVENKAMP, supra note __, at 155 (Aspen Publisher 2003). ("Where, for example, one firm prepares and circulates its price list or price computational manual, there is no assurance that a rival will not simply use that information to match or undercut it. Or a firm asking a rival for its price on a particular item or transaction and announcing an intention to match it may simply be articulating the obvious").
the same EU institutions would have applied it in the lack of any evidence as to market parallelism and market price increase.

III. THE US APPROACH TO CONCERTED PRACTICES: A FUNCTIONAL EQUIVALENT OF THE NOTION OF CONCERTED PRACTICES

In the United States an exact notion of concerned practices as well as defined in the European Union does not exist. Therefore, in order to develop our transatlantic comparison, we look for something that can work as the functional equivalent of the EU notion of concerted practices. Namely, we consider the notion of concerted actions and the diverse tools that US courts and scholars elaborated to tell perfect interdependence from collusive parallelism, without forgetting the general approach that US courts follow in dealing with agreements to exchange information. Taken altogether, these somehow diverse, somehow overlapping theories and doctrines contribute to cover the all issues that today EU antitrust institutions drive under the umbrella label of concerted practices.

4.1 The US Notions of Agreements and Concerted Actions

In the United States Section 1 of Sherman Act (Section 1) prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” Having granted that US courts have soon used the words contract, combination and conspiracy interchangeably among them and with the word “agreement,” the loose language of Section 1 has constantly forced enforcers to struggle with the notion of “agreement.”

Neither contract law, nor economics, nor even the ordinary parlance can—by themselves—supply prepackaged definitions of what an agreement is. The strict characterization that the word “contract” would make Section 1 too easy to be eluded, while antitrust enforcers need a notion of arrangement flexible enough to catch any behavior that could harm competition, even the most malicious one. Economic concepts alone are not suitable to interpret the word agreement because they focus on competitive and non-competitive outcomes, while legal rules must use tools that distinguish among species of business conduct. For example, lawyers need to know what business behaviours morph oligopolistic interdependence—which, as said above, does not require any kind of arrangement—into a case of tacit collusion or into a case of express exchanges of assurances. Economists, on the contrary, look at whether the equilibrium deriving from both oligopolistic interdependence and tacit/express collusion is achievable or sustainable. Finally, even the ordinary broad idea according to which an arrangement is any form of joint activity by two or more agents could not serve as a good interpretation of the legislative

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72 U.S. 15 § 1.
73 See, e.g., IV PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, 2-4 (Aspen Publisher 2003).
74 See, e.g., Robert H. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. L. & ECONOMICS 7, 21-22 (1966) (arguing that Section 1 identify a continuum of arrangements, leading from the most formal and express to the most informal and tacit, so to capture the full range of possible arrangements). See also, Gregory J. Werden, Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory, 71 ANTITRUST L.J. 719–778 (2004) (arguing that “[a]greement in antitrust law is a broad and ill-defined concept”).
75 In the common law system, contract is an agreement that creates obligations enforceable by law. In contracts are recognized specified elements. First, the parties of contract; second the common intent of the parties; and finally capacity and legality. See, e.g., GREGORY KLAAS, CONTRACT LAW IN THE USA 27 (Kluwer Law International 2010).
76 As to the broad use that antitrust law makes of the so-called teleological interpretation. See, e.g., PHILIP E. AREEDA & HERBERT HOVENKAMP, supra note ___, at 4 ¶1400 “unless we are prepared to hold that an actor ought not to have acted as it did, finding an agreements as no function.”
77 As a matter of fact, indeed, over the years firms have devised more subtle and covert means for achieving an arrangement. See, e.g., William H. Page, supra note ___, at. 17-18.
firms are actually aware of their shared economic interests and of their reciprocal abilities to talking about the EU experience, criterion for distinguishing concerted from interdependent parallel actions.

The above-quoted expressions about the meaning of the word agreement that all rivals share the same (lucrative) goal—what, in sum, seems to be the pivotal element of concerted actions from cases where coordination is accomplished via a direct exchange of assurances, minds addressing the case of word agreement and, thus, it has been used in association with the above quoted expressions.

85 scheme”.

but that, at a first look, appears as the correspondent of the EU notion of concerted practices?

By examining the relevant case law on the matter, professor Page notices how the term concerted actions—which is a clear term of art—has often been used interchangeably with the word agreement and, thus, it has been used in association with the above quoted expressions addressing the case of a unity of purpose, a common design and understanding, a meeting of minds or a conscious commitment to a common scheme. Yet—professor Page proceeds—away from cases where coordination is accomplished via a direct exchange of assurances, awareness that all rivals share the same (lucrative) goal—what, in sum, seems to be the pivotal element of the above-quoted expressions about the meaning of the word agreement—is not a good criterion for distinguishing concerted from interdependent parallel actions. As hinted before talking about the EU experience, economics teaches that in perfectly oligopolistic markets firms are actually aware of their shared economic interests and of their reciprocal abilities to

The interest in preserving the incentives of individual firms to compete fiercely is strong enough to make enforcers blame any species of over-deterrence of practice that just look like concerted ones. See 467 U.S. 752 (1984).

See Jonathan B. Baker, Two Sherman Act Section 1 Dilemmas: parallel pricing, the Oligopoly Problem, and Contemporary Economic Theory, 38 ANTITRUST BULL. 143 (1993).

328 U.S. 781 (1946), at 809 (noting that evidence of a violation “may be found in a course of dealing or other circumstances, as well as in exchange of words”).

334 U.S. 131 (1948), at 142; See also, 384 U.S. 127 (1996), at 142.

American Tobacco Co. v. United States, 328 U.S. 781 (1946), at 809–810. See also Hovenkamp, H. The rationalization of Antitrust, 116 H Arv. L. Rev. 917–925 (2003); (arguing that the case was “the high point of judicial recognition that collusion could be based on nonverbal or other tacit communication.”)

334 U.S. 131 (1948), at 142.

328 U.S. 781, (1946) at 810.


465 U.S. 752, 753 (1984); see also, In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004) (requiring a “conscious commitment to a common scheme” while referring to the words of American Tobacco addressing the “meeting of minds”).

Indeed, there is room to argue that, at least in the everyday parlance of scholars and practitioners, the expression concerted actions is used to address all those cases where there is no direct exchange of assurances. See, e.g., Gavil, Kovacic and Baker, supra note___ at 268. They argue that concerted actions amount to inter firm coordination “accomplished by means other than a direct exchange of assurances.”

Not by chance, the common law concept of agreement that, from the outset, did represented a term of comparison in the interpretation of Section 1, consists of three elements: namely, the plurality of participants, the method of conspiracy, and the unity of purpose. The expressions quoted above grasp just this idea of a conscious and intentional alignment.

See footnotes ___ and the accompanying text.
affect price and output decisions\textsuperscript{93}. Therefore, a definition of concerted actions and/or agreements hinging upon rivals’ awareness of their common profitable goal is not suitable to draw a line between cases where the observed parallelism was preceded by an arrangement and cases where such arrangement does not exist, that is to say, between cases that can be subject to Section 1 and cases that fall out of its scope.\textsuperscript{94}

In short, differently from the EU notion of concerted practices, the US concept of concerted actions does not furnish an operative solution to distinguishing oligopolistic interdependence from collusive conduct. The solution to this problem must be found somewhere else.

\subsection*{4.2 The Problem of Parallelism and Perfect Interdependence}

Similarly to EU antitrust institutions, the US courts have soon realized that no mere parallel behavior can constitute an arrangement within the meaning of Section 1. They have quickly endorsed the economic teachings that parallelism rationally happen in two different market scenarios—when markets are perfectly competitive, i.e. when there is no interdependence among them, and when markets are perfectly oligopolistic, i.e. when that interdependence exists. In the former situation firms may adopt the same practices and still be independent one from the other just because they are similar economic agents that answer to the same set of economic facts and incentives.\textsuperscript{95} In the case of perfectly oligopolistic markets, parallelism happens because firms, recognizing the influence of their own decisions on the profitability of their rivals, mimic their competitors’ choices.\textsuperscript{96} For example, in \textit{Theatre Enterprises}, the US Supreme Court held that the parallel behavior there at stake—i.e. eight refusals to deal—resulted just from eight independent decisions made on the basis of the same underlying economic conditions.\textsuperscript{97} The Court negated that in such a scenario “parallel business behaviour …constitutes itself a Sherman Act offense”.\textsuperscript{98} In \textit{Petroleum Products Antitrust Litigation},\textsuperscript{99} the Court held that in oligopolistic markets interdependence alone is sufficient to explain supra-competitive pricing and could produce consequences similar to those of cartels, without an agreement to occur.\textsuperscript{100}

In short, like in the European Union, in the United States the notion of arrangement cannot cover mere parallelism, because these practices can represent independent and interdependent decisions and "individual pricing decisions (even when each firm rests its own decision upon its

\textsuperscript{93} No further common understanding is required, then. See, e.g., Dennis W. Carlton, Robert H. Gertner, and Andrew M. Rosenfield, \textit{Communication among Competitors: Game theory and Antitrust}, 5 GEO. MASON L. REV. 423, 428 (1997) (describing the famous two gas stations hypothetical where, without any secret meeting, additional communications, or any form of further arrangement, the market naturally achieves the oligopolistic equilibrium that is, indeed, the rational outcome of the game); and Donald F. Turner, \textit{The definition of agreement under the Sherman Act: conscious parallelism and refusal to deal}, 75 HARV. L. REV., 669 (1962).

\textsuperscript{94} For the sake of simplicity, we use the word \textit{arrangement} to address all the species of conduct that may fall under Section 1 and/or Article 101, mainly because this term is not a statutory word in either of the two jurisdictions.

\textsuperscript{95} Donald Turner, \textit{The definition of agreement under the Sherman Act: Conscious parallelism and refusal to deal}, 75 HARVARD LAW REVIEW 655, 658 (1962); PHILIP E. AREEDA & HERBERT HOVENKAMP, supra note \_\_\_\_, at ¶1411, p. 67-68.

\textsuperscript{96} William E. Kovacic supra note \_\_\_, at 22-25

\textsuperscript{97} \textit{Theatre Enterprises v. Paramount Film Distribution Corp.}, 346 US 537, at 541 (1954) (making).

\textsuperscript{98} Id.

\textsuperscript{99} \textit{In re Coordinated Pretrial Proceeding in Petroleum Products Antitrust}, 906 F. 2d. 433, 445(9th Cir., 1990).

\textsuperscript{100} In addition, very recently, the Supreme Court clarified in \textit{Twombly} that mere oligopolistic parallelism does not suffice to show an antitrust conspiracy within the meaning of Section 1 even at the pleading stage where it is only the economic plausibility test that calls the plaintiff to furnish “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” See 550 U.S. 544, at 1964 (2007). Thus, parallel behaviors are only a piece of circumstantial evidence and they can prove the existence of a concerted practice if they are further substantiated by other elements, such as inter-firm communications, or if there are any other reason to justify a concerned practice.
belief that competitors will do the same) do not constitute an unlawful agreement under Section 1 of the Sherman Act." 101

This approach of the US Supreme Court towards oligopolistic markets urges two issues. First, antitrust enforcers need to find a way to tackle the suboptimal performances that perfect oligopolistic markets bring about. As the Turner-Posner debate clarified, and as professor Backer further explained, to solve such dilemma enforcers may choose among diverse solutions. It could be applied Section 2 of Sherman Act to so-called “shared monopolization,”102 or special pieces of legislation.103 They may opt for merger enforcement.104 Or—for what is more important here—antitrust enforcers can acknowledge that perfect interdependence is very rare.

If antitrust enforcers admit that tacit collusion requires something more than the mere fact of interdependence, they can avoid giving up the fight against oligopolistic markets—they can intervene ex ante, i.e. before suboptimal performance occurs, by going after that something more. Professor Posner—and many after him, the FTC included105—used the terms concerted actions and facilitating practices to address that something more—i.e. just to indicate those proactive practices that firm adopt to morph possible interdependence into real collusive parallelism.106 Therefore, instead of passively accepting the suboptimal performances of oligopolies, antitrust authorities may try to prevent them by enforcing either Section 1—when facilitating practices result from arrangements—or Section 2 and Section 5 of the FTCA—when facilitating practices amount to unilateral practices.107

Ex post—i.e. when parallelism and suboptimal performances have already occurred—US courts must solve another dilemma—i.e. they have to establish whether the observed parallelism resulted from collusion or from mere interdependence. On this purpose, US courts developed the so-called plus factors doctrine,108 which scholars may also address as the parallelism plus doctrine.109

In what follows we discuss what just said having the EU experience on the backdrop—i.e. looking for multilateral and unilateral facilitating practices that pivot around the exchange of information as well as considering plus factors regarding information.

### 4.2.1 Multilateral facilitating practices in the form of exchanges of information

101 Clamp-All Corp. v. Cast. Iron Soil Pipe Institute, 851 F. 2d 478, 484 (1st Cir. 1988).
102 See Jonathan B. Baker, supra note __, at 207.
104 Id. at 216.
107 Id. at 216.
108 See, e.g., 328 US 781 (1946) (where the Court looked for evidence of factors that, when added to the fact of parallel conduct, could sustain a finding of conspiracy). See also C-O-Two Fire Equip. Co. v. United States, 197 F. 2d 489, (9th Cir. 1952) (where the term plus factors was first introduced. In the course of conviction for price fixing, the Ninth Circuit Court relied on a series of plus factors which, ‘when standing alone and examined separately, could not be said to point directly to the conclusion that the charges of the indictment were true beyond a reasonable doubt, but which, when viewed as a whole, in their proper setting, spelled out that irresistible conclusion,’ i.e. the existence of an illegal price fixing scheme). See also, Blomkest Fertilizer, Inc. v. Potash Corp of Sask., 203 F. 3d 1028 (8th Cir. 2000) (arguing that the plaintiff ‘has the burden to present evidence of consciously paralleled pricing supplemented with one or more plus factors.’ On the conceptual level, this means that “an agreement is properly infer. (2006). red from conscious parallelism only when certain ‘plus factors’ exist’”). PHILLIP E. AREEDA & HERBERT HOVENKAMP, supra note __, at 1039.
109 For this expression, see MARINELLA FILIPPELLI, COLLECTIVE DOMINANCE AND COLLUSION. PARALLELISM IN EU AND US COMPETITION LAW (Edward Elgar Publ. 2013) (arguing that US case law starts from parallelism to wonder whether such parallelism can be explained/justified with collusion or with oligopolistic interdependence).
To fix price there is not only one device—agreement. To elude Section 1 second best devices—facilitating practices—exists. In short, these practices are conduct adopted by firms to reduce uncertainty in the market and coordinate their conduct more effectively “without entering into an explicit agreement.”

Because perfect interdependence is very rare, these practices are typical of oligopolistic markets where they contribute to morph the possibility of interdependence into an effective collusive equilibrium.

Facilitating practices may consist in vertical restraints, unilateral announcements, and exchanges of information. Ethyl case, American Column & Lumber Co. v. United States, Todd v. Exxon Corp., and Quality Trailer Products Corp. are only a few examples of each one of this typical facilitating practice conduct. In short, facilitating practices can either amount to unilateral conduct or fall somewhere between an unequivocal horizontal agreement and pure and simple oligopolistic interdependence. Hence, it is in this grey zone that US courts have to decide whether to apply Section 1, especially when the facilitating practice at stake amount to an exchange of information.

In Williams Oil v. Philip Morris, for example, the Eleventh Circuit upheld the district court decision, holding that in an oligopoly the exchange of information among manufacturers might represented a form of lawful conscious parallelism. To show that the conduct of the exchange of information in an oligopoly was unlawful, the Court asked for plus factors, according which that the exchange of information was “more probative of conspiracy than of conscious parallelism.”

In American Column & Lumber Co. v. United States the Supreme Court dealt with the case of an overt plan whereby a trade association submitted to its members financial reports on business, recommended future prices and production. There, the Court recognized that the plan amounted to an unlawful facilitating practice. It was an agreement to exchange information—in EU we would say, to exchange strategic information, which violated Section 1—that contributed to establish a harmonized agreement regarding the volume of production and prices and, thus, caused an “extraordinary price increase.”

Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit and their stocks to the discretionary inspection of

109 Ethyl Corp., 101 F.T.C. 425, 592, vacated sub nom. E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984). Here the Commission challenged the use of uniform delivered pricing—most-favored buyer contracts. As FTC noted, vertical practices may compromise competition. Indeed a company that provides a most-favored-customer clause in its contracts, because it cannot limit its discounts to a only customer, reduces its incentive to deviate from a coordinated horizontal arrangement. FTC, Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customers" Clause, (Sep. 28, 1995) available at http://www.ftc.gov/speeches/other/bakersp.shtm.
110 257 U.S. 377 (1921).
111 257 U.S. 377 (1921).
112 Id. at 409.
113 Id.
114 Id.
their rivals for the purpose of successfully competing with them; and they do not submit the
details of their business to the analysis of an expert, jointly employed, and obtain from him a
“harmonized” estimate of the market as it is and as, in his specially and confidentially informed
judgment, it promises to be.\textsuperscript{121}

In \textit{Maple Flooring Manufacturers Assn et Al v. United States},\textsuperscript{124} instead, the Supreme Court
held lawful an exchange of information—which, indeed, did not facilitate any form of
collusion—because the data there exchanged did not amount future plans or current price
quotations. In EU terms, we could say that the parties shared \textit{non strategic information}. Such an
exchange information was not judged applying the \textit{per se} rule. Otherwise, the court preferred to
assess the reasonableness of the restriction and ascertained that the exchange produced
procompetitive consequences\textsuperscript{125}—“fairer price levels and to avoid the waste which inevitably
attends the unintelligent conduct of economic enterprise,” the Court justified the exchange of
information.\textsuperscript{126} In particular, the Supreme Court specified that:

only that trade associations or combinations of persons or corporations which openly and fairly
gather a 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,
approximate cost of transportation from the principal point of shipment to the points of
consumption, as did these defendants, and who, as they did, meet and discuss such information
and statistics without however reaching or attempting to reach any agreement or any concerted
action with respect to prices or production or restraining competition, do not thereby engage in
unlawful restraint of commerce.\textsuperscript{127}

In sum, when facilitating practices in the form of exchanges of information were at stake
US courts followed diverse approaches. In \textit{Williams Philip v. Morris} they requested plus factors
to establish whether the exchange by itself was consistent with interdependence or not. In
\textit{American Column & Lumber Co.} and \textit{Maple Flooring Manufacturers Assn et Al.} they did what
EU antitrust authorities would have done—they considered the exchange as an arrangement,
they enforced Section 1 and focused on the kind of data exchanged to decide whether to apply
the \textit{per se} ban—as in the former case where the information exchanged regarded future business
decisions—or the rule of reason—as in the latter case where the information exchanged was not
capable of conditioning rivals’ decisions.

Having the EU experience on the backdrop, consider that in \textit{American Column & Lumber
Co.} the Supreme Court \textit{did jump} from the unlawful exchange of information/facilitating practice
to the price fixing agreement. It did it in presence of evidence as to the consequences that the
exchange of information had on market price and without formulating a general principle as to
the terms of the jump.

\subsection*{4.2.2 Attempts to monopolize and invitations to collude in the form of unilateral disclosure
of information}

In the US antitrust law, the exchange of information does not concern only Section 1 of
Sherman Act, but also Section 2 of the same Sherman Act and Section 5 of the FTCA. Section
2 prohibits acts to “monopolize, or attempt to monopolize, or combine or conspire with any
other person or persons, to monopolize any part of the trade or commerce.”\textsuperscript{128} Section 5 refers to

\begin{thebibliography}{99}
\item[121] Id. at 410
\item[124] 268 U.S. 563 (1925).
\item[125] Federal Trade Commission, \textit{supra} note 
\item[126] Id. at 571.
\item[127] Id. at 586
\end{thebibliography}
“unfair methods of competition” and extends anticompetitive conduct beyond horizontal agreements. In contrast to Sherman Act, Section 5 is based on a more generic formula, which applies to both unilateral and collective behaviour and allows courts to condemn concerted actions even when the existence of an agreement cannot be easily established. Because Section 2 and Section 5 allow to prosecute facilitating practices and forms of inter-firm coordination that could escape by notion under Section 1, they both attract a great attention. For instance, in American Airlines the president of American Airlines called the president of competing carrier Braniff Airlines and proposed to: “[r]aise your goddamn fares twenty percent. I’ll raise mine the next morning.” The DOJ reported that as an attempt to monopolize in violation of Sherman Act §2. However, the American Airlines decision left uncovered a wide range of cases concerning horizontal solicitations to restrain competition outside the joint monopolization context. Therefore, it is on the ground of Section 5 that the invitation to collude theory was developed.

In short, the theory states that an invitation to collude is a unilateral solicitation to enter into an unlawful horizontal price-fixing or market allocation agreement, without any countervailing procompetitive benefit. And unilateral disclosures of information can amount to invitations to collude. In the early nineties, the Federal Trade Commission developed three main cases: Quality Trailer Products Corp., AE Clevite Inc. and YKK (U.S.A.) Inc. In each of these cases, the alleged invitations to collude concerned naked solicitations on prices and did not involve high market shares companies. In Quality Trailer Products Corp., respondent’s officials were alleged to have met with a rival company’s employees telling them that prices for a group of certain axle products were too low. According to the complaint, these officials explained that “there was plenty of room in the industry for both firms, and that there was no need to compete on price.” In addition, they provided assurances that Quality would not have sold such products below a specified floor price. The FTC found that, had the invitation been accepted, the agreement would have been an unlawful restraint of trade, and thus the proposal violated Section 5 of the FTC Act.

In AE Clevite Inc. the complaint alleged that a respondent’s manager have advised at a meeting a competitor that its prices of locomotive engine bearings were too low. The company’s official stated that the competitor was ruining the marketplace and then faxed a list comparing the two companies’ aftermarket prices. Because the FCT recognized this unilateral disclosure of price information as an implied invitation not to compete, the agency condemned it as a violation of Section 5. Finally, in YKK (U.S.A.), the FTC alleged that YKK, a manufacturer of zipper and zipper installation equipment, had told its competitor Talon to stop offering free

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130 See FTC v. Cement Inst., 333 US 683, 692 (1948). In particular, the Federal Trade Commission Court has interpreted Section 5’s ban on unfair methods of competition to apply to concerted actions prohibited by Section 1 of Sherman Act.


132 United States v. American Airlines, Inc., 743 F. 2d 1114, 1116 (5th Cir. 1984) (the United States brought monopolization charges under Section 2 of the Sherman Act against American Airline, an airline company whose president proposed to a competitor, Braniff, to raise fares by 20 percent in turn of American Airlines raising its prices by the same amount the next day (“I think it's dumb as hell […], to sit here and pound the * * * * out of each other and neither one of us making a * * * * * dime. […],I have a suggestion for you. Raise your goddamn fares twenty percent. I'll raise mine the next morning”). The two airlines’ combined market shares were between 60 and 90 percent on a number of non-stop routes from Dallas-Fort Worth, but they were losing profits due to an aggressive price war. Braniff’s president demurred, and did not raise prices as proposed. American sought to dismiss the DOJ’s complaint for failure to state a claim under the Sherman Act; the 5th district court agreed and dismissed the complaint. On appeal, the court of appeals concluded that the elements of an attempted monopolization case under Section 2 had been met, because if Braniff had accepted American’s offer, the two airlines together would have had monopoly power).


135 In the Matter of YKK (U.S.A.) Inc., 116 F.T.C. 628 (1993),
zipper installation equipment to customers as part of their zipper purchases, accusing Talon of engaging in “unfair and predatory sales.” The FTC argued that the request was aimed at eliminating a form of discount in violation of Section 5 and, if accepted, would have significantly reduced competition.

All these cases concern the exchange of private communications. However, two recent FTC’s cases have suggested that an invitation to collude could involve not only private communication, but also public communications. In *Valassis Communications*\(^{136}\), for instance, the FTC challenged the announcement made by Valassis’s President and CEO in a public call with analysts detailing its future strategy for raising prices of newspaper advertising inserts. The company knew that its only rival, News America, would be monitoring the call and reacting to the information received. Since there was no legitimate business reason for Valassis to disclose its new pricing strategy, the FTC alleged that Valassis intended to facilitate collusion through its public announcement and held that the conduct thereby violated Section 5. Similarly, in *U-Haul International*\(^{137}\), U-Haul managers have privately called their counterparts at Budget (U-Haul closest competitor in the market for consumer truck rental) to exhort them to match U-Haul’s higher rates. The FTC noted that U-Haul’s CEO had publicly announced on an investor conference call that U-Haul was trying to show price leadership for the goods of the entire industry. Hence the FTC alleged that these private and public disclosures created a significant risk of anticompetitive harm and violated Section 5 of the FTC Act.\(^{138}\)

However, because unilateral disclosures often have pro-competitive effects and help improving economic integration and smooth functioning of the market, a unilateral disclosure of information does not automatically lead to an illegal invitation to collude.\(^{139}\) Therefore, also with respect to Section 5 and invitation to collude conduct the application of the rule of reason is recommended.

### 4.2.3 The parallelism plus/plus factors doctrine—the role of opportunities to collude

The parallelism plus doctrine teaches that, in presence of additional factors that can support the unlawful explanation of the already observed business behaviors, parallelism fall within the scope of Section 1. Actually, US Courts have never provided a ranking of plus factors according to their probative value or specified the minimum critical mass of plus factors that should be established for an inference of concerted action. As the Eleventh Circuit held, the notion of plus factors is broad. Any evidence provided by appellants, which seeks to exclude the possibility of independent action, can be ascribed as one plus factor.\(^{140}\) And also professor Kovacic concurs with this statements—he recognizes the broad discretion of courts to establish extra ingredients required to defendants when the parallelism of price could depend on the structure of market. In particular—not very differently from what professor Page does in connection to the notion of concerted actions—he warns how US courts miss the chance to identify some specific standards that would assist businesses in distinguishing between lawful—conscious parallelism—and


\(^{137}\) *In the Matter of* U-Haul Int’l Inc. and AMERCO, FTC File No. 081-0157 (2010).


\(^{139}\) The doctrine recognized at least two reasons to limit the invitation to collude theory to solicitations of per se illegal conduct. First, a limitation of the theory to solicitation of per se illegal conduct would not inhibit pro-competitive market behavior. Second, as Professor Areeda and Hovenkamp noted, an extension into the rule of reason analysis “would burden the FTC and the solicitor with complex and expensive enquiries into the reasonableness of non-existing agreements, thereby increasing the costs of even discussing potentially pro-competitive collaborations.” PHILLIP E. AREEDA & HERBERT HOVENKAMP, supra note **___,** at. 1039.

\(^{140}\) Williams Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003).
unlawful conduct—concerted behavior.\footnote{US courts seem to prefer a kind of holistic approach, focused on «the whole picture and not merely [on] the individual figures in it.»} Yet, as professor Hovenkamp noticed, the plus factors that have been more frequently used can be lead under three classes. Notably, (i) the plus factors suggesting whether the regarded firms have any rational motivation to collude; (ii) the plus factors mainly connected to market features, and (iii) other plus factors indicating whether these firms have the opportunity to collude. Arguably there is a rational theory of harm supporting the idea that the ascertained parallelism does not come from mere coincident, or from independent/interdependent decisions, if plaintiffs are not able to articulate a satisfactory rationale for the arrangement, or when the regarded actions are contrary to the defendants’ self-interest unless pursued as part of a collective plan. Likewise, the probability that parallelism results from collusion increases where there are some market performance indexes as well as some other behavioral elements, such as a firm’s proclivity to unlawful conduct, that signal whether a market and some firms are more conducive to collusive equilibria than others. But—given the topic of this paper—what is crucial to consider herein is the third category of plus factors. Antitrust agencies and plaintiffs may find an arrangement out of parallelism when the latter comes with some opportunities to collude—i.e. occasions prior to the observed parallel behavior where firms were in the conditions to collude.\footnote{Therefore if, for instance, plaintiffs are able to show evidence of not only parallel price increases but also of contacts among firms, the inference as to the existence of a price fixing arrangement can be well supported.} We say “well supported” and not “finally proved” because, as in the European Union, also in the United States inter-firm contacts that do not regard strategic information and that are not accompanied by other plus factors do not warrant the conclusive inference that the firms in question agreed about prices, terms of dealing, or any other subject matter. In other words, once inter-firms contacts prove that defendants have been tempted to collude, it remains plaintiff’s burden to prove that defendants succumbed to such temptation. And this because, first of all, US scholars assume that an exchange of information among firms does not itself imply that those firms will further exchange their mutual assurances to use that information in any particular way.\footnote{Second, as a matter of policy, US scholars maintain that, considering inter-firms contacts, this is not necessarily sufficient to prove the existence of a conspiracy.} While, in \textit{Theatre Enterprises the Court recognized that the defendant distributors had offered economic justifications about their conscious parallelism, which has not read entirely out of the Section 1. See 346 U.S. 537 (1954). In \textit{American Tobacco,} even though tobacco industry is a classic oligopoly, the Supreme Court condemned the conduct of the three tobacco company defendants as the product of a conspiracy, emphasizing that the tobacco companies did not provide an economic justification for the unlawful behavior. But, courts provided any exact definition of what implies economic justifications.}
firms contacts as a *prima facie* proof of conspiracy would mean deeming as presumptive conspirators two or more competitors that assemble for a lawful activity within trade associations, joint ventures, or that assemble for industry gatherings.\(^{151}\) For instance, in *Weit* the Seven Circuit granted summary judgment to the defendants accused of having charged the same rate of interest on their credit cards, notwithstanding that the banks met on a regular base; and that they actually charged the parallel interest rate, because both facts have alternative precompetitive explanations—the meetings were justified by the need to create a joint venture; and the rate could be justified looking at parallel costs and at the industry practice of the other circuits of credit cards.\(^{152}\)

Differently, when the contacts that come with parallelism regard information about future business strategies, the probability of finding an agreement out of those contacts combined with parallelism increases a lot. For example, in *U.S. Steel*, the exchange of communications at informal dinners was the discriminating point to establish the existence of a concerted action.\(^{153}\)

In short, though complex and articulated, the plus factors doctrine shows that, like in the European Union also in the United States exchanges of information may work as circumstantial evidence that together with parallelism can show the existence of an arrangement within the meaning of Section 1, even in oligopolistic markets.

But—true be told—the real issue that deserves to be discusses having the EU experience on the backdrop is whether US courts would ever establish that, away from the plus factor theory, i.e. in the absence of parallel conduct, inter-firms contacts in the form of exchanges of strategic information would be enough to infer the existence of a price fixing arrangement. In this regard, even professor Posner who argues that agreements to exchange information among competitors constitute a piece evidence of an agreement to fix prices and not a separate antitrust violation, assumes that such antitrust violation would occur only if the concrete agreement to fix price existed.\(^{154}\)

### 4.3 Arrangements to exchange information

Apart from what said above about unilateral disclosure of information and exchanges of information that facilitate collusion, we must add that, like in the European Union, also in the United States exchanges of information may be considered as the subject matter of separate arrangements. As explained in *United States v. Container Corporation of American et al.*,\(^{155}\) “dissemination of price information is not itself a per se violation of the Sherman Act,”\(^{156}\) but for the case when “the exchange of price information had an anticompetitive effect in the

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\(^{151}\) See also PHILLIP E. AREEDA & HERBERT HOVENKAMP, supra note \(\text{supra}^\text{note} \), ¶¶2111-212  


\(^{153}\) United States v. US Steel Corp., 251 U.S. 417 (1920) (between 1907 and 1911, executives of American steel manufacturers gathered in a series of social events and meetings known as the Gary Dinners. Their founder Gary believed that the dinners were a lawful way to maintain steel prices by enabling manufacturers to tell each other the prices they were going to charge as well as future business intentions. The Supreme Court held that the dinners amounted to unlawful price fixing.) *Se also*, United States v. Am. Linseed Oil Co., 262 U.S. 371 (1923); United States v. Foley, 598 F.2d 1323 (4th Circ. 1979) (emphasizing the importance of communications among firms as one of the most important plus factor) and United States v. Champion Intl. Corp., 1975 Trade Cas. ¶60453 (D. Or.), aff’d 557 F.2d 1270 (9th Circ.); William H. Page, *Facilitating Practices and Concerted Action Under Section 1 of the Sherman Act*, supra note \(\text{supra}^\text{note} \), William H. Page, *The Gary Dinners and the Meaning of Concerted Action*, 62 S. M. U. LAW REVIEW 597, 619.  


industry, chilling the vigor of price competition”. In this latter case the exchange is unlawful per se.  

Of course, distinguishing between arrangements to exchange information subject to the rule of reason and arrangements per se unlawful is not easy. For example, in *United States v. United States Gypsum Company* the Supreme Court held that six manufacturers and their corporate officials involved through exchanged price information violated Section 1. According to the Court, that conduct constituted a criminal price fixing violation, even though the exchange of information among competitors represents the “gray zone of the Sherman Act.” In the *Health Care Guidelines* the FTC arranged an *antitrust safe zone* to allow the exchange of prices or other surveys in this sector. They specified that “[p]articipation by competing providers in surveys of prices for health care services, or surveys of salaries, wages or benefits of personnel, does not necessarily raise antitrust concerns.” Again, hoping to assist firms in assessing whether the FTC and the Department of Justice (DOJ) will challenge a competition collaboration, the Agencies provided the *Antitrust Guidelines for Collaboration among Competitors* (Guidelines). The guidelines do not affect on the judgment and discretion in antitrust law enforcement. But, in attempting to provide a bright line rule, they explain how the FTC and DOJ exam specific antitrust issues concerning collaboration among competitors. For instance, the Guidelines discourage the exchange of price information, but recognize that “consumer may benefit from competitors collaboration in a variety of way,” among which offering cheaper and more valuable services and products to consumers.

In sum, the FTC and the DOJ confirm the EU approach—when arrangements to exchange information are at stake, the competitive concern flows from the nature of the information exchanged. Yet, EU antitrust institutions do a further step—they make a clear distinction between strategic and non strategic information.

**4.4 Cost and Benefits of the US Approach**

Having analyzed the US approach to facilitating practices, invitations to collude, plus factors and exchanges of information, a fact strikes us—US courts and Agencies do not seem to provide both a bright line rule and standards to recognize unlawful concerned practices. They favor a case-by-case analysis that implies a traditional rule of reason.

Markets are flexible, and at the first glace rule of reason seems to be the perfect tool to guarantee efficiency. Yet, the rule of reason allows for more evidence and implies a potentially costly inquiry, and courts are likely to reach the wrong answer every now and then because of the extraordinary expense involved in guaranteeing correct decision. If, on the one hand the rule

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157 Id. at 337.
159 Id. at 441. Richard A. Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEO. L.J. 1187,1188 (1979). Shortly after Gypsum decision, judge Richard Posner argued that (“[a]lthough the Court’s analysis may sound reasonable enough, I believe that it rests on a confusion in the Justices’ minds between the level and the dispersion of prices in a market in which competitors are exchanging price information”).
161 Id. at 1.
163 Id. at 6. In particular, “[t]he Agencies recognized that sharing of information among competitors may be precompetitive and is often reasonably necessary to archive the precompetitive benefits of certain collaboration; for example, sharing certain technology, know-how, or other intellectual property may be essential to achieve the precompetitive benefits of an R&D collaboration.” Id. at 15.
of reason grants courts a great discretion and flexibility without some exact bounders, on the other hand it increases uncertainty and thus affects firms, especially risk adverse ones.

As Kovacic noted, courts missed to provide standards to analyze collusion behavior of business and an exaggerated flexibility should be weight with the risk of uncertainty of rules and free riding of firms.

V. AN ATTEMPT TO BRIDGE THE TWO APPROACHES: BEYOND WILLIAM H. PAGE’S PROPOSAL

Having developed an in-depth and broad analysis of the US notion of concerted actions, professor Page suggests to elaborate a new definition of concerted actions that, by being focused on inter-firm communications, could provide a reliable operative criterion to clearly tell interdependent parallelism apart from the manifold species of collusive parallelism. In this way, US courts and Agencies would finally enjoy a bright line rule to apply Section 1 in oligopolistic markets.

We agree with the William Page’s thesis. The US courts have often—though not always—considered contacts as one of those plus factors from which to infer the existence of an episode of collusion behind the observed parallel practices. Therefore, nothing in the US case law would preclude doing what the EU Court of Justice did—i.e. characterizing strategic inter-firm contacts as one of the building blocks that, together with parallelism, complete the notion of concerted actions. Actually, as discussed in relation to the EU notion of concerted practices, such a choice would produce significant prosecuting advantages, further reducing the uncertainty that typically affects risk adverse firms.

In addition, such a modification would not impair any of the existing US doctrines—still US courts would prosecute facilitating practices other than exchanges of strategic information. Still they could apply Section 2 and Section 5 to cases of unilateral disclosure of information. Still they would be free to drive under Section 1 cases of parallelism substantiated by plus factors other from strategic inter-firm contacts. The difference would be that plaintiff claiming cases of strategic inter-firm communications combined with parallelism would enjoy a high speed highway to the application of Section 1.

But what about the other peculiarity included in the EU notion of concerted actions—i.e., what about the possibility of finding an arrangement to fix prices (or another naked restriction of competition) out from strategic inter-firm contact in the lack of market parallelism? Here the answer becomes more complicated.

US courts happened to discuss whether the use of the information gathered via an exchange led irresistibly to the conclusion that the parties had resulted, or would have necessarily resulted, in a price fixing arrangement, i.e. in a concerted effort to restrain production or raise prices. For instance, in Maple Flooring the Supreme Court concluded for the absence of a naked restriction of competition simply because the data there exchanged were not strategic, i.e. not capable of inevitably leading to a price fixing agreement. Differently as to the result, but

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164 It deserves to be remembered that in the famous Interstate Circuit an agreement was inferred from circumstantial evidence, including parallel price increases. Yet – and it is very surprising for a European reader – the blatant exchange of information among firms, that is to say, the fact that the same letter was sent to each supplier with the name of the other suppliers clearly stated on it, was not even taken into consideration to morph a series of overt agreements between a common dealer and its various suppliers into a covert horizontal concert of actions among the same suppliers – 306 U.S. 208 (1939). See also Toys “R” Us, Inc. v. Federal Trade Commission, 221 F.3d 928 (7th Cir. 2000) (endorsing the same theory of harm based upon the described “hub and spoke” scheme).

165 See, e.g., Maple Flooring Manufacturers Ass’n v. United States, 268 US 563 (1925), at 584-585.

166 Indeed, in Maple Flooring, after having noticed that the exchange was not strategic – indeed, it regarded past and not current sales, aggregated and not individual data, and it was open not only to the members of the association in question but also to the public – the Supreme Court held that “such information, gathered and disseminated among the members of a trade or business, may be the basis of agreement or concerted action to lessen production arbitrarily or to raise prices beyond
Similarly as to the method, in *Eastern States Retail Lumber Dealers’ Association* the Supreme Court held that the natural consequence of the circulation among retailers of a list reporting the names of those wholesalers who sold directly to consumers was a concerted refusal to deal with those wholesalers, though there was no express agreement in this direction.\(^\text{167}\) Analogously, in *American Column & Lumber* the Court observed that the information exchanged inevitably lead to a combination to restrict production and increase prices.\(^\text{168}\) Likewise, in *Petroleum Products* the Court affirmed that the public announcements that gasoline refiners did of wholesale price increases and discount withdrawals were sufficient to infer the existence of a price fixing conspiracy.\(^\text{169}\) Yet, in these latter two cases the Court had evidence of parallel market practices or, at least, of anticompetitive effects.

Therefore, nothing makes us believe that US courts would overrule what EU antitrust institutions assessed jumping from exchanges of strategic information to arrangements to fix prices or output. As clarified before,\(^\text{170}\) although affirming that they do not pay attention to market parallelism, actually EU antitrust institutions have elaborated the above-mentioned drastic presumption in cases where a host of elements show the existence of a cartel..

But we hardly believe that a US court would utter the principle according to which a firm takes part of a price fixing arrangement if it does not publicly refuse strategic information. Probably, US courts are not available to frame this jump within the notion of concerted actions and, thus, morphing it into an automatism. From the European prospective, US judges seems to verify and discuss the legitimacy of the jump case by case, really trying to ascertain whether the exchanged information put the parties in the condition to meet their minds as to prices, output and the like. Not surprisingly, indeed, in *United States v. Container Corporation of America*,\(^\text{171}\) what was at stake in the discussion between the majority, the concurring and the dissenting opinions was the fact the regarded exchange of information could have actually had the «necessary effect» of restraining price competition.\(^\text{172}\) Notably, Justice Fortas observed that «a

\(^{167}\) 234 U.S. 600 (1914). In particular, the Court observed, “[T]rue it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. […] In other words, the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed”. Id. at 608-609.

\(^{168}\) 257 U.S. 377, 410 (1921). Actually, three Justices dissented taking into account some facts that confuted the existence of a collusive equilibrium. For example, there was no uniformity in prices and sellers did not keep a uniform portion of their capacity unused but, in fact, engaged in fierce efforts to increase their own production.

\(^{169}\) In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d at 432 (9th Cir. 1990).

\(^{170}\) See footnotes \(\text{167}\) and the accompanying text.


\(^{172}\) Id. at 344-346. Here, the dissenting Justices made a paradigmatic discussion of some of the most difficult issues in antitrust law; namely, of the clash between theory-laden and fact-bound assessments; of the importance of counter-factual and, in the end, of the reasons why endorsing a per se prohibition: “[t]he record indicates that defendants have offered voluminous evidence concerning price trends and competitive behavior in the corrugated container market. Their exhibits indicate a downward trend in prices, with substantial price variations among defendants and among their different plants. There was also a great deal of shifting of accounts. The District Court specifically found that the corrugated container market was highly competitive and that each defendant engaged in active price competition. The Government would have us ignore this evidence and these findings, and assume that because we are dealing with an industry with overcapacity and yet continued entry, the new entrants must have been attracted by high profits. The Government then argues that high profits can only result from stabilization of prices at an unduly high level. Yet, the Government did not introduce any evidence about the level of profits in this industry, and no evidence about price levels. Not one customer was called, although the Government surely had ample access to defendants’ customers. The Government admits that the price trend was down, but asks the Court to assume that the trend would have been accelerated with less informed, and hence more vigorous, price
practice such as that here involved, which is adopted for the purpose of arriving at a determination of prices to be quoted to individual customers, inevitably suggests the probability that it so materially interfered with the operation of the price mechanism of the marketplace as to bring it within the condemnation of this Court’s decisions. Theoretical probability, however, is not enough unless we are to regard mere exchange of current price information as to akin to price-fixing by combination or conspiracy as to deserve the per se classification. I am not prepared to do this, nor is it necessary here. In this case, the probability that the exchange of specific price information led to an unlawful effect upon prices is adequately buttressed by evidence in the record. 173 Although the majority concluded as to the existence of an arrangement to fix prices, strong was the need to discuss the soundness of the link between the proved exchange of information and the effect of limiting price competition. More than that, for Justice Fortas this link was for the plaintiff to be furnished—it could not be granted, as the EU notion of concerted practices would have allowed doing.

In the end, indeed, the use of presumptions seems to distinguish the US and the EU experiences. For instance, consider that in order to infer the occurrence of an agreement from an invitation to collude, US courts generally require something more—much more, from the EU standpoint—than the lack of a manifest opposition to such a solicitation. Indeed in FMC, notwithstanding a clear invitation to increase prices coming from an employee of a producer, the court negated that the subsequent price increases charged by all the rival firms were the product of an arrangement. And this for two reasons. First—it held—one competitor rejected the invitation by complaining about it to the employee’s superiors; second, the observed parallel price increases could be autonomously justified considering that, at that time, the whole industry had to react to the same economic facts. 174 Furthermore, in US there is room to argue that, once inter-firms contacts prove that defendants have been tempted to collude, it remains plaintiff’s burden to prove that defendants succumbed to such temptation, even when the information exchanged was strategic. 175 For example, in Esco the Ninth Circuit made a hypothetical in which each of five competitors says, in turn, that it would set its price at X the next Monday. Each of them, then, did so. The court concluded that “we do not say that the foregoing illustration compels an inference … that the competitors’ conduct constituted a price-fixing conspiracy, including an agreement to so conspire, but neither can we say, as a matter of law, that an inference of no agreement is compelled.” 176 Finally, we are seriously tempted to negate that US courts would ever utter the EU principle according to which a concerted practice to fix prices exists even when the market conduct following the contacts is not consistent with the data exchanged. In Cement Mfrs. Protective Assn. v. United States, for instance, the Supreme Court observed that, whereas it existed an arrangement for the purpose of gathering and distributing information which would enable individual members to control the supply of cement, and whereas such an exchange afforded to cement manufacturers opportunity and grounds for refusing deliveries of cement, there was no concerted refusal to deal because there was no evidence that defendants actually did it. 177

In sum, our general impression as to the US and EU case law here compared is that the former is less prone than the latter to elaborate presumptions as to economic agents’ behaviors and to lighten plaintiffs’ burden of proof. If, on the one hand, the attention that US judges have often paid to economics does not accommodate the refusal to presume—as EU antitrust 

173 Id. at 339 – 340.
175 PHILLIP E. AREEDA & HERBERT HOVENKAMP, supra note __, ¶1417b, at 105.
176 Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965); In re Baby Food Antitrust Litigation, 166 F.3d 112 (3rd cir. 1999) (holding that price discussions among lower-level sales personnel lacking price-setting authority are not enough to establish fact issue of conspiracy).
177 268 U.S. 588 (1925).
institutions do—that economic agents will use the information received to shape their market conduct, on the other hand, the result not to lighten plaintiffs’ burden is consistent with the general approach that the US supreme court elaborated in Monsanto, Matsushita and Twombly\(^\text{178}\) and, probably, it is also careful of the potential criminal nature of the offence.

**VII. CONCLUSIONS**

On the bases of what economics suggests as to inter-firms communications, we agree with Page as to consider those contacts that “special” plus factor that, when together with parallelism, may immediately lead to the conclusion that parallelism did not amount to a case of oligopolistic interdependence without any further inquiry as to the existence of the other traditional plus factors. Such a solution, which is the one that the EU institutions are actually following within the boundaries of the notion of concerted practices, allows realizing significant prosecuting advantages in face of a law risk of false positive mistakes, at least as long as the regarded inter-firm communications are strategic, i.e. are aimed at reducing market uncertainty and thus at facilitating the realization of a cartel. Indeed, it is hard to find a redeeming virtue for strategic inter-firm communications.

Yet, the current EU notion of concerted practices does something more. Because of the presumptions that are built in it, it allows finding out the existence of a price fixing arrangement from an invitation to collude from which rivals do not genuinely and publicly take distance. Such a drastic solution that EU institutions adopted not only for prosecuting needs but also for pedagogic reasons does not seem totally viable in the United States. And this for diverse reasons—first, because US courts are much more cautious when it comes to presumptions that lighten plaintiff’s burden of proof, probably because price fixing arrangements are criminal offences. Second, because Section 5 of the Federal Trade Act is probably enough to punish bad habits, such as invitations to collude that consist in disclosing strategic information.

Then, the account of the EU approach should not be exaggerated. EU institutions did elaborate the presumptions combined in the EU notion of concerted practices. Yet, they used them against firms clearly involved in blatant cases of cartels.

In the end, the divergences between the US and EU experiences could be just a matter of nuances.

\(^{178}\) In *Monsanto* and *Matsushita* the US Supreme Court affirmed, respectively in connection with vertical and horizontal agreements, that in order to survive a motion to dismiss the plaintiff’s thesis for the existence of an arrangement must be supported by “evidence that tends to exclude the possibility of independent action by the [defendants]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective.” 465 U.S. 752, 768 (1984). In other words, in order to escape plaintiffs’ claims defendants “must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.” 475 US 574, 588 (1986). In the *Twombly* Case, then, the Supreme Court moved back analogous requirements to the standard of pleading, by stating that “when allegations of parallel conduct are set out in order to make a Section 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent actions.” In other words, these allegations cannot miss “some further factual enhancement, stops short of the line between possibility and plausibility of entitlement to relief.” 550 U.S. 544 (2007), at 555.