Uniform Pricing in Concentrated Markets: Is Conscious Parallelism Prohibited by Article 85(1) of the Treaty of Rome

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Of the difficult problems of antitrust regulation confronting the European Economic Community (EEC), one of the most perplexing is how to prevent stagnation of price competition in concentrated markets. Article 85(1) of the Treaty of Rome prohibits “agreements,” “decisions,” and “concerted practices” which are designed to prevent, restrict, or distort competition. When price competition has ceased among enterprises in any given market, and the antitrust authorities are unable to prove the existence of an “agreement” or “decision,” attention turns to whether “concerted practices” can be shown. The problem which has yet to be solved satisfactorily is precisely what constitutes a “concerted practice.” Is some element of anticompetitive intent required, or is the existence in fact of an ostensibly noncompetitive market situation sufficient? Stated differently, must the EEC Commission find at least some tacit or informal agreement to cooperate, or does “concerted practice” mean strict liability for price uniformity?

These questions acquire added significance when the enterprises under investigation are participants in a concentrated market. In such a market

   The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . . . An unofficial English translation appears in 298 U.N.T.S. at 47-48.

2. The reason is an evidentiary one. It is possible to find “concerted practices” from circumstantial evidence where there is no other evidence that enterprises have entered into any formal mutual agreement. 6 Organization for Economic Co-operation and Development, Guide to Legislation on Restrictive Business Practices, EEC ¶ 2.0, at 1 (1962).

3. An ostensibly noncompetitive market situation or relationship broadly refers to a set of market facts or circumstances of economic interaction between two or more enterprises which would be present if those enterprises had mutually agreed not to compete, but which is not necessarily in fact the result of such an agreement.

4. A concentrated market, for purposes of this discussion, is a near oligopoly.
it is theoretically possible for purely competitive, independent decision-making based on rational economic calculation to thrust the enterprises involved into an outwardly noncompetitive market relationship which is virtually indistinguishable from that which would be produced by mutual agreement not to compete.\(^6\) This can happen when the enterprises are practicing what is called "conscious parallelism," by which the market behavior of hypothetical enterprise \(A\) tends to conform to that of its competitor enterprise \(B\), simply because \(A\) has acted independently in response to, or in anticipation of the actions of \(B\).\(^6\) In a concentrated market, competitors enjoy an increased ability to correctly anticipate each other's actions because of the simplification of economic calculations resulting from the small number of enterprises in the market.\(^7\) Thus, as market "transparency" increases, so does the likelihood of price uniformity without any type of mutual agreement.

It is one of the fundamental assumptions of this Note that "conscious parallelism" is justifiable competitive behavior and should be distinguished from "concerted practices."\(^8\) On a conceptual level, such a distinc-

5. This is a phenomenon known as "oligopolistic interdependence." For a more complete discussion of this basic theory, see J. Bain, INDUSTRIAL ORGANIZATION 304-48 (2d ed. 1968); E. Chamberlin, THE THEORY OF MONOPOLISTIC COMPETITION 30-35 (6th ed. 1952); W. Felner, COMPETITION AMONG THE FEW 3-50, 175-83 (1949); 13 VA. J. INT'L L. 375, 377 n.10 (1973).


7. Id. See also 13 VA. J. INT'L L. 375, 377 n.10 (1973).

8. See 13 VA. J. INT'L L. 375, 376 n.9 (1973) and accompanying text. See also Turner, supra note 6, at 665, who argues that the theory of oligopolistic interdependence provides a basis for excluding conscious parallelism from the meaning of "conspiracy." Seeing conscious parallelism as an economically rational course of action in a concentrated market, he states:

To repeat, it can fairly be said that the rational oligopolist is behaving in exactly the same way as is the rational seller in a competitively structured industry; he is simply taking another factor into account, which he has to take into account because the situation in which he finds himself put it there. Turner, supra note 6, at 665-66. Turner's thesis is challenged by Posner, supra note 6, at 1566-67, who criticizes the theory of oligopolistic interdependence on several grounds, pointing out that it makes certain assumptions which yet remain to be conclusively proved. Included are the following: that there is no appreciable time lag between one competitor's action and another's response, that all participants have an equal ability to expand output at the same rate, and that all sales from price reductions are diverted from rivals. Posner's argument is that "tacit collusion or noncompetitive pricing is not inherent in an oligopolistic market structure but, like conventional cartelizeing, requires additional, voluntary behavior by sellers," in the form of cooperation and enforcement of that cooperation. Posner, supra note 6, at 1578. But Posner does not really invalidate the theory of oligopolistic interdependence as a basis for conceptually distinguishing conscious parallelism, he merely demonstrates that it is less easy for uniformity to be produced by purely independent action than the theory might at first imply.
Conscious Parallelism in the EEC

Conscious parallelism can be made by definition. The term "conscious parallelism" can be understood as a form of over-competition in which actively competing enterprises learn so much about each other that by sophisticated, rational, independent decision-making, based on carefully calculated probabilities, they are able to neutralize each other's pricing behavior, producing an ostensibly noncompetitive relationship. Conversely, "concerted practice" can be defined as a uniformity or parallelism of behavior artificially induced by actions taken in accordance with a mutual understanding between parties to substitute cooperation for the risks of competition. On a practical level, the difference between concerted practice and conscious parallelism can be recognized only by the application of workable standards of proof which differentiate honest, sustained efforts by competing enterprises to abide by the rules of the economic system, on the one hand, from the planned coordination of cooperating enterprises to override it on the other. Such standards have yet to be articulated.

The importance of maintaining the distinction is clear. If "concerted practice" is understood to include "conscious parallelism," then article 85(1) imposes a form of strict liability for the creation of price uniformity, regardless of the culpability of the parties. Such an outcome disdains any suggestion that competition is a state of mind as well as an objective phenomenon. Accordingly, in recognition of the view that noncompetitive behavior requires anticompetitive intent, the purpose of this Note is threefold: (1) to show that Common Market tribunals have interpreted "concerted practice" to mean strict liability for noncompetitive effects in concentrated markets; (2) to demonstrate how this is inconsistent with the purposes of the Treaty of Rome and the needs of the Common Market and to suggest the meaning of "concerted practice" most appropriate for a system of antitrust regulation based upon culpable anti-


"Concerted practices" therefore are not present where several enterprises merely act identically in the market or where an enterprise merely adapts itself to the market behavior of one or more of its competitors; such conduct need not be based on mutual concert of action, but can be the result of keen competition. See also Note, Conscious Parallelism—Fact or Fancy?, 3 STAN. L. REV. 679, 693 (1951); Givens, Parallel Business Conduct Under the Sherman Act, 5 ANTITRUST BULL. 273 (1960) (recognizing that parallel conduct tends to be required by competition but not seeing that as a basis for distinguishing it from concerted action).

10. See generally Posner, supra note 6, at 1577; Turner, supra note 6, at 665.


12. See notes 28-31 infra and accompanying text.
competitive conduct; and (3) to enunciate workable standards of proof for distinguishing in fact between conscious parallelism and concerted practices.

I

DYESTUFFS AND STRICT LIABILITY

The first attempt by the European Court of Justice to give content to the article 85(1) notion of concerted practices was in Imperial Chemical Industries, Ltd. v. EEC Commission. In that case, ICI, a British corporation, marketed dyestuffs through subsidiaries in which it held a controlling interest and which were located in the European Economic Community. The Court found that ICI, through its subsidiaries, acted in concert with other EEC dyestuffs producers to simultaneously and uniformly fix, on three occasions, rates of price increases. It defined


14. ICI brought the appeal to the European Court of Justice after the EEC Commission, in a decision of May 31, 1967, had found that ten producers of dyestuffs—of which ICI was one—had engaged in concerted practices in violation of article 85(1). The producers were: Bayer, BASF, Cassella, and Hoechst (Germany); Francolor (France); ACNA (Italy); Ciba, Geigy and Sandoz (Switzerland); Imperial Chemical Industries, Ltd. (U.K.). These ten producers, generally large in size, accounted for eighty percent of the market. They were actively engaged in competition, not only in the quality of their products, but in technical assistance and price, through substantial discounts given selectively to important customers. Average interchangeability of standard dyestuffs was relatively high. In addition, the dyestuffs market was characterized by the fact that there were five isolated national markets with varying price levels and each such market exhibited oligopolistic features. This partitioning was due to the need to offer on-the-spot assistance and to guarantee immediate delivery. On a majority of these markets, the price level was formed under the influence of a price leader. 2 CCH COMM. Mkt. Rep. ¶ 8161, at 8027-28 (1972), 11 Comm. Mkt. L.R. at 623-24.

15. Between January 1964 and October 1967, there were three general and uniform increases in the prices of dyestuffs in the Community. On January 7, 1964, Ciba-Italy, on instructions from Ciba-Switzerland, announced and immediately put into effect a fifteen percent price increase. The other producers on the Italian market followed within two or three days and on January 9, 1964, ICI Holland initiated an identical increase for the Netherlands as did Bayer for the Belgium-Luxembourg market. Generally, these affected the same range of products, i.e. most aniline dyes.

The 1965 price increases went into effect on January 1 and had been announced in advance by several enterprises. On the German market, the increases amounted to fifteen percent for the products whose prices had already been raised by the same percentage on other markets and to ten percent on other products. BASF first announced the proposed price increase on October 14, 1964, and was followed by Bayer on October 30 and Cassella on November 5. All of the other producers named in the Commission's decision, except ACNA of Italy, joined in the general price increase which was put into effect simultaneously in all markets except the Italian market because
the term "concerted practices" to mean a "form of coordination between enterprises that has not yet reached the point where there is a contract in the true sense of the word but which, in practice, consciously substitutes a practical cooperation for the risks of competition."  

While the Court's definition of "concerted practice" includes the adverb "consciously," the phrase in which it is found is modified by the preceeding phrase "in practice," which would seem to mean "in fact" or "in effect." If this is correct, the definition could better be understood as a form of coordination which has the effect of consciously substituting a practical cooperation for the risks of competition. What does the Court mean by "practical cooperation"? Why not simply use the term "cooperation"? Clearly, there are strong indications that the Court's definition of "concerted practice" focuses on ends rather than means, on consequences rather than culpability.  

In its arguments before the Court, ICI maintained that what had taken place was mere conscious parallelism, and not a concerted practice. The Court attributed little significance to that position noting that conscious parallelism can be a decisive indication of [concerted practices] where it leads to competitive conditions that are not, considering the nature of the goods, the size and number of the enterprises concerned, and the extent of the market, normal market conditions.  

A reasonable interpretation of this is that when abnormal market conditions appear, conscious parallelism is no different than a concerted practice.

of ACNA's refusal and the French market because of a price freeze. The range of products affected did not vary between enterprises. The 1967 increase followed a similar pattern. At a meeting attended by all the producers named (except ACNA), which was held in Basel on August 18, 1967, the Swiss-based firm Geigy announced its intention to raise prices by eight percent as of October 16, 1967. Bayer and Francolor made similar announcements on the same occasion, and by September all enterprises named in the decision had announced an eight percent price increase (twelve percent in France) to take effect on October 16 in all countries except Italy, where ACNA again refused to raise prices. Id. at 8028-29, 11 Comm. Mkt. L.R. at 624-25.

16. Id. at 8027, 11 Comm. Mkt. L.R. at 622. In its decision, the Court found a concerted practice by imposing a form of strict liability on the dyestuffs producers for the uniform price increases of 1964, 1965, and 1967. This is apparent upon an examination of how the Court defined "concerted practice," how it described the relationship between "conscious parallelism" and "concerted practices" and most importantly, how it evaluated the evidence it used in finding a concerted practice.

17. By adopting such a definition, the Court seems to prefer a result-oriented approach. See notes 28-31 infra and accompanying text.


20. See Note, Common Market—Antitrust—Interpretation of Concerted Practices
The Court in Dyestuffs based its finding of concerted practices on the argument that through advance announcement by dyestuff manufacturers of proposed price increases,

the various enterprises eliminated any uncertainty as to their future conduct and therefore also much of the normal risk connected with any autonomous change in conduct on one or more markets . . . . [Thus] the enterprises . . . temporarily eliminated some of the conditions of competition in the market which prevented uniform parallel conduct.21

Note that the Court fixed liability on the ground that those conditions which prevented uniform parallel conduct were eliminated, not upon any affirmative understanding between the parties to engage in such conduct.22 Because the 1964 price increase demonstrated the possibility of "price leadership," the Dyestuffs Court calmly presumed that any advance announcement of a price hike which had the effect of reducing the risks of competition was an invitation to collusion. In other words, because collusion was possible and uniformity was present, the parties were held to have engaged in a concerted practice.

II

THE TREATY OF ROME AND CULPABILITY

It should be apparent that the Dyestuffs decision did little to distinguish the meaning of "concerted practices" from "conscious parallelism." By minimizing the significance of culpability, the Court demonstrated its willingness to hold enterprises strictly liable for ostensibly noncompetitive markets.23 That this is neither consonant with the purposes of article 85(1) nor in accord with the needs of the Common Market can be shown by a detailed examination of the Treaty of Rome itself.

22. The Court, however, did devote some attention to facts from which intention (or lack thereof) could have been inferred. It concluded that the European dyestuffs market could not be considered a strict oligopoly, since in such a market price competition could no longer play an important part, and in the dyestuffs market the producers were powerful and numerous enough to create a substantial risk that some of them would not subscribe to price leadership. Id., 11 Comm. Mkt. L.R. at 626. But the Court's analysis of the markets was superficial at best. See Korah, Concerted Practices, 36 MODERN L. REV. 220, 224 (1973). Moreover, as the refusal of ACNA to join the price hike indicated, there were five relevant markets, not one, and these were oligopolistic. Id. at 223. Finally, nowhere does it clearly appear that the Court actually did infer any anticompetitive intent from the economic analysis in which it dabbled. For a fuller discussion of how such intent can be inferred from circumstantial evidence, see notes 48-49 infra and accompanying text.
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Under accepted rules of treaty interpretation, it is unclear whether the signatories intended, through the use of the words "concerted practice," to make illegal all uniform pricing or only uniform pricing practices which are accompanied by anticompetitive intent. Commentators have had difficulty clarifying the problem. Confronted with such
uncertainty, EEC tribunals, in construing the term "concerted practice," should strive for that meaning which is most compatible with the overall approach to antitrust regulation embodied in the Treaty of Rome.\[27\]

Basically, there are two ways to regulate competition among enterprises. One may be termed a rule-oriented approach,\[28\] the other a result-oriented approach.\[29\] An interpretation of "concerted practice" requiring the Commission to prove that uniform pricing activities are the result of anticompetitive intent is most compatible with a rule-oriented approach.\[30\] An interpretation which permits the Commission to impose a form of strict liability for uniform pricing practices best comports with a result-oriented approach.\[31\] Which of these two approaches is embodied by the Treaty of Rome is the subject of the following analysis.

The Common Market's approach to antitrust regulation has its roots in the basic objectives of the Community\[32\] as articulated in article 2\[33\] he nevertheless makes the statement that concerted practices extend to prohibit cases of "cooperation purely as a matter of fact." Id. ¶ 119, at 11.

\[27\] Coing, supra note 24, at 449-50, 452, notes that when standard rules of treaty interpretation are unsuccessful, the particular term should be evaluated in regard to the context in which it is set in the treaty. There are two levels at which the context should be examined. The first is the narrower context of the specific section, sentence, or phrase of the treaty in which the term is found. See Geitling v. Haute Autorite 8 Recueil de la Jurisprudence de la Cour 165, 218 (Cour de Justice de la Communaut6 europenne 1962), where the European Court of Justice, interpreting the European Coal and Steel Treaty, resorted to examination of the specific context in which the term was set. In this connection, at least one writer has argued that article 85(1) places concerted practices on the same level as agreements between enterprises and decisions of associations "so that established rules of treaty interpretation render it impossible to attribute a meaning to the term 'concerted practices' which is not ejusdem generis and would render some form of consensus redundant." Mann, The Dyestuffs Case in the Court of Justice of the European Communities, 22 Int'l & Comp. L.Q. 35, 36 (1978).

The second sense in which context can be examined refers to the consistency of a specific term with the "system embodied in and the aims pursued by the treaty." Coing, supra note 24, at 448, 452-53.

\[28\] This seeks to control the behavior of enterprises through emphasis on adherence to a system of rules which define what types of behavior are noncompetitive and thereby embody the goals and purposes of regulation.

\[29\] This seeks to implement the goals and purposes of regulation directly by doing whatever is necessary to achieve a particular desired result.

\[30\] Since the rule-oriented approach emphasizes adherence to certain principles, it recognizes that competition is not only a type of objective behavior, but also a state of mind. Hence, this approach focuses on culpability.

\[31\] Since the result-oriented approach is concerned primarily with consequences, it sees competition only as a type of objective behavior. Whether or not particular enterprises intended to act competitively or anticompetitively is irrelevant.


\[33\] Article 2 reads:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an
and article 3(f)\textsuperscript{34} of the Treaty of Rome. Recognizing this, Ellis has summarized the purpose, aims, and objectives of article 85, based upon an analysis of the reports and documents comprising the \textit{actes préparatoires} of the Treaty of Rome, including the Spaak Report,\textsuperscript{35} and relevant case law:

In the conception of the authors of the Treaty, the fusion of the separate markets—or, in other words, the establishment of a common market—is one of the two essential conditions for realizing the objects of the Community, while undistorted competition is a fundamental condition for the success of such a common market. The rules which have to ensure that the free play of competition within the common market is not distorted fulfill a derivative, protective function, consisting in preventing the Community's objectives from being frustrated by disturbances in the functioning of the common market caused by distortions of competition.\textsuperscript{36}

In fulfilling its protective function, article 85(1) must somehow strike a balance between control over behavior having noncompetitive effects and freedom of commercial enterprise for the type of maximum economic development described in article 2. Since the term "concerted practice" is an essential component of article 85, its meaning must enhance that balance. This should be remembered in considering the following series of arguments.

A. ARGUMENTS FOR THE RESULT-ORIENTED APPROACH

It is a fact that not every cartel or agreement not to compete is damaging to economic and industrial development. Schwartz and Wellman have observed that "both individual behavior and arrangements among
independent firms, which may contribute to the creation of market power, may at the same time enhance the efficiency with which the processes of production and distribution of goods are conducted. In light of the overriding importance to the Common Market of maximum economic development, as described in article 2, it can be argued that the framers of the Treaty of Rome intended to permit selective application of the antitrust machinery, so that those anticompetitive practices which produce the desired result of overall Community well-being and a higher standard of living for the inhabitants of its members would not be impaired. If this is true and the framers thus intended a result-oriented approach to prevent beneficial cartels from being destroyed, it is a short step to argue that they intended the same approach to provide more effective control of uniform pricing practices which, regardless of the culpability of the parties involved, are harmful to the Community. Such an argument finds some support in Ellis' analysis of the Spaak Report:

It is to be noted that, while the rules of competition contained in the Treaty are exactly those advocated by the Spaak report with a view to attaining normal conditions of fair competition the expressions "normal" and "fair" competition are not to be found either in the ultimate actes préparatoires or in the articles of the Treaty. The Treaty has summarized these conditions and stated them more precisely by prescribing that competition must not be distorted. . . . This requirement . . . is one which relates directly to the requirements of a proper functioning of the fused markets, and this expression therefore ties the elements of fair and normal competition to the objectives of the common market.

The terms "normal" and "fair" admit to wide interpretation. They are subjective terms through which broad formulations of economic policy can enter antitrust regulation. That the framers considered the word "distortion" to embody these two terms may indicate that they intended the Commission to have significant discretion in defining what amounts to anticompetitive behavior. If that is the case, a construction of "concerted practice" which ignores the culpability of the parties involved and focuses merely on the effects of their behavior, for whatever purpose, is most appropriate.

Another reason for believing that the framers intended a result-oriented

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37. Schwartz & Wellman, The Rule of Reason in EEC Antitrust: Efficiency Enhancement Through Integration by Agreement Among Competitors, 12 VA. J. INT'L L. 192, 193 (1972). The argument also draws support from Angulo and Minshall who have noted, "Throughout European Development, the policy behind trade regulation appears to have been the elimination and control of abusive practices, not of monopolies or restrictive practices themselves." Angulo & Minshall, An Inquiry into The Economic Philosophies Underlying Antitrust Regulation in the United States and the European Economic Community, 4 VA. J. INT'L L. 139, 163 (1964).

38. Ellis, supra note 32, at 252-53.
Conscious Parallelism in the EEC approach is based on the difficulty of proving culpability from circumstantial evidence. In a concentrated market situation (where the effects of conscious parallelism are most like those of an agreement not to compete), a few large enterprises having vast resources at their disposal are not only in a favorable position for easy collusion, but are also well equipped through financial leverage and other means to disguise such collusion.\(^3\)

In this way, they can avoid effective and necessary regulation under any construction of concerted practice which requires the Commission to prove culpable anticompetitive behavior. In addition, since anticompetitive activity under article 85 is not forbidden by the criminal law as *malum in se*, but is merely a form of undesirable economic activity, at least one writer has suggested that this fact alone justifies a less burdensome standard of proof.\(^4\) In light of these two considerations, one could say that “concerted practice” should be interpreted, on purely practical grounds, to mean strict liability for uniform pricing practices.

**B. Arguments in Support of the Rule-Oriented Approach**

That the Treaty of Rome embodies a rule-oriented approach to antitrust regulation is apparent from the structure of article 85. The primary emphasis of that provision is on rule adherence, as is demonstrated by the flat prohibition in article 85(1) of “agreements,” “decisions” or “concerted practices” which distort competition.\(^4\) In order to provide flexibility in the enforcement of article 85(1) however, the framers of the Treaty of Rome provided in article 85(3) that if the benefits of conduct found illegal under article 85(1) outweigh the harm, such conduct will nevertheless be permitted, regardless of its formal illegality.\(^4\)

\(^3\) Attending such problems are those normally associated with any attempt to prove the mental state of individuals, primarily the necessity of relying on circumstantial evidence.

\(^4\) For a copy of the relevant text, see note 1 supra. For authority supporting the position see Ellis, *supra* note 32, at 277.
manner, the framers provided the Commission with enough discretion to apply the antitrust machinery selectively, so that there would be no conflict between control of anticompetitive behavior and the goal of maximum economic development. Because the Treaty of Rome has thus separated its rule-oriented provision from its result-oriented provision, it is difficult to maintain that the meaning of "concerted practice" in article 85(1) should be construed to implement in any way the purposes of article 85(3). This is particularly important since article 85(3) flexibility is of the "one way" type, permitting the Commission to exercise discretion only in regard to concerted practices already established under article 85(1). It does not grant the Commission power to relax the requirements of article 85(1) and find a concerted practice where nonculpable uniform pricing behavior is especially damaging to the Community's economic development. Clearly article 85's structure stands in direct contradiction to any thought that the meaning of the word "distortion" in article 85(1) justifies the Commission in exercising anything more than ex post facto discretion.

In addition to mentioning the structural arguments supporting a rule-oriented approach, it should also be pointed out that such an approach is free of the numerous practical and administrative difficulties endemic to one which is result-oriented. Saving arguments about burden of proof for section III of this Note, one could begin a list of such difficulties by noting some of the enforcement problems implicit in a result-oriented approach. Unless the Commission chooses to adopt the solution of divestiture, it could find extreme difficulty in altering the behavior of enterprises which may never have entered any form of agreement or even arrived at some mutual understanding. Though the Commission would have the authority to manipulate consequences, businessmen must act according to principles. If it were merely a particular end which was to be avoided—uniform prices for example—enterprises would be placed in the position of attempting to act non-uniformly and such a system might ultimately require deliberate price differentiation. The chaos would be enormous, not to mention the severe damage to any notion of free enter-

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.


43. This is suggested by Korah, supra note 22, at 226, who also points out that at present the Commission may not have power to order divestiture and that, in any case, the cost would be very great. Id. at 226 n.10.
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Moreover, some form of agreement can usually be neutralized by an injunctive order; that is clearly not true for conscious parallelism. Other problems in addition to enforcement are also readily apparent. First, the Commission's actions under such an approach would probably be relatively unpredictable owing to the necessity for evaluating each case individually. This in itself can be counterproductive, especially with respect to economic growth and development which often require a stable legal environment. More significantly, such uncertainty could eliminate any incentives for enterprises to undertake "questionable" activities that would have beneficial effects for the Community. Excessive caution would prevail. Second, such a system would encourage a see-no-evil policy whereby enterprises would avoid including in their market calculations the reactions of their competitors in order to minimize any possibility of parallelism. That in itself would weaken the ability of enterprises to compete. Finally, the wide discretion permitted the Commission would open the way to abuse by which the views of the Commission would be substituted for the operation of free market forces.

III

THE PROBLEM OF PROOF

It appears that the Common Market's approach to antitrust regulation is rule-oriented. The construction of "concerted practice" which is most compatible with that approach is one which requires the Commission to prove an element of anticompetitive intent in addition to the existence of uniform prices. The question remains whether such a construction requires the Commission to shoulder an impractical burden of proof. An examination of American jurisprudence and learned commentary

44. The problem is neatly summarized as follows:
   Once one seller lowers his price, another must lower his in order to maintain his own share of the market, unless his product is sufficiently differentiated to give him a monopoly in the market. But if he lowers his price to merely match the first price cutter, he will be accused of parallel action. Must he strike even lower?
   Note, supra note 9, at 684.
45. Id.
46. See Korah, supra note 22, at 225-26, who points out such difficulties already exist in the wake of Dyestuffs.
47. Section 1 of the Sherman Act has many similarities to article 85: "Every 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, is declared to be illegal . . . ." 15 U.S.C. § 1 (1971).
   It is the opinion of at least three European commentators that the concept of con-
reveals that workable evidentiary standards for distinguishing between uniform pricing coupled with anticompetitive intent (concerted practice) and purely competitive uniform pricing (conscious parallelism) do exist.

Basically, anticompetitive intent can be inferred from three types of circumstantial evidence. The first of these is evidence that the market structure in which the particular enterprises under investigation operate is not sufficiently transparent or oligopolistic to support conscious parallelism. Such evidence would be based on information regarding the number and size of the enterprises involved, the sizes of their particular market shares, the comparability of their production and cost structures, as well as any other factors pertaining to the structure of a market and its performance characteristics. For independent behavior to produce effects similar to those resulting from an agreement not to compete, each enterprise must be able to gather sufficient data from existing market conditions and past behavior of competitors to predict with reasonable certainty.
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accuracy future behavior and future market conditions. The greater the ability of an enterprise to anticipate its competitors, the more likely it will be that uniform or complementary pricing behavior will result. It should be remembered that the existence of a perfect oligopoly situation is not always necessary for an enterprise to be able to anticipate its competitors. A finding of anticompetitive intent should not be made unless it can be shown that no facts existed which, when combined with reasonable techniques of economic analysis, could have enabled enterprises acting independently to produce uniform prices. Of course, any evidence of intervening factors which would prevent even an oligopolistic market from becoming transparent should also be considered.

A second type of circumstantial evidence which may be used is that showing behavior inconsistent with purely competitive intent. Examples of this type of evidence have been suggested by Posner: (1) evidence that firms practice systematic price discrimination, i.e., a pattern of selling in which the "ratio of price to marginal cost is not the same for all sales of a commodity"; (2) prolonged excess of capacity over demand; (3) evidence regarding changes in market price—"prices of noncompeting sellers should change less frequently than prices of competing firms due to difficulty in agreeing at mutually acceptable standards"; (4) abnormal profits (even for an oligopoly); and (5) extremely uniform and long continued price leadership.

The third way to prove anticompetitive intent is by circumstantial evidence of a mutually adopted plan the logical consequence of which is price uniformity. Implicit in any plan is the existence of some form of agreement or mutual understanding between the parties involved to cooperate. Such an understanding can be established where reasonable men in the

49. Id. at 1578. See also the recent case of Dahl, Inc. v. Roy Cooper Co. 448 F.2d 17 (9th Cir. 1971), in which the Court of Appeals held that in an antitrust action by a motion picture exhibitor against distributors and other exhibitors, a Sherman Act conspiracy was not established where the plaintiff was able to bid competitively for the first-run showings of films and acquire some films, and where there was an explanation wholly consistent with proper business operations as to every instance in which plaintiff unsuccessfully attempted to obtain film from distributors.

50. Posner, supra note 6, at 1578-82.

51. Id. at 1578.

52. Id. at 1580.

53. Other more traditional types of evidence include (1) fixed market shares for a substantial period, (2) filed identical sealed bids on non-standard items, (3) refusal to give discounts in the face of substantial excess capacity, (4) announcement of price increases far in advance without legitimate business justification for doing so, and (5) public statements of what a seller considers the right price for the industry to maintain. Id. at 1582.
positions of the parties would believe that they had at least morally oblig-
gated themselves by some action or statement to assist each other rather
than compete.\textsuperscript{54} One example of a court's reliance on evidence of a
mutually adopted plan is \textit{Interstate Circuit, Inc. v. United States}\textsuperscript{55} in
which the Supreme Court focused on a letter which it construed as an
invitation to participate in an unlawful scheme.\textsuperscript{56} In that case, eight
motion picture film distributors were found to have agreed with each
other, in violation of section 1 of the Sherman Act, to enter into and
carry out certain contracts with two exhibitors of first run films. The
contracts obligated each distributor who signed to require second run
exhibitors to maintain a certain minimum price of admission. The Court
found that the unlawful agreement between distributors consisted in
their mutual adherence to a plan, the necessary consequence of which
was an unlawful restraint of interstate commerce. In finding the existence
of a plan, the Court emphasized the fact that each distributor had
received a letter from one of the first run exhibitors naming all of the
other distributors as addressees and proposing the contract terms which
were eventually adopted in substance by each.\textsuperscript{57} The Court also em-
phasized that each distributor “knew that all were in active competition
and that without substantially unanimous action there was a risk of sub-
stantial loss of business and goodwill, but that with unanimity there was
the prospect of increased profits” and that this was a strong motive for
“concerted action.”\textsuperscript{58}

\textsuperscript{54} Consider the following statement by A. D. Neale:
Whenever there is a plan, there is mutual awareness among the participants;
but it does not follow that whenever there is mutual awareness, there is a plan.
A plan implies some assurance of reliable action in the future; its breakdown
will usually be a matter for reproach between the parties. “Conscious parallel-
ism of action” is without this quasi-moral element. The actions of others may
be highly predictable, as when a number of firms refuse to deal with a bad
credit risk, or the film distributors refuse first runs to a “flea pit”; but an un-
foreseen action is regarded as a fact, like a change in the weather, and not as
a betrayal, like a change of allegiance.
1 A. D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 88 (2d ed.
1970).
\textsuperscript{55} 36 U.S. 208 (1939).
\textsuperscript{56} \textit{Id.} at 216. Without that letter, it is doubtful that concerted action could have
been established. Note, \textit{supra} note 9, at 683.
\textsuperscript{57} \textit{Cf.} Moore \textit{v. Jas. H. Matthews & Co.}, 473 F.2d 328 (9th Cir. 1973),
where the details of the plan were published by the defendant in a book and were
later agreed to individually in meetings and consultations. This case also provides
a summary of the current law on the requirement of intent.
\textsuperscript{58} The Court also observed behavior inconsistent with competitive intent noting
that compliance with the proposals involved radical departures from previous business
practices; that there was opposition to them by three of the distributors' local man-
In *United States v. Parke, Davis & Co.*, the Supreme Court found a mutually adopted plan in which a drug manufacturer, embarking on a program to promote general compliance with the suggested retail prices it had published, induced wholesalers to refuse to deal with any retailer who disregarded the suggested prices. Here the Court emphasized the verbal discussions between each wholesaler and representatives of Parke Davis in which the wholesalers were informed that Parke Davis would refuse to deal with those who sold to retailers who did not observe the suggested price minimums. Also emphasized was that in these discussions each wholesaler was told that its competitors were receiving the same information.

In still another case, *United States v. Container Corp. of America*, the Supreme Court found that a mutually adopted plan was established through the reciprocal exchange of price information. The facts indicated that each producer, upon request by a competitor, would furnish information as to the most recent price charged or quoted to individual customers with the expectation of reciprocity and the understanding that it represented the price currently being bid. The exchange stabilized prices, although at a downward level. In finding concerted action, the Court said, "[t]here was of course freedom to withdraw from the agreement. But the fact remains that when a defendant requested and received price information, it was affirming its willingness to furnish such information in return."

While it should now be apparent that it is possible to formulate work-
able standards for proving anticompetitive intent from circumstantial evidence, one caveat is in order. It is important to remember that these standards, while valid, are only reference points to guide the trier of facts in evaluating a given body of circumstantial evidence. They are foci around which to associate different bits of information. As such they are necessarily somewhat crude indicia of whether a concerted practice is actually present since in the evaluation of circumstantial evidence, a concerted practice can be found if it is only reasonable to conclude that enterprises have acted with the requisite intent. Within the broad range of what is reasonable, conscious parallelism and concerted practices can co-exist. Consequently, it must be recognized that even where there are well designed criteria for distinguishing concerted practices from conscious parallelism, such criteria can rarely, if ever, be perfectly effective.

CONCLUSION

Behind current efforts to determine the appropriate meaning of the term “concerted practice” in article 85(1) of the Treaty of Rome is a fundamental conflict over basic antitrust policy. It arises from the necessity of Community antitrust laws to somehow strike a balance between control over behavior having noncompetitive effects and the freedom of commercial enterprise necessary to insure the kind of continuous and stable economic development described in article 2 of the Treaty of Rome. The issue of whether this can best be accomplished by a rule-oriented approach or a result-oriented approach is raised by the failure of the Court of Justice in the Dyestuffs case to adequately distinguish concerted practices from conscious parallelism. There, the Court in effect held the enterprises involved strictly liable for the decline of price competition in dyestuffs in EEC markets. It has been shown that this is inconsistent with the purposes of the Treaty of Rome and the needs of the Common Market, and that more attention to the proof of anticompetitive intent is necessary. That workable evidentiary standards are available for this task is beyond question, although they are not infallible. The underlying premise of article 85 is that some imperfection is but a small price to pay for an antitrust policy based on the individual responsibility of enterprises acting in truly free competition.

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