Tackling invitations to collude and unilateral disclosure: the moving frontiers of competition law?

Ioannis Lianos[*] and Florian Wagner-von Papp[**]

I. Introduction

Most jurisdictions have a rule against anticompetitive agreements, such as Article 101 TFEU in the EU or Section 1 Sherman Act in the US (in the following 'collusion rules'). These collusion rules are extended beyond obvious agreements to encompass other forms of coordination, such as 'concerted practices' or 'concerted action'. The prevailing opinion is, however, that even these extensions require more than mere tacit collusion in the economic sense, that is, raising the price in parallel beyond a non-collusive equilibrium price. Mere tacit collusion based on an intelligent adaptation to the observed behaviour of other firms is not caught by antitrust law unless there are reciprocal reassurances through some form of at least implicit two-way communication or plus factors that indicate coordination between the firms. This requirement for reciprocal reassurances results in the 'oligopoly problem' – in oligopoly markets with a sufficiently high market transparency, the firms may achieve market outcomes that are as bad as a hardcore cartel, but antitrust law cannot reach it for lack of an 'agreement' (even in the broader sense). Given that oligopolistic markets are, in real life, the norm rather than the exception, this formalistic approach may have substantial implications for social welfare.

Occasionally, commentators have argued that the rules against anticompetitive agreements should be reinterpreted so as to catch all tacit collusion (Richard A. Posner, 'Oligopoly and the Antitrust Laws: A Suggested Approach' (1968) 21 Stanford Law Review 1562; Louis Kaplow, *Competition Policy and Price Fixing* (Princeton University Press 2013)). However, this approach has been criticized, most famously by Donald F. Turner, 'The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal' (1962) 75 Harvard Law Review 655: instead of allowing firms to compete freely on the best available intelligence, an approach prohibiting all collusive outcomes regardless of prior concertation would essentially require price regulation and price control – and not, as is the case today, only for some discrete regulated markets, but for all markets. This is neither practically feasible, nor would it be what we understand as free competition. In 2014, Richard A. Posner came around to Turner's view as well (Richard A. Posner, 'Review of Kaplow, Competition Policy and Price Fixing' (2014) 79 Antitrust Law Journal 761).

II. Collusion facilitated by a unilateral disclosure

So, are the only two options either to turn a free economy into a regulated one, or to take the defeatist route of accepting that markets are distorted by oligopolies? Not quite. There is a wide range of oligopoly markets in which market transparency is insufficiently high to collude tacitly in the absence of any further contacts between the oligopolists, but which are still sufficiently transparent to achieve collusive outcomes where some additional information

[*] President of the Hellenic Competition Commission, Professor of Global Competition Law and Public Policy at University College London (UCL). Any views expressed are personal and do not represent the opinion of the HCC.

[**] Professor of Private and Trade Regulation Law at the Helmut Schmidt University / University of the Federal Armed Forces in Hamburg.

is communicated. As soon as these further contacts take the form of *reciprocal* reassurances, even the prevailing approach finds an infringement of the collusion rules in the form of an 'information exchange'.

However, this still leaves those cases in which the participants can reach collusive results based on the *unilateral* disclosure of information, for example, because the firms are primarily facing a coordination problem. Addressing such cases of unilateral disclosure (through some form of price signalling) does not present the same problems as the radical solution of prohibiting all tacit collusion: firms could still intelligently and freely adapt to the available information on the market but would be prohibited from unilaterally disclosing information that would have anticompetitive consequences. A prohibition against (some) unilateral disclosures is still a prohibition of discrete *conduct* distinguishable from the actual market transactions, and not of market *outcomes*.

Nor is this a purely theoretical problem: in the relatively recent *Container Shipping* case, the European Commission claimed that the contacts between the parties were sufficient for a concerted practice, but evidently the Commission did not feel sufficiently certain of its case to hand down an infringement decision, instead settling the case by accepting commitments (*Container Shipping* (Case AT.39850) Commission Decision of 7 July 2016). There are other cases where the unilateral disclosure with anticompetitive effects, and perhaps even an unambiguous invitation to enter into an agreement, is sufficiently clear, but an 'acceptance' or at least sufficient reciprocal assurances cannot be shown to exist with the necessary degree of certainty (cf., as a borderline case, Case C-74/14 *"Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba* ECLI:EU:C:2016:42; or, in the US, the split within the FTC to make a finding of concerted action in Count 1 of the *McWane* case (Administrative Complaint in *In re* McWane and Star Pipe, paras 35–38, Docket No. 9351, and Opinion of the Commission of 30 January 2014 in that case). After the restrictive Wood Pulp precedent of the European Court of Justice (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 and others v Commission of the European Communities* ECLI:EU:C:1993:120), the Competition authorities have made attempts to use expansively the provisions concerning collusion for price announcements by competitors, but this has only worked in limiting circumstances, and mostly through the adoption of commitment decisions, such as the European Commission's *Container Shipping* case (see above), the Dutch mobile operators case (Case 13.0612.53 Netherlands Authority for Consumers and Markets Decision of 7 January 2014) or the Irish motor insurers case (*CCPC v. AIG Europe S.A., Allianz PLC, AXA Insurance DAC, Aviva Insurance Ireland DAC, FBD Insurance PLC and AA Ireland Limited*, Press Release of 20 August 2021), or based on provisions that transcend the typical conduct rules (CMA, Market Investigation into the Supply or Acquisition of Aggregates, Cement and Ready-Mix Concrete, The Price Announcement Order 2016, Notice of making an Order pursuant to sections 161 and 165 of and Schedule 10 to the Enterprise Act 2002). There is no equivalent in EU competition law of Section 5 of the FTC Act, which prohibits 'unfair methods of competition' and does not require prior to its application evidence of reciprocal collusive conduct, as Article 101 TFEU or equivalent national law provisions do.

The clearest example showing the legislative gap in the EU is the most egregious category of unilateral cases: invitations to collude, in which one party proposes to enter into a hardcore cartel to another party, and that other party declines the invitation. The most famous example is still the exchange in the 1984 *American Airlines* case (*United States v. American Airlines, Inc. and Robert L. Crandall*, 743 F.2d 1114 (5th Cir. 1984)), in which the President of

American (Crandall) told the President of his competitor Braniff (Putnam): 'Raise your goddamn fares 20 percent. I will raise mine the next morning', only to receive Putnam's reply: 'We can't talk about pricing' – a coy answer that may have been influenced by the knowledge that Putnam was recording the conversation for the benefit of the Justice Department. Although this case in the US was dealt by enforcing the attempted monopolization provision of Section 2 Sherman Act, in the EU neither Article 101 nor 102 TFEU could have dealt with the situation.

Or take the FTC's InstantUPCCodes.com case (FTC, In the Matter of Jacob J. Alifraghis, an individual, also doing business as InstantUPCCodes.com, File number 141 0036), in which one company wrote an e-mail with the following content to a competitor: 'Hello Phil, Our company name is InstantUPCCodes.com, as you may be aware, we are one of your competitors within the same direct industry that you are in..... Here's the deal Phil, I'm your friend, not your enemy .... Here's what I'd like to do: All 3 of us- US, YOU and [Company A] need to match the price that [Company B] has .... I'd say that 48 hours would be an acceptable amount of time … The thing is though we all need to agree to do this or it won't work … Reply and let me know if you are willing to do this or not.' Again, provided none of the others responded positively to the invitation (at least by failing to publicly distance themselves from the invitation), the unilateral invitation could not have been challenged in the European Union. The same is true for a range of other 'invitation to collude cases' that have been dealt with under Section 5 FTC Act (or, as in *Ames Sintering*, under wire fraud rules) in the US since the 1990s.

In all these examples of unilateral disclosure or invitations to collude, one could ask: what's the harm if the attempt was unsuccessful? The answer can be found in the FTC's Valassis decision (FTC, In the Matter of Valassic Communications, Inc, Docket No. C-4160): 'First, it may be difficult to determine whether a particular solicitation has or has not been accepted. Second, even an unaccepted solicitation may facilitate coordinated interaction by disclosing the solicitor's intentions or preferences. Third, the anti-solicitation doctrine serves as a useful deterrent against conduct that is potentially harmful and that serves no legitimate business purpose.' After all, under certain market circumstances, price signalling through unilateral disclosure of information on future pricing to competitors may succeed and lead to higher prices for consumers. This was extensively discussed and acknowledged in an OECD Roundtable in 2012 on Unilateral Disclosure of Information with Anticompetitive Effects. The anticompetitive effect of unilateral disclosures may be reinforced by the use of algorithms that enable firms to 'guess' the next moves of their competitors (e.g., Ariel Ezrachi & Maurice E. Stucke, 'Is Your Digital Assistant Devious', in Damien Geradin & Ioannis Lianos *Reconciling Efficiency and Equity* (CUP 2019) 222; Salil K. Mehra, 'Antitrust and the Robo-Seller: Competition in the Time of Algorithms' (2016) 100 Minnesota Law Review 1323)).

Therefore, omitting unilateral disclosure cases, and in particular the subset of invitation-to-collude cases, is potentially welfare-decreasing.

III. The new Greek provision against invitations to collude and anticompetitive unilateral disclosure

This is what motivates the inclusion in the recent amendment of Greek competition law of a provision against both invitations to collude and information disclosures on future pricing to competitors.

The first paragraph of the new Article 1A prohibits invitations to collude with the purpose of directly or indirectly fixing purchase or selling prices on a market, limiting or controlling production, supply, technological development, or investments or sharing markets or sources of supply. Where an invitation to collude is aimed at entering into a hardcore cartel, its prohibition does not deter from socially useful conduct or chill legitimate conduct. After all, if the addressee did accept the invitation, the collusion rules would apply, so that those who are deterred by a cartel prohibition will not invite others to collude anyway – a prohibition of a naked invitation to collude therefore has no greater chilling effect than the existing collusion rules. The cost-benefit-analysis for prohibiting invitations to collude (where a reply of 'Yes, please' would form a hardcore cartel) suggests that such a prohibition is clearly desirable.

The case is slightly more complicated for other forms of unilateral disclosure, especially in public communications, which is dealt by the second paragraph of the new Art. 1A in Greek law. Here, there is a certain danger that introducing a simple prohibition rule against unilateral disclosure of information could deter socially useful conduct. In particular, a firm will need to notify its customers of its prices. It is also possible that the disclosure of information to competitors has some beneficial effects in specific circumstances. Finally, to the extent that the disclosure of information to customers (or other non-competitors, such as investors) is truly beneficial, and it is impossible to avoid disclosing the information at the same time to competitors, this is arguably something that cannot be prohibited. For this reason, Art 1A, paragraph 2, institutes a rule of reason approach: the competition authority has first to examine if the disclosure in question restricts effective competition, by looking to a number of factors, such as the degree of specificity of the information, whether the information relates to future activities, to what extent the information is readily accessible to the public, whether the disclosure is part of a pattern of similar disclosures by the undertaking, history of past collusion in the specific market or sector between the same undertakings, and whether the market in question is concentrated and oligopolistic in nature. It will then have to assess if such disclosure is not made in the ordinary course of business and has no legitimate purpose. There is a rebuttable presumption that the competition authority is unlikely to identify that a disclosure of information restricts effective competition if the disclosure of information is aimed exclusively at end users of the product or the service in question. Finally, as it is the case for conduct following under Article 101 TFEU, it is possible to justify such unilateral disclosure by analogy to the conditions of Article 101(3) TFEU.

The provision presents some similarities to specific price signalling provisions that were introduced in Australia in 2011, which included a 'per se' prohibition for 'private' communications and an effects-based approach for public communications and which were later repealed following The Harper Review 2017). The new Greek provision fits the specific characteristics of markets in Greece, which is a rather more closed economy with close personal and other ties between entrepreneurs in some oligopolistic economic sectors.

Article 1A[1]

[1] As inserted by Article 4 of Law 4886/2022 with effect from 1/7/2022 in accordance with par. 2 Article 73 of Law 4886/2022.

Invitation to collude and announcement relating to communicating future pricing intentions for products and services between competitors

1. It is prohibited for an undertaking to propose, coerce, motivate or in any way invite another undertaking to participate in an agreement between undertakings or in decisions of associations of undertakings or in concerted practices aimed at preventing, restricting or distorting competition in the Greek Territory and which consist in:

a) directly or indirectly fixing purchase or selling prices on a market, or

b) limiting or control production, supply, technological development, or investments, or

c) sharing markets or sources of supply.

2. An undertaking is prohibited from disclosing price, discount, supply or credit information about products or services it supplies or is supplied where:

a), the disclosure restricts effective competition in the Greek Territory, and

b) does not constitute a normal business practice.

In order to assess whether a disclosure restricts effective competition, the following shall be taken into account:

a) the degree of specification and the individual nature of the information;

b) whether the information relates to future activities;

c) the extent to which the information is readily accessible to the public;

d) whether the disclosure is part of a pattern of similar disclosures by the undertaking;

e) whether there is a history of past collusion in the specific market or industry between the same undertakings, and

f) whether the market to which the disclosure relates is concentrated and oligopolistic in nature.

Disclosure of information is not considered to restrict effective competition if it is addressed solely to the end users of the product or service.

3. Practices that fall under par. 1 and 2 are not prohibited, as long as they meet by analogy the conditions of par. 3 of article 1.

4. The undertakings with a total turnover of less than fifty million (50,000,000) euros and with less than two hundred and fifty (250) employees are excluded from the application of par. 1 and 2.

5. This Article is without prejudice to Articles 1 and 2 hereof or Articles 101 and 102 of the Treaty on the Functioning of the European Union. Where the conditions set out herein and in Articles 1 and 2 and Articles 101 and 102 of the Treaty on the Functioning of the European Union are met, including, inter alia, the exchange of commercially sensitive information, the latter articles shall apply to the exclusion of the present.

IV. Is the new provision compatible with Art. 3(2) of Regulation (EC) 1/2003?

One may raise the question if this provision is compatible with Article 3(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 ('Regulation 1/2003'), which provides in its first sentence that national competition rules 'may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition [or where Art. 101(3) TFEU or a block exemption applies]'. However, in the gap cases discussed here, there is *by definition* no 'agreement[] … or concerted practice[]'. Therefore, the wording of the first sentence of the provision does not prohibit rules, such as the new Greek Art. 1A, which prohibit *unilateral* conduct. To make sure that there is no conflict with the first sentence of Art. 3(2) Regulation 1/2003, Art. 1A of the Greek law even specifies explicitly that it will not apply where there is an agreement between undertakings, a decision by an association of undertakings, or a concerted practice.

While the permissibility of prohibiting unilateral conduct therefore already follows from the *first* sentence in Art. 3(2) Regulation 1/2003, the permissibility of provisions such as Art. 1A is confirmed by the second sentence of Art. 3(2) Regulation 1/2003, which explicitly specifies: 'Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.' This is precisely what the new Greek Art. 1A does – and is permitted to do.

The wording of both sentences in Art. 3(2) Regulation 1/2003 is unambiguous. Even if one did not consider this to be conclusive in itself, the permissibility of introducing rules against invitations to treat and unilateral disclosure is confirmed by a teleological interpretation. In its original form, as proposed by the European Commission, the provision that eventually became Art. 3(2) Regulation 1/2003 was meant to facilitate EU-wide distribution agreements: suppliers should not be constrained by national competition laws before concluding their pan-European distribution agreements where European competition law considered these agreements to be pro-competitive or efficient. There is no indication that the Commission wanted to indicate that all, even anti-competitive non-concerted conduct should be absolved from stricter national scrutiny. Rules such as the new Greek Art. 1A do not conflict with a pan-European distribution scheme.

The second sentence of Art. 3(2) Regulation (EC) 1/2003, which explicitly exempts 'unilateral conduct' from the prohibition of stricter national rules, was concededly introduced by Member States at the final stage of the legislative process *mainly* to allow for economic dependency rules, that is, rules that are meant to catch some form of elevated market or contractual power, more in the penumbra of Art. 102 TFEU than of Art. 101 TFEU. This is indicated in the recitals, specifically recital 8, which mentions economic dependency rules as an example for an area where Member States have leeway to regulate. However, this recital merely mentions that unilateral conduct rules may 'include' those against economic dependency, not that economic dependency is the only possible application of the second sentence. Given that various Member States at the time had provisions that prohibited anti-competitive recommendations or invitations to enter into a collective boycott (see below), it is quite likely that the Member States also wanted to safeguard the continued freedom to

legislate for unilateral conduct other than economic dependency. In addition, the operative part of the Regulation in no way indicates any limitation to the words 'unilateral conduct'.

The European Commission has noted, on various occasions, for example in its contribution to the OECD Roundtable cited above (pp. 179-183), that price signalling can result in anticompetitive effects: 'The unilateral disclosure of information can also help competitors to collude by reducing strategic uncertainty as to which equilibrium should be played. To that end, firms can also use information as signals to influence the terms of a collusive outcome. Communication can also help monitoring of deviations from collusion, as well as entry, which is important for ensuring stability of collusion. Unilateral disclosure of strategic information can also stabilise collusion by allowing competitors to build trust between each other.' The Commission also had to concede that not all anticompetitive forms of price signalling can be caught under Art. 101 TFEU ('Therefore, a truly unilateral disclosure of commercial information, of itself, – *i.e.*, with no element of reciprocity or acceptance – would normally not be captured by the wording of Article 101(1) TFEU').

It would be difficult to argue, therefore, that the Commission by proposing Art. 3(2) Regulation (EC) 1/2003 wanted to prevent Member States from keeping or introducing rules against unilateral conduct that facilitates collusive behaviour. On the contrary, there is an obvious gap in EU law, the Commission is aware of this gap, and it is preferable that Member States fill this gap.

Furthermore, other Member States have largely retained their rules against unilateral conduct that facilitates or is in the penumbra of collusion. Germany retained its Section 21(1) of the Act against Restraints of Competition (ARC), which prohibits '[u]ndertakings and associations of undertakings [from requesting] that another undertaking or other associations of undertakings refuse to supply to or purchase from certain undertakings, with the intention of unfairly impeding these undertakings.' It is the *unilateral action* of requesting (or inviting) others to engage in a boycott that is prohibited. Additionally, Section 21(2) of the ARC prohibits 'threaten[ing] or caus[ing] disadvantages, or promis[ing] or grant[ing] advantages, to other undertakings in order to induce them to engage in conduct which, under [Art. 101 or 102 TFEU, or a decision under these provisions, or the ARC], may not be made the subject matter of a contractual commitment.' Again, it is the *unilateral conduct* that seeks to entice or cajole others to enter into prohibited conduct that is prohibited. And it is not only Germany that has such rules. Austria prohibits so-called 'Recommendation cartels' (*Empfehlungskartelle*) in Section 1(4) of its Cartel Act. The European Commission has never taken issue with any of these rules.

V. Conclusion

The Greek provision in Art. 1A will not fix all evils of the 'oligopoly problem'. Where tacit collusion can be established without any, even unilateral, information disclosure, or on the basis of unilateral information disclosure that is indispensable to achieving procompetitive or efficiency objectives, even the new tool is powerless.

However, by prohibiting invitations to collude and those unilateral information disclosures that are not indispensable for achieving procompetitive or efficiency objectives, the new provision catches as much anticompetitive conduct as is possible without impinging on free competition and legitimate reasons for disclosing information. It remains to be seen how this

provision will operate in practice. The Hellenic Competition Commission will adopt Guidelines prior to its implementation in July 2022.