

**RE-PRICING THROUGH DISRUPTION IN OLIGOPOLIES WITH TACIT
COLLUSION:
A FRAMEWORK FOR ABUSE OF COLLECTIVE DOMINANCE**

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INTRODUCTION

This paper proposes an understanding of abuse of collective dominance or shared monopolization that does not outlaw oligopolistic tacit collusion as such, but that reputes abusive a set of tactics adopted by tacitly colluding oligopolists exposed to disruption. As much as deviation is an internal force likely to undermine tacit collusion, disruption is a powerful external force that can cause a return to the competitive equilibrium. The sources of disruption may be technological (*eg* radical innovation), economic (*eg* entry of a low-cost player) or legal (*eg* tax reform). But disruption may never deliver its pro-competitive promises if oligopolists tinker to restore a collusive equilibrium. This paper suggests that competition agencies (“agencies”) can use the dormant doctrine of abuse of collective dominance to illegalize oligopolists’ conduct that seeks to “*re-price*” through disruption, and elude its pro-competitive effect. This rationalized definition of abuse of collective dominance would both promote legal certainty by clarifying the messy state of the law in this field, and ensure economic efficiency by giving agencies a market-triggered *ex post* remedy in mature oligopolies with lethargic M&A activity.

This paper is divided in IV sections. The first section makes the case for more *ex post* enforcement in oligopolistic markets with tacit collusion (I). The second section describes how disruption can undermine tacit collusion, and what oligopolists can do to overcome the competitive effect of disruption (II). The third section discusses the pros and cons of this approach, from a decision theoretic, error costs approach (III). The last section skims through EU cases decided at Member State level, to gain a better understanding of existing antitrust policies on collective dominance (IV).

**I. THE MERGER CONTROL “BLIND SPOT”: A CASE FOR EX POST
ENFORCEMENT**

Across the world, antitrust policy predominantly approaches tacit collusion *ex ante*¹, through the application of rules on merger control. Agencies halt oligopoly mergers that yield risks of

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¹ For an introduction to the problem of oligopolies and tacit collusion, *See* G. Stigler, “A theory of oligopoly”, (1964) *The Journal of Political Economy*, 44-61; R. Posner, “Oligopoly and the Antitrust Laws: A Suggested Approach”, (1969) 21 *Stanford Law Review*, 1562; N. Petit, “The Oligopoly Problem in EU Competition Law” in *Research Handbook in European Competition Law*, I. Liannos and D. Geradin, eds. Edward Elgar, 2013; M. Filippelli, *Collective Dominance and Collusion – Parallelism in EU and US Competition Law*, Edward Elgar, 2013; B. Hawk and G. Motta, “Oligopolies and Collective Dominance: A Solution in Search of a Problem”, in E. Raffaelli (ed.), *Antitrust between EC Law and National Law*, Bruylant, 2008, p.65; S. Stroux, *US and EC Oligopoly Control*, Kluwer Law International, The Hague, 2004.

coordinated effects.² At the margins, antitrust policy also combats tacit collusion *ex post*. Cartel-type provisions are indirectly enforced to illegalize agreements amongst oligopolists that facilitate tacit collusion (for instance, exchange of information agreements).³

The defect of that enforcement paradigm is so obvious that it should not require much discussion. It leaves unchecked mature oligopolies where mergers do not happen (and/or where oligopolists do not enter into agreements).⁴ Worse even, the antitrust laws might be the cause of merger (or agreements) apathy in many mature oligopolies. Take a duopoly – the market structure most likely to harbor tacit collusion in mainstream theory⁵ – and make a quick thought experiment – with the hypothetical example of the Coca-Cola and Pepsi duopoly. Coca-Cola and Pepsi know that combination (or cooperation) is no option under the antitrust rules, for any agency would prohibit their merger to monopoly.

In mature oligopolies where mergers do not or cannot happen – due to tight M&A markets and/or to a legal impossibility in the duopoly case – the trigger that enables agencies to scrutinize tacit collusion is wholly defused. Oligopolists can thus sustain tacit parallel pricing over time without ever facing competition exposure.⁶ And many real life markets seem to fall within this category. Utilities are a good illustration, with players on those markets being often warned by competition officials that mergers are not welcome.

II. RE-PRICING THROUGH DISRUPTION IN A TACITLY COLLUSIVE OLIGOPOLY

1. THE PRO-COMPETITIVE IMPACT OF DISRUPTION

Our proposed theory of liability may be illustrated by a fictional beer duopoly composed of firms A and B. Both hold an equal share of total output, which is sold to 100 well-informed retailers. The average cost of production of a gallon of beer is 5\$. And both charge 10\$ per gallon to their retailers. As a result, A and B make a 5\$ profit margin on each sold gallon.

The 10\$ parallel pricing policy is caused by tacit collusion. A and B share a joint understanding that 10\$ is the appropriate supra-competitive pricing point. The market is transparent. Retaliation is possible. And there is no prospect of entry.⁷

Moreover, the case is a “*gap case*”: A and B cannot merge because the agency follows a strict prohibition policy in mergers to monopoly. And they do not take part to “*agreements*” that facilitate tacit collusion and that could thus fall within cartel laws.

Government introduces a new tax on beer of 3\$ per gallon. This can be called “*legal disruption*”. The disruptive effect occurs because A and B are forced into individual re-pricing decisions. And both face four possible re-pricing strategies. A first option is to fully transfer the tax to retailers, and raise the price per gallon to 13\$. In this case, the prospect is to maintain a 5\$ per gallon profit margin. A second option is to fully internalize the tax (ignore it), and

² See Article 2(3) of Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29 January 2004. See US Merger Guidelines, US DOJ and FTC, 19 August 2010, p.24.

³ See R. Posner, *supra* note 1. See F. Mezzanotte, “The Anti-Collusion Toolkit: Limits of a Policy that Combats the Facilitation of Collusion”, (2011) 17(4) *European Law Journal*, 495–512. See K-U. Kühn and X. Vives, *Information Exchange among Firms and their Impact on Competition*, Office for Official Publications of the European Community, Luxembourg, 1995.

⁴ See N. Petit, *supra* note 2.

⁵ See E. H. Chamberlin, “Duopoly: Value Where Sellers Are Few”, (1929) 44 *Quarterly Journal of Economics*, 63, p.65.

⁶ Assuming economists are to be believed that tacit collusion exists.

⁷ The industry is mature, the product is homogeneous, technology is stable, there are no capacity constraints, etc.

keep the price per gallon at 10\$. In this case, the profit margin gallon swells to 2\$ per gallon. A third option is to partially internalize the tax. The price per gallon will be set between 10 and 13\$, and the profit margin will be superior to 2\$ but inferior to 5\$. A last option is to over-internalize the tax, and set the price at 9\$. The profit falls to 1\$, but volumes can be expected to increase because retailers will defect from the competitor.

With this background, it should be now apparent that disruption has a huge competitive potential. The new tax introduces a bug in the quiet life of the tacitly collusive beer oligopoly. The beer duopolists must now adjust their prices. And suffice is it that A and B do not follow the same decision for tacit collusion to be structurally undermined. This is because if A and B re-price at distinct levels, the market share of the lowest price duopolist will increase and this will undermine the tacitly collusive equilibrium.⁸

From a game theoretic perspective, such disruptions may be reduced to a simple trade-off between compete (absorb) v coordinate (transfer) strategies in a game with two players. But the menu of re-pricing strategies faced by each oligopolist is more copious. In our example, each player faces at least four possible strategies.

Additionally, disruption has other vexing characteristics that are not well apprehended in a simple game theoretic framework. First, a genuine disruption cannot be anticipated. In our example, the tax may just be introduced as response to unanticipated electoral change. Hence, the re-pricing choice must often be made in poor informational contexts, because oligopolists will not have readily available profitability estimates. Second, disruption demands quick market reaction. In our example, retailers who procure beer weekly will press A and B for a new quote. This leaves little time for trial and error by oligopolists. Third, disruption may also occur in forms which are not necessarily as intelligible as a new tax. Instead of changing the beer tax rate, the Government could just have altered the tax base, change the calculation method or restricted the deductibility of certain expenses. Oligopolists will thus have a hard time deciphering the effect of the disruption on their cost functions.

In real life markets, examples of disruptive events in oligopolies abound. Scherer and Ross report, for instance, that foreign import on the US steel market have repeatedly frustrated tacit collusion dynamics in the 1960s, 1980s and 1990s.⁹ Similarly, in the 1960s, the introduction of radial technology by Michelin upset the quiet life of the US tyre oligopoly.¹⁰ In the 1980s, the entry of low cost carriers on routes dominated by oligopoly airlines caused fares to plummet.¹¹ In 2006, Spain increased taxes on cigarettes by 30%. This triggered a price war which decimated the profitability of oligopolists tobacco producers.¹² In 2011, the entry of the company Free on the French mobile market turned the dormant three players' oligopoly into a

⁸ See J. Bertrand, "Théorie des richesses: revue de 'Théories mathématiques de la richesse sociale' by L. Walras and 'Recherches sur les principes mathématiques de la théorie des richesses' par A. Cournot", (1883) *Journal des Savants*

⁹ See F.M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance*, 3rd ed., Houghton Mifflin Company, Boston, 1990.

¹⁰ See D. N. Sull, "The Dynamics of Standing Still: Firestone Tire & Rubber and the Radial Revolution", "The Dynamics of Standing Still: Firestone Tire & Rubber and the Radial Revolution", *Business History Review*, Autumn 1999.

¹¹ See R. Windle and M. Dresner. "Competitive responses to low cost carrier entry.", (1999) 35.1 *Transportation Research Part E: Logistics and Transportation Review*, p. 59-75.

¹² See "Marlboro y Chesterfield bajan de precio en plena guerra del tabaco", *El Mundo Economía*, 26 January 2006; "Altadis baja ahora el precio de Fortuna y Ducados para responder a Philip Morris", *El Mundo Economía*, 1 February 2006.

price battlefield.¹³ Closer to us, the change brought by digital technologies and sharing economy business models in local transport or hotel services markets is yet another illustration.

When this is properly understood, there is no need to restrict our understanding of disruptive events to cases of market entry. External shocks such as natural disasters, change in tax rates, rise of new technological standards, introduction of new regulatory obligations (*e.g.*, environmental protection, product design, safety regulations, etc.) are all factors which create disruption capable of upsetting tacitly collusive equilibria.

2. RE-PRICING THROUGH DISRUPTION

Having exposed the rudiments of our model, let us turn to its implications. By now, it shall be assumed that the beer duopolists will not stay put. They may adopt a range of practices to restore a collusive price equilibrium post disruption. We call this re-pricing through disruption.

This can be done through the adoption of subtle price communication conduits. In our fictional example, the simplest strategy is for each duopolist to convey its preferred re-pricing intentions to the other.¹⁴ Let us sift through some of the available possibilities that fall short of a cartel infringement:

- A announces to the press that it will transfer the tax to retailers, and that it expects “*the industry*” to follow this lead;
- B makes public statements that it is studying with its analysts the effects of a “*full transfer*” of the tax on retailers;
- An alternative is for B to declare that it will wait to see what A decides, and follow its lead.
- A takes a minority shareholding in B, so as to closely monitor B’s pricing strategy as an insider.

New technologies also allow for more trivial, though equally effective forms of communication. Think of the following:

- A posts its new price on its Facebook timeline. A is friend with retailer Z. Z shares A’s posts on its Facebook page. B is also friend with Z...

Or of the other:

- B tweets @beerretailersassociation that it is ready to discuss compensations given in exchange of a full passing on to retailers.
- @beerretailerassociation retweets this news, and tags @breweryA with the following question: ready to do the same?

With this in mind, let us now slightly change an assumption of our model, to explore further the implications of the doctrine under discussion. In our fictional model, let us imagine that the disruption is no longer tax-driven, but that it is caused by the entry of new market players, say 10 micro-breweries.¹⁵ The 10 micro-brewers do not sell a perfectly substitutable beer, so they will not steal more than 10% of the duopolists’ combined market share. This notwithstanding,

¹³ See N. Huet and G. Guillaume, “Bouygues could turn from predator to prey in French telecoms war”, (2014) *Reuters*, March 17, available at <http://www.reuters.com/article/2014/03/17/us-bouygues-future-idUSBREA2G1JB20140317>.

¹⁴ In the *Atlantic Sugar* case, for instance, one firm posted its prices in the lobby of its headquarters, so rivals could see them. See E. M. Iacobucci and R. A. Winter, “Abuse of Joint Dominance in Canadian Competition Policy”, (2010) 60 *University of Toronto Law Journal*, 219, p.228.

¹⁵ For some data on micro-breweries, see <https://www.brewersassociation.org/insights/microbrewery-tap-room/>

the incumbent duopolists cannot ignore the disruptive effect caused by the micro-brewers' entry. If they want to maintain their profitability through disruption – which is a reasonable assumption to make – they must select a new price point. This price will necessarily have to be superior to 10\$, so they can reap similar profits out of 45% of customer demand (assuming that both A and B lose 5% of orders). And again, this re-pricing decision has nothing obvious, for several collusive price points are possible.¹⁶

Similarly, if the beer duopolists attempt to exclude the micro-brewers, this will alter their costs functions. In our example, A and B may purchase all key inputs on the wholesale market or negotiate exclusive supply agreements with water suppliers, in a bid to foreclose the micro-brewers from access to essential inputs. Any exclusionary strategy of this kind will have a cost effect, which will make the re-pricing decision inevitable.¹⁷

Lastly, the beer duopolists can seek to restore the collusive equilibrium with accommodating practices. The point here is to induce the new entrants to join the tacitly collusive equilibrium with threats and incentives. A and B could declare that they will fight without mercy all those micro-brewers who do not stay within their niche, including by resorting to hostile acquisitions. Or A and B can declare that they are ready to offer financial or technological support to the micro-brewers on condition that they do not enter into the market segment served by the duopolists.

3. FRAMEWORK

Any disruption alters, directly or indirectly, the costs of oligopolists. And this cost effect consistently requires that oligopolists re-price their products. If oligopolists want to maintain collusive profits through disruption, they need to work together to re-set a collusive price point. In this process, they must avoid entering into a horizontal agreement, facilitating practice or plus factor that would expose them to the strictures of competition rules (joint ventures, exchange of information agreement, etc.). In our opinion, abuse of collective dominance or shared monopolization doctrines have a narrow, yet useful role to play in this space. In particular, the adaptative strategies adopted by oligopolists to re-price collusively through disruption and mitigate its pro-competitive effect could be deemed to constitute unlawful abuses of collective dominance or shared monopolization. The core evidentiary components of this theory of liability would entail proof of (i) some degree of pre-existing collusion; (ii) disruption; (iii) re-pricing strategy; (iv) a likely post-disruption return to collusive equilibria.

A chief example of such practices could be the unilateral signaling strategies documented in the economic literature.¹⁸ And if, as some have argued, unilateral communication tactics are pervasive and are often objectively based on other legitimate motives such as customer, investors or shareholders information, this does not rule out the necessity to control them when they purport to ensure competitor information in a subset of tacitly collusive oligopolies subject to disruption.¹⁹ By organizing a sort of antitrust “*blackout*” in oligopolies subject to disruption,

¹⁶ Moreover, both A and B might be tempted to take advantage from the disruption as an opportunity to defect, and gain market share over the other.

¹⁷ All the more so if exclusion is carried out by one oligopolist and not the other.

¹⁸ Scherer and Ross, for instance, report unilateral announcements in the steel industry. See F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance*, op. cit., pp.258-259. Joint negotiations with other firms are not plausible given the antitrust prohibitions.

¹⁹ See J. Markham, “The Nature and Significance of *Price Leadership*”, (1951) 41(5) *American Economic Review*, 891. More generally, see L. Kestenbaum, “What is Price Signalling and How does it violate the Law?”, (1980) 49 *Antitrust Law Journal*, 912; D. A. Washburn, “Price Leadership”, (1978) 64(5) *Virginia Law Review*, 691, p.734.

agencies raise the cost of oligopolists' communication. This may push them towards more hardcore forms of communications, which fall foul of the cartel prohibitions.

In prior research, we have argued that agencies should go as far as to illegalize the exclusionary tactics of tacitly colluding oligopolists in a context of disruption (predatory pricing, systematic defamation of the entrant, judicial harassment, etc.).²⁰ Professors Hemphill and Wu have advanced a similar idea. They propose to declare unlawful oligopolists "*parallel exclusion*" tactics, though their theory of liability is not limited to a disruption context.²¹

With the benefit of hindsight, we believe that those propositions are perhaps too ambitious at this stage for policy implementation. Applying abuse of collective dominance or shared monopolization theories to oligopolists' exclusionary strategies would move enforcement policy well beyond its current scope. As a result, agency officials might be reluctant to push such theories in the decisional pipe-line and stakeholders might lobby more intensely against such drastic expansions of their liability.

Moreover, exclusionary strategies are to some extent embedded in our proposed abusive re-pricing theory of liability, because any foreclosure tactic will have a cost effect that will call for re-pricing initiatives.

III. PROS AND CONS

The debate over the pros and cons of using abuse of collective dominance or shared monopolization as an *ex post* enforcement tool against re-pricing strategies in tacitly collusive oligopolies can be seen through a consequentialist perspective. In this context, a conventional approach consists in relying on the analytical framework laid down by Professor Easterbrook in his seminal 1963 article "*The Limits of Antitrust*".²² As is well known, Professor Easterbrook was amongst the first to vindicate the "*importance of the costs of actions and information*" in the formulation of substantive antitrust rules. In particular, he stressed that antitrust doctrines should be designed to "*minimize the total costs of (1) anticompetitive practices that escape condemnation; (2) competitive practices that are condemned or deterred; and (3) the system itself*". Put differently, the antitrust system should respectively seek to minimize false negatives (or type II errors), false positives (or type I errors) and enforcement costs (or type III costs). In the literature, this initial framework has since then been discussed, augmented and refined by a wealth of studies on errors analysis in antitrust enforcement.²³ A common criticism addressed to Easterbrook's initial framework is that it is very conservative and biased in favour of a small antitrust policy.²⁴ In the following sections, however, we have decided to review our proposed theory of liability through the initial Easterbrook framework. As is well-known, Professor Easterbrook was associated to the Chicago school. With this background we believe that

²⁰ See N. Petit, (2012), "The Oligopoly Problem in EU Competition Law" in *Research Handbook in European Competition Law*, I. Liannos and D. Geradin eds., Edward Elgar, September 2013. Available at SSRN: <http://ssrn.com/abstract=1999829>

²¹ See S. Hemphill and T. Wu, "Parallel Exclusion", *Yale Law Journal*, Vol. 122, 2013.

²² For a discussion of antitrust enforcement and false negatives, see F. H. Easterbrook, "The Limits of Antitrust", (1984) 63 *Texas Law Review*, p. 1-40.

²³ See B.A. White, "Choosing Among Antitrust Liability Standards Under Incomplete Information: Assessments of and Aversions to the Risk of Being Wrong", 20 *BerkeleyTech. L.J.* 1173 (2005).; F. C. Beckner III and S. C. Salop, "Decision Theory and Antitrust Rules", *Antitrust Law Journal*, Vol. 67, No. 1 (1999), pp. 41-76; P. Joskow, "Transaction Cost Economics, Antitrust Rules, and Remedies", *Journal of Law, Economics, and Organization*, 2002, Vol.18(1), pp.95-116

²⁴ See A. Devlin and M. Jacobs, "Antitrust Error", 52 *Wm. & Mary L. Rev.* 75 (2010).

relying on a conservative benchmark to assess a proposed expansion of substantive antitrust law is the best method to neutralize any inherent bias that we may have in discussing the issue.

1. TYPE II ERRORS?

A first possible test for our proposed expansion of antitrust law to re-pricing through disruption conduct is the risk of type II errors. As explained earlier, a merger-only (or merger-mostly) approach of oligopolistic tacit collusion generates a systemic type II error. The sort of events that triggers the applicability of merger regimes is by definition absent in stable oligopolies, and especially in duopolies. A similar conclusion has been reached by Professor Kaplow, who demonstrates that the current formalistic understanding of the concept of “*agreement*” in the rules on anticompetitive coordination leaves socially harmful price-fixing unchecked.²⁵ This again causes a type II error.²⁶

With this background, Professor Easterbrook’s most famous argument was that “*errors on the side of excusing questionable practices are preferable*” to type I errors.²⁷ If we were to follow this proposition, we should thus err on the side of caution and accept that positive competition law leaves existing tacitly collusive oligopolies at bay from antitrust remediation, thereby causing a tolerable Type II error. But can we really turn a blind eye on oligopolistic tacit collusion? Let us look at the three justifications advanced by Professor Easterbrook in support of the idea of tolerating questionable practices in antitrust enforcement: first, most forms of interfirm cooperation caught by the antitrust laws are beneficial; second, monopoly power is self-correcting; third, the costs of monopoly power wrongly permitted are small in comparison of the risks of productive efficiency losses.

Neither the first nor the third justification appear to work in the context of markets where there is oligopolistic tacit collusion. The first justification is absent: there is no procompetitive interfirm agreement and tacit collusion has the same anticompetitive effect as cartels which, as Professor Easterbrook recognized, “*reduce output and produce nothing in return*”.²⁸ The third justification does not seem to work either. Indeed, in any oligopoly market where there are some fixed costs, productive efficiency benefits will be by definition lower than in a market subject to a monopoly. And the second justification is excessively optimistic. Williamson, a Nobel Prize economist once explained that the conclusion that markets will take care of themselves “*relies too greatly on average tendencies*”, and the “*implied time horizon for self-policing to be efficacious may be unacceptably long*”.²⁹

The reasons advanced in support of a tolerant antitrust policy against oligopolistic tacit collusion thus appear far from compelling. And even if, for the sake of the argument, Professor Easterbrook framework was right, our re-pricing through disruption model would only expand antitrust liability by a tractable margin, in line with the humble philosophy aired in his 1963 paper and with the more modern “*evidenced based*” antitrust enforcement framework supported

²⁵ See L. Kaplow, “An Economic Approach to Price Fixing” (2011) *Antitrust Law Journal*, vol. 77(2), 343–449.

²⁶ See A. Devlin, “A Proposed Solution to the Problem of Parallel Pricing in Oligopolistic Markets”, *Stanford Law Review*, Vol. 59, No. 4 (Feb., 2007), pp. 1111-1151: “*At present, society is not given a tool by which to attack tacit collusion, even though evidence of its existence may be explicit and the damage caused by it severe*”.

²⁷ See F. Easterbrook, *supra* p.15.

²⁸ *Id.* P.18.

²⁹ See O. Williamson, “Dominant Firms and the Monopoly Problem: Market Failure Considerations”, *Harvard Law Review*, Vol. 85, No. 8 (Jun., 1972), pp. 1512-1531.

by conservative antitrust scholars.³⁰ First, in our proposed approach, the trigger of theory of liability is the occurrence of disruption. Absent empirical evidence of disruption, *ex post* remedies cannot be administered. It is therefore a prudent approach, considering that tacit collusion may be a “*fat tail*”, low probability-high impact type of market equilibrium.³¹

Second, our approach keeps antitrust proceedings predictable. Abuse of dominance and shared monopolization proceedings will only start in disrupted oligopolies.³² This is a specific and well-delineated setting intelligible to all stakeholders. And this is critical because a recurrent objection against abuse of collective dominance or shared monopolization theories of liability has been that agencies conduct unpredictable investigations in oligopolies, which are a widespread market structure in the modern economy.³³

A possible alternative to abuse of collective dominance and shared monopolization law would be to approach tacit collusion under cartel law.³⁴ Professor Kaplow has made a convincing case in favour of a more economic approach of Section 1 of the Sherman Act.³⁵ The problem, however, with the cartel law approach is not one of desirability, but of feasibility. In existing antitrust regimes, the cartel provisions invariably require a degree of reciprocal cooperation amenable to a formalized arrangement. Our proposed approach – which is not exclusive of the cartel law approach – is not constrained by such restrictive legal requirements. On the contrary, the abuse of dominance and monopolization provisions of most competition regimes, and in particular those of the US and the EU, are couched in sufficiently broad terms to apply to oligopolistic markets.³⁶ In reality, the problem with existing abuse of collective dominance and monopolization law is just the polar opposite. In some jurisdictions, the law has received a very wide, and somewhat exotic interpretation. With this, many firms, and not only oligopolistic firms, are placed today in a state of excessive legal uncertainty when it comes to understanding the contours of their liability under abuse of dominance law.

2. TYPE I ERRORS?

A second benchmark to assess our proposed re-pricing through disruption theory of liability is the risk of prohibition of pro-competitive practices. In Easterbrook’s view, such type I errors are more problematic than type II errors. And this consideration “*is especially important when most practices in the category are beneficial*”.³⁷ Competition agencies should therefore not enforce antitrust law when the practice in consideration belong to a type of practice that is “*probably beneficial*” and leave “*to assessment under the Rule of Reason only those with significant risks of competitive injury*”.³⁸

³⁰ See J. Wright, “Evidence-Based Antitrust Enforcement in the Technology Sector”, Speech delivered at Competition Law Center Beijing, China, February 23, 2013.

³¹ Concerning the inherent difficulty in predicting such low probability-high impact events, see N. N. Taleb, *The black swan: The impact of the highly improbable fragility* (Vol. 2), Random House, 2010. See also, considering that *contactless* tacit collusion is a rare phenomenon, G. Werden, “Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory”, (2003-2004) 71 *Antitrust Law Journal*, 719, p.762; D. Neven, “Oligopolies and Competition Law”, in B. Hawk (ed.), *Fordham Competition Law Institute*, 2008, 725, p. 749.

³² Moreover, agencies may decide to cast priority eyes on duopolies which escape the merger control regimes.

³³ See notably, UK Office for National Statistics, “Concentration ratios for businesses by industry in 2004”, (2006) *United Kingdom Input-Output Analyses*, available at <http://unstats.un.org/unsd/EconStatKB/Attachment106.aspx>.

³⁴ See R. Posner, *supra* note 1.

³⁵ See L. Kaplow, *supra*.

³⁶ As far as EU competition law is concerned, see notably R. Whish & D. Bailey, (2012) *Competition law*, 7th Ed., Oxford University Press, 571.

³⁷ See F. Easterbrook, *supra* p.16

³⁸ *Id.* P.17.

This objection has often been advanced to stall policy progress in relation to the application of abuse of collective dominance and shared monopolization theories of liability in oligopolies.³⁹ But it has less teeth against our proposed expansion of the law. Price communication, price leadership, headline price announcements, publications of price lists, attempts to provoke Government price recommendations, hub and spoke contacts through retailers and other signalling strategies have nuanced welfare effects, and cannot be a priori categorized as practices that are presumably “*beneficial*” (or procompetitive) in Easterbrook sense.⁴⁰ Besides the radical early position of Areeda who stood in favor of a drastic prohibition regime,⁴¹ most authors have long tended to agree that such pricing communication practices deserve to be subject to antitrust examination.⁴² In modern scholarship, Posner, who is not an antitrust activist, argues that in oligopolies with few sellers, exchanges of price information can be inferred to “*be sought primarily to facilitate cartellization*” and “*should be scrutinized carefully*”.⁴³ Blair and Romano show that advance price announcements can generate consumer harm or benefit, depending if the convey information about demand or costs,⁴⁴ and conclude that “[w]hile an inference of explicit collusion may not be warranted from evidence of advance price announcements, it does not necessarily follow that they should go unchallenged”. Carlton, Gertner and Rosenfeld who concede possible efficiencies to price communication, nonetheless propose that “*the rule of reason be the rule of decision in cases involving communication, especially new forms of information dissemination*”.⁴⁵

With this, the discussion ought instead to be focused on the legal test that permits to separate wheat – pro-competitive re-pricing conduct – from chaff – pro-collusive re-pricing conduct.⁴⁶ To overcome this identification problem, a strict standard is arguably needed.⁴⁷ We believe that, in re-pricing conduct cases, six elements should be scrutinized: (i) existing tacit coordination; (ii) plausible (or actual) disruption; (iii) intent based evidence of re-pricing conduct; (iv) nexus between tacit coordination and anti-disruption conduct; (v) absence of alternative pro-

³⁹ The objection to the expansion of abuse of dominance liability to oligopolists’ conduct is the fear of deterring pro-competitive deviation. The risk that agencies would be entitled to scrutinize the conduct of oligopoly firms who are not market leaders, on liability objections similar to those routinely pursued single firm conduct cases could chill the competitive efforts of all the number 2, 3, 4 and N players in concentrated markets, and generate a risk of type I errors (false positives). The fear of type I errors may stall policy progress in relation to the application of abuse of collective dominance and shared monopolization theories of liability in oligopolies. However, to the best of our knowledge, the same difficulty arises in abuses of single-firm dominance cases in relation to “*meeting competition*” justifications. And in this area, no one suggests affording them blanket immunity.

⁴⁰ See R. Posner, “Oligopoly and the antitrust laws: A suggested approach” (1969) *Stanford Law Review*, 21, 1562–1606.

⁴¹ See P. Areeda, *Antitrust Law: an Analysis of Antitrust Principles and Their Application*, 1st Ed., Little, Brown and Company, Boston, 1978, §1407a, p.28 and §1435c, pp.225-227.

⁴² See L. Kestenbaum, “What is Price Signalling and How does it violate the Law?”, (1980) 49 *Antitrust Law Journal*, 912; D. A. Washburn, “Price Leadership”, (1978) 64(5) *Virginia Law Review*, 691, p.734.

⁴³ See R. Posner, *Antitrust Law*, Second Edition, The University of Chicago Press, 2001, pp. 86-87

⁴⁴ See R. Blair and R. Romano, “Advance price announcements and antitrust policy”, *International Review of Law and Economics* 21 (2002) 435–452.

⁴⁵ *Id.* p440.

⁴⁶ See EAGCP Report, “*An economic approach to Article 82*”, July 2005, pp.21-22: “*We therefore need to carefully identify the precise story that is supposed to summarize the alleged abusive behaviour, and to compare it with possible alternative explanations, if there are any, that derive from a non-abusive oligopolistic practice. This exercise identifies the relevant elements and the facts that allow discrimination between the lawful and anticompetitive explanations in a given and specific situation*”.

⁴⁷ See A. M. Rosenfeld, D. W. Carlton & R. H. Gertner, “Communication among Competitors: Game Theory and Antitrust: Application of Game Theory to Antitrust”, 5 *George Mason Law Review* 423 (1997). They recommend to “*include an analysis of many facts and factors including, importantly, the actual effects of the specific communication practices at issue in the specific market in which they occur*” (p.425).

competitive explanation;⁴⁸ and (vi) evidence of actual/likely return to tacit collusion *post* entry. Not all factors carry the same weight in the assessment. For instance, evidence of anticompetitive intent may not be needed in all cases. By contrast, in relation to the last factor, a key issue will be to establish that re-pricing communication has commitment value. In other words, re-pricing communication should not be “*cheap talk*”.⁴⁹ Carlton, Gertner and Rosenfeld take the example of an isolated statement like “*we would be willing to go along with an industrywide price increase*”.⁵⁰ They suggest that such statements would be unlikely to maintain collusion through disruption.

To close this discussion of type I errors, a last remark is in order. A firm and explicit commitment to import tacit collusion reasoning in the land of abuse of dominance and monopolization regimes may collaterally reduce the risks of type I errors in single firm conduct cases. A not insignificant number of exclusionary abuses involve aggressive price conduct – eg, rebates, discounts, predatory pricing, meet and release clauses, etc. – which could equally constitute cheating measures likely to bring a return to cut-throat competition in an oligopoly market.⁵¹ A systematic testing of single firm conduct cases through tacit collusion lenses could help ensure that agencies do not mistakenly confuse procompetitive deviation in tacitly collusive oligopolies with anticompetitive abuse.

III. TYPE III COSTS?

A third benchmark to assess our proposed theory of liability is system costs. In essence, those are the costs incurred by courts and agencies to administer our proposed theory of liability. As we shall see, those costs are neither negligible, nor substantial (1). We also discuss possible system benefits (2).

1. System costs

In an early 1969 paper, Posner recognized a “*problem of proof*”:⁵² how can the existence of supra-competitive oligopoly pricing be established without any proof of acts of agreement, implementation, or enforcement? Posner’s optimistic faith in the ability of plaintiffs, agencies and courts to prove tacit collusion through a checklist of economic factors created a stir. Professor Scherer chastised Posner’s economic treatment of collusion under the Section 1

⁴⁸ See J. Markham, “The Nature and Significance of Price Leadership”, (1951) 41(5) *American Economic Review*, 891: “in a number of oligopolies, it cannot be sure that an individual price increase is the result of a signalling strategy. There may be plenty other reasons for an oligopolist to individually increase its prices such as an increase in the cost of raw materials on supply markets or a more substantial cost/price sensitivity of this firm (due in turn to a more limited efficiency)”. See also, L. Miller, S. Schnaars and L. Vaccaro, “The Provocative Practice of Price Signalling: Collusion v Cooperation”, *Business Horizons*, December 1973.

⁴⁹ See J. Farrell, “Cheap Talk, Coordination and Entry”, (1987) 18 *RAND Journal of Economics*, 34. That said, they find that even cheap talk can play a role. See, e.g., J. Farrell and R. Gibbons, “Cheap Talk Can Matter in Bargaining”, 48 *J. Econ. Theory* 2- 21, 237 (1989). See also, in contrast, T. Cason, “Cheap talk price signaling in laboratory markets”, *Information Economics and Policy* 7 (1995) 183-204 who does not find conclusive evidence in laboratory experiments.

⁵⁰ See A. M. Rosenfield, D. W. Carlton & R. H. Gertner, *supra* p.436.

⁵¹ To talk of European cases only, the major abusive rebates cases of the last decades are often cited as possible illustrations of type I errors. See notably J. Kallaugher & B. Sher, “Rebates revisited: Anti-competitive effects and exclusionary abuse under Article 82”, (2004) 25(5) *European Competition Law Review*, 263-285.

⁵² The expression was used for the first time in R. Posner, “Oligopoly and the Antitrust Laws: A Suggested Approach”, (1969) 21 *Stanford Law Review*, 1562. For a good explanation, see F. Mezzanote, “Tacit Collusion as Economic Links in Article 82 EC Revisited”, (2009) 3 *European Competition Law Review*, 137: “*proof of tacit collusion requires the Commission to overcome a difficult problem of identification, notably how to distinguish tacit collusion from other very subtle conducts like unconscious parallelism and undetected overt collusion*”. Mezzanote goes on to advocate against the use of *ex post* unilateral conduct instruments, owing to this problem of proof.

prohibition, noting that tacit collusion investigations would be “*big cases*” necessitating protracted economic inquiries and endless experts’ quarrels.⁵³ Beyond the obvious resources point, the problem is in his view that observed price parallelism or supra-competitive profits in oligopolies may find several explanations alternative to tacit collusion including undistorted competition,⁵⁴ product differentiation,⁵⁵ Cournot competition,⁵⁶ Edgeworth cycles,⁵⁷ etc. In recent scholarship, Professor Mezzanote has referred to this as a “*problem of identification*”. In an interesting study, he reports two empirical examples from the practice of the United Kingdom (“UK”) agency.⁵⁸ In the oligopoly market for Liquid Gas Petroleum, the UK Competition Commission has found that high prices were caused by switching costs, not tacit collusion. And in the home credit loan market, the Competition Commission considered that supra competitive prices could be explained by the difficulty faced by consumers to compare prices and by the importance given to credit availability over price.

In sum, type III costs may be high, given the need to establish that tacit collusion is the “only cause” of parallel conduct, and not other market dynamics.⁵⁹ And this is likely to require long and costly economic inquiries and experts’ discussions.⁶⁰ For all this, the affirmation of an *ex post* theory of liability to address tacit collusion could be a difficult sell to resource-constrained agencies.⁶¹

On further thought, however, the problem of proof may just be a bogey man. Many empirical economic studies document the existence of tacit collusion.⁶² Typically, the evidentiary method followed by economists is first to screen the market for suspicion of collusion and then to test

⁵³ F. M. Scherer, “The Posnerian Harvest: Separating Wheat from Chaff”, (1977) 86 *Yale Law Journal*, p.983: “Every tacit collusion case [...] would be a “big case”, drawing teams of economist to ply the courts with their expert but conflicting opinions. In the end, the decision would turn significantly upon whose experts were more credible. It would not, I fear, be a system highly likely to yield either truth or justice, especially when private respondents pay \$1,000 per day for “credibility” (including extensive preparation) while the government is limited to \$150 or (in exceptional cases) \$250”.

⁵⁴ Situations of price uniformity may appear, for instance, in mature markets where technology and costs remain constant when operators price at marginal cost as a result of fierce competition in the market.

⁵⁵ Pinkse and Slade show that price increases in the brewery industry had initially been suspected of tacit collusion, and were eventually caused by unilateral effects. See J. Pinkse and M. E. Slade. “Market Power and Joint Dominance in U.K. Brewing”, (2004) 52(1) *Journal of Industrial Economics*, pp. 133-163.

⁵⁶ Similarly, in a model of so-called Cournot competition, which leads to price equilibriums situated between marginal cost-pricing and monopoly pricing, oligopolists may achieve supra-competitive profits absent tacit collusion.

⁵⁷ See E. Avenel, G. de Muizon and N. Daley, “Collective dominant position: Overcoming the Airtours criteria in the ex post control of anti-competitive practices”, *Concurrences*, N° 4-2011, n°39886, pp. 41-50.

⁵⁸ See F. Mezzanote, supra.

⁵⁹ Id. And this investigation is marred with possible “*inferential errors*”.

⁶⁰ For a list of the factors that need to be taken into account in order to identify tacit collusion, see, for instance, M. Ivaldi, B. Jullien, P. Rey, P. Seabright and J. Tirole, *The Economics of Tacit Collusion*, Final Report for DG Competition, European Commission, March 2003; Study on Assessment Criteria for Distinguishing between Competitive and Dominant Oligopolies in Merger Control, Report for the European Commission, DG Enterprise, May 2001, Europe Economics.

⁶¹ Resource constrained competition authorities and courts might thus be reluctant to spend time on such cases.

⁶² On the Ready-mix concrete market in Denmark, see S. Albæk, H.P. Møllgaard and P.B. Overgaard, “Government-assisted Oligopoly Coordination? A Concrete Case”, (1997) *Journal of Industrial Economics*, 0022-1821 Volume XLV; On the car industry in the US, see T. Bresnahan, “Competition and Collusion in the American Automobile Industry : The 1955 Price War”, (1987) XXXV 4 *Journal of Industrial Economics*, 457; on the audit industry in France, see O. Billard, M. Ivaldi and S. Mittraille, “Evaluation of the Risks of Collective Dominance in the Audit Industry in France” (June 2011), *CEPR Discussion Paper* No. DP8417; On electricity markets in the US, see R. M. Benjamin, “Tacit Collusion in Real-Time U.S. Electricity Auctions”, *USAE Working Paper No. 11-08*, (October 4, 2011); On the London Interbank Offered Rate market, see R. M. Abrantes-Metz & A. D. Metz, “How Far Can Screens Go in Distinguishing Explicit from Tacit Collusion? New Evidence From the Libor Setting”, *CPI Antitrust Chronicle*, March 2012 (1).

the hypothesis for verification of collusion. Screens seek to identify patterns of prices, output, costs or demand “*that are anomalous or highly improbable under ordinary competitive conditions*”.⁶³ Such anomalous patterns can be economic models showing that no deviation takes place despite being profitable short term, parallel increases in price not driven by changes in input prices or inflation, price parallelism despite changes in costs, technology or demand, anomalous excess in capacity. The verification consists in (i) controlling for the presence of the four conditions of tacit collusion, namely mutual understanding of the terms of collusion, ability to detect cheating, availability of punishment mechanism and barriers to entry;⁶⁴ and (ii) running a counterfactual analysis.⁶⁵

The problem of proof is moreover instantiated by the practice of antitrust agencies. In merger proceedings, agencies do make occasional findings of pre-transaction tacit collusion when they review the pre-transaction context.⁶⁶ For instance, in *ABF/GBI Business*, the Commission noted:

“a series of structural and behavioural elements are in place supporting the conclusion that the Spanish compressed yeast market already exhibits some degree of tacit coordination allowing ABF, GBI and Lesaffre to influence prices and/or the levels of sales in individual regions through, inter alia, (de facto) exclusive relations with distributors”.

Moreover, it is often forgotten that oligopolists may possess internal documents suggesting the existence of tacit collusion. In support of its challenge of the *Anheuser-Busch InBev/Grupo Modelo* merger in 2013, the DoJ quoted internal company documents showing the parties’ awareness, understanding and intention to pursue a tacitly collusive strategy.⁶⁷

Finally, beyond and above those counter-arguments, the “*problem of proof*” may not be of particularly compounded in our proposed theory of liability. This is because our approach ascribes the antitrust liability to re-pricing conduct. To be clear, some degree of proof of pre-existing tacit collusion remains necessary under the first of the six conditions previously mentioned. However, given that we do not propose to outlaw tacit collusion in itself, plaintiffs, agencies and courts can perfectly operate under a “*preponderance of the evidence*” standard of proof (51% or causation more likely than not) close to the one that applies in merger control,⁶⁸ and laxer than the “*proof beyond reasonable doubt*” standard when it discusses the prior existence of tacit collusion.⁶⁹ The application of cartel law to tacit collusion along the lines

⁶³ See R. M. Abrantes-Metz & A. D. Metz, “How Far Can Screens Go in Distinguishing Explicit from Tacit Collusion? New Evidence From the Libor Setting”, *CPI Antitrust Chronicle*, March 2012 (1).

⁶⁴ See GC, T-342/99, *Airtours plc. v. Commission*, 6 June 2002, ECR [2002] II-2585 for an early formulation with three conditions. The test was complemented by an additional condition in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2004, at §41. In the US, See Merger Guidelines, US DOJ and FTC, 19 August 2010, in section 7 p.24.

⁶⁵ See S. Davies and M. Olczak, “Tacit v. Overt Collusion, Firm Asymmetries and Numbers”, Working Papers 08-32, Centre for Competition Policy, University of East Anglia.

⁶⁶ In the EU, the Commission evidenced pre-existing tacit collusion in a number of merger cases: *Exxon/Mobil* (1999), *Grupo Villar Mir/EnBW/Hidroeléctrica del Cantabrico* (2001), *EnBW/EDP/Cajastur/Hidrocantabrico* (2002), *Bayer/Aventis Crop Science* (2002), *Wallenius Lines AB/Wilhelmsen ASA/Hyundai Merchant Marine* (2002), *Dong/Elsam/Energi E2* (2006), *ABF/GBI Business* (2008), *RWE/Essent* (2009).

⁶⁷ See <http://www.justice.gov/atr/cases/f292100/292100.pdf>

⁶⁸ See Case C-13/03 P, *Tetra Laval v. Commission*, [2005] ECR I-1113, at §44: “*That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission’s conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible* (emphasis added)”.

⁶⁹ See notably Y. Botteman, “Mergers, standard of proof and expert economic evidence” (2006), 2 *J. Comp. L. & Econ.* 2 (2006), p. 74.

proposed by Professor Kaplow would, in contrast require the application of a “*proof beyond reasonable doubt*” for the cartel offenses give rise to quasi-criminal liability.

2. System benefits

In some jurisdictions, and especially in the EU, the doctrine of abuse of collective dominance has received a wide judicial interpretation. Though some recent courts pronouncements have seemingly limited its scope, the notion of collective dominance is not restricted to oligopolistic markets where tacit collusion conspicuously occurs.⁷⁰ It seems to be applicable as soon as an oligopoly is structurally observed regardless of whether price parallelism prevails in the market. And it also seems to apply to un-concentrated markets where atomistic firms share “*links*”. Moreover, the perennial single-firm conduct principle that the notion of abuse is open-ended has never been judicially refuted in a collective dominance context.

As a result, abuse of collective dominance is an open-ended concept, and this has generated significant type III costs which have been well observed in relation to “*sports-league*” activities. In the past years, clever complainants – almost invariably sports clubs, sports players or their agents – have kept demanding to agencies to illegalize restrictive sports leagues’ regulations, on the ground that the league members would occupy a joint dominant position through their organizational link.⁷¹ Agencies have no other choice but to devote time and resources to review, and then dismiss, those ludicrous complaints. And sometimes, agencies are even dragged in appeals proceedings.⁷²

Under a rationalized notion of abuse of collective dominance limited to re-pricing conduct in tacitly collusive oligopolies, those cases would collapse like a house of cards. Agencies would in turn free resources for cases worthy of investigation,⁷³ and reduce type III costs.

To be sure, it could also be argued that the open-ended case law is a tool that gives vast remedial margin of maneuver to agencies. And as is well known, agencies are rarely keen to limit their decisional discretion. That said, however, the conjecture that the open-ended abuse of collective dominance theory is a Swiss-knife that antitrust agencies may prefer to keep in their toolbox is a preposterous one. The best proof of this is that the European Commission has expressed a clear disinterest for the enforcement of the abuse of collective dominance theory in the Guidance Paper on enforcement priorities under Article 102 TFEU.⁷⁴

⁷⁰ Even though the General Court (“GC”) of the EU has made declaration in this sense. See GC, T-193/02, *Laurent Piau v. Commission*, 26 January 2005, ECR [2005] II-209, §111; See also GC, T-296/09, *EFIM v. Commission*, 24 November 2011, ECR II-0000, §§73 and 75. Some authors challenge the relevance of *Piau* as a precedent to the principle that collective dominance applies to tacit collusion. See F. Mezzanote, “Tacit Collusion as Economic Links in Article 82 EC Revisited”, (2009) 3 *European Competition Law Review*, 137.

⁷¹ See, for instance, the EU Commission cases in COMP/39471 (*ATP*); COMP/39732 (*Formula 1 association*); AT.40105 (*UEFA*). Another example (not sports related) is COMP AT/39921 (*DataCell*), related to payment services.

⁷² See, for instance, Case T 273/09, *Associazione Giulemanidallajuve v European Commission*, Order of the General Court, 19 March 2012.

⁷³ And they would also make a more intelligible use of the case-law, which should help firm in their compliance efforts.

⁷⁴ Even if the Guidance Paper confirmed the theoretical applicability of the concept of collective dominance, it focuses on situations of “*single dominant position*” as a matter of enforcement priority. See Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 3 December 2008, COM(2008), 26 p., §4: “*Article 82 applies to undertakings which hold a dominant position on one or more relevant markets. Such a position may be held by one undertaking (single dominance) or by two or more undertakings (collective dominance). This document only relates to abuses committed by an undertaking holding a single dominant position*”.

IV. OVERVIEW OF ENFORCEMENT IN EU MEMBER STATES

In 2011, we published a review of collective dominance and coordinated effects cases in the EU member States over the period 2007 to 2011.⁷⁵ This exercise was conducted with the database *e-competitions*. It led to the identification of 39 decisions worthy of interest. For this paper, we have decided to renew the exercise since 2011.⁷⁶

In this new research, we have identified only 9 relevant decisions or judgments.⁷⁷ This is not much. It may denote a disinterest for collective dominance at the Member State level.

In so far as merger control is concerned, most of the cases concern Germany. Two cases discuss the use of structural market share presumptions in collective dominance cases.⁷⁸ In *Fresenius Kabi/Fenwal*, the German agency has seemed willing to advance a “*more economic*”, less structural approach of oligopoly mergers.⁷⁹ In contrast, the German Federal Court vindicated a more orthodox stance in the *Total/OMV* case, reaffirming a tough stance on mergers in concentrated industries.⁸⁰

In abuse of dominance cases, three agency decisions found an infringement,⁸¹ but only two of them deserve commentary.⁸² In the Spanish *Telefonica, Vodafone and Orange* case, the agency imposed large fines to three telecommunications firms for abusive pricing in termination markets.⁸³ The case, however, did not concern a genuine tacit collusion setting. The agency found that each telecommunication operator individually occupied a dominant position on its own termination market. In its reasoning, it aggregated those legal findings and eventually talked of a situation of collective dominance, but this is merely formal.

Besides, in a French case in the aggregates sector, the agency found that four firms that had unlawfully engaged into price fixing, had also abused of a collective dominant position by jointly refusing to supply rockfills to competitors.⁸⁴ We read the decision in full. In this case,

⁷⁵ See N. Petit and N. Neyrinck (2011), “Collective dominance: An overview of national case law”, *e-Competitions*, No. 39129, October 2011. Available at: <http://orbi.ulg.ac.be/handle/2268/106843>

⁷⁶ The same caveats apply to this research. They are discussed at footnote 5 of our 2011 paper.

⁷⁷ The 6 other results that we retrieved do not concern cases but advocacy and legislative proposals.

⁷⁸ See W. Nothhelfer, “The German Federal Cartel Office blocks a joint-venture for the creation of an online video on demand platform by the two leading German TV broadcasters (RTL and Pro7Sat1)”, 17 March 2011, *Bulletin e-Competitions* March 2011, Art. N° 36120; see P. Elliott, “The German Competition Authority prohibits merger between cable network operators (*Tele Columbus/Kabel Deutschland*)”, 22 February 2013, *Bulletin e-Competitions* February 2013, Art. N° 57216.

⁷⁹ See P. Werner, “The German Competition Authority clears merger in the healthcare industry despite presumed market dominance and a presumed oligopoly, and applies a rather detailed economic analysis, in relation to the SIEC and the old dominance test (*Fresenius Kabi/Fenwal*)”, 11 December 2012, *Bulletin e-Competitions* December 2012, Art. N° 57351.

⁸⁰ See P. Elliott, “The German Federal Court of Justice rules on appeal against decision prohibiting petrol station deal (*Total/OMV*)”, 6 December 2011, *Bulletin e-Competitions* December 2011, Art. N° 58350

⁸¹ There was one additional abuse of dominance case, but this was a failed action for damages before the Italian courts. See P. Croene, “The Italian Supreme Court confirms a rejection of damages claim for alleged abuse of collective dominance (*Delta Impianti*)”, 5 March 2014, *Bulletin e-Competitions* March 2014, Art. N° 67173

⁸² We do not discuss here a Lithuanian case that we found in the database, for the facts and the description given do not clearly explain the collective dominance analysis followed in the case. See Giedrė Adomavičiūtė, “The Lithuanian Competition Council fines two retailers for imposing unfair conditions on their food and drinks suppliers (*Norfos mazmena/Rivona*)”, 24 January 2014, *Bulletin e-Competitions* January 2014, Art. N° 71867.

⁸³ See P. Pérez Fernández, “The Spanish Competition Authority imposes fines of nearly € 120 M on telecom operators for having abused of their dominant position in the wholesale telephone sort messaging market (*Telefonica, Vodafone and Orange*)”, 19 December 2012, *Bulletin e-Competitions* December 2012, Art. N° 50523

⁸⁴ See French Competition Authority, “The French Competition Authority fines several civil engineering companies for having distorted competition in the civil engineering sector in Saint-Pierre-et-Miquelon (*GIE Exploitation des carrières*)”, 26 January 2012, *Bulletin e-Competitions* January 2012, Art. N° 58714.

the abuse of collective dominance allegations seemed largely ancillary to the price-fixing and bid rigging concerns. And the collective dominance finding was not reasoned in tacit collusion terms, but instead by recourse to proof of “*structural links*” amongst the four players (*ie* the participation to an industry-wide trade grouping).

The sole possible conclusion of this modest review is perhaps that no case clearly concerns tacitly collusive oligopolies. Beyond this, however, the sample of the results found in the *e-competitions* database is unfortunately too poor and unclear to shed any light on issues worth of policy discussion.

CONCLUSION

This paper has sketched the contours of a rationalized, market-triggered, case-law proof and predictable abuse of collective dominance theory of liability. It is not the grand legal revolution that some may have ambitioned. It focuses on the adaptative re-pricing strategies adopted by oligopolists to artificially buffer the pro-competitive effect of disruptive events, and dynamically maintain an anticompetitive tacitly collusive equilibrium.

As limited as it may be, however, we believe that our proposed approach would incrementally improve the current *ex ante* merger-only (or merger-mostly) paradigm that prevail in many antitrust jurisdictions. It would fill part of the gap caused by the exclusive recourse to merger instruments. And it would complement existing *ex post* tools that illegalize oligopolists agreements that facilitate tacit collusion,⁸⁵ such as unilateral price-signalling.⁸⁶

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⁸⁵ See also R Gjendemsjo, E. Hjelmeng and L Sorgard, “Abuse of Collective Dominance: The Need for a New Approach”, *World Competition*, 36, no 3 (2013): 355-372. The authors propose to apply the concept of abuse to certain facilitating practices taken by oligopolists like minority shareholdings and most favored nation clauses that in principle fall foul of Article 101 TFEU but that may be immune from antitrust scrutiny when applied by dominant firms to consumers.

⁸⁶ At a later stage, the approach may be enlarged to tackle exclusionary tactics of tacitly colluding oligopolists exposed to disruption. For more on this *see* N. Petit, *supra*.