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## Oligopolies, Conscious Parallelism and Concertation

by *Rafael Allendesalazar, Paloma Martínez-Lage and Roberto Vallina*<sup>1</sup>

### A. Introduction

The extreme market structures of perfect competition and absolute monopoly are scarce in the real world, where oligopoly is a much more prevalent situation. In many oligopolistic markets, undertakings tend to be competitively interdependent, and each firm consciously adapts its own strategy to the expected reactions of its competitors. This situation may result in supra-competitive oligopoly pricing. But firms that charge supra-competitive prices do not, for that reason alone (and in the absence of some sort of explicit or tacit agreement), infringe competition law. It has been rightly pointed out that treating such behaviour as illegal would require competitors to act irrationally by ignoring their perceived interdependencies, and would also call for unworkable remedies.<sup>2</sup>

The difficulty for competition law, competition authorities, and also for the undertakings themselves, is to distinguish between situations in which strategic coordination implies some sort of illicit collusion and when it merely corresponds to spontaneous coordination resulting from the rational response of each member of the oligopoly to the perceived interdependencies.

This paper has two main parts. In Section B we outline the general principles governing the application of Article 81 EC to strategic coordination in oligopolies, as defined by the case law. In the light of such principles, we see in Section C how the notions of concerted practices and conscious parallelism are defined under Spanish competition law, especially in view of the practice of the Spanish competition authorities. Finally, in Section D we draw our conclusions.

### B. Article 81 EC, concerted practices and oligopolies

Concertation within the meaning of Article 81 EC implies, as such, parallel conduct or at least some degree of coordination. However, not all parallel conduct amounts to concertation within the meaning of Article 81 EC.

According to the ECJ, the notion of concertation under Article 81 EC must be understood in light of the concept inherent in the provisions of the EC Treaty relating to competition: each economic operator must determine independently the policy which he intends to adopt on the market. The Treaty thus lays down a requirement of

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<sup>2</sup> Note by the US Department of Justice and the US Federal Trade Commission, *Mini-Roundtable on Oligopoly*, OECD (1999).

independence.<sup>3</sup> However, this requirement does not prevent economic operators from adapting themselves intelligently to the conditions of the market; rather, it prohibits any practice that may influence competitors' conduct on the market.<sup>4</sup>

The problem lies in distinguishing between legitimate conscious parallelism and illicit collusion.<sup>5</sup> Oligopoly is the place where the boundaries between these concepts can become elusive.

## 1. Oligopolies

Oligopoly has been traditionally defined (at least by lawyers) as a market structure in which there are only a few suppliers (at least two).<sup>6</sup> However, it has been rightly pointed out that what matters is not really the number of firms. From an economic point of view, what matters is market power, that is, whether undertakings can, either individually or collectively, reduce output or raise prices to the detriment of consumers.<sup>7</sup>

The relevant feature of oligopolies from the point of view of Article 81 EC is that, in such markets, competitors are interdependent. According to the "oligopolistic interdependence" theory, in a genuine oligopolistic market the structure of the market enables competitors to closely monitor each other's movements, as a result of which they are bound to match one another's marketing strategy.<sup>8</sup>

Thus, if the necessary conditions are met (transparency, etc.), market players in a homogeneous oligopolistic market tend towards a stable, non-competitive equilibrium. If a firm in such a market cuts its prices, it will increase its market share for a short period of time. However, the competitors will probably react by matching the price cut, thus neutralizing the gains of the price cut in the long term. The initial gain obtained by the firm could thus be outweighed by these long term sales at this new reduced price.

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<sup>3</sup> Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission* [1975] ECR 1663, at paragraphs 173-174.

<sup>4</sup> *Ibid.*

<sup>5</sup> The essence of this problem has been very clearly stated in the OECD definition of conscious parallelism contained in its *Glossary of Industrial Organisation Economic and Competition Law*:

"Under conditions of oligopoly, the pricing and output actions of one firm have a significant impact upon [those] of its rivals. Firms may after some period of repeated actions become conscious or aware of this fact and without an explicit agreement coordinate their behaviour as if they were engaged in collusive behaviour or a cartel to fix prices and restrict output. The fear that departure from such behaviour may lead to costly price cutting, lower profits and market share instability may further create incentives for firms to maintain such an implicit arrangement amongst themselves. This form of conscious parallel behaviour or tacit collusion generally has the same economic effect as a combination, conspiracy or price fixing agreement. However, whether or not conscious parallel behaviour constitutes an illegal action which is restrictive of competition is [a] subject of controversy in both competition law and economics. Price uniformity may be a normal outcome of rational economic behaviour in markets with few sellers and homogenous products. Arguments have been advanced that the burden proof must be higher than circumstantial evidence of concerted or parallel behaviour and uniform pricing and output policies. In other words, conscious parallelism in and of itself should not necessarily be construed as evidence of collusion. The problem arises more from the nature of the market or industry structure in which firms operate than from their respective behaviour."

<sup>6</sup> Faull J. and Nikpay A. (1999): *The EC Law of Competition*, Oxford University Press, Oxford, p. 24.

<sup>7</sup> Whish R. (2003): *Competition Law*, Lexis Nexis, pp. 504-505.

<sup>8</sup> *Ibid.*, at pp. 506-507.

In short, if the conditions are met, undertakings in oligopolistic markets may have little incentive to compete, and they must closely follow and analyze the other operators' conduct. If this is the case, the undertakings reach a non-competitive equilibrium.

Game theory (and the prisoner's dilemma) supports this conclusion. According to game theory, if in a game the worst solution for each player is to ignore the behaviour of the other players, since such behaviour will affect the outcome of the game, the players will end up cooperating. They will either decide from the very first moment that reaching an agreement is the most advantageous solution, or they will reach the conclusion that it is necessary to cooperate by trial and error.<sup>9</sup> In such a case, the players will cooperate "as if" they had reached an agreement. For game theory it does not matter whether such cooperation is reached through an express agreement or by tacit cooperation (acting "as if" there was an agreement). What matters is whether the conditions of the game create the incentives for the players to cooperate.

It can thus be seen that the structural conditions of the market in which oligopolists operate can be such that they have little or no incentive to compete. In these circumstances, parallel conduct would be not the result of the will or intention of market players but a natural consequence of the market structure, or the "natural operation" of the market, in the wording of the ECJ.<sup>10</sup>

Nevertheless, the very existence of an oligopoly does not entail a less competitive industry or market. Day-to-day business experience proves that, in some oligopolistic markets, competition is intense and fierce.<sup>11</sup> This shows that not every oligopoly creates interdependence between competitors: for a non-competitive outcome, certain conditions must be met, e.g., transparency (a vital element), possibilities of retaliatory measures, product homogeneity, etc.<sup>12</sup>

Oligopolies thus pose a major challenge for competition law. On the one hand, some oligopolies could affect the very essence of the objectives that competition law aims to protect: they could lead to a restriction of output and may increase prices well above the competitive level.<sup>13</sup> On the other hand, Article 81 EC only applies to agreements and coordinated practices. That is, Article 81 EC requires at least a concurrence of wills or a meeting of minds between the undertakings concerned. If the market conduct of an enterprise is not the result of either an agreement or at least a conscious common intention of coordination among competitors, Article 81 EC is not applicable.

The question therefore arises as to what extent, if any, parallel behaviour in an oligopolistic market is the result of a meeting of minds or whether, on the contrary, it is the result of the autonomous will of each undertaking? The answer to this question is the key element in applying Article 81 EC in most cases.

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<sup>9</sup> Franzosi M. (1988): "Oligopoly and the prisoner's dilemma: concertated practices and " 'as if' behaviour", 9 *European Competition Law Review* 385.

<sup>10</sup> Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. *Ahlström Osakeyhtiö e.a. (Woodpulp II)* [1993] ECR I-1307, at paras. 101-102.

<sup>11</sup> See comments on this by Whish R., *op. cit.*, pp. 510-511.

<sup>12</sup> See, from a merger control perspective, Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, at paras. 58, 60 *et seq.*

<sup>13</sup> Of course, this begs the question of what *is* the competitive price level? And how can it be determined? These questions are hard if not impossible to answer. See the reference made to the normal conditions of competition in Case 48/69 *Imperial Chemical Industries Ltd. (ICI) v. Commission* [1972] ECR 619, at para. 66.

## 2. Oligopolies, concertation and Article 81 EC

The ECJ stated in *ICI* (and since then has repeatedly affirmed) that concertation within the meaning of Article 81 EC must be defined as:<sup>14</sup>

“[...] a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition”.

The ECJ further added that:

“[b]y its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants”.

Therefore, concertation implies a form of cooperation that: (i) protects the undertakings concerned from the risks of competition; and (ii) usually becomes apparent from the behaviour of the participants (for example, from parallel conduct with regard to their pricing policy).

The problem now lies in how to apply and interpret the notion of concertation in the context of an oligopoly. As we have seen, market players in an oligopolistic market may assess the potential actions of competitors and take account of the interdependence of strategies.<sup>15</sup> To what extent, if any, does the oligopolists’ analysis of the market and the strategies of their competitors amount to a concerted practice within the meaning of Article 81 EC ?

The ECJ has acknowledged that, although each economic operator must determine its own commercial policy independently, it is legitimate for the economic operators to adapt themselves intelligently to the existing and anticipated conduct of their competitors.<sup>16</sup> However, if adapting intelligently to the existing and anticipated conduct of their competitors is legitimate, it is foreseeable that all the existing operators will adapt similar conduct, *i.e.* parallel conduct. Such conduct could be easily read as an evidence of “coordination which becomes apparent from the behaviour of the participants”.

The ECJ rightly acknowledged this, and ruled that parallel conduct as such is not caught by Article 81 EC and creates no presumption of collusion between the undertakings concerned.

Nevertheless, the Court’s case law seemed to provide for two exceptions to this principle:

- First, in *ICI* the ECJ stated that, although parallel behaviour may not by itself be identified with a concerted practice, parallel conduct may amount to strong evidence of concertation if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.<sup>17</sup>

<sup>14</sup> See above.

<sup>15</sup> Faull J. and Nikpay A. (1999), *op. cit.*, p. 24.

<sup>16</sup> Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission* [1975] ECR 1663, at paras. 173-174.

<sup>17</sup> Case 48/69 *Imperial Chemical Industries Ltd. (ICI) v Commission* [1972] ECR 619, at para. 66.

- Second, in *Woodpulp II* the ECJ ruled that parallel conduct cannot be regarded as proof of concertation unless concertation constitutes the only plausible explanation for such conduct.<sup>18</sup>

In spite of the fact that the language varies from one case to another, these two “exceptions” can be read as a single one: parallel conduct is not proof of concertation if the conduct of the enterprises can be explained by market conditions.

In *ICI*, the ECJ said that parallel conduct may amount to strong evidence of concertation if it leads to conditions of competition which do not correspond to “the normal conditions of the market”. However, in practice it is very difficult to ascertain what such “normal” conditions are, and this reference to the “the normal conditions of the market” was never repeated.<sup>19</sup>

The position of the ECJ in *ICI* must be read in light of the subsequent cases, and mainly in light of *Woodpulp II*. In *Woodpulp II*, the ECJ reformulated its previous statement in *ICI*. The ECJ again said that account must be taken “of the nature of the products, the size and the number of the undertakings and the volume of the market in question”, but with an important difference. The goal of such an analysis is no longer to establish what “the normal conditions of the market” are but to ascertain whether or not the parallel conduct can be explained otherwise than by concertation.

Thus, the case law must be seen as an evolution whose outcome is clear. Parallel conduct is not prohibited, and it does not create a presumption *iuris tantum* of collusion. Nevertheless, parallel conduct can be considered sufficient proof of collusion if concertation is the only plausible explanation.

### 3. Plausible explanations

The list of plausible explanations is not exhaustive, but to date, two main circumstances have been considered to be plausible explanations for parallel behaviour: (i) price leadership; and (ii) market structure.

As we have said, it is legitimate for economic operators to adapt themselves intelligently to the existing and anticipated conduct of their competitors.<sup>20</sup> Consequently, if there is a price leader in the market, competing undertakings could try to adapt themselves to the leader’s commercial policy. Such parallel pricing behaviour in an oligopoly producing homogeneous goods would not in itself amount to concertation within the meaning of Article 81 EC.<sup>21</sup>

A price leader could be characterized as an economic operator which, due for example to its market share, is able to act independently of its competitors, knowing that they would almost certainly follow suit (“dominant price leadership”).<sup>22</sup> Another possibility is so-called “barometric price leadership”, where the firm taking the lead is not dominant but is widely accepted as the best performing operator in the sense of meeting demand and adapting to evolving market conditions (cost increases, etc.).

<sup>18</sup> Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A. Ahlström Osakeyhtiö e.a. (Woodpulp II)* [1993] ECR I-1307, at para. 71.

<sup>19</sup> This may be because the notion of “normal market conditions” was heavily criticized by commentators.

<sup>20</sup> Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie v Commission* [1975] ECR 1663, at paras. 173-174.

<sup>21</sup> Commission Decision EEC/84/405 of 6 August 1984, Case IV/30.350 - *zinc producer group*, OJ L 220 [1984], at paras. 75-76.

<sup>22</sup> Waelbroeck M. (1997): *Commentaire Megret. Vol. IV: Concurrence*, ULB Brussels, p. 138-139. See also *supra* note no. 21.

The conclusion could be quite different if additional evidence is adduced, such as evidence of contacts between undertakings on desirable price changes prior to the adoption of a new price, or of an exchange of information that reinforces such contacts.<sup>23</sup> In any event, an agreement between competitors to follow or to choose a price leader will be regarded as concertation within the meaning of Article 81 EC.

Another possibility is that the very structure of the market leads to parallel conduct.

The ECJ has implicitly acknowledged that, in some oligopolistic markets, competitors are interdependent. Accordingly, in *Woodpulp II* the ECJ appointed a group of economic experts to examine the characteristics of the affected market during the period covered by the Commission's contested decision. After examining the market in the relevant period, the experts concluded that the normal operation of the market was a more plausible explanation for the uniformity of prices than concertation.<sup>24</sup>

The ECJ accepted this as a plausible explanation for the parallel conduct and upheld the applicants' argument that the Commission had not sufficiently proved concertation within the meaning of Article 81 EC. The ECJ thus implicitly accepted the practical consequences of the "oligopolistic interdependence" theory.

It is worth noting that, in *Woodpulp II* the experts did not say that the normal operation of the market was the *sole* plausible explanation for the uniformity of prices. For the ECJ, it was enough that there were other explanations apart from collusion. Concertation thus cannot be inferred from the mere existence of parallel conduct.

#### 4. Burden of proof

According to the case law of the ECJ, in order to establish that parallel behaviour is the result of concerted action, the evidence must be "sufficiently precise and coherent".<sup>25</sup>

In light of the foregoing, in *Woodpulp II* Advocate General Darmon considered that this statement of the ECJ implied that it is necessary to establish a degree of certainty that goes beyond any reasonable doubt. He further added that, in "accordance with the principles governing the burden of proof, it is for the Commission to demonstrate that; the burden of proof cannot be shifted simply by a finding of parallel conduct".<sup>26</sup> Still further, the Advocate General considered that, in any event, if a plausible alternative explanation is put forward by the parties, then concertation cannot be deemed to be established.<sup>27</sup>

The position of Advocate General Darmon in *Woodpulp II* was quite clear: the burden of proof is always borne by the competition authority. Parallel conduct neither creates a presumption of concertation nor shifts the burden of proof. In view of the

<sup>23</sup> *Ibid.* See also Case T-202/98 *Tate & Lyle v Commission (British Sugar)* [2001] ECR II-2035, at paras. 34-46.

<sup>24</sup> Joined Cases -89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. *Ahlström Osakeyhtiö e.a. (Woodpulp II)* [1993] ECR I-1307, at paras. 75 *et seq.*

<sup>25</sup> Joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA (CRAM) and Rheinzink GmbH v Commission* [1984] ECR 1679, at para. 20.

<sup>26</sup> Joined Cases -89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. *Ahlström Osakeyhtiö e.a. (Woodpulp II)* [1993] ECR I-1307.

<sup>27</sup> *Ibid.*

conclusions of Advocate General Darmon, in *Woodpulp II* the ECJ ruled on this point as follows.<sup>28</sup>

“[70] Since the Commission has no documents which directly establish the existence of concertation between the producers concerned, it is necessary to ascertain whether the system of quarterly price announcements, the simultaneity or near-simultaneity of the price announcements and the parallelism of price announcements as found during the period from 1975 to 1981 constitute a firm, precise and consistent body of evidence of prior concertation.

[71] In determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although [Article 81] of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (see the judgment in *Suiker Unie*, cited above, paragraph 174).

[72] Accordingly, it is necessary in this case to ascertain whether the parallel conduct alleged by the Commission cannot, taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be explained otherwise than by concertation.”

The position of the ECJ seems, at first glance, to follow Advocate General Darmon. However, this may not be a realistic interpretation of the existing case law.

First, competition authorities reason (at least in the officials’ minds) in a quite different way: parallel conduct is either proof of concertation, or at least creates a presumption of collusion. No matter how the case law defines the principles governing the burden of the proof in these cases, a competition authority will presume the existence of concertation if there is parallel behaviour. It will then be a hard task for the defendants to find “sufficiently precise and coherent” evidence that concertation is not the only plausible explanation. It is neither practical nor realistic to expect competition authority officials to presume that there is no concertation in the face of parallel behaviour.

Second, *Woodpulp II* must be read in the light of the previous case law. Indeed, in *CRAM and Rheinzink*, the ECJ stated:

“The Commission’s reasoning is based on the supposition that the facts established cannot be explained other than by concerted action by the two undertakings. *Faced with such an argument*, it is sufficient *for the applicants to prove circumstances* which cast the facts established by the Commission in a different light and which thus allow another explanation of the facts to be substituted for the one adopted by the contested Decision.” (emphasis added)

This seems to be a much more practical approach. Competition authorities tend to presume that parallel conduct is the result of concertation if they see no clear evidence supporting an alternative explanation. It is then for the defendants to provide an alternative plausible explanation.

<sup>28</sup> See Opinion of Advocate General Darmon in Joined Cases -89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A. Ahlström Osakeyhtiö e.a. (Woodpulp II)* [1993] ECR I-1307, at paras. 96 and 196.

This does not mean that a competition authority must never look for alternative explanations. As an initial matter, a competition authority must also examine on its own initiative whether such an alternative explanation exists or not. However, if after a preliminary analysis the competition authority does not find a plausible alternative explanation, the burden of proof will shift to the defendants (at least, in practice).

It is then for the defendant undertakings to provide evidence which casts the facts established by the competition authority in a different light and which thus allows another explanation for those facts.<sup>29</sup>

## 5. Additional evidence of concertation

Nevertheless, the problem of the plausible explanation, the burden of proof or the structure of the market only arises if evidentiary support for the case is insufficient. Parallel conduct could be considered as proof of collusion if it can be connected with other evidence of collusion, in particular with facilitating practices or “plus factors”. These facilitating practices have been defined as activities that promote interdependent behaviour among competitors by reducing their uncertainty as to each other’s future action, or by diminishing their incentive to deviate from a coordinated strategy.<sup>30</sup>

For instance, parallel conduct can be deemed to be proof of concertation if it is accompanied by evidence of any of the following:<sup>31</sup>

- **Documents.**

Taken together, a finding of parallel market conduct and documents which show that the practices were the result of concerted action are sufficient proof of concertation<sup>32</sup>.

- **Contacts between competitors.**

In its landmark *Sugar* case, the ECJ held that Article 81 EC strictly precludes any direct or indirect contact between operators that can influence the conduct on the market of an actual or potential competitor.<sup>33</sup> In such a case, the defendants cannot explain the existence of the parallel conduct by the fact that they have adapted intelligently to the existing and anticipated conduct of their competitors. Such contacts remove in advance the uncertainty as to the future conduct of the competitors, and thus protect the undertakings from the risks of competition.

<sup>29</sup> See Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission (PVC II)* [1999] ECR II-931, at para. 728.

<sup>30</sup> See Areeda P. (1986): *Antitrust Law*, Little Brown, Boston, para. 1407 b.

<sup>31</sup> See Ritter L. and Braun W. D. (2005): *European Competition Law: A Practitioner’s Guide*, Kluwer Law International, The Hague, 3rd edition, at pp. 108 *et seq.*

<sup>32</sup> See Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission (PVC II)* [1999] ECR II-931, at paras. 724-728.

<sup>33</sup> *Ibid.*

These contacts could consist of, for example, meetings between competitors.<sup>34</sup>

- **Disclosing to competitors the course of conduct that each undertaking has decided to adopt (or contemplates adopting) on the market.**

For example, announcements of price increases, together with parallel conduct, can be regarded as proof of concertation.<sup>35</sup>

- **Exchange of Information.**

Exchange of sensitive data can be considered proof of concertation, especially if the data are closely linked to the competitive conditions in respect of which the conduct of competitors is parallel.<sup>36</sup>

- **Reciprocal supply agreements between competitors.**

Reciprocal supply agreements between competitors could be regarded as proof of concertation, especially if, at the same time, the concerned undertakings refrain from supplying competitors' clients.<sup>37</sup>

- **Common board members.**

Having representatives on the board of directors or any other management body of a competitor could be considered a device facilitating collusion.<sup>38</sup>

- **Associations of enterprises.**

If all (or a vast majority) of the undertakings investigated are members of an association of enterprises, this can be an element supporting an accusation of concertation by a competition authority.

- **Network of joint ventures coordinated by a parent company.**

In the *Optical fibres* case, the Commission found that concertation in an oligopolistic market could result of a network of interrelated joint ventures with a common technology provider and a common parent company.<sup>39</sup>

The above non-exhaustive list of examples shows that, in the presence of parallel conduct, any device, practice or framework facilitating collusion can be considered sufficient supporting proof of concertation. In such cases, it is not enough for the defence merely to provide a plausible alternative explanation of the parallel conduct. The additional proof (exchange of information, documents, etc.) must also be rebutted.<sup>40</sup> Furthermore, it should be recalled that most of the facilitating practices can serve pro-competitive as well as anticompetitive purposes. Therefore, the mere fact that some sort of facilitating practice exists should not alone lead to a conclusion of illicit collusion among the defendants.

<sup>34</sup> See, *inter alia*, Case T-7/89 *Hercules Chemicals NV v Commission* [1991] ECR II-1711 at paras. 259–261.

<sup>35</sup> Case 48/69 *Imperial Chemical Industries Ltd. (ICI) v Commission* [1972] ECR 619, at paras. 83 *et seq.*

<sup>36</sup> Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG*. [1981] ECR 2021, at para. 21.

<sup>37</sup> Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie v Commission* [1975] ECR 1663, at paras. 173-174, and Commission Decision of 23 of December 1977, Case IV/29176 - *Vegetable Parchment*, OJ L 70 [1978].

<sup>38</sup> Joined Cases 142 and 156/84 *British-American Tobacco Company Ltd (BAT) and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487, at para. 46 *inter alia*. See also Commission Decision EEC/86/405 of 14 July 1986, Case IV/30.320 - *optical fibres*, OJ L 236 [1986].

<sup>39</sup> Commission Decision EEC/86/405 of 14 July 1986, Case IV/30.320 - *optical fibres*, OJ L 236 [1986].

<sup>40</sup> See Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission (PVC II)* [1999] ECR II-931, at paras. 724- 728.

## 6. Prices and parallel conduct

We would like to end this section with a little reflection on parallel conduct. In a number of markets there is a significant gap between the ‘official’ or the ‘catalogue prices’ and the actual transaction prices charged to such customers. In those markets, the ‘official prices’ of the market players may be similar, but the effective transaction prices could vary significantly from one market player to another.<sup>41</sup>

For a competition authority, the similarity of the ‘official prices’ would be clear evidence of collusion (at least in the officials’ minds). The point is that, in such markets, competition could have shifted to the rebates and conditions offered to each seller. Secret (or not so secret) discounts could spread all over the industry, and the effective prices charged to customers could therefore be very different from those on which the competition authority’s attention is focused. In our experience, the competition authorities tend to pay too much attention to the announced or ‘official prices’ rather than to effective transaction prices (maybe because this is a much easier task).

In our opinion, this is wrong. If important rebates are not only widespread but are almost the rule in the market, the ‘official prices’ are only a reference point, and do not reflect the reality of the market. In such cases, whether there is concertation in setting up the ‘official prices’ is not so relevant. When there is a big gap between ‘official prices’ and the real market prices, free riding is not only possible, it will be the rule, and retaliatory measures are possible. Competition authorities should essentially focus on proving that parallel conduct exists as to the effective prices charged to customers, which could only be possible if prices are also similar and there exists some degree of transparency at that level. By focusing on ‘official’ prices and ignoring the effect of individual discounts leading to different real prices, competition authorities could be unwillingly introducing an element of artificial transparency in the market, thereby reducing the uncertainty as to other competitors’ pricing practices and facilitating collusion.

### C. Concerted and consciously parallel practices in the case law of the *Tribunal de defensa de la competencia*

The equivalent in Spanish law of Article 81 EC, Article 1 of the *Ley 16/1989 de Defensa de la Competencia* (“LDC”), refers to “any collective agreement, decision or recommendation or any *concerted or consciously parallel practice* aimed at producing or enabling the effect of impeding, restricting or distorting competition in all or any part of the domestic market.” (emphasis added)

Article 1 LDC thus mentions consciously parallel practices among the prohibited conduct, unlike Article 81 EC. The question then arises as to whether, in the LDC, concerted practices and consciously parallel practices are equivalent concepts or whether on the contrary they refer to two different types of conduct and thereby introduce a disparity between Spanish and EC competition law.

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<sup>41</sup> In this regard, see the commentary on the *Woodpulp II* case in Motta M. (2004): *Competition Policy: Theory and Practice*, Cambridge University Press, at p. 219.

We will analyze the judgments of the *Tribunal de Defensa de la Competencia* (“TDC”), which support each of these two possibilities (compare sections 1 and 2 below), in order to try and draw a conclusion from the existing case law.

1. Concerted and consciously parallel practices as different categories of infringements of Article 1 LDC

The LDC has inherited the expression of consciously parallel practices from the law that regulated competition in Spain until 1989, when the LDC was enacted. In fact, Act 110/1963 (*Ley 110/1963 de Represión de Prácticas Restrictivas de la Competencia*, or the “LRPR”) already mentioned consciously parallel practices. The precedent for this Spanish term, first included in the LRPR, may be found in the theory of conscious parallelism developed by the North American courts in applying Section 1 of the Sherman Act. In fact, in the 1950s, just before the enactment of the LRPR, US courts had expressed the inability of Section 1 of the Sherman Act to deal with cases in which it was difficult to demonstrate the existence of an agreement or in which there was a restriction of competition but no agreement between the parties involved.

In applying the LRPR, the TDC defined consciously parallel practices as those practices where the involved parties, without concluding any kind of agreement, and acting “unilaterally but harmonically”, remove from free competition one of its characteristic components.<sup>42</sup> Thus, according to the TDC’s judgments in *Asturiana de Zinc* and *Española de Zinc*, in a consciously parallel practice there is not necessarily an agreement between the companies involved: it is enough that they act unilaterally but harmonically, and thus avoid competing with each other.

To this respect, in *Asturiana de Zinc*, the TDC stated that “the supposition that behind a consciously parallel practice there has to be, necessarily for it to be prohibited, an agreement, is not imposed by law; on the contrary, it should be accepted that the prohibition embraces such conduct, independently of the agreement, insofar as the involved parties, deliberately, and acting unilaterally but harmonically, are removing from competition one of its characteristic components”.

Further to these cases under the LRPR, the key judgment on consciously parallel practices after the enactment of the LDC was adopted by the TDC on 6 March 1992 in a case known as *Detergentes*.<sup>43</sup> The facts were the following: in September 1989, new four-kilo concentrated detergent containers of different companies appeared simultaneously on the Spanish market, indicating that they were equivalent to the usual five-kilo containers of non-concentrated detergent. The companies involved —Henkel, Camp, Procter & Gamble and Lever — denied the existence of any agreement or decision on the reduction of size of the containers or on the production and sale of concentrated detergent. They claimed that the change from the five-kilo container to the four-kilo one was due exclusively to the reduction of sulphates in the detergents, which was beneficial for the environment. The relevant companies acknowledged having discussed this issue in an industry association (ADTA) but they claimed that it had simply been an exchange of opinions and that there had been no agreement whatsoever between them. There had also been contacts with the Spanish Administration in order to exchange opinions on the effects on the environment of sulphates and other detergent

<sup>42</sup> Judgment of the TDC of 18 July 1986 in Case 223/86, *Española de Zinc*; judgment of the TDC of 9 January 1987 in Case 223/89, *Asturiana de Zinc*.

<sup>43</sup> Judgment of the TDC of 6 March 1992 in Case 306/91, *Detergentes concentrados*.

components. However the Administration only pointed out the disadvantages of dumping in water chemical components of detergents, without imposing any standardization or normalization of the products.

Provided there was no evidence of a collective recommendation or decision by ADTA or of a formal agreement between the companies, the TDC explored the possibility of a “concerted or consciously parallel practice”, as expressed in Article 1 LDC.

It started by defining concerted practices in accordance with the judgments of the ECJ in *ICI*<sup>44</sup> and *Zuechner*.<sup>45</sup> As the ECJ stated in *ICI*, Article 81 EC draws a distinction between the concept of “concerted practices” and the concepts of “agreements between undertakings” or “decisions by associations of undertakings”. As explained by the ECJ, the reference in to concerted practices in Article is intended to bring within the scope of the prohibition a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.

Starting from there, the TDC concluded that “concerted practices” are those practices which, restricting competition in the market, imply a conscious parallelism of conduct between economic operators, usually competitors, and a certain cooperation and coordination between them. By contrast, “consciously parallel practices”, according to the TDC in its judgment, do not require the consensual element, *i.e.*, the element of coordination. However, the TDC specified that, if liability is to be established, such consciously parallel behaviour “should not be explained by normal or foreseeable reactions of the operators in the market”.

In that particular case, the TDC concluded that the four companies involved had engaged in a concerted practice through their parallel conduct, and in particular through their mutual dissemination of strategic commercial information. According to the TDC, all the elements of concerted practices were present: (i) there was a parallelism of conduct (the simultaneous launching of the four-kilo concentrated container); (ii) there was conscious behaviour (the conduct of the companies in ADTA meetings and the discussion of the effects of sulphates on the environment and the launching of concentrated detergents, thereby expressing a common will); (iii) there was cooperation and coordination (the exchange of information, the solicitation of third parties to adhere to the common behaviour, the waiting period of some companies already set to launch the new product format, etc.); and (iv) there was a distortion of competition (while the object was not to raise prices in this case, the coordination *was* intended to avoid the risks of an individual launching).

Accordingly, the TDC did not need to resort to the concept of consciously parallel practices in the *Detergentes* judgment because there was evidence of coordination between the companies (the meetings at ADTA). Nevertheless, the existence of such a concept was plainly affirmed by the court.

In fact, it is quite clear from the *Detergentes* judgment that consciously parallel practices are an independent type of infringement of Article 1 LDC. The TDC recapitulates both EC and national case law and tries to set the boundaries between the different types of conduct that fall under Article 1 LDC. According to this judgment, there are four types of conduct that fall foul of Article 1 LDC:

- (i) decisions or recommendations by associations of undertakings;
- (ii) formal or proper agreements between undertakings;

<sup>44</sup> Case 48/69 *Imperial Chemical Industries Ltd. v Commission* [1972] ECR 619.

<sup>45</sup> Case 172/80 *Gerhard Zuechner v. Bayerische Vereinsbank* [1981] ECR 2021.

- (iii) concerted practices: they are not formal agreements but they require a coordination or cooperation (*i.e.*, concertation) between the undertakings involved;
- (iv) consciously parallel practices: coordination is absent from this concept; the undertakings act “unilaterally but harmonically” to restrict competition.

In light of these categories, and in light of the precedents cited by the TDC, a consciously parallel practice within the meaning of Article 1 LDC would be prohibited conduct in respect of which there is neither an agreement nor any coordination or cooperation between the companies involved.

#### 1. Concerted and consciously parallel practices as equivalent expressions and means of proof of such conduct

Notwithstanding the above judgments, there are several cases where the TDC has not acknowledged a difference between concerted practices and consciously parallel practices, and has instead used both expressions as if they were equivalent.

For example, in a recent judgment, dated 16 February 2005,<sup>46</sup> the TDC found that the defendant companies involved had engaged in a “concerted practice or consciously parallel conduct in order to fix the prices” of their services. In this judgment the TDC uses both terms together every time, as a sort of redundancy, as if they were equivalent. The court does not refer, in any part of the judgment, to the distinction made in the *Detergentes* judgment.

Furthermore, we cannot leave out the fact that the TDC has always pointed to some sort of “plus factor” when condemning companies for having pursued a consciously parallel practice. In fact, as explained above, in the *Detergentes* judgment, where it drew the clearest distinction between the different forms of conduct prohibited under Article 1 LDC, the TDC found in the end that the companies had been involved in a concerted practice. Similarly, in the two above-mentioned judgments issued under the LRPR (*Asturiana de Zinc* and *Española de Zinc*), in which the TDC established that the consensual element was not necessary for the existence of a consciously parallel practice, the court concluded that there was concerted or cooperative behaviour among the defendant companies.

Moreover, the means of proof used by the TDC to establish the existence of consciously parallel practices have also contributed to a blurring of the boundaries between that concept and the concept of concerted practices.

In particular, in a judgment issued on 11 May 1998,<sup>47</sup> the TDC set forth the three elements that are necessary for a consciously parallel practice to exist: (i) the facts have to be sufficiently proven; (ii) there must be a causal link between these facts and the allegedly infringing conduct; and (iii) there cannot be another rational interpretation for the observed behaviour. Reading this in accordance with other TDC judgments on Article 1 LDC cases, it may be seen that these features are in fact the three steps necessary to demonstrate the existence of a consciously parallel practice. In the above-mentioned judgment of 11 May 1998, the TDC found that a consciously parallel practice could not be established. Although the first requirement was fulfilled, the second one was uncertain and the last one was not satisfied because there was an economic report that provided an alternative explanation of the parallel behaviour. The

<sup>46</sup> Judgment of the TDC of 16 February 2005 in Case 582/04, *Autoescuelas Extremadura*.

<sup>47</sup> Judgment of the TDC of 11 May 1998 in Case 387/96, *Películas de Vídeo*.

report established that the characteristics of the relevant market (*i.e.*, the market for sales and rental of videotapes) favoured the existence of similar recommended prices but that there was great dispersion between the prices actually applied. This showed that the apparent probative value of the recommended prices was deceptive.

The TDC's three-step rule is also used to establish the existence of concerted practices, since it is applied whenever there is no direct evidence of the infringement.

A quite recent judgment may be referred to in this respect. In a judgment dated 23 September 2004,<sup>48</sup> the TDC used the three elements described above to rule out the existence of a concerted practice on prices. The court stated that it is frequent in competition cases to rely on presumptions in order to demonstrate an infringement,<sup>49</sup> mostly when the case deals with collusive practices. In this respect the TDC's approach follows the case law of the Spanish Constitutional Court, which has stated that, under certain conditions, proof by presumptions may be used to establish certain facts that constitute an infringement. According to the case law of the Constitutional Court, the acceptance of presumptions as valid evidence in punitive law requires the three elements described above: (i) the indications or signs must be completely proven; (ii) the relation between those indications and the presumed conduct (the concerted or consciously parallel practice) must be sufficiently argued; and (iii) if there are other explanations for the signs or indications, they must be thoroughly analyzed and ruled out.

In the above-mentioned judgment of 23 September 2004, the TDC stated that, if there was no direct evidence of an infringement of Article 1 LDC, it was necessary to examine the case under the principles of proof by presumptions in order to establish whether, on the basis of a total coincidence of prices among the companies involved, the conclusion could be drawn that there had been a concerted or consciously parallel practice - once again used as equivalent terms by the TDC. Relating the first requirement of proof by presumptions, the TDC found the required factual indications in the form of documents contained in the file: it was established that the three defendant companies had applied identical prices (and variations) over a seven-year period. Nevertheless, the TDC pointed out that this was common in markets with homogeneous products, including the market for water in the case before it. Therefore, the TDC found that the alternative explanations provided by the companies had to be carefully analyzed and ruled out (third requirement) in order to establish an infringement, since the second requisite (the causal link) was also fulfilled.

Finally, the TDC found that the explanations provided by the involved companies were highly credible and had not been appropriately ruled out during the investigation: the existence of a concerted practice could not be established. The explanations put forward by the parties, and accepted by the TDC, were based fundamentally in price leadership behaviour.

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<sup>48</sup> Judgment of the TDC of 23 September 2004 in Case 567/03, *Servicios Agua Tenerife*.

<sup>49</sup> There are in fact several cases where the TDC has found the existence of a concerted practice consisting of price fixing by relying on presumptions: judgment of 13 June 2003 in Case 543/02, *Transmediterránea/Euroferrys/Buquebús*; judgment of 30 September 1998 in Case 395/97, *Vacunas Antigripales*; judgment of 18 December 1998 in Case 421/97, *Autoescuelas Collado Villalba*; judgment of 15 April 1999 in Case 426/98, *Azúcar*; judgment of 4 June 2001 in Case 492/00, *Hormigón Gerona*. Even under the LRPR, the TDC had already used this mechanism on many occasions in order to prove concerted practices relating to prices using the coincidence and simultaneity of their variations: judgment of 4 July 1988 in Case 235/87, *Prensa dominical*; judgment of 25 October 1988 in Case 237/88, *Autoescuelas*; judgment of 2 November 1988 in Case 239/88, *Prensa del corazón* and judgment of 8 July 1992 in Case 294/91, *Aceites*.

By contrast, in an earlier case,<sup>50</sup> the TDC used this proof by presumptions to establish the existence of a concerted practice relating to prices. In its judgment, the court stated that “concerted practices prohibited by Article 1 LDC are tacit agreements or forms of coordination between economic operators that cannot be expressly proven”. Therefore, it said, “it is necessary to rely on concrete signs or indications by which the existence of a tacit concertation between independent operators can be inferred, taking into account that tacit concertation, unlike written agreements, lacks express evidence”.

Thus, the TDC has used proof by presumptions in several cases to prove or rule out the existence of both concerted and consciously parallel practices.

Nevertheless, proof by presumptions may have the non-desirable effect for companies of obliging them to prove their innocence when their behaviour is, in some respect, “parallel” to that of their competitors. This would amount to reversing the burden of proof, which should always rest with the competition authority.<sup>51</sup> In fact, it has been said<sup>52</sup> that there is no other reason for the inclusion of consciously parallel practices in Article 1 LDC but to facilitate the establishment of an infringement by reversing the burden of proof. In other words, on this view it is not intended to introduce a new type of prohibited conduct. The TDC has endorsed this position, stating that the function of the concept of consciously parallel practices is to facilitate the proof of an agreement between the parties.<sup>53</sup> This would support the interpretation that consciously parallel practices require concertation or coordination to fall foul of Article 1 LDC. The difference with other concepts embraced by this Article is that the consensual element exists but cannot be proved by direct evidence.

In any event, Article 1 LDC should not, by virtue of proof by presumptions, be applied to conduct that amounts to a unilateral, logical, rational and competitive response to market conditions. It is important in this respect, in order for the TDC to establish that there has been an infringement of Article 1, to rule out the possibility that the parallel behaviour results from anything other than collusion. In fact, in the *Detergentes* judgment, the TDC stated that, for consciously parallel conduct to be an infringement of Article 1 LDC, it “should not be explained by normal or foreseeable reactions of the operators in the market”.

That rule was actually applied in a judgment dated 5 July 1996,<sup>54</sup> in which the TDC concluded that, under the circumstances of the case, the conduct of the banks involved was not a concerted practice because the parallelism of their conduct could be explained by the “normal reactions of economic operators in the market”.

By contrast, in a very recent judgment,<sup>55</sup> the TDC did not give an adequate answer to the alternative explanations given by the parties for their allegedly infringing conduct. In fact, in its judgment, the TDC did not reach the third step of the proof by presumptions described above. It used presumptions as valid evidence based only on the first two requirements of the constitutional doctrine of proof by presumptions. The TDC considered that the indications or signs of concertation were sufficiently proven and that there was a causal link between those indications and the alleged infringement. However, it did not proceed to rule out the alternative explanations offered by the

<sup>50</sup> Judgment of the TDC of 4 June 2001 in Case 492/00, *Hormigón Gerona*.

<sup>51</sup> According to Article 2 of Regulation 1/2003, the burden of proving an infringement rests with the party or the authority alleging the infringement.

<sup>52</sup> Pascual y Vicente J. (2000): “Las conductas prohibidas en la reforma de la Ley de Defensa de la Competencia”, 205 *Gaceta Jurídica de la Unión Europea y de la Competencia* 13.

<sup>53</sup> Judgment of the TDC of 9 January 1987 in Case 223/89, *Asturiana de Zinc*.

<sup>54</sup> Judgment of the TDC of 5 July 1996 in Case R 144/96, *Tipos de Interés Bancario*.

<sup>55</sup> Judgment of the TDC of 10 May 2006 in Case 588/05, *Distribuidores Cine*.

companies involved. We believe that this step cannot be overlooked if an uncontrolled or exaggerated application of Article 1 LDC is to be avoided.

## 2. Conclusions that can be drawn from the case law of the TDC on concerted and consciously parallel practices

Taking into account the discrepancy introduced by the expression “consciously parallel practices” in the relationship between Article 1 LDC and Article 81 EC, consciously parallel practices seem to be a rather awkward category of Spanish competition law.

In fact, the definition of consciously parallel conduct given in the *Detergentes* judgment has not gone without criticism. The criticism accounts for the fact that if there is no consensual element (coordination or cooperation) at all in the concept of consciously parallel practices, a problem arises as to where the frontier is, under Article 1 LDC, between a normal reaction to market circumstances — that is, a legal parallelism of conduct — and a “consciously parallel practice” prohibited by Article 1 LDC.

Furthermore, the LDC’s stated purpose says that it has the aim of prohibiting restrictions to competition that arise from collusion. Therefore, in a coherent interpretation of the LDC, it cannot be sustained that Article 1 proscribes unilateral conduct.

The proposal for a new LDC maintains in Article 1 the expression “consciously parallel practices”.<sup>56</sup> However, while the title of Article 1 LDC as it stands is “Prohibited conduct”, in the proposed text Article 1 is entitled “Collusive conduct”. Thus, if collusion means coordination, cooperation or concertation, how can conduct that is unilateral be caught by a provision with such a title?

Moreover, the apparent aim of the TDC in *Detergentes* to go further than Article 81 and to catch all restrictive practices that do not fall under Article 6 LDC (*i.e.*, the equivalent of Article 82 EC) even if they are unilateral, seems to be incompatible with Regulation 1/2003. According to Article 3(2) of Regulation 1/2003, the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which do not restrict competition within the meaning of Article 81(1) EC. Consequently, consciously parallel practices do not seem to have a place in Spanish competition law as a different category of prohibited conduct (*i.e.*, to the extent they are not equivalent to concerted practices), and we believe that the expression should be understood as a synonym for concerted practices, despite the fact that this interpretation essentially renders the expression redundant.

## D. Conclusions

Dealing with parallel conduct in oligopolistic markets is one of the most difficult tasks for competition authorities.

Economic theory assumes that firms in an oligopoly can often perceive interdependencies facilitating strategic coordination.

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<sup>56</sup> This inclusion was criticized by some of the commentators to the *White Paper on the Reform of the Spanish System of Competition Defence*.

Although this strategic coordination may result in supracompetitive prices, this should not by itself lead to the conclusion that there has been an illicit collusion.

Since direct proof of illicit collusion is often difficult, when parallel behaviour is accompanied by facilitating practices, as a matter of practice competition authorities tend to shift the burden of proof to defendant undertakings.

Although this attitude may seem logical, competition authorities must also remain open-minded to logical explanations of parallelism and to countervailing justifications of facilitating practices. Furthermore, competition authorities should not forget that parallel conduct may be a rational response by firms competing in an oligopolistic market, and that most facilitating practices can have both pro- and anticompetitive purposes.

While competition authorities should use all legitimate means to prosecute illegal cartels, whether based on explicit or implicit collusion, condemning spontaneous parallelism prevents undertakings from adapting themselves intelligently to the market conditions and implies unworkable remedies.

An example of the doubts with which competition authorities address parallel conduct can be found in the different approaches applied by the Spanish competition authorities to conscious parallel practices, considered in some cases to include unilateral practices while in other cases they are treated as synonymous with concerted practices.