INFORMATION SHARING AS EX ANTE REGULATION: 
A NEW LOOK AT THE PROPHYLACTIC RULE 

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Abstract 

It is trite law that the exchange of information between horizontal competitors may amount to anti-competitive infringements under Art 101 TFEU. The conceptual basis for this rule, however, is far less obvious. In this article, we attempt to elucidate the fundamental nature of the rule. If the rule is to be consistent with the welfare-maximising objective of competition law, it must be grounded on the conception of prophylaxis – a form of ex-ante regulation. However, given the prophylactic nature of this rule, we argue that enforcement of it through the statutory medium of Art 101 TFEU is problematic. We provide three reasons for why this is so. First, we argue that the classical dichotomy between “object-type” infringements and “effect-type” infringements in Art 101 TFEU aims to address both presumed and actual anti-competitive harm. Regulating the risk of future anti-competitive harm from information exchange, however, requires further inferential leaps that may not be justified. Second, drawing on the literature in industrial economics, we assert that any clear dichotomy separating information exchange practices into distinct categories of “object-type” infringements and “effect-type” infringements is likely to be arbitrary. Third, we contend that in contrast to the ambit of Art 101 TFEU, the rule prohibiting information exchange has a far more limited scope – that of preventing the facilitation of collusion. In light of the aforementioned reasons, we suggest potential avenues for reform. In particular, we submit that liability for information exchange between competitors should only be imposed when there firms breach clear and bright-line standards specifying the exact practices that are prohibited ex-ante. 

I: Introduction 

It is no overstatement to say that we live in an “information age” today. The advent of technological innovations over the past few decades has led to an exponential increase in our ability to store, transmit, and process information. From 1986 to 2007, Hilbert et al estimate that our capacity for bidirectional telecommunications has grown at an enormous rate of almost 28% per year. In contemporary commerce, firms often rely on immediate access to detailed information of other firms in making important business decisions. 

For competition law specialists, the exchange and use of information between horizontal competitors demands additional scrutiny, as it is closely related to the competitive structure of the market that these firms compete in. The relationship is an involved one – on an abstract level, information exchange has ostensibly conflicting effects on the level of competition in a given market. For example, while a fundamental tenet of the theory of perfect competition is the assumption that there is perfect freedom of information amongst firms and consumer, it is also uncontroversial that the exchange of price-sensitive information may facilitate collusion between competing firms. This complex relationship mirrors the approach adopted by substantive EU competition law. While many forms of information exchange between competitors are pro-competitive and unlikely to infringe competition law, other types of information exchange will raise competition concerns and may amount to such infringements. However, despite the extensive caselaw of the EU Community Courts concerning instances of information exchange between undertakings, the conceptual basis for the imposition of liability is far less obvious. The EU Community Courts often note that information exchange has the potential to stymie competition, but
the assertion fails to consider exactly how information exchange does so. Furthermore, any attempt at formulating a conceptual basis for the imposition of liability raises further questions to be considered. What are the economic theories of harm that follow from information exchange? Are these theories of harm sufficient to justify the imposition of liability on undertakings through the medium of competition law? Are there particular characteristics of the type of information shared that are critical in establishing liability?

In our article, we attempt to address some of these questions. Our article is organised pursuant to two parts. In the first part of our article, we attempt to elucidate the descriptive nature of rules in existing EU competition law with regard to the exchange of information between horizontal competitors. We argue that if the rule is to be consistent with the welfare-maximising objective of competition law, it must be grounded on the conception of a prophylactic rule. We characterise the rule as a form of ex-ante regulation, and explain why it has no ex-post counterpart in competition law.

In the second part of our article, we seek to examine normative arguments as to the desirability of existing rules in EU competition law that regulate information exchange. Given the prophylactic nature of this rule, we argue that enforcement of it through the statutory medium of Art 101 TFEU is problematic. We provide three reasons for why this is so. First, the classical dichotomy between “object-type” infringements and “effect-type” infringements in Art 101 TEFU aims to address both presumed and actual anti-competitive harm. Regulating the risk of future anti-competitive harm from information exchange, however, requires further inferential leaps that may not be justified. Second, drawing on the literature in industrial economics, we assert that any clear dichotomy separating information exchange practices into distinct categories of “object-type” infringements and “effect-type” infringements is likely to be arbitrary. Third, we contend that in contrast to the ambit of Art 101 TFEU, the rule prohibiting information exchange has a far more limited scope — that of preventing the facilitation of collusion. In light of these reasons, we suggest potential avenues for reform. As liability for information exchange may only be imposed in the form of ex-ante regulation, the aforementioned uncertainties associated with the enforcement of these rules are especially problematic. Hence, we submit that liability for information exchange between competitors should only be imposed when firms breach clear and bright-line standards specifying the exact practices that are prohibited ex-ante.

To the best of our knowledge, our characterisation of the rules governing information exchange as a form of ex-ante regulation is a novel one that has not been adopted by the literature. While we support the extensive use of economics in contemporary competition law as a methodological tool, our paper illustrates that the conceptual basis of liability in competition law for a firm’s given conduct must be distinguished from the economic effects flowing from that conduct. Indeed, a central corollary of our paper is that liability simpliciter in competition law should not turn on whether a firm has engaged in an activity that has, or potentially would, decrease social welfare. Thus, courts and competition law authorities must recognise the limits of law as a regulatory tool in achieving a stated objective — in this case, the maximisation of economic efficiency.

This article proceeds as follows. Part II reviews the role of Art 101 TFEU in regulating information exchange, and discusses an important distinction between “economic” and “legal” collusion. Part III distinguishes the distinct concepts of maintaining economic collusion and information exchange, and explains why the latter is better characterised as a facilitating practice that ameliorates the existence of the former. Following this, we go on to argue that any competition regime that makes the conscious policy decision to prohibit certain instances of information exchange must establish liability on a prophylactic basis.
We elucidate how the rule manifests itself as a form of *ex-ante* regulation, and illustrate why it has no *ex-post* counterpart in competition law. In Part IV, we provide a critical examination of the current state of EU competition law on information exchange. Drawing on the Law & Economics literature concerning ex-ante regulation, Part V argues for the appropriate reformation of these doctrines. Part VI concludes.

II: Art 101 TFEU and Information Exchange

A. The Economist’s Definition of Collusion

Where exchanges of information between competitors amount to anti-competitive infringements in EU competition law, liability must be established under Article 101 in the Treaty on the Functioning of the European Union (“TFEU”). Art 101 TFEU prohibits “agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market”. Consequently, information exchange that attracts liability under Art 101 TFEU must amount to an “agreement or concerted practice” as defined by the caselaw expounded by the CJEU.

While the wording of Art 101 TFEU ostensibly distinguishes between the distinct concepts of agreements, decisions, and concerted practices; collectively, the three concepts merely aim to capture different forms of coordination and collusion between undertakings. As Jones and Sufrin have pointed out, “the different forms of collusion are distinguishable from each other only by their intensity”. The concepts of “collusion and coordination” require further elaboration, but for now let us use the term as a synonym for an “illegal concertation that should be prohibited”. Collusion between undertakings is seen as a central touchstone of liability in EU competition law because of its adverse effects on economic efficiency. Therefore, a primary objective of competition law is the deterrence of conduct that would lead to the aforementioned effects. The inferential process here is instrumentalist – Art 101 TFEU aims to prohibit collusion as a form of anti-competitive conduct, but *only* because of its negative effects on social welfare.

The legal definition of “collusion” expounded above begs the question – what are the specific types of “concertation” that should be prohibited under competition law? The answer to this question is non-trivial – if liability is to turn on the welfare effects flowing from a given course of conduct, the definition of “collusion” could be expanded to encompass any state of affairs whereby certain conduct results in a decrease in welfare vis-à-vis a counterfactual where the conduct does not take place. While this does not reflect the current state of the law, it seems to reflect the economist’s view of “collusion” – here, “collusion” refers to the situation where firms in a given industry have prices that are higher than some competitive benchmark. The legal definition of “collusion” that was used earlier suggests “concertation”, which implies some form of communication between the firms concerned. The economist’s definition, however, is independent of this requirement, and simply refers to a state of affairs where firms are able to maintain supra-competitive prices.

B: A Primer on Economic Collusion and How It May Be Sustained Without Legal Intervention

While economic collusion may not be the basis for liability insofar as Art 101 TFEU infringements are concerned, it is important to set out a theoretical framework concerning economic collusion insofar as competition law attempts to *respond* to the adverse effects
on economic efficiency that result from economic collusion. As we will argue in Part X, the differential treatment of various instances of economic collusion is critical to our argument that the rule prohibiting information exchange is prophylactic in nature.

Contemporary industrial economics informs the scope of competition law by highlighting the inherent instability of economic collusion even in the absence of laws forbidding anti-competitive practices. Based on game-theoretic oligopoly theory, economists view market play between competitors as a game where competing firms are rational players in the market, attempting to maximise their profits. An equilibrium of the game is a state of affairs where each player plays its best strategy, and where no player has an incentive to deviate from its existing strategy. In the context of this market play, each firm (player) decides on the particular price that the firm will adopt in the market. Economists have shown that when firms interact with each other in a static (one-shot) setting, each firm will choose to set the competitive price as its dominant strategy. Although the entire industry is better-off if all the firms set the supra-competitive monopoly price, each firm has an incentive to deviate by reducing its price below this supra-competitive price to capture the market shares of its competitors. This incentivises all the firms to reduce their prices accordingly until the market price reaches the competitive price level.

However, when firms interact with each other repeatedly, firms have an opportunity to retaliate to a reduction in price by other firms in subsequent games. For example, they may reduce their prices to the competitive level in subsequent games if any firm reduces its price in the current game to increase its short term profits. The short term profits from an individual price reduction may not compensate for all the future losses produced by retaliation. Following this, all firms will be reluctant to deviate, and supra competitive prices will be maintained as a result. This coordinated maintenance of supra competitive prices is the essence of economic collusion. An examination of the sustainability of economic collusion is thus based on the so-called “incentive compatibility constraint” – each firm compares the short term profits it makes from a deviation with the profits it gives up in future when its rivals retaliate. A collusive equilibrium will only arise if the former is lower than the latter.

In light of the aforementioned analysis, to successfully collude, competing firms must overcome three obstacles. Firstly, they have to reach a common understanding of the terms of coordination; secondly, they should be able to monitor adherence to those terms of coordination; and thirdly, they should be able to effectively punish firms that deviate from the terms of coordination. The first factor relates to the ability of competing firms to reach a collusive equilibrium, while the latter two factors relate to the ability of the competing firms to sustain that collusive equilibrium. The relationship between these factors and information exchange is an important concept which we will return to later.

C: Tacit Collusion


2 In other words, they should be able to detect deviations from the terms of coordination.

3 We adopt this conceptual distinction from Gonzalez A. O., Object Analysis in Information Exchange among Competitors, 311 European Competition Journal 314–320, 318 (2012).
Differing views over the scope of “illegal collusion” in competition law culminated in what we now know as the “Posner-Turner” debate in U.S. Antitrust Law. The debate centred on how competition law should treat the phenomenon of “tacit collusion”, where a collusive equilibrium arises without any form of communication between firms in the industry. Recall that in deciding whether to set a supra competitive price at a point in time, each firm compares the short term profits it makes from a deviation with the profits it gives up in future when its rivals retaliate. Suppose that a firm increases its prices by 5%, and a rival firm has to decide whether to follow its pricing. Even without any form of communication between the two firms, a collusive equilibrium may still arise if the rival firm expects that a failure to do so would trigger a costly price war that would reduce profits, or if it expects that it can increase its profits with the new industry price.

Two countervailing tensions informed the debate. On the one hand, the influence of Bork’s work on antitrust provided great deference to the instrumentalist role of competition law on economic efficiency. Pursuant to this view, competition law ought to respond to the inefficiencies resulting from tacit collusion. On the other, legislators were reluctant to prohibit rational business conduct in the absence of evidence proving that there was some type of explicit consensus between two or more firms. The practical realities of competition law enforcement ultimately settled the debate in favour of the latter. The suggestion that behavioural remedies could be used to address rational responses to the structure of the market was viewed as a solution that was close to impossible to implement. By mandating that firms behave “irrationally” to avoid an infringement of competition law, a competition law authority would have to determine an appropriate competitive benchmark in each case – a herculean task given its lack of information concerning any given industry’s costs.

The aforementioned position that was endorsed by the U.S. Courts has been similarly countenanced across the Atlantic in the EU. In accordance with the proposition that tacit collusion simpliciter would not be sufficient to establish liability, the EU Courts have required further extrinsic evidence of communication to establish an instance of illegal collusion. Following an instance of tacit collusion, a clear market outcome that is often observed is the phenomenon of price parallelism, where firms charge similar prices over time. However, the EU Courts have placed restrictions on the inferences that the trier of fact may draw from such a market outcome. In particular, collusive activity may only be inferred from evidence of parallel conduct if it constitutes the sole plausible explanation for such conduct. In other words, where a finding of collusive activity rests exclusively on observed conduct, parallel conduct cannot be regarded as furnishing proof of collusion where there is another plausible explanation. Such plausible explanations would of course include the argument that the parallel conduct was merely a market outcome resulting from tacit collusion between the firms involved.

A clear illustration of this principle is provided by the case of *Ahlstrom Osakeyhhtio v Commission* (“Wood Pulp II”). In this case, forty wood pulp producers and three of their trade associations were alleged to have infringed Art 101 (then Art 85) of the TFEU by concerting on prices. Although there was explicit “hard evidence” of concertation in relation to firms belonging to two of the trade associations, the EC went beyond that, and found that various undertakings not involved in the two trade associations had also infringed Art 101 TFEU as an inference from their parallel conduct. In particular, the EC

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4 *Supra* note 69. As mentioned earlier, evidence of parallel conduct encompasses parallel movements in any parameter of competition, and not just prices.


argued that the identical and quasi-simultaneous price announcements made by the undertakings amounted to parallel conduct that could be explained only by a concerted practice. On appeal, the ECJ annulled this portion of the EC’s decision. The ECJ accepted the expert reports tendered by the undertakings that the “close succession of price announcements could be explained by the natural operation of the market”.

In an ordinary instance of tacit collusion, a given firm would respond to its rivals’ actions only upon its observation of those actions. This is a process that occurs over a period of time, and is closely related to the transparency of information within the market in question. In *Wood Pulp II*, the ECJ noted that the market for wood pulp had various market features which made it extensively transparent. For instance, the rapid information transfer amongst the wood pulp producers could be attributed to the fact that each buyer was in contact with several producers, and would have an incentive to reveal prices set by other producers when they were reduced. Furthermore, most wood pulp producers also had downstream operations which purchased some of their input from upstream rivals, and thus would be immediately informed of any price changes by upstream rivals. Common agents who facilitated transactions between buyers and producers worked for numerous producers and expedited the process of price discovery. Hence, it was entirely plausible that tacit collusion could have been a plausible explanation for the behaviour of the firms that were not involved in the two trade associations.

If tacit collusion per se does not amount to an infringement under Art 101 TFEU, what then, is the appropriate touchstone of liability to establish “illegal collusion”? Our earlier discussion suggested a possible definition – illegal collusion must contain an element of “concertation”, which in turn implies that some form of communication between the firms concerned must exist. Indeed, in situations where the EC is attempting to establish the existence of an agreement, it tends to rely on evidence of documentation establishing the agreement between the undertakings, or on conduct that allows an agreement to be directly inferred from that conduct⁷. As the notion of communication necessarily encompasses the exchange of strategic information between competitors, it is to this concept that we turn our attention to in Section D.

**D: Communication as Information Sharing**

Consider a typical instance of a naked price-fixing⁸ agreement amongst several firms. In order to meaningfully sustain a collusive equilibrium in relation to a common price, the firms in question would have to first achieve unanimous consensus in selecting a particular price to set. Where explicit communications between firms take place, cartel price-setting usually proceeds by way of negotiation. Information exchange in this instance serves an enabling function – it allows the firms to agree on a price that would be potentially profitable for all of them.

In the absence of communication, it is still possible for each firm to independently select an equilibrium price which would be considered by every other rival firm as being the optimal outcome from a collective point of view. This is indeed the situation where tacit collusion between firms is *spontaneously* formed – firms do not necessarily have to engage in direct communication for them to engage in tacit collusion. Nevertheless, the frequency

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⁷ For example, in Case C-277/87 *Sandoz prodotti farmaceutici v. Commission* [1990] ECR I-45, the ECJ held that the tacit acceptance of a term that prohibited exports by a number of customers could be inferred from renewed orders placed without protest on the same terms.

⁸ A naked price-fixing agreement is one that is not part of, or ancillary to a legitimate business arrangement that is unrelated to the suppression of competition.
of such occurrences is likely to be extremely low. Firms in real-world markets are prone to having heterogenous cost structures, range of products, and expectations on future customer demand. As such, each firm is likely to select an equilibrium price that is optimal vis-à-vis its own unique circumstances, but sub-optimal in relation to the competing firms as a collective whole. Following this, a collusive equilibrium would be unsustainable – prices would, *ceterus paribus*, eventually converge to the one-shot, non-cooperative equilibrium price. As Motta rightly points out, any process attempted by such a firm to avoid this outcome might prove to be exceedingly costly for itself. If a firm were to increase its own price in an attempt to persuade its competitors to adopt a new collusive equilibrium price, it would lose market share in any adjustment period. On the other hand, if a firm were to decrease its own price to try to coordinate on a lower price, such a move might be understood as a deviation and trigger a price war. Such problems are avoided when firms engage in the exchange of relevant information.

As examined above, achieving a common consensus on a unique equilibrium is only one of the three main obstacles that firms must surmount to successfully collude. Even if firms are able to come to an initial agreement on a particular equilibrium price to be set, they will not be able to sustain the stability of the collusive equilibrium over time if they are not capable of detecting and punishing deviations. Consider a setting where a given firm cannot observe the prices charged by its rival firms. Where market demand levels are also unobservable, a firm would not know if the lower demand that it observes is attributable to a negative shock in demand, or to a price reduction by a rival which has acquired some or all of its sales. In response, a firm would have to adopt a “mixed strategy” that wrongly “penalises” conduct upon observing lower demand, even in the instance where no firm has actually deviated from the collusive price. Again, these costly strategies are averted when firms engage in the exchange of relevant information.

III: The Ex-Ante Regulation of Information Sharing: A Prophylactic Rule

A: Information Sharing as a Facilitating Practice

Our analysis thus far has outlined the mechanism by which information exchange ameliorates the formation and maintenance of a collusive equilibrium. At the same time, we have also suggested that notwithstanding its adverse effects on economic efficiency, contemporary EU competition law has nevertheless countenanced tacit collusion as legal behaviour for specific policy reasons. This leads us to a conceptual “crossroads” of sorts – does competition law prohibit certain instances of information exchange on a similar basis as it does so for cases of “explicit”, illegal collusion? Alternatively, does it countenance all instances of information exchange on a similar basis as it does so for tacit collusion? Or is there an independent, *sui generis* third ground on which liability for information exchange may be established? The three hypotheses will be discussed in turn. In evaluating the conceptual grounds of liability, we will take into consideration the explanatory “fit” of these grounds in accordance with the contemporary caselaw of the CJEU.

The first hypothesis is ostensibly attractive, insofar as every instance of “explicit” collusion will necessarily involve the exchange of information. Insofar as the information exchange here is merely ancillary to the fact that illegal “collusion” (in both the economic and legal sense) has occurred, one could posit that it merely serves an evidentiary function in proving the existence of a collusive equilibrium⁹. This hypothesis is rebuttable on two grounds.

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⁹ See the case of U.S. v. Citizens & Southern National Bank
Firstly, in an ordinary case of “explicit collusion”, the legal responsibility, or culpability of the firm is closely tied to its conduct in maintaining a collusive equilibrium. Thus, any instance of explicit collusion is associated with a corresponding temporal element, better known as the “duration” of the infringement. This aspect seems to be irrelevant in a solitary instance of information exchange. Secondly, the CJEU seems to treat instances of information exchange as independent of the collusion that results from that exchange. In 

Suiker Unie v Commission [1975] ECR 1663, a group of sugar traders were alleged to have engaged in certain concerted practices to allocate the sugar market amongst themselves. The correspondence and information exchanged between the defendants took the form of telexes and letters detailing how much and where each company was selling and/or intending to sell. In dismissing the defendants’ arguments that their conduct in exchanging information did not amount to concerted practices, the CJEU noted that:

> Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or 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.

The aforementioned passage by the CJEU is instructive. The fact that firms have the “right to adapt themselves intelligently to the existing and anticipated conduct of their competitors” mirrors the basis for why mere tacit collusion is not illegal – competition law should not require that firms behave “irrationally” to avoid an infringement. On the other hand, “direct or indirect” contact with competitors to influence their conduct or to disclose one’s own conduct is to be distinguished from the former right. Such instances of information exchange may amount to a concerted practice under Art 101 TFEU.

The second hypothesis can thus be summarily dismissed. Solitary instances of information exchange may still prohibited under EU competition law, even when no explicit collusion has actually occurred. For example, in John Deere v Commission, a number of tractor manufacturers in the UK approached the EC to clear a proposed agreement between them to establish a data sharing platform where highly specific details on retail sales volume and relative market shares were proposed to be shared. The platform was anticipated to be only open for manufacturer access. As the platform had not been set up, it was clear that no actual effects on competition had eventuated. Nevertheless, the CJEU determined that the exchange of information on the market “reduced or removed the degree of uncertainty as to the operation of the market and that the system is therefore liable to have an adverse influence on competition between manufacturers”.

Indeed, liability for the prohibition of information exchange lies on a conceptually distinct ground. In section X, we posited that competition law attempts to respond to the adverse effects on economic efficiency that result from economic collusion. As Sullivan, Grimes and Sagers point out:

> “… Oligopolistic interdependence…without collusion [used in the legal sense, i.e. without communication] is not unlawful, even in instances where the effect is supra-competitive prices and returns… [However] in instances of interdependent pricing in which the oligopolists act concertedely to bring
about or maintain the industry conditions which make interdependent pricing feasible, there is no inhibition to the application of Section 1… When the concerted exchange of price information facilitates interdependent pricing, the concerted exchange is itself unlawful, not because it constitutes price fixing (which, in reason, it does not) but because, given the structural conditions of the market, it makes it possible or easier for the oligopolists to engage in interdependent pricing, conduct which is lawful if it occurs without concerted facilitation, but which is always harmful to competition… Precisely because interdependent pricing hurts competition, much as does cartelization, any concerted conduct by competitors that facilitates such pricing also hurts competition. And unlike interdependent pricing itself, such facilitating conduct is both avoidable by oligopolists and remediable by courts.

This is the crux of the rule that prohibits information exchange. Unlike the case of tacit collusion simpliciter, information exchange involves an overt act on the part of firms that is not only avoidable by firms, but also practically remediable through the instrument of competition law. It is sapient to note that information exchange is a member of a larger class of conduct forming what we know as “facilitating practices”. A “facilitating practice” is an activity that makes it easier for parties to coordinate price or other behaviour in an anti-competitive way; they make it more likely that tacit collusion will occur, and make tacit collusion more effective. In the next section, we characterise the nature of a rule that prohibits facilitating practices as one that is prophylactic.

B: The Nature of Prophylactic Rules

A rule prohibiting facilitating practices is prophylactic – it aims to prevent, or to reduce the probability of future economic collusion from arising. Even if the rule is infringed, it does not necessarily suggest the existence of any present economic collusion. Nor does infringement of the rule suggest the confirmation of future economic collusion; it merely conveys the fact that the firms in question have chosen a course of conduct that would provide them with strategic advantages if they were to choose to collude in the future. This explains why the failure to use information acquired from price-sensitive exchanges of information does not amount to a substantive defence – the mere exchange of such information would be objectionable per se.

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10 C.f. the view by Ghezzi and Maggiolino that market parallelism “still forms the second building block of any concerted practice in the form of “firms’ planned use of the strategic data acquired through an exchange”, contrasting this to the earlier view in the 1970s that market parallelism was once “the crucial element of the notion of concerted practices.” In our view, market parallelism was never required as an element in establishing a concerted practice. In fact, they take on an even more diminished role for facilitating practices due to the prophylactic nature of the rule. This further suggests that the “parallelism plus” rule (which entails the finding illegal behaviour whenever price parallelism is accompanied by a facilitating practice) adopted by U.S Antitrust Law is difficult to justify since it is the facilitating practice that renders the firm culpable, and not the parallel behaviour per se. See F. Ghezzi & M. Maggiolino, Bridging EU Concerted Practices With U.S. Concerted Actions, 10 Journal of Competition Law and Economics 647–690, 665 (2014).

11 Thus, market outcomes such as high prices in a given industry, or parallel conduct amongst firms in the industry that ostensibly evidence the existence of a collusive equilibrium, have little to no probative value in establishing a facilitating practice. Instead, a facilitating practice should be inferred from proven conduct, evidenced by e-mail messages, memos or other recorded evidence exhibiting the alleged communications.
Our characterisation of the rule as being prophylactic in nature raises two preliminary points that will be considered in turn. Firstly, unlike a rule prohibiting collusion where economic harm has to be either proven or presumed, the prophylactic rule prohibiting information exchange guards against the risk of economic harm. This is an important distinction which will merit further discussion later. Secondly, as opposed to an ex post regulation against existing collusive activity, the prohibition of information exchange amounts to an ex ante regulation that aims to reduce the probability or possibility of future economic collusion. The ex ante nature of the rule is not immediately apparent. Competition law enforcement is generally seen to be ex post in nature, for it “primarily establishes and punishes past infringements or infringements that have already begun”. However, as Shavell rightly points out, the crux of an ex-ante rule lies in the fact that the imposition of liability is independent vis-à-vis the actual occurrence of harm. This may be contrasted with the situation where liability is imposed ex-post; here, liability is intrinsically tied to actual or inferred harm that has occurred.

Ex-ante regulation in competition law is, of course, not limited to the prohibition of facilitating practices. The obvious candidate here is that of merger control – prospective mergers amongst undertakings may be prohibited prior to any consolidation of the merging parties’ assets or manpower. Clearly in this situation no actual harm has possibly occurred. Instead, regulation here is driven by economic theory – there is a strong basis for believing that a reduction in the number of firms or a more symmetric distribution of assets amongst firms would ameliorate conditions for actual collusion. Any prohibition of such a prospective merger must thus proceed on this conceptual basis.

IV: A Critique of Contemporary EU Competition Law

A: The Scope of Art 101 TFEU