Price signalling as concerted practice under the EU Competition Law provision Article 101 TFEU

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1 Introduction

1.1 Topic and research question

The topic of this thesis is price signalling. The question that is going to be examined is in which situations and to what extent price signalling can be found as a concerted practice within the meaning of this concept as it is listed in the competition provision of Article 101 of the Treaty on the Functioning of the European Union (shortened TFEU).

Article 101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practice which may affect trade between member states and which have as their object or effect to prevent, restrict or distort competition within the internal market. Article 101(1) may be found inapplicable for conduct that satisfies the criteria listed in the exception rule of Article 101(3). Article 53 of the Agreement on the European Economic Area and Article 10 of the Norwegian Competition Act are analogous provisions of Article 101, which makes an analysis and clarification of the concepts listed in Article 101 TFEU relevant for the interpretation of the Norwegian law.

Price signalling is not a legal term, which means that a clear definition of its criteria and characteristics does not exist. However, based on case law and relevant literature, and for the purpose of this thesis, I have defined price signalling as follows: Price signalling is when one or more undertakings disclose information publicly to producers, suppliers and consumers about their future intentions, such as the increase or decrease of supply or demand, prices and strategies, it plans to apply to its products or services. Other names for this type of information exchange or information sharing is advance price announcements and advance price communication. Examples of conduct that can qualify as price signalling are; if an undertaking comments on its future intentions in the public domain (for example on the television, in a radio show or in the newspapers), publishes price information on their website, announces statements of future conduct in a press release, or while attending a press conference, and the distribution of future plans in an e-mail.

Price signalling is considered to have mixed effects. The same signalled information has the capability of resulting in an enhancement of efficiency and consumer benefits, as well as it can allow undertakings to coordinate their behaviour which can have a detrimental effect on competition and be harmful to consumers.\(^1\) A harmonisation of the different effects must be done before it is possible to conclude whether the conduct in question is considered to be anti-competitive.\(^2\)

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\(^1\) Bennett and Collins (2010), p. 314.
\(^3\) Commission Decision C(2016) 4215 Container Shipping.
Price signalling as means to exchange information on the competitive market is considered to be a controversial topic of current interest due to the difficulties in determining which types of conduct are seen as an infringement of Article 101 and what is considered legal. Article 101 is concerned with illegal coordination amongst undertakings. The cooperation alternative concerted practices contain several criteria that must be met, which are the criteria of contact and subsequent conduct, with an additional requirement of a causal link between the two. These criteria will be analysed and applied to price signalling.

The European Commission (hereafter “the Commission”) has recently considered the subject matter of price signalling. On July 7th 2016 the Commission issued a decision where it declared acceptance of commitments submitted by 14 container shipping companies involved in an antitrust investigation. The case concerned several big global carries, which made general rate increase (GRI) announcements available either on their websites, in the press or by other means. These announcements communicated their future prices intentions, however it was only the intended increase that was provided, not the actual full price. A commitment decision by the Commission is legally binding for the parties concerned, but it does not make the conclusion of an infringement of the EU competition provisions. Thus this decision does not give any further clarification of the legal boundaries of price signalling in regards to the competition law provisions listed in the TFEU.

1.2 Sources and methodology

In order to further discuss and examine the research question set out in the previous subchapter, more precisely under what circumstances price signalling can be considered as concerted practice, this thesis have analysed the several sources.

Article 101 does not solve to what extent the concept of ‘concerted practices’ can be applied to price signalling. The provision does not state a prohibition for undertakings to compete, but it is strictly forbidden for the undertakings to cooperate with each other, which can result in harmful effect on the competition process. The provision lists examples of types of agreements or concerted practices that might restrict or distort competition. The fact that price signalling is not listed, as an example in Article 101, does not necessarily mean the provision is not applicable to such conduct. The provision does not hold an exhaustive enumeration of the different types of conduct that can constitute an infringement.

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4 Ibid., paras. 25-29.
Due to the lack of answer in Article 101 to my research question, the judgments of the court system of the European Union will be considered. This thesis is going to analyse the judgments of the European Union Courts where the general topic of concerted practices have been discussed and further defined. In addition to judgments about the notion of concerted practice, cases elaborating on the specific concept of price signalling, if it exists, will be analysed and applied.

In addition to this the opinions of the Commission will be examined. However, the perspectives expressed by the Commission, both in respect of its published guidelines and decisions, are not legally binding due to the possibility for the Court of Justice of the European Union (shortened ECJ or “the Court”) as the higher court of the judicial system to overrule the Commission. The Court can therefore conclude contradictory to the guidelines and decisions of the Commission.

Incidentally the topic of price signalling has been addressed in some British court cases, which is going to be examined in this thesis. These cases are harmonized with the EU law. The issue at question in those cases was indirect price signalling, which is the exchange of information through third parties. In addition to this there has been a case regarding direct and indirect price signalling before the Dutch Competition Authority, which is also going to be discussed.

The results emerging from the analyses of the resources mentioned above are going to be compared and applied to different factual types of price signalling in order to answer to what extent or in what situations such conduct is found inapplicable with concerted practices in Article 101.

1.3 Outline
To examine the research question in a proper way a presentation of Article 101 and the conditions listed therein are going to be examined in the following chapter – chapter 2. This information constitutes a framework and allows for a better understanding of the further analysis.

Chapter 3 is concerned with the economical and factual issues of price signalling. The term of price signalling is, as mentioned above, not a clearly defined legal concept and can occur in

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many different forms. This chapter accounts for the diverse situations that can be considered as price signalling so this review provides the basis for the further legal deliberation.

In Chapter 4 an in-depth analysis of the cooperation alternative ‘concerted practices’ is given. The condition is presented along with its different criteria that must be fulfilled to find conduct in nonconformity with the provision. The phenomenon of tacit collusion will be examined and compared with the concept of concerted practices and collective dominance as listed in Article 102 and the EUMR. The requirements needed to establish conduct as a concerted practice within the meaning of Article 101 are going to be examined and applied to the different forms of price signalling.

Final remarks on the topic of price signalling as concerted practices under Article 101, based on the examination in the preceding chapters, is given in Chapter 5.

2 Article 101 – Presentation

The purpose of this chapter is to give a presentation of Article 101. First, a general overview of the European Union competition law will be provided. Further, the intention of this chapter is to present an overview of the diverse conditions listed in in Article 101. The reason to include a presentation of these topics is to explain the basis of European Union competition law in order to understand the objectives and grounds of this area of law. This presentation contributes for a better understanding of the concept of concerted practices, which is going to be discussed later in this thesis.

The aims and objectives of the European Union are listed in Article 3 of the Treaty of the European Union (shortened TEU), which includes the purpose of ensuring the competition on the internal market of not being distorted.\textsuperscript{7} In the Continental Can case the Court stated that the idea of the European Union competition rules is not to prohibit or eliminate competition, because that would be contradictory with the purposes and system of the Treaty.\textsuperscript{8} Further, the Court expressed that in order to restrain competition, such restraint must be founded in the principles listed in Article 3 TEU and harmonised with the other objectives of the Treaty.\textsuperscript{9}

The primary objectives of competition law has been elaborated by the Court in several cases, for example in T-Mobile, and later confirmed in the GlaxoSmithKline case, where the Court

\footnotesize{\textsuperscript{7} The Treaty on European Union, Article 3 cf. Protocol (no 27) on the internal market and competition.  
\textsuperscript{9} Ibid., para 24.}
recognized some important objectives of the competition rules, namely the protection of the competitive structure of the market as well as the competition as such.\textsuperscript{10}

The protection of consumers as an objective of the competition rules was recognized in the \textit{Continental Can case}\textsuperscript{11}, and later repeated by the Court in the \textit{British Airways v. Commission case}.\textsuperscript{12} In addition to this, in the latter case, the Court stated that the competition rules not only protect consumers from directly harmful practices, but also protect them against practices detrimental to the effective competition structure for the reason that such conduct has indirect adverse effect on consumer welfare.\textsuperscript{13}

On the substantive level the European Union competition law is broadly divided into three main subject matters. The prohibition of anticompetitive cooperation between undertakings is listed in Article 101. Secondly, Article 102 states the prohibition of abusive behaviour by dominant undertakings. The last subject matter of the EU competition law is the rules regarding the control of merges and acquisitions, regulated in the EU Merger Regulation (shortened EUMR). The research question of this thesis falls within the subject matter of Article 101.

Article 101(1) has as its main concern to prohibit different types of collusive conduct between two or more independent undertakings, which is harmful to the competition.\textsuperscript{14} The aim of Article 101(1) is not to eliminate competition as whole on the internal market; the provision declares a prohibition of anti-competitive conduct established through a “\textit{concurrence of wills}” between undertakings.\textsuperscript{15} In order to find an infringement of the provision the conduct in question must have an appreciable affect on competition as well as on the trade between member states. These are the core elements of the prohibition. According to Article 101(2) an agreement or a conduct that fulfils all the criteria listed in the first paragraph shall be seen as automatically void, unless it satisfies the exception requirements of Article 101(3).

There are many aspects of this provision that requires collaboration. There are four conditions that must be met in order to find conduct in nonconformity with the provision. The legal as-

\begin{footnotesize}
\begin{enumerate}
\item Case C-8/08, \textit{T-Mobile Netherlands BV and others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit} para. 38, Joined Cases C-501/06 \textit{P GlaxoSmithKline Services Unlimited and others v. Commission} para. 63
\item Case C-95/04 \textit{P British Airways plc v. Commission}, para. 106.
\item Ibid.
\item Whish and Bailey (2015), p. 103
\item Case T-41/96 \textit{Bayer AG v. Commission}, para. 174.
\end{enumerate}
\end{footnotesize}
essment done in accordance with Article 101 must balance between the pro-competitive and anti-competitive effects.\textsuperscript{16}

The first condition states that the provision is only applicable to ‘undertakings’. The Treaty does not provide a definition of the term ‘undertaking’, but it was settled with a wide interpretation in the Höfner and Elser case when the Court stated that it “encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.”\textsuperscript{17}

In the opinion of the Commission the provision is applicable to cooperation between economic undertakings, not only legal undertakings.\textsuperscript{18} When operators in the market are part of the same legal group the undertakings involved form one undertaking. This means that an agreement between the parent company and subsidiary fall outside the scope of Article 101 because they are considered to be within the same economic undertaking. In a situation like this Article 101 is not applicable because an agreement between two undertakings, which is the requirement of the provision, does not exist.\textsuperscript{19} In case law it has become clear that the parent company must have control over the subsidiary\textsuperscript{20}, for example the power to conclude agreements on the subsidiary’ behalf to be considered as one undertaking.

The term ‘associations of undertakings’, like ‘undertaking’, is not defined in the Treaty. It is not only the independent undertakings that can coordinate amongst each other, coordination between undertakings is also possible to achieve through a trade association.\textsuperscript{21} The term ‘associations’ is a broad concept.\textsuperscript{22} According to case law there is no requirement to prove a binding effect on the members of such measures that may be considered as a decision of an associations of undertakings in order to find Article 101(1) applicable to the situation.\textsuperscript{23}

The second condition in Article 101(1) states that the cooperation between undertakings in question must affect the trade between the member states. This defines the jurisdictional limit of the prohibition.\textsuperscript{24} It was stated in the STM case that it is not necessary to be absolutely certain about the effect; it is sufficient that it might have a potential and indirect influence on the

\textsuperscript{16} Horizontal Guidelines (2011), para. 4.
\textsuperscript{17} Case C-41/90 Klaus Höfner and Fritz Elser (Höfner and Elsner) v. Macrotron, para. 21.
\textsuperscript{18} Horizontal Guidelines (2011), para. 11.
\textsuperscript{19} Whish and Bailey (2015), page 95.
\textsuperscript{20} Case C-73/95 P Viho Europe BV v. Commission, para. 51
\textsuperscript{22} Opinion of Advocate General Léger in Case C-309/99, para. 61.
\textsuperscript{24} Jones and Sufrin (2014), p. 181.
trade. In other words, there is no requirement to prove direct and actual effect.\textsuperscript{25} The condition of an appreciably affect on the trade holds a requirement of a minimum level of cross-border effect.\textsuperscript{26}

The third condition listed in Article 101(1) is the requirement of cooperation, which means that there must exist some kind of cooperation between undertakings in order to establish a violation of the provision. There are three alternative forms of cooperation according Article 101(1); these are ‘agreements, decisions by associations of undertakings and concerted practices’.

In the \textit{Bayer case} it was settled that the only condition to establish the existence of an agreement within the meaning of Article 101(1) is that the undertakings involved has in some way expressed a “joint intention”.\textsuperscript{27} It is irrelevant which form such joint intention take.\textsuperscript{28} Further, it was decided in the \textit{Pre-Insulated Pipe Cartel case} that a formal contract does not have to be reached in order to qualify as an agreement after Article 101(1).\textsuperscript{29} This results in a broad variety of what can be considered an unlawful agreement, examples are; legal contracts, ‘gentleman’s agreements’, oral contracts, the exchange of correspondence and standard form contracts.\textsuperscript{30} Article 101 is applicable to both horizontal agreements (between competitors, both actual and potential, on the same level of the market) and vertical agreements (between competitors, both actual and potential, at dissimilar levels of the market).\textsuperscript{31}

It was settled in \textit{ICI (Dyestuffs)} that the purpose behind ‘concerted practices’ is to broaden the area of applicability of the term ‘agreements’ in Article 101(1).\textsuperscript{32} In \textit{Anic} it was expressed that the purpose of the prohibitions in Article 101(1) was to “\textit{catch different forms of coordination and collusion between undertakings}.”\textsuperscript{33} Further, the Court decided that it is not necessary to make a clear distinction or to categorise the different types of conduct as either an agreement or as a concerted practice.\textsuperscript{34} In addition the Court expressed that “\textit{the only essential thing is

\textsuperscript{25} Case 56/65 Société Technique Minière (STM) v. Maschinenbau Ulm GmbH, p. 249.
\textsuperscript{26} Jones and Sufrin, (2014) p. 181.
\textsuperscript{27} Case T-41/96 Bayer AG v. Commission, para. 67
\textsuperscript{28} ibid., para. 68.
\textsuperscript{29} Commission Decision 1999/60/EC Pre-Insulated Pipe Cartel, para. 134.
\textsuperscript{30} Whish and Bailey (2015), pp. 104-105.
\textsuperscript{32} Cases 48, 49 and 51-57/69 Imperial Chemical Industries Ltd (ICI) (Dyestuffs) v. Commission, para. 64.
\textsuperscript{33} Case C-49/92 P Commission v. Anic Partecipazioni, para. 112.
\textsuperscript{34} Ibid., paras. 132-133.
the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of the distinction between types of collusion”.  

In order to establish an infringement of Article 101(1) an agreement or a concerted practice must have as its object or effect to restrict competition, which is the fourth cumulative condition of the provision. In the STM case it was stated that ‘object or effect’ are disjunctive conditions, which means that if it is possible to prove the existence of an anticompetitive object it is not necessary to prove any effects.  

The approach on the distinction between the object and effect restriction has been a controversial topic and it appeared as if the ‘object box’ was relentlessly expanding. However, in the Carte Bancaries case the Court stated that there is no need to examine the effects if the coordination in question causes “a sufficient degree of harm to competition”. The EFTA Court stated in the Ski Taxi SA and others case that the ECJ has persistently held, since the STM case, that a sufficient degree of harm must exist in order to conclude with a restriction by object. This means that it is not satisfactory that the coordination in question has the mere capability of restricting the competition.

In the Völk v. Vervaecke case the Court of Justice formulated the de minimis doctrine, which is a rule of double appreciable impact. To be caught by Article 101(1) both the trade between member states and competition must have been appreciably affected. The Court has repeated this doctrine several times in later cases. In the Expedia case however, the Court expressed an important clarification of the doctrine; if an agreement has anticompetitive purposes and may affect the trade between member states, it is not necessary to prove any specific effects on competition. This means that the rule of double appreciable impact is not required for restrictions by object.

Agreements and concerted practice that violates Article 101(1) may be exempted by the efficiency defence rule listed in Article 101(3), insofar the conditions in this paragraph is met. The exemption is only applicable in those cases where it is possible to prove that the pro-competitive effects can outweigh the anti-competitive effects.

35 Case C-49/92 P Commission v. Anic Partecipazioni, para. 108.
38 Case C-67/13 P Groupement des cartes bancaires (CB) v. Commission, paras. 49.
39 Case E-3/16 Ski Taxi SA and others v. The Norwegian Government, para. 54.
40 Ibid., para. 64.
41 Case 5/69 Franz Völk v. S.P.R.L Ets J. Vervaecke.
42 Case C-226/11 Expedia Inc. v. Autorité de la Concurrence and others, para. 37.
3 Price signalling – economic and factual issues

3.1 Introduction

In order to properly examine the legal aspects of price signalling and to what extent it can be considered a concerted practice, the different economic and factual issues of price signalling are presented in this chapter, before the analysis of the legal requirements in the following chapter.

The concept of price signalling can, as mentioned in Chapter 1, be defined as public announcements of future intended prices.

Theories of harm of the economic issues of price signalling are presented in this chapter. Price signalling can have mixed effects, which mean that it exists both potentially pro-competitive, understood as efficiency gains, and possibly anti-competitive effects of this type of conduct. 45 A harmonization of the potential effects must be done before determining whether the conduct in question is anti-competitive or not. 46

This chapter further examines the factual issues of price signalling. The various information types and channels where price signalling can occur are discussed; in addition the concept of public information exchange and market characteristics are presented. A summary of the relevant factors of price signalling will be provided at the end of this chapter.

The assessment of information exchanges as a potential infringement of Article 101 has a case-by-case approach. 47 This means that the nature of price signalling, which is discussed in this chapter, must be taken into account in order to decide to what extent such conduct can violate Article 101. 48 The essential issue at question is whether price signalling may impair competition or result in an enhancement of efficiency. 49

3.2 Theories of harm – economic effects of price signalling

In this subchapter the diverse effects of price signalling is going to be examined. The theories of harm will be supplied with the potential benefits of price signalling.

Price signalling can reduce the strategic uncertainty on a market because it makes it possible for an undertaking to “check or test the market” in order to find out if an implementation of its intended price can be executed without the risk of losing any customers.\(^{50}\) The intention and purpose of the signalling for the initiating undertaking is to see if the competitors show any support or indications to follow the plan set out in their announcement. Such conduct can create a focal point for coordination.\(^{51}\) One can argue that undertakings do not exchange confidential information between themselves voluntary without the desire to lessen the competition between them.\(^{52}\) The first undertaking to announce its price intentions may wish to provoke a price increase and if no competitors behave in accordance with the announced plan, the initiating undertaking can cancel or postpone the price implementation without any risk of losing market shares or customers.\(^{53}\) When the undertakings “test the market” they can use their announcements as negotiation devices to coordinate their behaviour.

If a sufficient number of competitors have agreed, by showing support, with the announced price, it makes it possible for the competitors to align their prices and implement them at the same time, which can be prejudicial to customers.\(^{54}\) This will leave the consumers with fewer options to choose from, high search costs and they are more likely to accept the price increase.\(^{55}\)

Signalled prices, in its pure form, are only intentions about future conduct, which means that the announcing undertaking is not bound by the disclosed information. These announcements are therefore intended and directed towards the competitors and not the consumers, with the likelihood of facilitating collusive conduct. This type of information exchange has the most adverse effects.\(^{56}\) It is therefore necessary to examine who the recipients are.\(^{57}\) This type of communication enables signalling between undertakings in order to reach a tacit meeting of minds without any risks.\(^{58}\) Communication between undertakings can facilitate coordination

\(^{50}\) Commission Decision C(2016) 4215 Container Shipping, para. 37.
\(^{51}\) Bennett and Collins (2010), p. 320.
\(^{54}\) Bennett and Collins (2010), p. 320.
\(^{56}\) Bennett and Collins (2010), p. 311.
\(^{58}\) Bennet and Collins (2010), p. 321.
in order to achieve a collusive equilibrium,\textsuperscript{59} which enables the undertakings to maximise their profits.\textsuperscript{60}

If the signals do not hold a commitment of the future intentions the consumers cannot adjust to the announcements for their purchase decisions. They cannot reduce their search costs by making rational choices if the information exchanged only holds intentions, not actual implemented prices. In the situation of price intentions the undertakings can revise the price before the actual price comes into effect, which means before the consumers actually purchase and make use of the information.\textsuperscript{61} Such information amounts to what is considered as “cheap talk” which is non-verifiable announcements without any committal value.\textsuperscript{62}

When coordination between undertakings is established the continuing of information exchanges may help to stabilise the collusive behaviour. The undertakings can monitor each other’s behaviour by gathering information about their loyalty, so if an undertaking deviate from the coordinative conduct a punishment can be made, for example by initiating price wars.\textsuperscript{63} In the event of increased transparency, generated by the information exchange, such monitoring is possible to achieve.\textsuperscript{64}

Signalling of future prices and strategies may facilitate adjustments of the competitors’ behaviour and in oligopolistic markets it may facilitate tacit collusion.\textsuperscript{65} The undertakings can align their conduct without entering an agreement or a concerted practice.\textsuperscript{66} Price signalling can therefore eliminate the incentives to compete, which results in a distortion of the competitive process on the market in question.

On the contrary, due to the diverse competitive circumstances price signalling emerges in, it is possible to find pro-competitive effects or efficiency gains.\textsuperscript{67} It can be beneficial for customers, competitors and the competitive process\textsuperscript{68}. In some markets exchanges of information are considered a common feature, such as in the market for construction materials.\textsuperscript{69} It is possible,

\textsuperscript{59} Harrington and Zhao (2012), p. 284.
\textsuperscript{60} Blair and Romano (2002), p. 448.
\textsuperscript{61} Horizontal Guidelines (2011), para. 99.
\textsuperscript{62} Das Nair and Mncube (2014), pp. 9-10.
\textsuperscript{63} Bennett and Collins (2010), p. 322.
\textsuperscript{64} Capobianco (2004), p. 1256.
\textsuperscript{65} Jones and Sufrin (2014), p. 714.
\textsuperscript{66} Whish (2006), p. 22.
\textsuperscript{67} Vives (2006), pp. 95-96.
\textsuperscript{68} Whish and Bailey (2015), p. 575.
due to the specific market structure to find advance announcements necessary in order for the buyers to be able to inform its downstream market about coming changes.\(^\text{70}\) It might also happen that the customers request advance price information in order for them to plan ahead.\(^\text{71}\)

An efficiency defence can exist if the information exchanged consists of information directed to the customers.\(^\text{72}\) Communication with customers, due to commercial necessity, may have pro-competitive effects.\(^\text{73}\) Circulation of information results in increased market transparency, which can enhance the consumer welfare because they can make informed decisions.\(^\text{74}\) To achieve efficiency gains the information must be accessible for the consumers.\(^\text{75}\) It is therefore possible that advance price announcements exchanged because of customer demand may be justified, even though this is considered as indirect communication between undertakings.\(^\text{76}\) If such demand results in exchanged information with committal value, like a guarantee of a maximum price, this can have an enhancing effect on the efficiency.\(^\text{77}\)

A public price announcement with commitment value towards the consumers is therefore another efficiency defence.\(^\text{78}\) It must be possible for the customers to trade based on the disclosed information, contrary to “cheap talk” as mentioned above, which is useless information for customers.\(^\text{79}\) An ability to act based on the information is necessary in order for the customers to make a rational decision.\(^\text{80}\) The customers can compare prices if the announcements hold a public commitment, in particularly information about the maximum price, which can lead to pro-competitive effects.\(^\text{81}\) A direct benefit for the customers by reliable price announcements or communication is the reduction of search costs and the wider selection of possible choices.\(^\text{82}\) They can make better and more satisfactory choices.\(^\text{83}\) Price signalling with a commitment to customers can therefore improve their welfare.

\(^{71}\) Das Nair and Mncube (2014), p. 6.
\(^{72}\) Kühn (2001), page 183.
\(^{73}\) Blechman (1979), page 903.
\(^{74}\) Bennett and Collins (2010), p. 316.
\(^{75}\) Ibid., p. 315.
\(^{80}\) Bennett and Collins (2010), p. 315.
A third efficiency defence can be where reliable market information is disclosed between undertakings.\textsuperscript{84} The more the undertakings know about all relevant factors on a market, the state of the market, future strategies of competitors, demand, etc., they can use this information to make rational choices about their own behaviour, production and marketing plans.\textsuperscript{85} Sharing of information can provide efficiency gains, because it can encourage innovation which makes a market more competitive, as well as it can give the undertakings better insight of market trends.\textsuperscript{86} These are arguments in favour of a higher degree of transparency on the market, which can benefit the both the undertakings, customers and the competitive process. Price signalling that eliminates cost uncertainties is considered to result in an improvement of customer welfare and greater profits for the undertakings.\textsuperscript{87}

The arguments presented in this subchapter shows that the efficiencies of price signalling are ambiguous. The information may be disclosed due to efficiency reasons, but it might also be shared based on a desire to collude.\textsuperscript{88} To distinguish whether the advance price signalling has legitimate commercial reasons or facilitates coordination is challenging.\textsuperscript{89} In addition to this and dependent on several case specific factors, price signalling might have the potential of resulting in collusive behaviour, but this can have a countervailing factor due to the benefits for the customers.\textsuperscript{90}

### 3.3 Information types and channels

The content of the information exchanged as price signalling can have different characteristics. It can also be disseminated through different channels. These two factual aspects are discussed in this subchapter.

The essence of price announcements is a relevant factor to determine whether the disclosed information can have any negative impact on the competition.\textsuperscript{91} This indicates that not every type of information exchange has relevance and is considered harmful to competition.

The exchange of information regarding essential elements, typically strategic data, can be harmful to the competitive process.\textsuperscript{92} The subject matter of strategic information can be; pric-
es, discounts, rebates, interest rate levels, increase or reduction of prices, volume, capacity, marketing plans, risks and investments, customer base and the like. Such strategic information can facilitate collusion because it can result in a reduction of the undertakings decision-making independence on the competitive market. Disclosure of strategic information is considered to have a greater negative impact on the competition than other types of information.

The temporal dimension of the exchanged data is another relevant factor in determining the information’s relevancy as possibly harmful to the competition. The shared information can be about either past, current or future conduct, which are all considered to be able to provide a focal point for facilitation of coordination amongst competitors, especially in regards to price levels on the market. However, it is more likely and easier to identify a focal point through the exchange of future intentions, which means that past and current data have less possibilities of creating a coordinative outcome. Information about future strategies is therefore considered to be highly sensitive and should not be disclosed with competitors.

Further, the distinction between individualized and aggregated data is important. The level of detail can influence the ability and increase the likelihood of coordination between competitors. In order for the information to be individual it must be possible to identify sensitive and confidential information, for example data about specific trade secrets. Purely aggregated information, where the data has not been systematized and modified, makes it more difficult to identify the individual company data. The dissemination of genuinely aggregated information, where it is sufficiently challenging to identify individualized company data, are considered to have less anti-competitive impact on the competitive process than the exchange of disaggregated information.

If the information exchanged makes it possible for the competitors to detect company level performance data a coordination of future conduct are more likely to occur because the knowledge of such information facilitate for a common understanding between the compet-

93 The Horizontal Guidelines (2011), para. 86
94 Ibid, para. 61.
95 Ibid.
101 Ibid., p. 1250.
tors.\textsuperscript{103} This means that if precise cost or demand information are exchanged it might be feasible for competitors to collude.\textsuperscript{104} If the information exchanged concerns individualized intentions regarding future prices, it is likely to result in a collusive outcome.\textsuperscript{105} The exchanges of such intentions are considered to be commercially very sensitive.\textsuperscript{106}

Another relevant factor is the frequency, how often information is exchanged.\textsuperscript{107} By exchanging information frequently it allows the undertakings to easier adapt and coordinate their behaviour.\textsuperscript{108}

There are various ways for exchanging information, hence also several ways for undertakings to communicate with each other.\textsuperscript{109} Some common ways to communicate is presented in the following, while public exchanges of information will be discussed in the next subchapter.

The most obvious way to communicate is by doing it directly and vertically.\textsuperscript{110} This is typically disclosure of information directly between competitors. A vertical direct exchange of information can be from producer or provider to seller, customers or agents. Example can be in a newsletter distributed to the customer base, disclosure of information via emails, phone calls, meetings or at conference meetings.

Other means of communication is through trade or industry associations, because these associations frequently compile data from undertakings and later circulate it to its members.\textsuperscript{111} Such a dissemination of information is beneficial for undertakings, especially when they are going to decide their future strategies.\textsuperscript{112} There is no direct contact between the competitors, but that does not exclude the possibility for the competitors to exchange information.\textsuperscript{113}

Another way of communication is by doing it indirectly.\textsuperscript{114} This is disclosure of information via for example independent third parties, such as consultant companies. They collect infor-

\textsuperscript{103} Jones and Sufrin (2014), p. 703 and Horizontal Guidelines (2011), para. 89.
\textsuperscript{104} Kühn and Vives (1994), p. 52.
\textsuperscript{105} Horizontal Guidelines (2011), para. 73.
\textsuperscript{106} Commission Decision C(2016) 4215 Container Shipping, para 51 and 35.
\textsuperscript{107} Horizontal Guidelines (2011), para. 91.
\textsuperscript{109} Ibid., p. 1260.
\textsuperscript{110} Ibid.
\textsuperscript{112} Jones and Sufrin (2014), p. 699.
\textsuperscript{113} Capobianco (2004), p. 1261.
\textsuperscript{114} Ibid.
mation about the market, which they analyse and compile, and later sell it as a study to market operators. Other third parties, as intermediate, may be agents and ‘hub-and-spoke’ agreements.\textsuperscript{115}

Information through trade press are less likely to be harmful to competition, such announcements can make it easier for customers to gain knowledge about the prices, which reduces their search costs, in addition it can lead to more competition.\textsuperscript{116} Other means of communication can be a trade journal, which can be specialised, the press or online platforms.\textsuperscript{117}

\section*{3.4 Public information exchange}

Information exchanges can be disclosed in contrasting ways: publicly or privately. The concept of price signalling is disclosure of information in a public manner.

A definition of ‘public exchange of information’ is therefore required. In the opinion of Rabinovici, who expresses a definition I find suitable, public information exchange “refers to the dissertation of information through publicly available means such as press releases or announcements on public websites.”\textsuperscript{118}

An infringement of the competition rules is generally excluded when the information is exchanged in the public domain.\textsuperscript{119} The same is applicable to public unilateral announcements.\textsuperscript{120} For an information exchange to be genuinely public, the exchanged data must be accessible to all customers and competitors on equal terms.\textsuperscript{121} Information made publicly available is considered to be less harmful to the competition.\textsuperscript{122} These statements indicate that publicly shared information is in general considered legal.

\section*{3.5 Market characteristics}

How much an information exchange can affect the level of competition depends on the characteristics of the market. The concentrated nature of the specific market and the characteris-

\textsuperscript{115} Lamprecht (2014), p. 4 footnote 12.
\textsuperscript{116} Kühn and Vives (1994), p. 79.
\textsuperscript{118} Rabinovici (2016) p. 1 footnote 3.
\textsuperscript{119} Joined Cases T-191/98 Atlantic Container Line AB (TACA) and others v. Commission. para. 1154.
\textsuperscript{120} Horizontal Guidelines (2011), para. 63.
\textsuperscript{121} Ibid., para 94.
\textsuperscript{122} Lamprecht (2014), p. 27
tics of the offered products must be examined in order to conclude whether or not the market structure can have an impact on the information exchanged.\textsuperscript{123}

Characteristics of a market can be the degree of concentration, transparency, stability, symmetry and complexity.\textsuperscript{124} Markets with a sufficient degree of these characteristics present can facilitate collusion.\textsuperscript{125} Markets with a few large undertakings holding a high combined market share are more likely to violate Article 101, than a market with several small undertakings.\textsuperscript{126} It is more difficult for the competitors to coordinate when there are a large number of competitors on the market. However it can still be possible if the market is transparent.\textsuperscript{127}

If a market is highly transparent the likelihood of collusive conduct is increased, which can result in higher price levels and that can make it more difficult for the consumers to make rational and well-informed choices.\textsuperscript{128} On the contrary, increased transparency can make the comparison of prices and products easier for the consumers.\textsuperscript{129} In addition to this it can result in reduced search costs. These arguments indicate that transparency can have both positive and negative affects on the competition; which means that the individual and specific circumstances of each case must be taken into account.\textsuperscript{130}

The nature of the products can be similar or differentiated products.\textsuperscript{131} A market with homogeneous products makes it easier for the competitors to coordinate their behaviour, which means that if the market is fragmented and the products differentiated, collusion will be more difficult to achieve.\textsuperscript{132}

Other market characteristics and structures, such as the highly concentrated oligopolistic market are going to be further examined in Chapter 4.

3.6 Review
Due to the diverse economic effects and factual circumstances of price signalling presented in this chapter, I find it necessary to sum up the relevant factors.

\textsuperscript{123} Capobianco (2004), p. 1266-1267.
\textsuperscript{124} Horizontal Guidelines (2011), para. 58.
\textsuperscript{125} Boshoff, Frübing and Hüschelrath (2015) p. 8.
\textsuperscript{126} Case C-7/95 P John Deere Ltd v. Commission, para. 88.
\textsuperscript{127} Joined Cases C-89/85 Wood pulp II, para. 85.
\textsuperscript{128} Bergman (2006), p. 11.
\textsuperscript{129} Ibid., p. 15.
\textsuperscript{130} Møllgaard and Overgaard (2006), pp. 102-103.
Because of the mixed effects of price signalling, it requires that the negative and positive effects on competition must be carefully balanced. As discussed above the potential anti-competitive effects may have a countervailing effect because of the possible consumer benefits.133

Price signaling can be considered as a communication device to enhance the possibilities of coordination between undertakings, even though the information is made publicly available. The fact that the information is made publicly available does not necessarily mean the information is directed towards the consumers. The intended recipients must be determined.134 If there are no commitments of an actual implementation, the only purpose might be the dissemination of information with the intention of coordination.135

Price signalling is information dissemination of prices, which is considered as typical strategic information. It is not necessarily limited to prices; it can also be information about strategies, which when disclosed, may affect the future prices.136 In addition, as discussed above, if the signalled information is individualized, about future intentions and non-committal to consumers it can create focal points and facilitate coordination, where it might be challenging to find any pro-competitive arguments. If an announcement contains more information than needed, the objective might be to collude.137

The main concern of price signalling is coordination.138 When determining whether or not price signalling is illegal, the circumstances cannot be ignored.139 As mentioned before, because of case-specific and distinctive factors of price signalling it is necessary to examine every case individually.

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134 Ghezzi and Maggiolo (2014).
138 Bennett and Collins (2010), 320
4 Concerted practice and price signalling

4.1 Introduction

In this chapter I am going to present the general requirements in order to establish a violation of concerted practices in Article 101 and examine to what extent price signalling can fulfil the criteria.

As mentioned in Chapter 2, the main objective of Article 101 is the prohibition of coordinated behaviour between competitors. The Court stated in the *ICI (Dyestuffs) case*¹⁴⁰ that Article 101 prohibits the specific types of communication required to establish coordination, which results in a collusive outcome where the strategic uncertainty is eliminated.¹⁴¹ This means that those three elements – coordination, communication and the removal of strategic uncertainty – are closely connected.¹⁴²

The first subchapter – 4.2, presents a general overview of the term ‘concerted practices’. The purpose is to give a presentation about the requirements needed in order to find conduct in nonconformity with the notion of concerted practices.

In subchapter 4.3 the phenomenon of tacit collusion is going to be examined and compared with the concept of concerted practices.

Subchapter 4.4 and 4.5 are concerned with the three elements to establish a concerted practice, more exactly the requirements of contact, conduct and casual link and to what extent price signalling can fulfil these criteria.

4.2 Concerted practice – presentation

Like mentioned earlier, the cooperation alternative ‘concerted practices’ is considered to be an addition to the condition ‘agreements’ and it has the purpose of broadening the area of applicability of Article 101(1).¹⁴³ An agreement constitutes the most typical from of collaboration between undertakings, so if the category of concerted practices had not been added to the provision an evasion of the prohibition could be achieved easily.¹⁴⁴

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¹⁴⁰ Cases 48, 49 and 51-57/69 *ICI (Dyestuffs) v. Commission*, para. 10.
¹⁴² Ibid., p. 183.
¹⁴³ Cases 48, 49 and 51-57/69 *ICI (Dyestuffs) v. Commission*, para. 64.
The Treaty does not provide a definition of ‘concerted practices’, but the interpretation of the term has been the subject of many court cases. The Court of Justice has in the cases *ICI (Dyestuffs)*\(^{145}\), *Suiker Unie*\(^{146}\) and *Anic*\(^{147}\), among others, given a description of the term.

The Court has stated that the object of including concerted practices to the cooperation alternatives listed in Article 101 was to prohibit: “a form of coordination between undertakings which, without it having reached the stage of an agreement, practical cooperation between competitors is knowingly substituted for the risks of competition.”\(^{148}\) With this statement the Court interprets the concept of concerted practices broadly. The notion therefore covers the informal and sophisticated forms of cooperation.\(^{149}\) This definition has been repeated by the Court in several later cases, for example in the *T-Mobile case*.\(^{150}\) This statement establishes the requirement of a mental consensus.

Further, in *Suiker Unie*, the Court emphasised that the concept does not require the existence of “an actual plan”.\(^{151}\) However it is strictly forbidden with “any direct or indirect contact between such operators, the object of effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.”\(^{152}\)

The Court stated in the *Anic case* that, “a concerted practice implies beside undertakings’ concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.”\(^{153}\) By this statement the Court defined the criterion of a casual link.

The Court has confirmed that cooperation and coordination are considered constituent elements of the notion of concerted practice. These elements must be interpreted in the accord-

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\(^{145}\) Cases 48, 49 and 51-57/69 *ICI (Dyestuffs) v. Commission*, paras. 64-65.

\(^{146}\) Joined Cases 40-48/73 *Coöperative Vereniging 'Suiker Unie’ UA and others v. Commission*, para. 173.

\(^{147}\) Case C-49/92P, *Commission v Anic Partecipazioni*.

\(^{148}\) Cases 48, 49 and 51-57/69 *ICI (Dyestuffs) v. Commission*, para. 64.


\(^{150}\) Case C-8/08 *T-Mobile*, para. 26.

\(^{151}\) Joined Cases 40-48/73 *Suiker Unie*, para. 173.

\(^{152}\) Joined Cases 40-48/73 *Suiker Unie*, para. 174.

\(^{153}\) Case C-49/92 P *Commission v. Anic Partecipazioni*, para 118.
ance with the established rule that each undertaking must determine their policy and strategies independently.\textsuperscript{154}

In the \textit{ICI (Dyestuffs) case} the Court stated that concerted practice “\textit{may inter alia arise out of coordination which becomes apparent from the behaviour of the participants.}”\textsuperscript{155} This means that the behaviour of the undertakings involved must be examined in order to find out whether or not coordination exists.\textsuperscript{156}

A disclosure of information about future intentions is likely to facilitate coordination between competitors where the undertakings manages to attain a mutual understanding about the terms of cooperation.\textsuperscript{157} Such meeting of minds can lead to a collusive outcome. Collusion is understood as coordination between competitors, which means that the behaviour in question must be examined, in particular the communication. A collusive conduct will have limited success if it does not exist any communication.\textsuperscript{158}

Based on the existing case law presented above, it is evident that three elements are required in order to construct concerted practices within the meaning of Article 101. According to the \textit{Suiker Unie case}\textsuperscript{159} the existence of contact, either direct or indirect, between the undertakings with a possibility of affecting their decision-making independence, is the first required element. The fact that contact is required indicates that pure parallel behaviour will not be found as a violation of Article 101.\textsuperscript{160} Further, as stated in the \textit{ICI (Dyestuffs) case}\textsuperscript{161}, such contact must be manifested as a mutual understanding of the desire to replace competition with forms of collusion, as collusive conduct on the market. Finally, in accordance with the \textit{Anic case}\textsuperscript{162}, a casual link must be present between the mutual understanding resulting in collusive conduct and the established contact between the undertakings.


\textsuperscript{155} Cases 48, 49 and 51-57/69 \textit{ICI (Dyestuffs) v. Commission}, para. 64.


\textsuperscript{157} Horizontal Guidelines (2011), para. 66.

\textsuperscript{158} Kühn (2001), p. 183.

\textsuperscript{159} Joined Cases 40-48/73 \textit{Suiker Unie}, para. 174

\textsuperscript{160} Camesasca and Grelier (2016), p. 601.

\textsuperscript{161} Cases 48, 49 and 51-57/69 \textit{ICI (Dyestuffs) v. Commission}, para. 64.

\textsuperscript{162} Case C-49/92P, \textit{Commission v Anic Partecipazioni}, para 118.
4.3 Concerted practice vs tacit collusion

In this chapter the phenomenon of tacit collusion are going to be presented, as well as its relationship to the concept of concerted practices. The problem with tacit collusion is not limited to Article 101; it can appear in cases under Article 102 TFEU and the European Union Merger Regulation (shortened EUMR). It is therefore necessary to examine the correlation between tacit collusion, concerted practices and the requirement of collective dominance listed in Article 102 and the EUMR.

Tacit collusion is coordination created without any explicit communication or contact between the respective undertakings, which makes it possible for them to behave in a parallel manner, and this results in a reduction of competition on the market in question. A market must possess certain features to be conductive to tacit collusion, elements that make collusion feasible. Features such as the lack of incentives to compete, the realisation of mutual interdependence, the achievability to align conduct and the possibility to monitor the other competitors can facilitate tacit collusion. The impact on the market by the existence of tacit collusion can be similar to the effects of an explicit collusion.

Tacit collusion is most likely to appear on oligopolistic markets, which have the characteristics mentioned above. A market structure, such as the oligopolistic market structure, facilitates the achievement of parallel behaviour and the benefits of a coordinated behaviour.

Oligopoly is a market structure recognised by a small amount of sellers and many buyers. Characteristics of a stable oligopoly are homogeneous products, transparency and high entry barriers. Increased transparency can be beneficial for customers, however it can facilitate collusion by the creation of focal points. A highly transparent market can result in tacit collusion being sustainable. The establishment of a successful tacit coordination is difficult to achieve on a fragmented market, which is characterised by for example a large number of sellers and buyers, differentiated products, low entry barriers and changeable demand.

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165 Ibid.
Undertakings in an oligopolistic market are naturally interdependent, aware of their shared cooperation interest and they can predict the reactions of the other undertakings, which result in the lack of need of an agreement between them to establish parallel behaviour.\textsuperscript{172} The oligopolists understand their profitability depends on the strategies and behaviour of their competitors.\textsuperscript{173} This results in a non-competitive and stable market.\textsuperscript{174} In addition to this the oligopolists recognize their individual self-interest in achieving the greatest possible profit.\textsuperscript{175} They are aware of the fact that if they coordinate their conduct this will result in higher profits, which can indicate a strong incentive to cooperate.\textsuperscript{176} To maintain a coordination between undertakings it must be more attractive to be a part of the cooperation than not to be part of it, this is applicable to both joining in and being a part of it and not deciding to leave.\textsuperscript{177}

Article 101 differentiates between illegal collusive behaviour and non-coordinated conduct on an oligopolistic market.\textsuperscript{178} In the ICI (Dyestuffs) case the Court made an exclusion of parallel behaviour and concluded that it does not by itself amount to a concerted practice, however it could be possible that parallel behaviour may be used as evidence of an unlawful collusion depending on the circumstances.\textsuperscript{179}

The Wood pulp case holds a very clear statement from the Court on the distinction between tacit collusion and the notion of concerted practice.\textsuperscript{180} If the conduct in question can be justified as independently chosen parallel behaviour as an intelligent adjustment to the anticipated conduct of the competitors, it will not be considered as an infringement of Article 101.\textsuperscript{181} This means that the mere existence of parallel behaviour or tacit collusion is not considered prohibited by Article 101(1). It is therefore the opposite, more precisely; the non-independent parallel conduct that constitutes a concerted practice.

Tacit collusion is not limited to anticompetitive behaviour under Article 101 as mentioned above, it is therefore necessary to examine the interaction between tacit collusion and collective dominance in Article 102 and the EUMR.

\textsuperscript{173} Jones and Sufrin (2014), pp. 661 and 663.
\textsuperscript{174} Whish and Bailey (2015), p. 596.
\textsuperscript{175} Ibid., p. 596-597.
\textsuperscript{176} Jones and Sufrin (2014), p. 663.
\textsuperscript{177} OECD (2012) p. 22
\textsuperscript{178} Ghezzi and Maggiolino (2014).
\textsuperscript{179} Cases 48, 49 and 51-57/69 ICI (Dyestuffs) v. Commission, para. 66.
\textsuperscript{180} Joined Cases C-89/85 Wood pulp II, para. 71 and Jones and Sufrin (2014), page 712.
\textsuperscript{181} Joined Cases C-89/85 Wood pulp II, para. 71 cf. Joined Cases 40-48/73 Suiker Unie, para. 174
Collective dominance as defined in case law requires the existence of a collective undertaking, established by two or more undertakings that are united by economic links, and this united undertaking must be capable of acting independently of its competitors and consumers.\textsuperscript{182} The definition has been further clarified in later court cases.\textsuperscript{183}

According to the Court in a merger case, the \textit{Gencor case}, the finding of collective dominance does not necessarily have to be identified by explicit collusion comparable with the same sort of conduct that might constitute a violation of Article 101.\textsuperscript{184} Further the need for ‘economic links’ was interpret as not only applicable to structural links, but it could be applied to a concentrated oligopoly where interdependence exists between the undertakings in question.\textsuperscript{185} The Court confirmed this wide approach on ‘economic links’ in the \textit{Compagnie Maritime case}, an Article 102 case\textsuperscript{186}, which clarified that the concept of collective dominance is not limited to merger cases.\textsuperscript{187}

In order to establish collective dominance the Court stated in the \textit{Compagnie Maritime case} that it does not exist a legal condition to prove the existence of an agreement or “other links in law”.\textsuperscript{188} This statement indicate the possibility of establishing collective dominance based on parallel conduct arising out of the oligopolistic character of the market.\textsuperscript{189} This interpretation was repeated in the \textit{Impala case}\textsuperscript{190}, which means that “the essence of collective dominance is parallel behaviour within an oligopoly”, this is exactly the description of the concept of tacit collusion.\textsuperscript{191} The Court further specified that an economic analysis must be done, where several significant factors must be taken into consideration, not only an assessment of the relevant market structure.\textsuperscript{192}

It appears from the cited case law above that collective dominance within the meaning of Article 102 and the EUMR can potentially be established by tacit collusion, which is in contract

\begin{footnotesize}


\textsuperscript{184} Case T-102/96 \textit{Gencor Ltd v. Commission}, para. 276.

\textsuperscript{185} Ibid., paras. 273 and 276.

\textsuperscript{186} Case C-395 and 396/96 \textit{CMB v. Commission}, para. 45.


\textsuperscript{188} Case C-395 and 396/96 \textit{CMB v. Commission}, para 45.


\textsuperscript{190} Case C-413/06 \textit{P Impala}.


\textsuperscript{192} Case C-395 and 396/96 \textit{CMB v. Commission}, para. 45.
\end{footnotesize}
to the non-applicability of the concept to demonstrate the existence of a concerted practice under Article 101.

**4.4 Contact vs joint intention and price signalling**

**4.4.1 Introduction**

In this subchapter, the first required element to demonstrate the existence of a concerted practice, more precisely the notion of contact, is going to be analysed. The existing case law elaborating on the concept of contact are going to be examined.

An exchange of information is considered to be sufficient to establish contact between undertakings within the meaning of concerted practices. The purpose of this presentation it to examine the approach on the concept of contact as defined in the case law and apply it to price signalling.

**4.4.2 Direct or indirect contact as qualified coordination?**

As mentioned above, the *Suiker Unie case* stated that any direct or indirect contact between competitors that has a purpose or effect to influence market conduct is a violation of the concept ‘concerted practices’. It is therefore essential to examine the subject matter of the ‘direct or indirect contact’ as it has been defined in the case law and to further analyse if such contact can be considered as qualified coordination within the scope of Article 101.

As mentioned in Chapter 3, an undertaking that discloses information with its competitors will be considered to have exchange information directly, such as the disclosure of information from producer to producer, examples can be dissemination of information by emails, phone calls or in meetings. Direct disclosure of information between competitors is the most evident means of information exchange. A direct information exchange about future price intentions is considered most detrimental to the competitive process. Such conduct will be found in nonconformity with Article 101, unless an adequate justification can be presented. The characteristics of price signalling, public advance price announcements, indicates that conduct that falls within this definition is typically not exchanged directly between undertakings. It is more likely that the information is disclosed indirectly. Indirect contact is, as men-

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193 Case C-172/80 Gerhard Züchner v. Bayerische Vereinsbank AG, para. 21.
197 Ibid.
tioned in Chapter 3, information exchange by means of an intermediate or another third party, for example the situation where a retailer provides information to its supplier, who discloses that information to another retailer on the same market. Other examples are information exchanged publicly in interviews, magazines or on websites.

According to the *Suiker Unie case*, there is a distinction between unilateral market adjustment (which is lawful behaviour) and concerted practice (considered unlawful behaviour) as a result of direct or indirect contact.\(^ {198}\) The Court further stated that the contact in question must have as its object or effect to influence the behaviour of the market participants or to share information about actual conduct or future intentions.\(^ {199}\) These arguments presuppose that it is not possible for all kinds of indirect contact between competitors to form the basis of a concerted practice; otherwise this distinction would be of no use. This indicates that if direct or indirect contact can establish concerted practice, it might only occur in situations of qualified contact.

In the decision-making process the undertakings must act independently, which means that they should not be influenced by their competitors while making decisions about their future behaviour in the market, for example about future prices and strategies.\(^ {200}\) This constitutes a requirement of autonomy when an undertaking is determining its future policy.

However, as stated in *Suiker Unie* it is allowed for the firms to intelligently adopt their behaviour to fit with the market situation, based on information about already existing conduct of competitors or their anticipated behaviour on the market.\(^ {201}\) One can argue that every intelligent market adjustment can result in some form of indirect contact because an undertakings’ independently adopted behaviour on a market will be observed and interpreted by its competitors, which in turn decides and implement their policy based on their intelligent market adjustment and later their conduct will again be observed and analysed by the competitor. Based on this argument, that information observations, intelligent adjustments and conduct goes in circles on the respective market, it will be difficult to separate intelligently unilateral market adjustment from concerted practice as a result of indirect contact, because it seems that these two types of conduct are closely connected.

If undertakings are engaged in a behaviour, which has the possibility to reduce strategic uncertainty to the operation of the market, they do not act independently and this is considered

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\(^ {198}\) Joined Cases 40-48/73 *Suiker Unie*, paras. 173 and 174.

\(^ {199}\) Ibid., para. 174.

\(^ {200}\) Case C-8/08 *T-Mobile*, para. 32.

\(^ {201}\) Joined Cases 40-48/73 *Suiker Unie*, para. 174.
to be in divergence with Article 101. Any exchange that makes the competitors aware of the others intentions and business plans would be considered as illegal coordination. The disclosure of information, such as price signalling, is likely to reduce or remove the uncertainty between the undertakings about their future market behaviour insofar as the information has the necessary characteristics, such as individualized non-committal future intentions, as mentioned in Chapter 3. In the opinion of the Commission the competitors’ independence in the decision-making situation and the incentive to compete are reduced if competitors share strategic information amongst each other, therefore such conduct would amount to concurrence.

In the Cartonboard case the Court stated that if the communication between competitors makes them either directly or indirectly informed about individual confidential business information such conduct will fall within the scope of Article 101. It is considered that the strategic uncertainty on the market is reduced, as well as the risk of coordination and collusive behaviour increases, if only one undertaking on the respective market reveals its future intentions. In the T-mobile case attendance to a meeting was found sufficient to violate Article 101. It was stated in the Tate & Lyle case that if only one out of several undertakings discloses its future intentions at a meeting, the Court would not exclude the achievability of a concerted practice, based on undertakings receiving the anti-competitive information. These statements support the notion that a unilateral disclosure of information has the potential to be in contrary with Article 101.

If these statements, a pure direct or indirect contact criterion as established in Suiker Unie, are applied to price signalling it will be evident that every unilateral public advance price announcement about individual strategic information run the risk of being caught by Article 101. The arguments indicate that the strategic uncertainty of the future conduct on the particular market will be eliminated or reduced by such signalling as well as the undertakings decision-making independence will be distorted by receiving or observing the information indirectly. The fact that the information is disseminated seems sufficient to establish contact, ei-

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202 Case C-7/95 P John Deere, para. 90.
206 Opinion of Advocate General Kokott in Case C-8/08, para. 54.
207 Case C-8/08 T-Mobile.
208 Joined cases T-202/98 Tate & Lyle and others v. Commission, paras. 57-59.
209 Joined Cases 40-48/73 Suiker Unie.
ther directly or indirectly. This will make the differentiation between lawful market adjustments and collusive coordination a challenging task.

In the UK, the Competition Appeal Tribunal (shortened CAT), has in two cases interpreted the concept of indirect contact between competitors. The Chapter I of the UK Competition Act is an analogous provision of Article 101 and must be interpreted consistent with the EU rules.\(^{210}\) Both cases concerned indirect information exchange through third parties, more precisely, disclosure of information from one retailer to another through their supplier. In the *Replica Kit case*\(^{211}\) the CAT applied the ‘direct or indirect’ approach established in *Suiker Unie* and concluded that when one of the competitors disclosed its future intentions the conduct on the market would be influenced. The CAT did not establish a requirement of invitation in the relation between the competitors, it was sufficient that the retailer could “reasonably foresee” that the intermediary might use the information and later disclose it to a competing retailer, which did not need to accept the information or have any knowledge about the relationship between its competitor and the intermediary.\(^{212}\) In the *Toys and Games case*\(^{213}\), the CAT referred to its previous decision in the *Replica Kit case* and used the same method of reasoning. In both cases the CAT came to the conclusion; the UK Competition Act had been infringed.

These two cases illustrate that according to the CAT, the mere existence of a disclosure of information about future intentions will automatically influence the market in a negative manner, which results in a violation of the provision. This statement indicates that every type of unilateral dissemination of strategic information has the possibility of infringing Article 101; as long as the disclosing undertaking could have predicted or understood that the intermediary might have an intention to further communicate the information. If such approach is sufficient to violate Article 101, the assessment does not take into account any subsequent conduct on the market, collusive intentions or any confirming reaction, or knowledge, of the receiving undertaking.

The cases were later appealed by the undertakings and The British Court of Appeal combined the two cases for settlement.\(^{214}\) The court rejected the appeals and came to the same conclusion as the CAT that it existed indirect concerted practices in both cases. However, the Court

\(^{210}\) The UK Competition Act, section 60.

\(^{211}\) Competition Appeals Tribunal, Replica Kit – JJB Sports v. OFT.

\(^{212}\) Ibid., para. 657.

\(^{213}\) Competition Appeal Tribunal, Toys and Games - Argos Ltd & Littlewoods Ltd v. OFT.

\(^{214}\) Court of Appeal – combined judgement, Replica Kit and Toys 2006, EWCA Civ 1318.
of Appeal modified the scope of indirect contact as stated by the CAT.\footnote{Ibid., para. 91.} The Court of Appeal established a different concept of indirect contact, where the undertaking that exchanges information must have an intention or provide an invitation to its competitor, which the competitor receives through the intermediate. Additionally, the competitors that receive the information from the third party must have knowledge about the information exchange between its competitor and the intermediate.\footnote{Court of Appeal – combined judgement, Replica Kit and Toys 2006, EWCA Civ 1318, para. 141.} The method of reasoning by the Court of Appeal was based on the approach in \textit{Suiker Unie}, but it also applied the approach expressed in \textit{Bayer}\footnote{Joined cases C-2/01 P and C-3/01 P \textit{BAI and Commission v. Bayer}, para. 102.} (which is going to be further discussed in the next subchapter). The modification applied by the Court of Appeal requires that the competitor who discloses information has an intention of disclosing the information with its competitor as well as the undertaking that received information via a third party have to know about its competitors’ intention.

Based on the interpretation of the ‘direct or indirect contact’ criterion done by the Court of Appeal it appears that a direct application of the criterion is not sufficient to find conduct in nonconformity with Article 101. The appeal case illustrates that a pure unilateral disclosure of strategic information that can influence the market conduct and reduce strategic uncertainty cannot by itself establish a concerted practice by ‘indirect contact’. It indicates that the disclosing undertaking must, at the very least, had an intention to exchange the information with its competitors. In addition to this the receiving undertaking must have accepted it or understood the anti-competitive intentions of its competitor. This approach makes it applicable to tacit acceptance, because if the receiving competitor do not oppose against the information it will be considered to have accepted the invitation.

Another country that has dealt with the concept of price signalling is the Netherlands, by its competition authority. The Netherlands Authority of Consumers and Markets (shortened ACM) issued a commitment decision in 2014 regarding advance public announcements made by several Dutch mobile operators.\footnote{ACM Case number: 13.0612.53 - Commitment Decision Regarding Mobile Operators.} Article 1 of The Dutch Competition Act declares that the provisions must be interpreted in accordance with Article 101 TFEU.\footnote{The Dutch Competition Act Article 1.} The particular announcements were expressed at a conference and in a trade magazine. The ACM’s concern was that these announcements would reduce strategic uncertainty and harm consumers because the announced measures did not have any committal value and it seemed like the undertakings was anticipating and depending their behaviour based on the reactions of the competi-
The undertakings were considered to have knowledge that the competitors noticed these announcements. The case was settled without admitting any infringes of the Dutch Competition Act, similar to the Container Shipping case. However the undertakings in question agreed to refrain from public announcements until an internal decision of the actual prices had been made. The approach of the ACM indicates the public announcement of price intentions, which were both direct and indirect, could be anticompetitive and may facilitate coordinated behaviour. However, it appears if the ACM added another relevant factor when determining the anticompetitive risks, which was that the announcing undertaking was aware its competitors could observe the information. This approach seems to be in line with the abovementioned decision of the British Court of Appeal.

These cases suggest that the mere ‘direct or indirect’ criterion is not sufficient to establish contact within the meaning of Article 101. This indicates that the criterion has been modified and must be supplemented by an additional criterion of a collusive intention, even though the Dutch case regarding the mobile operators hold a clear statement that price signalling, by its existence is considered harmful to the competitive process.

4.4.3 Joint intention as qualified coordination?
The approach on contact as established in the Suiker Unie case has been interpreted and further developed by the Court in several subsequent cases. The Court has emphasized and added a requirement of a joint intention that must be present in order to fulfil the criterion of contact in concerted practices. The objective of this subchapter is therefore to analyse and present the case law, the method of reasoning that has developed after the Suiker Unie case and to examine if such joint intention can be sufficient and qualify as coordination within the scope of concerted practices in Article 101.

In the ICI (Dyestuffs) case the Court stated that the undertakings involved must “knowingly” have replaced the uncertainty of the competition process with practical coordination. This illustrates that a shared or a mutual understanding, or a common will, of cooperation amongst the competitors on the particular market in question must be present. This judgment came

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220 ACM Case number: 13.0612.53 - Commitment Decision Regarding Mobile Operators, para. 45
221 ibid.
225 Cases 48, 49 and 51-57/69 ICI (Dyestuffs) v. Commission, para. 64.
before the *Suiker Unie case*\(^{226}\), which can illustrate that the Court already had in mind that in order to violate Article 101 the undertakings must have achieved a mental consensus about their collusive intentions. If the undertakings have mutually agreed to exchange information about future plans and intentions, the exchange itself may reduce competition and create a distortion of the competitive process on a given market.\(^{227}\) This statement by the Court in the *ICI (Dyestuffs) case* also establishes the need for coordination of the conduct on the market. This aspect is going to be further examined in the next subchapter.

In another case, more precisely the *Cimenteries case*, the Court expressed the necessity of reciprocal contact between competitors in order to establish a concerted practice.\(^{228}\) By the wording of ‘reciprocal contact’ it indicates that if an undertaking is purely passive while receiving information it does not constitute a violation of the provision. In addition to this it might illustrate that a unilateral information exchange in itself does not have the characteristics of being ‘reciprocal’. However, according to the *Cimenteries case* it is possible to constitute a unilateral disclosure of information, an exchange done by one undertaking, as ‘concerted practices’ even though the concept implies that a reciprocal contract must exist. In order to fulfil the criterion of contact the undertaking disclosing information about its future intention or conduct must either have received a request from another undertaking with a wish to receive information or the receiving undertaking accepts the information exchanged.\(^{229}\) The Court considered these elements as sufficient to establish reciprocity, which means that the conduct must be reciprocal, but there are not that many requirements to establish reciprocity.

According to the *Bayer case* in the judgment of the First Instance it was considered sufficient that a joint intention had been expressed by the undertakings involved to constitute an infringement of Article 101.\(^{230}\) In the Bayer appeal case, it was stated by the Court that it is possible to establish a concerted practice by tacit acceptance, however this can only be applied to the situations where an invitation to collude has been expressed.\(^{231}\) Such invitation from one of the undertakings must hold a desire to jointly affect the competition in a negative manner, in addition it is regardless whether this wish has been expressed or is implied.\(^{232}\)

\(^{226}\) Joined Cases 40-48/73 *Suiker Unie*.

\(^{227}\) Case C-7/95 P *John Deere Ltd*, para. 87.

\(^{228}\) Joined Cases T-25/95 *Cimenteries CBR SA and others v. Commission*, page 1849.

\(^{229}\) Ibid.

\(^{230}\) Case T-41/96 *Bayer AG v. Commission*, para. 67.

\(^{231}\) Joined cases C-2/01 P and C-3/01 P *BAI and Commission v. Bayer*, para. 102.

\(^{232}\) Ibid.
The *Bayer cases* concerned the understanding of the concept of agreement within the scope of Article 101, but the approach established in the cases has been applied to judgments concerning the notion of concerted practices, which a few of these are going to be further examined below.

A unilateral announcement by an undertaking, that is also made publicly, is in general not considered to violate Article 101(1). However, in the opinion of the Commission, not all unilateral information exchanges in the public domain are considered pro-competitive. The possibility of finding an infringement of Article 101 cannot be excluded, partly due to the case-by-case analysis that must be made. The provision can be applied to announcements that hold an invitation to collude, as expressed in the *Bayer case*. In these cases the published information must be analysed in order to find out if such invitation is communicated to the competitors. The formulation of the communication is important. Further, the following reaction of other competitors might be a strategic response to the first announcement. Such behaviour can lead to a mutual understanding amongst the competitors on the market about future coordination. This model demonstrates the necessity of an invitation to collude followed by a subsequent accept, or a mutual understanding, in order to fulfil the criterion of contact. However, if the undertakings announce simultaneously the information exchanged holds no possibility to lessen the future strategic uncertainty.

In 2014 there were three cases before the Court elaborating on the requirements of invitation to collude and the subsequent acceptance in order to find out when such conduct can be found inapplicable with Article 101(1).

The Court suggested in the *AC Treuhand case* that the mere attendance to a meeting is not sufficient to constitute an infringement of Article 101(1). The Court stated that if an undertaking does not wish to participate in concerted practice it must oppose against the invitation in a clear manner, otherwise a tacit acceptance would exist. By not distancing itself publicly to the anti-competitive conduct it is considered that the undertaking tacitly accepts such

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236 Ibid.
238 Cases C-194/14 *AC-Treuhand AG*, Case C-74/14 *Eturas UAB and others v. Lietuvos Respublikos konkurencijos taryba* and Case C-542/14 *SIA 'VM Remonts' and others v. Konkurences padome*.
239 Cases C-194/14 *AC-Treuhand AG*, para. 31.
240 Ibid.
conduct and encourages the continuing of that behaviour.\textsuperscript{241} The approach of the Court shows that attendance to a meeting can violate the provision when the model of invitation to collude and accept of such invitation is added as a requirement. This case shows that the Court considers participation by being passive without any additional requirement not to be sufficient to violate Article 101(1).

In the \textit{Eturases case}\textsuperscript{242} the Court found the dispatch of a message in an online booking system sufficient to amount to the existence of a concerted practice. The Court further emphasised that this particular conduct fulfilled the requirement of contact as long as the undertakings in question was aware of the content of the message and with such knowledge neglected to oppose against the information exchanged.\textsuperscript{243} The Court referred to the \textit{AC Treuhand case} and stated that in the absence of an objection, the undertakings involved will be considered to have tacitly agreed to the anti-competitive behaviour.\textsuperscript{244}

The last of the three relevant judgments of 2014 is the \textit{SIA case}.\textsuperscript{245} The Court was asked to interpret whether the concept of concerted practice could be found applicable, or not, to the situation where an independent service provider is supplying an undertaking. The question was if the undertaking could be held liable for the conduct of the independent service provider, which would result in an infringement of Article 101(1). The Court concluded with three alternative conditions and stated that if one of the conditions were met, the undertaking in question would, in principle, be found liable for the actions of the service provider.\textsuperscript{246} The relevant condition in regard to the criterion of contact was the establishment of a requirement of knowledge for the undertaking about the anti-competitive purposes of its competitor and the independent service provider. In addition to this the undertaking must have an intention to contribute to such collusive objectives by its own behaviour.\textsuperscript{247}

The statements of the Court in these three cases support the notion of Article 101(1) possible applicability to passive conduct. However, the purely passive conduct is not sufficient in itself to constitute unlawful conduct, because the Court has added the requirement, as expressed for the first time in the \textit{Bayer case}\textsuperscript{248}, of a model where the disclosed information must hold an

\textsuperscript{241} Ibid.
\textsuperscript{242} Case C-74/14 \textit{Eturases UAB}.
\textsuperscript{243} Ibid., para. 50.
\textsuperscript{244} Case C-74/14 \textit{Eturases UAB}, para. 28 cf. Cases C-194/14 \textit{AC-Treuhand AG}.
\textsuperscript{245} Case C-542/14 \textit{SIA}.
\textsuperscript{246} Ibid., para. 34.
\textsuperscript{247} Ibid.
\textsuperscript{248} Joined cases C-2/01 P and C-3/01 P \textit{BAI and Commission v. Bayer}, para. 102.
invitation to collude which is later accepted by the receiving undertaking. The Court has therefore defined an additional requirement to the contact criterion, which consists of an invitation with a subsequent accept where the undertakings has a joint intention of an anti-competitive goal. It is therefore necessary for the receiving undertaking to oppose against the disclosed information to avoid liability.

4.4.4 Reconciling the different approaches

Based on the assessments of the Court in the case law described above, it exists two different approaches on the notion of contact. It is therefore necessary to try to reconcile the methods of reasoning. The purpose of this subchapter is to harmonize the approaches and apply it to price signalling in order to find out to what extent price signalling can be found to infringe Article 101.

One can argue that the two approaches is partly conflicting on how to examine contact between competitors and conclude whether such contact can be found as an infringement of Article 101(1) based on which requirements are found necessary.

The approach defined in the *Suiker Unie case*, as mentioned above, can be considered a wide approach on the concept of contact, based on the fact that all kinds of direct or indirect contact that may affect the uncertainty about future conduct of competitors, is considered inapplicable with Article 101.249

After analysing the mentioned case law, it appears if the Court has established an additional requirement of knowledge about the exchanged anti-competitive information in order to fulfil the criterion of contact within the meaning of concerted practice. This means that the approach from the *Suiker Unie case*250, where “any direct or indirect contact” was found sufficient to conclude with the existence of concerted practices, has been modified. This can indicate that the ‘direct or indirect’ criterion cannot be applied alone; it needs to be supplemented by at least one of the other approaches established by the Court.

The other approach based on the *Dyestuffs (ICI) case* and subsequent case law, especially on the *Bayer cases* and the *Cimenteries case*251, can be understood as a narrow interpretation of the procedure of ‘direct or indirect’ contact as stated in the *Suiker Unie case*. The model de-

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250 Ibid., para. 174.
veloped in these cases establishes a need to prove a joint intention between undertakings in addition to the criterion of the direct or indirect contact in order to find conduct in non-conformity with Article 101. All of these cases indicates the necessity of a common intention, either by the need of reciprocal contact established by acceptance, a joint intention or that the undertakings have knowingly coordinated.

The latter approach has been applied more often in recent cases, as presented above, which might indicate that the Court is moving towards a less wide interpretation of how to demonstrate the existence of contact under the notion of concerted practice in Article 101(1). This can illustrate that a certain conduct has to, at the very least, meet the criterion of joint intention in order to infringe Article 101(1) as a concerted practice.

If an advance price announcement holds an invitation to collude, which gives the receivers of the information knowledge about the announcing undertakings’ anti-competitive purposes it can lead to the existence of a concerted practice. This indicates that not all kinds of price signalling are sufficient to violate Article 101.

The undertaking in question must have been aware of the collusive purposes of its competitors, which can be seen as an invitation to participate in the anti-competitive conduct. Such invitation, which shows that the undertaking was aware or should have been aware of the information exchanged, will be considered accepted if it cannot provide any evidence of non-participation. By being passive while having the knowledge of an existing invitation to collude, the undertaking risks that such passive behaviour might be considered as a tacit acceptance of the invitation, which can result in an infringement of the provision. This indicates that some type of active measure must be conducted in order to avoid liability.

In the Dyestuffs case the Court found the particular advance price communications in question sufficient to prove concerted practices. According to the Court the behaviour of the undertakings involved managed to eliminate uncertainty about each competitors’ future behaviour as well as a temporarily elimination of the preconditions for competition, “which stood in the way of the achievement of parallel uniformity of conduct.” In the Wood pulp settlen...
the Court further elaborated on the topic of price signalling. The Court stated that announcements of future prices cannot be considered as a per se infringement of Article 101(1). The particular information exchanges in this case were found to serve and be beneficial for the customers and therefore the parallel conduct in question had a plausible explanation. Further, the approach in the Wood pulp case illustrates that a mere release of future intentions will not be sufficient evidence of a concerted practice. Parallel advance price announcements cannot be considered as unlawful price signalling if a plausible explanation exists, in a situation like this it requires additional circumstances to conclude with an infringement of Article 101(1).

These two cases show that price signalling which cannot prove any clear legitimate business justification and announcements directed to the customers, the behaviour might be considered as indirect contact between undertakings as concerted practice under Article 101(1). This means that in order to find out to what extent price signalling can be characterised as concerted practice, which amount to an infringement of Article 101(1), one must approach it as a question of degree. The legitimate contact between undertakings must be distinguished from illegal collusive behaviour.

The mere existence of public price signalling should not by itself result in a concerted practice. Otherwise every competitor who has the possibility to attain the announced information through the relevant information channel could be held liable as a participant to a concerted practice, just by the existence of the information. This indicates that the requirement of contact when it comes to price signalling cannot be constituted only by the existence of the information. The characteristics of the particular advance price announcement must be done.

As mentioned in Chapter 3 there are several characteristics of price signalling that are decisive of whether such information exchange can facilitate anti-competitive conduct. In short, the information must be specific enough so that the competitors can identify the focal points

259 Joined Cases C-89/85 Wood pulp II.
260 Ibid., 64 and 65.
261 Ibid.
265 Jones and Sufrin (2014), p 673 footnote 57.
and align their conduct.\textsuperscript{267} It is therefore considered that announcements of intended future prices can represent the introduction to a reciprocal disclosure of information.\textsuperscript{268}

### 4.5 Practice/conduct + causation and price signalling

This subchapter is going to be a combined examination of the second and third criteria of the condition ‘concerted practices’, more precisely the necessity to prove the existence of a collusive practice or conduct on the market and the casual link between conduct and the requirement of contact between undertakings as mentioned in the previous subchapter. These two criteria are closely connected which is why they are being examined in the same chapter. The results of the analysis are going to be applied to price signalling to determinate to what degree such behaviour meet the criteria.

The second criterion was expressed by the Court in the \textit{ICI (Dyestuffs) case} and stated that the undertakings involved must intentionally have replaced the uncertainty of the competition process with practical coordination.\textsuperscript{269} In other words, the coordination must result in a subsequent behaviour on the market.\textsuperscript{270} As mentioned in subchapter 4.2, the \textit{Anic case}\textsuperscript{271} established the third criterion of concerted practices. A casual link between the collusive conduct and contact is required to find the specific behaviour as concerted practice.

In the \textit{Fresh Del Monte v. Commission case} the Court stated that it is not necessary to prove a ‘meeting of minds’ to establish concerted practices within the meaning of Article 101(1).\textsuperscript{272} It is sufficient that an undertaking participates in the anti-competitive conduct by contributing in the pursuant of the same objectives as the participating competitors, when the undertaking itself was aware or at least could reasonably predict the implementation of the unlawful conduct by the other competitors.\textsuperscript{273} These statements indicate that the contact between the respective undertakings must in some manner manifest itself in conduct on the market as well as the mutual understanding does not have to very precise in order to consider the behaviour of the competitors as coordination.

\textsuperscript{267} Rabinovici (2016), p. 2.
\textsuperscript{268} Ghezzi and Maggiolino (2014).
\textsuperscript{269} Cases 48, 49 and 51-57/69 \textit{ICI (Dyestuffs) v. Commission}, para. 64.
\textsuperscript{271} Case C-49/92P \textit{Commission v Anic Partecipazioni}, para 118
\textsuperscript{272} Case T-587/08 \textit{Fresh Del Monte Produce v. Commission}, para. 300.
\textsuperscript{273} Joined Cases C-293/13 P and C-294/13 P \textit{Fresh Del Monte Produce v. Commission}, paras. 156-159.
If the public price announcements has no committal value, as well as the market has asymmetries or consists of several undertakings, such announcements might not be able to facilitate coordination.\(^{274}\) However, in the situation when a public announcement by an undertaking is followed by similar types of announcements by its competitors it can be an indicator or evidence of a strategy implemented by the undertakings to reach a mutual understanding amongst themselves about the specific terms of coordination.\(^{275}\) Such behaviour can facilitate collusion because the following announcements can be strategic replies to the first announcement, which means the competitors can continue to readjust their announcements until a shared understanding has been reached.\(^{276}\) This means that in the event of an information exchange, like price signalling, the exchanges itself can make it possible for competitors to reach a shared understanding on the terms of coordination.\(^{277}\) The disclosure of future intentions makes a mutual understanding easily achievable for the undertakings.\(^{278}\)

The discovery of parallel conduct in the market can be seen as indicators of coordination. Parallel conduct is not necessarily sufficient to constitute concerted practice, as mentioned in subchapter 4.2, but it can be evidence of such unlawful coordination.\(^{279}\) Further indicators or evidence is required.\(^{280}\) If the parallel conduct is able to reasonably affect the competition on a market it could be considered as a concerted practice.\(^{281}\) However, parallel conduct can be a result of the competitors’ adjustment to the market situation in a unilateral manner, which is lawful and falls outside the scope of Article 101(1).\(^{282}\) These statements indicate that pure price signalling, understood as public unilateral price announcements regarding actual prices, which is later followed by the competitors, might only be a legal adjustment to the market behaviour.\(^{283}\) It seems that there is a fine line between the lawful adjustment to the competitors’ market behaviour and the illegal collusive conduct.

In a situation where the parallel behaviour on the market has coordination between the participants as the only plausible or reasonable explanation, the behaviour can be considered an

\(^{276}\) Ibid.
\(^{277}\) Ibid., para. 66.
\(^{278}\) Ibid.
\(^{279}\) Cases 48, 49 and 51-57/69 ICI (Dyestuffs) v. Commission, para. 66.
\(^{281}\) Case C-172/80 Züchner, para. 22.
\(^{282}\) Case C-49/92 P Commission v. Anic Partecipazioni, para. 108.
\(^{283}\) Kestenbaum (1980), pp. 914 and 921.
infringement of Article 101. A factor to support this exception can be that the on-going conduct is not common between the companies in question, understood as the normal conditions on the market and the conduct in question does not correspond. The parallel behaviour must be proven to be a result of coordination between undertakings. This illustrates that if price signalling is common on the particular market, it might not be considered as a violation of Article 101.

In the absence of a mutual understanding, circumstantial evidence must be examined to find out if the conduct in question can be considered as a concerted practice. Such evidences cannot be applied if the conduct in question has a plausible explanation other than being collusive, for example that the behaviour is a result of the conditions present on the specific market.

The Court established the criterion of casual link in the Anic case and repeated it in the Hüls case. According to the Court a presumption of the existence of a casual link will be present in the cases where undertakings has made contact with each other, because collusive conduct on the market is presumed to follow such contact.

It is considered that if an undertaking has the knowledge of its competitors’ strategic plans or intentions it will not manage to determine its own future policy regardless of the obtained information. If an undertaking, while having the knowledge of its competitors’ future strategy intentions, remains active on the particular market, it is therefore presumed that the exchanged information will be taken into account when the undertaking is determining its future behaviour. This emphasises that if contact between undertakings on the specific market reduces the uncertainty about the competitors’ future behaviour it is considered to result in a presumption of a casual link. This is recognized as “the presumption of parallelism”.

285 Cases 48, 49 and 51-57/69 ICI (Dyestuffs) v. Commission, para. 66.
287 Ibid., p. 850.
288 Joined Cases C-89/85 Wood pulp II, para. 71
289 Case C-49/92 P Commission v. Anic Partecipazioni, para. 118.
290 Case C-199/92 P Hüls AG v. Commission.
291 Ibid., para. 161.
292 Ghezzi and Maggiolino (2014).
295 Ghezzi and Maggiolino (2014).
This indicate that as long as the competitors have made contact with each other there will be a presumption that subsequent collusive conduct will be implemented on the market. By acquiring information the undertakings will be influenced and is presumed to apply the knowledge when conceiving its own business plans, which means the decision-making process is not conducted independently. The approach presented in these cases seems to navigate away from a requirement of actual subsequent conduct on the market, as introduced above. The Court appears to find the establishment of contact between undertakings as the only necessity, because the contact is presumed to influence the undertakings in a collusive manner when they determine their policy.

The fact that an undertaking is not implementing strategies similar to the information exchanged cannot prove that the undertaking “never took into account the information exchanged” when deciding its future market conduct. To prove the existence of a concerted practice is it sufficient that one undertaking has stated its future intentions because this reduces the strategic uncertainty of its expected future conduct. The presumption of casual link will be present and have been found to be sufficient to establish an infringement of Article 101(1) in the situation of a single meeting between the competitors, where the information was disclosed in a unilateral manner. This indicates that it is not required that the undertaking has implemented a certain kind of conduct on the market or that several undertakings have exchanged information about future intentions. In the Hüls case the Court stated that conduct can be considered as concerted practices and an infringement of Article 101, regardless of any anti-competitive effects. This statement indicates that a concerted practice do not have to be put into effect in order to violate the provision.

However, the Court has stated that if the undertakings in question manage to prove the contrary, that it does not exist any concerted practice, the conduct will not be considered an infringement. This statement illustrate that it exists a possibility for the undertakings to try to rebut the presumption.

297 Ghezzi and Maggiolino (2014).
299 Joined Cases T-25/95 Cimenteries, para. 1852.
300 Case C-8/08, T-Mobile, para. 62.
301 Ghezzi and Maggiolino (2014).
302 Case C-199/92 P Hüls AG v. Commission, para. 163.
303 Joined Cases T-25/95 Cimenteries, para. 1865.
It has been stated in case law in order to avoid the presumption of a casual link between the strategic information received from a competitor and collusive coordination, the receiver has to clearly express its non-involvement in such conduct, otherwise the presumption will be present.\textsuperscript{304} It is therefore necessary for an undertaking to show disapproval by declaring its distance to the information or report it to the competition authorities to avoid liability.\textsuperscript{305} In the \textit{Aalborg Portland case} the Court found a presumption of anti-competitive contact present in the situation of undertakings participating in meetings when the undertakings involved did not oppose against the exchanged information.\textsuperscript{306}

There is a presumption that the decision-making process will be affected by the disclosure of strategic information, which means that if undertakings do not properly manage to manifest their opposition against the exchanged information, it will be very unlikely that the undertakings in question escape liability as a concerted practice.\textsuperscript{307} In the absence of an opposition the undertaking imply that it supports the collusive conduct and further encourages it.\textsuperscript{308} An undertaking present at a meeting where anti-competitive information is disclosed will be considered to have tacitly acquiesced and a reciprocal contact established, in the absence of opposition.\textsuperscript{309}

In the \textit{Westfallen case} the Court stated “\textit{the notion of public distancing as a means of excluding liability must be interpret narrowly}”.\textsuperscript{310} This statement indicates that it exists only a few possible means the undertakings can use to rebut the presumption or that in order to fulfil the criterion the action of distancing must have some specific characteristics.

A unilateral disclosure of strategic information may meet the criterion of contact in the absence of a report to the competition authorities or a clear statement of non-involvement of the anti-competitive intentions.\textsuperscript{311} The undertaking must sufficiently manage to disassociate itself from the received information to avoid involvement in a concerted practice.\textsuperscript{312}

\begin{itemize}
\item \textsuperscript{305} Joined Cases C-204/00 \textit{P Aalborg Portland and others v. Commission}, paras. 82 and 84.
\item \textsuperscript{306} Ibid., para. 81.
\item \textsuperscript{307} Ghezzi and Maggiolino (2014).
\item \textsuperscript{308} Ibid.
\item \textsuperscript{309} Ibid.
\item \textsuperscript{310} Case T-303/02 \textit{Westfallen Gassen Nederland v. Commission}, para. 103.
\item \textsuperscript{311} Ghezzi and Maggiolino (2014).
\item \textsuperscript{312} Ibid.
\end{itemize}
The Court further elaborated on the method to rebut the presumption of a casual link in the *Eturas case*. With reference to existing case law the Court expressed that undertakings can distance themselves publicly to the content of the unlawful initiative or report such anti-competitive conduct to administrative authorities to avoid the presumption of a casual link. The Court stated that an opposition against the anti-competitive objectives is not limited to the options where the undertaking could either publicly distancing itself or reports the collusive conduct to the administrative authorities. The case law lists other possible means as sufficient to avoid applicability of Article 101(1). By this judgment the Court has expanded the concept of distancing to escape liability, compared to its statement in the *Westfallen case*, which means that it exists several other means to rebut the presumption.

According to the Court in the *Eturas case*, in contrast with the presumption, the answer to whether the conduct in question held sufficient evidence to prove that the particular undertakings knew or should have known about the information exchanged was not considered to follow from the notion of ‘concerted practices’. The answer must be assessed in relation to the evidences and the standard of proof, but only insofar as it did not threaten the effective implementation of Article 101. The existence of several indicia and coincidences when added together may constitute an infringement of Article 101, if the conduct is not provided with a plausible explanation.

According to the Court it is possible to justify a presumption of a casual link, by examining other consistent and objective indicia present and relevant for the case, if the undertakings that is considered to be aware of the exchanged information still had the possibility to rebut the information or conduct in question.

If the conduct in question does not regard an anticompetitive meeting, other means than an undertaking publicly distancing itself and the possibility of reporting to administrative authorities, can be sufficient to rebut the presumption. This means that a requirement of a publicly distancing of the anti-competitive conduct in order to avoid involvement in an infringement

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313 Case C-74/14 *Eturas UAB*.
314 Ibid., para. 28
315 Ibid., para. 46
316 Case T-303/02 *Westfallen Gassen Nederland v. Commission*.
317 Ibid., para. 34
318 Ibid., para. 35
320 Case C-74/14 *Eturas UAB*, para. 40.
321 Ibid., para. 46.
cannot be applied in all circumstances. The Court stated in the Total Marketing Services case that such distancing is considered to be only one factor amongst several others when deciding whether an undertaking has continued to participate in anti-competitive conduct or has refrained from it. The circumstances in each case must be assessed to find out what types of behaviour is capable to rebut the presumption of a casual link.

In regards to the situation of price signalling, which cannot be considered to fall within the definition of an anticompetitive meeting; there are several options for undertakings, if they are accused of being involved in concerted practices, to try to rebut the presumption. The opportunity and method to rebut the presumption is not limited to the means available if the conduct in question was an anticompetitive meeting. The relevant and individual objectives and indicia of each case must be examined and analysed in order to find out if the presumption of a casual link has been rebutted successfully or not. The undertakings accused of involvement in price signalling can rebut the presumption in many different ways, which is case specific and should therefore be analysed on a case-by-case approach.

After analysing the existing case law, it appears that it is not necessary to prove any subsequent behaviour on the market as long as the information has been exchanged. This illustrates that as long as contact between competitors is established the undertakings cannot avoid taking the disclosed information into consideration. The undertakings are presumed to be influenced by the information based on its existence.

The information shared as price signalling is announced in the public and will therefore be available to all participants on the market, so if sufficient contact has been concluded, the signalled information will influence the competitors. Due to the presumption that the competitors will take this information into consideration when conceiving its strategies, it seems that the mere existence of such information is sufficient to infringe Article 101. This indicates that price signalling might meet the criterion of a casual link.

However, the undertakings have the possibility to try to rebut the presumption, which is not limited to publicly distancing or report to the competition authorities. This indicates that every case must be assessed individually and decided based on its specific circumstances.

322 Case C-634/13 P TMS, para. 22.
323 Ibid., para. 23.
5 Final remarks

As the examination on the topic of price signalling as concerted practice under the competition provision Article 101 has shown, it does not exist a clear answer to the research question. Price signalling is, as discussed, not a legal term and has not been defined by the Court, which means that it is not certain what type of conduct the Court consider to fall within the scope of a definition.

However, the cited case law has provided indicators of what types of conduct that may constitute an infringement of Article 101 as a concerted practice. Every case must be analysed individually. Many factors must be assessed before a conclusion can be made about what degree an advance public price announcement fall within the meaning of a concerted practice. The exchanged information must be detailed enough in order to identify focal points and facilitate collusion.\(^{324}\) As mentioned in Chapter 3 such information has often the following characteristics, non-binding, individual intentions of future prices on a market with few undertakings.

Price signalling can be found as innocuous and beneficial to the competition or as harmful and with anti-competitive outcomes, depending on the circumstances. The pro-competitive effects must therefore be balanced against the anti-competitive. The definitive question in regards to the particular market conduct may be if it exists any valid business explanation to behave in this specific manner.\(^{325}\) In the case of a valid legitimate reason price signalling may be found in accordance with Article 101.\(^{326}\)

However, if an undertaking cannot provide a legitimate reason for its price signalling and it is possible to determine that the announcements was not made because of an undertakings individual intention, these factors may constitute sufficient evidence of a concerted practice.\(^{327}\) If the advance price announcements do not have committal value towards the consumers, such as a maximal price this should be considered harmful the competition.\(^{328}\)

The decisive factor to determinate to what extent price signalling can be considered as concerted practices is the requirement of ‘contact’. The examination has shown that collusive conduct will occur by the existence of strategic contact between competitors, because the undertakings is considered to not being able to determine their strategies independently while

\(^{324}\) Rabinovici (2016), p. 2.
\(^{326}\) Opinion of Advocate General Darmon in Cases C-89/85 and others (Wood pulp II), para. 251.
being aware of its competitors future plans.\textsuperscript{329} It seems that regardless of any subsequent conduct of on the market, the implemented policy of the undertakings have already been affected by the exchanged information. Because of this presumed lack of independent decision-making, the presumption of a casual link will exist.

By analysing the *Container shipping case*\textsuperscript{330} one can question why the Commission chose to apply the commitments procedure and not charge the carrier companies of an infringement of Article 101, with a full prosecution. If indirect contact between competitors is considered sufficient to establish price signalling as a concerted practice it would not existed a legal obstacle for the Commission to accuse the undertakings of an infringement. Based on this reflection it can be plausible to suggest that the Commission consider joint intention as the only qualified coordination criterion and in this particular case they might have been uncertain whether it existed a joint intention between the carriers. This may have been the reason why the Commission chose to settle for a commitment decision and not challenge the conduct in question as an infringement.

Based on this reflection and the analysed case law it appears the ‘indirect contact’ criterion has been modified and supplemented with a requirement of intention to collude or an invitation with subsequent accept approach\textsuperscript{331}, this suggests that it is necessary to prove a joint intention to find price signalling as a concerted practice.

\textsuperscript{329} Ghezzi and Maggiolino (2014).
\textsuperscript{330} Commission Decision C(2016) 4215 *Container Shipping*.
\textsuperscript{331} Court of Appeal – combined judgment, Replica Kit and Toys 2006, EWCA Civ 1318.
6 Table of reference

6.1 Legislation and official documents


The Norwegian Competition Act, Act of 5 March 2004 No.12 on competition between undertakings and control of concentrations.


The Dutch Competition Act, Act of 22 May 1997 (Mededingingwet).


6.2 Case law


Cases 48, 49 and 51-57/69 Imperial Chemical Industries Ltd (ICI) (Dyestuffs) v. Commission [1972] ECLI:EU:C:1972:70

Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73 Coöperative Vereniging 'Suiker Unie' UA and others v. Commission [1975]


Case C-95/04 P *British Airways plc v. Commission* [2007] ECLI:EU:C:2007:166

Case C-413/06 P *Bertelsmann and Sony Corporation of America v. Impala* [2008] ECLI:EU:C:2008:392


Case C-8/08, *T-Mobile Netherlands BV and others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECLI:EU:C:2009:343


Case C-74/14 Eturas UAB and others v. Lietuvos Respublikos konkurencijos taryba [2016] ECLI:EU:C:2016:42


Case C-542/14 SIA 'VM Remonts' and others v. Konkurences padome [2016] ECLI:EU:C:2016:578

EFTA Court:

Opinions of Advocate General:

Commission Decisions:
Commission Decision 1999/60/EC Pre-Insulated Pipe Cartel OJ L 24/1 [1999]
Commission Decision C(2016) 4215 Container Shipping [2016]

British Court Cases:
Competition Appeals Tribunal, Replica Kit – JJB Sports v. OFT 2004 CAT 17
Competition Appeal Tribunal, Toys and Games - Argos Ltd & Littlewoods Ltd v. OFT. 2004 CAT 24
Court of Appeal – combined judgment, Replica Kit and Toys 2006, EWCA Civ 1318

Dutch Competition Authority:
Decision of the Board of the Netherlands Authority of Consumers and Markets (ACM), Case number: 13.0612.53 - Commitment Decision Regarding Mobile Operators, January 2014:
6.3 Books


6.4 Articles


Bergman, Mats, "Introduction” The Pros and Cons of Information Sharing, Swedish Competition Authority, 2006, pages. 11-17.


