Law and Philosophy (2011) 30:105–140
DOI 10.1007/s10982-010-9087-5
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# CONCERTED PRACTICES AND THE PRESENCE OF OBLIGATIONS: JOINT ACTION IN COMPETITION LAW AND SOCIAL PHILOSOPHY

(Accepted 23 September 2010)

ABSTRACT. This paper considers whether, and if so how, the modelling of joint action in social philosophy – principally in the work of Margaret Gilbert and Michael Bratman – might assist in understanding and applying the concept of concerted practices in European competition law. More specifically, the paper focuses on a well-known difficulty in the application of that concept, namely, distinguishing between concerted practice and rational or intelligent adaptation in oligopolistic markets. The paper argues that although Bratman's model of joint action is more psychologically plausible and phenomenologically resonant, its less demanding character also makes it less useful than Gilbert's in our understanding of the legal concept of concerted practice and in dealing with the above difficulty. The paper proceeds in two parts: first, a discussion of the concept of concerted practices in European competition law; and second, a discussion of Gilbert and Bratman's models of joint action, including a comparative assessment of their ability to provide an evidentiary target and an evidentiary platform for concerted practices.

## I. INTRODUCTION AND OVERVIEW

Papers on joint action tend to begin by pointing out how common and pervasive acting together really is. The examples used in support of such an opening salvo include everything from walking together to painting a house together. Some of these papers go on to argue that being able to act together is what makes us human, especially where that acting together involves 'sophisticated' forms of agency and meta-cognition and not, say, 'mere' motor understanding. When we turn to competition law, however, what is remarkable is how narrow and difficult-to-prove certain forms of joint action are pre-

sented to be: the notion of concerted practice, for instance, is to be distinguished not only from agreements and decisions of trade associations, but also from the many different forms of parallel conduct, including rational or intelligent adaptation to each other's actions in certain kinds of markets.

There are other differences still. After all, the activity of philosophising about some phenomenon is obviously different to the activity judges engage in on an everyday basis, i.e. that of framing and characterising facts through some legal concept and justifying normative conclusions on the basis of a set of specific rules and principles. To take but two differences: first, whereas philosophers are free (at least in principle) to generalise from whatever examples they please, in the practice of law, especially in the common law, judges are obliged, and indeed often find it useful, to base their findings on a common stock of factual patterns; second, the kinds of consequences that flow from a court's application of a concept, including the imposition of sanctions, are obviously worlds apart from a philosopher's claim to have captured, say, the necessary and sufficient conditions for what it means to genuinely walk together or paint a house together.

How, then, given these and other differences, can these two fields of human practice be placed in dialogue with each other? Furthermore, how could they possibly assist each other, not only in terms of an enhanced understanding of what, say, it means to do philosophy rather than competition law (and vice-versa), but in terms of how the findings of one may be translatable, and usable, by the other?

This paper is an attempt to answer these questions, though necessarily in modest and incomplete form. The specific strategy taken is to filter philosophical models via an evidentiary sieve. The legal concept of concerted practices, like any other legal concept, has a binary structure: it contains both an evidentiary target and an evidentiary platform. The first points to what the evidence ought to be aiming for, e.g. the forms of conduct prohibited. The second allows us to see what kinds of evidence may support an inference to the existence of such forms of prohibited conduct.[1] The strategy, then, is to consider how models of joint action in social philosophy might be translated into an evidentiary target and an evidentiary

[1] Regrettably, it is outside the scope of this paper to present a fully-fledged account of this evidentiary understanding of the structure of legal concepts.

platform for the understanding and application of the concept of concerted practices in European competition law. The challenge, in particular, will be to investigate whether philosophical analysis and modelling of joint action can help in distinguishing between concerted practices and the rational or intelligent adaptation of trading entities in oligopolistic markets.

The models in social philosophy focused on in this paper are those proffered by Margaret Gilbert and Michael Bratman, whose dispute over the status of the presence of obligations in joint action is particularly instructive for the competition law context. In the result, the paper argues that although Bratman's model is more psychologically plausible and phenomenologically resonant, it is Gilbert's model, with its account of the constitutive status of obligations grounded in a joint commitment to a joint activity, that more readily offers a helpful evidentiary target and evidentiary platform for the concept of concerted practices.

The argument is developed in two parts: first, a part devoted to explaining the legal meaning and uses made of the concept of concerted practices in competition law; and second, a part dedicated to examining and comparing the contributions of Gilbert and Bratman, in light of their applicability to the difficulty of formulating a test for the concept of concerted practices that distinguishes it from rational or intelligent adaptation in oligopolistic markets.

## II. JOINT ACTION IN COMPETITION LAW

### *A. Background*

The aim of competition law, or antitrust law in the United States, is the protection of competition or rivalry amongst undertakings (for the most part trading entities, such as sellers of goods or services). The value of competition is sometimes, if not often, presented under the guise of certain economic ideals, such as allocative and productive efficiency, or greater investment in Research & Development, or general consumer welfare as a result of lower prices.[2] From that perspective, competition law is an integral part of a liberal tradition, according to which 'law and economic freedom are the

[2] Goyder 2003, p. 9.

central means of organising society and giving it meaning'.[3] However, as the reference to consumer welfare already indicates, competition law also relates to 'social equity' and 'freedom from exploitation'; as David Gerber puts it, 'the goal of protecting competition has often been interwoven with the idea of achieving social justice'.[4] On this view, competition law is one of the most important tools that governments can rely on in intervening in the market to protect the weakest in the market from the most powerful.

In the European context, the idea to protect competition began in the 1890's, with the first European competition law having been enacted in 1923.[5] Beginnings were slow and difficult – some countries, like Italy, only introduced competition law for the first time in the 1980's[6] – and it is easy to guess why. The principal enemies of competition law were, of course, representatives of 'big' industry, from whose perspective 'competition laws are generally seen as unwanted constraints on their decision-making prerogatives'.[7] Indeed, buried into this fight between big business and government is one of the paradoxes of this area of regulation: economic freedom is constrained in the name of economic freedom. This and other such puzzles have led to many questions and indeed doubts, e.g. 'Does competition law serve the interests of consumers or surreptitiously protect producers?'[8] Controversies of this kind, in turn, have led some theorists to note that 'competition has been both God and devil in Western civilisation'.[9]

The focus of contemporary competition law is on markets where what is called 'workable competition' is discernable. Workable competition lies somewhere between two extremes: perfect monopoly and perfect competition. The first obtains where 'the provider of goods or services has 100 percent control of the market and there are no close or even similar products or services to which buyers can turn'.[10] Examples include such State-imposed monopolies

[3] Gerber 1998, p. 1.

[4] *Ibid*., p. 2.

[5] *Ibid*., pp. 6–7; though it is perhaps telling that the law could not 'withstand the pressures ranged against it', leading to its elimination in the 1930's.

[6] *Ibid*., p. 8.

[7] *Ibid*., p. 9.

[8] *Ibid*., p. 9.

[9] *Ibid*., p. 1.

[10] Goyder 2003, pp. 9–10.

as the postal service. Perfect competition, on the other hand, would exist in conditions where the number of competitors would be 'so great that the market share of each is tiny, so that none alone has sufficient influence to alter price levels or the balance of supply and demand'.[11] The point is that in such markets the relevant undertakings would 'remain totally uninterested in the actions or reactions of their rivals'.[12] As can be expected, such markets are very rare indeed – perhaps the best example is the agricultural production of the same crop, where none of the producers 'has a large enough percentage of total production in the relevant area to be able individually to influence market conditions or prices'.[13]

Falling in the middle between these two extremes, workable competition generally requires fewer undertakings, with a substantial enough market share, all of which do pay attention and react to each other's actions. Of course, putting it this way immediately brings to mind oligopolistic markets, where there are usually only a 'handful' of competitors and where the 'nature of the rivalry between them is substantially affected by this fact',[14] i.e. circumstances where the undertakings are, and often have been for many years, highly mutually aware and responsive to each other's actions (this often occurs with highly homogenous products, which leave little room for product innovation and differentiation). It is not always easy to distinguish between workable competition and oligopoly, so the best way of thinking about what competition law regulates is markets where there is workable competition, including those with 'recognisable features of oligopoly'.[15]

Exercising a monopoly is clearly profitable; one can raise prices whenever one feels like it (in theory), and one does not have to worry about being pushed out of the market by any other competitor. Where there are few undertakings in a market, and especially where products are homogeneous, the temptations to form something like a monopoly-in-practice (e.g. by fixing prices) are keenly felt by undertakings, certainly in hard economic times (during which nobody wants to begin a price war). Where such temptations

[11] *Ibid.*, p. 10.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*, p. 11.

are succumbed to, undertakings may 'agree, collectively, to exploit their joint economic power and improve their profitability'.[16] We may call such agreements between undertakings 'explicit collusion'. Agreements of this kind are, of course, prohibited by competition law. However, and as one would expect, undertakings are hardly going to advertise the making of such agreements; they may, instead, collude or co-ordinate their efforts in surreptitious forms. The problem, in the context of oligopolistic markets, is that it is not easy to distinguish such prohibited surreptitious forms of collusion or co-operation (what are called 'concerted practices') from mere 'rational or intelligent adaptation', i.e. from mere conscious parallelism. Finding ways to distinguish between such mere conscious parallelism and prohibited forms of 'tacit' (as opposed to 'explicit') collusion and co-operation is precisely the challenge to be investigated in detail in this paper.

The relevant legislation, in the European context, is Article 81 (1) of the *EC Treaty*.[17] The relevant portion of the Article is its prohibition of 'all 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 with the common market'. There are, of course, many other relevant considerations to prosecuting cases of alleged infringements against Article 81. Although it will be necessary to ignore them in the context of the present paper, it ought to be observed that this separation of issues is highly artificial, for in some cases, interpreting any one term or provision is going to depend on how one characterises the relationship between it and other terms and provisions.[18]

The focus in this paper, then, is squarely on the meaning of the term 'concerted practices'. Before we discuss that, however, we need

[16] Jones and Sufrin 2004, p. 771.

[17] *Treaty Establishing the European Economic Community*, Rome, 1958 ('referred to as the EC Treaty'). The EC Treaty, though technically still in force, has been subsumed under the *Treaty on the Functioning of the European Union*, Lisbon, 2009 (thereby also dropping the reference to the 'European Community'). Nevertheless, in this paper, I shall refer to the EC Treaty, given that this is the Treaty that the commentaries and scholarly literature discussed in this paper refer to.

[18] For example, the present paper will not discuss the exemptions mentioned in Article 81(3), nor indeed the relationship between Article 81 and other articles, such as the prohibition on the abuse of dominant market power (this is important to mention, as in some cases what is not a concerted practice may amount to an infringement under Article 82).

to say something, even if necessarily brief, about the meaning of 'agreements between undertakings'.[19]

The notion of 'agreement' under Article 81 is broad; certainly, it covers all explicit and formalised agreements (contracts), but it goes beyond such agreements to include all agreements, whether they are legally binding (e.g. under national contract laws) or whether they were intended to be legally binding, and whether they be written or oral.[20] Examples include: 'gentleman's agreements, standard conditions of sale, trade association rules, and agreements entered into to settle disputes, such as trade mark delimitation agreements'.[21] It does not matter, for instance, that no sanction has been agreed upon for violations of the agreement; all there needs to be is a 'concurrence of wills', e.g. as reflected in parties agreeing on 'good neighbour rules', or on 'certain rules of the game which it is in the interest of us all to follow'.[22] Further, the parties need not go on and enforce the agreement; nor does it matter if the behaviour of the parties differs (partially) from it.[23] What is sufficient is that 'the parties have expressed their joint intention to conduct themselves on the market in a specific way and ''adhere to a common plan that limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market'''.[24] Given the broad meaning given to 'agreements', especially since 'the existence of an agreement may be…implied from the behaviour of the parties',[25] matters of proof are often very difficult

[19] I shall be ignoring 'decisions by associations of undertakings', as the meaning of this term is relatively uncontroversial, and also of least relevance to the concerns of this paper. Perhaps the only aspect worth mentioning here is that the 'decisions' in question need not be legally binding on the parties; what matters is that the decision was 'intended to co-ordinate their conduct' (Vaughan et al. 2006, p. 61). In cases where the proof of such an intention becomes a real issue, it may be that there will be some overlap with what is discussed below.

[20] See Jones and Sufrin 2004, p. 130.

[21] *Ibid*.

[22] *Ibid*. The issue of the concurrence of wills is complicated, in that the notion of agreement here extends to unilateral agreements, even where one of the parties was unwilling to accept the terms of the agreement: see *ibid*., p. 134. In such cases, the European Commission ('the Commission') may choose not to impose a fine on the unwilling party – the point being that an agreement has nevertheless been formed. Some of the controversy here, again matching what is said below, concerns distinguishing between genuine unwillingness and only apparent unwillingness, where the later is in fact tacit acquiescence.

[23] Hirsch et al. 2008, p. 473.

[24] *Ibid*., p. 474; internal quote from Com (2002) OJ L100/1, Recital 98 – *Graphite electrodes*.

[25] Hirsch et al. 2008, p. 475.

and sometimes controversial.[26] Proof can include 'correspondence between undertakings, (unilaterally made records), or agendas of meetings as well as testimonies'; indeed, 'the participation in a joint meeting is of particular importance; it can indicate that there has been an agreement between the parties about a certain form of conduct'.[27]

The less formalised agreements become, the more difficult they are to prove – the more difficult, in other words, is it to infer, based on circumstantial evidence, that an agreement existed. This is precisely where the concept of 'concerted practices' enters the stage. Indeed, in many cases, the authorities will try for both, hoping that where the evidence is not found strong enough to warrant a conclusion that an agreement existed, it will be sufficient to point to the existence of a concerted practice. In that respect, it is worthwhile to keep in mind two points: first, that there can be overlap between less formalised agreements and concerted practices; and two, that the category of concerted practices is a safety-catch-all provision, designed to include cases where proof of an agreement may fall short.

### *B. Commentary and Scholarship on Concerted Practices*

The general definition of a concerted practice is 'a form of co-ordination between undertakings which, without having reached agreement properly so called, knowingly substitutes practical co-operation between them for the risks of competition'.[28] This does not yet tell us a great deal, for we need to know what 'form of co-ordination' is of the prohibited kind (i.e. we need to know the evidentiary target), and we need to know under what circumstances, by reference to what kinds of behaviour or materials, we can reasonably infer the likely existence of such a prohibited form of co-ordination (i.e. we need to know the evidentiary platform). It will be worth our while to very briefly consider a number of the leading commentaries on the concept of concerted practices.

According to David Vaughan et al. (2006), the crucial element of the definition is that one or more of the undertakings, as a

[26] For example, see Korah 2009, §2.02(2)(c).

[27] Hirsch et al. 2008, p. 483.

[28] Vaughan et al. 2006, p. 62.

result of co-ordination, lose or are curtailed in their independence. Vaughan et al. are careful to point out that 'this requirement of independence does not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors', but they do stress that 'it does strictly preclude any direct or indirect contact between them, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question'.[29] With respect to this direct or indirect contact, Vaughan et al. argue that some 'element of reciprocity appears to be acquired', e.g. 'reciprocal disclosure of the parties' intentions, or, possibly, such disclosure by one party in circumstances where other parties have given him to understand that they will act in a certain way in consequence of disclosure'.[30] By 'disclosure' here, Vaughan et al. refer to information that is 'not readily available on the market' and is 'of the sort likely to affect decisions or prices or others terms of supply'.[31] This exchange of information may itself amount to a concerted practice (be the kind of form of contact prohibited), but it may also count as evidence of a concerted practice.[32] Each case here has to be looked at on its own facts, e.g. although the exchange of statistics of the performance of a particular sector of industry is ordinarily unobjectionable, if more information than is required is submitted (e.g. copies of invoices or statistics on prices or sales figures), then 'it will be inferred that the purpose of the exchange is to facilitate co-ordination of the marketing strategy of the undertakings involved and thereby reduce competition'.[33] According to Vaughan et al., it is not actually necessary for there to be exchange of information; in some cases it will be sufficient that there has been unusual simultaneity of prices (or other trade conditions), and that there is no other explanation than the inference that there was a concerted practice.

[29] *Ibid.*

[30] *Ibid.*, p. 64.

[31] *Ibid.*

[32] This double possibility occurred in the *Wood Pulp* case (*Ahlström Osakeyhito and Others v Commission* [1993] ECR I-1307; [1993] 4 CMLR 407), where the ECJ considered the merits of both readings. In light of what is argued below, it may be that the first possibility is better prosecuted as an agreement rather than a concerted practice.

[33] Vaughan et al. 2006, p. 66.

D.G. Goyder, in his account of the meaning of concerted practice, notes that the concept (if not the term) was imported from US antitrust law, where the courts developed a series of 'plus factors' that were designed to distinguish cases of mere parallel conduct from cases of concerted action. Among these factors, were actions that were against the interests of the undertaking.[34] Like Vaughan et al., Goyder also stresses the importance of 'contact between the parties', though he adds that this contact 'must involve intentional communication of information between them, either directly or through an intermediary'.[35] Further, according to Goyder, not only must the sending of the information be intentional, but so must the receipt of it: 'it is also essential for the Commission to show that the party receiving the information is aware of having done so, not accidentally, but as a target'.[36] The exchange must go 'beyond mutual awareness by competitors that the terms which they quote to their customers will subsequently become known to their competitors'.[37] Where such contact is inferred, the parties are still given a chance to defend: they could either argue that the market itself is such that mutual responsiveness is normal and usual, or they could argue that there is some other rational explanation for the co-ordination.[38]

Whereas Goyder's account makes the intentional exchange of information a necessary element, Vaughan et al. argue, as we saw above, that a concerted practice can be proved either by such exchange or by parallel conduct that has no other explanation than the inference of a form of co-ordination that lessens the risks of competition. The explanation given by Alison Jones and Brenda Sufrin (2004) differs yet from these two accounts.

[34] Examples included: 'raising prices at a time when there was a substantial supply available of the relevant product; artificially limiting the supply of products; imposing unusual conditions of sale; refusing to attend sales of goods by auction unless other leading competitors were present; or agreeing to price identical goods to be transported long distance only on identical fixed basing points' (Goyder 2003, p. 72).

[35] *Ibid*., p. 74. In Vaughan et al.'s explanation, it would appear that it can be inferred that there was intentional communication where the information itself is beyond what is necessary for, say, reports of the state of some industry.

[36] *Ibid*.

[37] *Ibid*.

[38] For example, in the *Rheinzink* case (*Compagnie Royal Asturienne des Mines and Rheinzink v Commission*, Cases 29-30/83 [1984] ECR 1679; [1985] 1 CMLR 688) two companies agreed to refuse to supply a particular seller on the basis that the seller had a poor credit record; the problem for the companies was that the seller in question was re-selling at a lower price, thus undermining their profits; the Commission did not accept the parties' explanation, but the Court did.

When they come to discuss the need for 'direct or indirect contact', Jones and Sufrin say, following the European Court of Justice ('ECJ') in the *Suiker Unie* (or the *Sugar Cartel*) case,[39] that 'the criteria do not require the working out of an actual plan',[40] but that instead, the focus should be on contact insofar as its 'object or effect 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'.[41] Jones and Sufrin, then, end up placing much more focus not so much on how the parties collude, but on what the object or effect of their collusion is, namely, the reduction of uncertainty about future conduct. When Jones and Sufrin discuss the exchange of information, they again stress this aspect, saying that what will be unacceptable will be 'exchanges of information, designed to influence the conduct on the market of an actual or potential competitor, to disclose to a competitor the course of conduct which the sender has to adopt on a market or rendering the market artificially transparent'.[42] They do mention the difficulties associated with exchange of information that may be freely available (and thus the need for establishing intentional communication), but they place much less stress on the intentional dimension (e.g. in contrast to Goyder 2003) and much more on the object or effect of such exchange (i.e. the reduction in uncertainty as to future conduct). This focus in their explanation also appears in their discussion of participation in meetings: in the *Polypropylene* case,[43] for example, the 'participants clearly had the aim of eliminating any uncertainty about the future conduct of their competitors', and then they add, 'they were bound to take into account the course of conduct upon which other participants had decided'[44] (this notion of being bound, or obligated, will be important later).

Finally, like Jones and Sufrin, Jonathon Faull and Ali Nipkay (2007) also stress the importance of a kind of contact between the

[39] *Cooperative vereniging Suiker Unie UA v Commission* [1975] ECR 1916; [1976] 1 CMLR 405.
[40] Jones and Sufrin 2004, p. 154.
[41] *Ibid.*, p. 155.
[42] *Ibid.*
[43] *Polypropylene* [1986] OJ L230/1; [1988] 4 CMLR 347.
[44] Jones and Sufrin 2004, p. 156.

parties that reduces uncertainty about the future, and thus eats into the independence of each undertaking in a market. However, they also outline their own three-step test for the establishment of a concerted practice. Their first step involves showing some 'form of contact between undertakings', though this contact can be 'indirect' and 'weak' (e.g. announcement of prices in the knowledge that others would follow it).[45] The second step requires 'some meeting of minds or consensus between the parties to co-operate rather than compete',[46] though this too can 'be found easily', as where it was found that the mere receipt of information about the commercial activities of competitors was sufficient.[47] The third step necessitates, though again on a low threshold, there being some relationship of cause and effect between the concertation and subsequent conduct.[48] Faull and Nipkay present this three-part test as establishing a presumption that there was a concerted practice, which can nevertheless be rebutted if proof is adduced that concertation did not have any influence whatsoever on the conduct of the market.[49] Faull and Nipkay supplement this account by noting that it may be possible to infer concerted practice from circumstantial evidence alone (where there is no evidence of contact and a common intent to co-operate), but that the standard of proof here is very demanding, it being necessary to show that no other rational explanation is available.[50]

We have seen that even amongst the most cited and relied upon on commentaries on European competition law, there is some disagreement about what is required for establishing a concerted practice. Moving further out, there is also heated discussion in the more theoretical discussion of the concept amongst competition law scholars. Perhaps the leading contribution here, and one, interestingly, that also draws on some of the philosophical joint action literature, is that of Oliver Black.[51] In keeping with a theme we have seen above, namely the importance of direct or indirect contact

[45] Faull and Nipkay 2007, p. 212.

[46] *Ibid.*

[47] *Ibid.* It did not matter that the relevant undertaking did not abide by the outcome of the meetings; the mere participation in meetings with manifestly anti-competitive purposes was enough.

[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.*, pp. 213–214.

[51] See Black 2005a and 2005b.

amongst the undertakings, Black argues that the key element of the test for concerted practices ought to be the notion of communication. The importance of communication is illustrated in the following list of grades of correlation[52]:

(1) *Independent action*: each party does an act entirely independently of the other;
(2) *Mutual belief*: the firms act, each believing the other is acting in a particular way;
(3) *Mutual reliance*: the firms act, not only believing the others will act in a certain way, but relying on them to do so;
(4) *Mutual reliance with a common goal*: the firms act in reliance on their belief that the others will act in a certain way, and in doing so the firms have the same goal;
(5) *Mutual reliance with a common goal and with knowledge*: the firms act knowing that all of the foregoing conditions have been satisfied;
(6) *Mutual reliance with a common goal and with knowledge gained, in part, by communication*: the firms act knowing that all conditions have been satisfied in part because they communicate their reliance and their goals to each other.[53]

According to Black, it is communication that distinguishes concerted practices from, say, mere conscious parallelism. Black is surely right that communication is important, and the case law of the ECJ clearly supports such a view.[54] However, it is unclear whether communication itself, even with the other elements mentioned above (reliance with a common goal), is a demanding enough test for the purposes of distinguishing concerted practices from rational or intelligent adaptation in oligopolistic markets. In that respect, Black's analysis of the concept of concerted practices may not give us a sufficiently robust evidentiary target. The difficulties are exacerbated here by the fact that Black provides very few illustrations of the kind of evidence required for his notion of communication. William Page, one of the supporter's of Black's position, has the same complaint: Black, notes Page, says little about the 'proof of concerted action'.[55]

[52] I take this way of presenting it from Page 2007, p. 427.

[53] See Black 2005a, pp. 185–187.

[54] It is noteworthy that some US scholars, principally Page 2007 and 2009, have argued that Black's model also makes sense in the US context. Regrettably, considering the US context is outside the scope of this paper.

[55] Page 2007, p. 428.

Black's model 'does not tell us what sorts of communications satisfy the definition, nor does it tell us what evidence would be sufficient to prove that the requisite communications had taken place. Even', Page adds, 'where there is direct evidence of communications, it will be necessary to determine whether they carry the necessary import'.[56] Black's analysis, in the abstract, is useful and enlightening, but until and unless he provides a clear account of both the evidentiary target and evidentiary platform for concerted practices, his contribution is likely to be marginalised.

Black's difficulties may be compounded by his resistance to the importance of the presence of obligations for concerted practices (or joint action more generally). This is all the more surprising given that Black recognises that at least some of the case law supports the view that concerted practices involve obligations.[57] Black's argument against obligation is, in brief, that there is no 'interesting relation of conditionality connecting reliance and moral obligation…there is no such relation between the state of affairs (SR) that X in doing Ax relies on Y to do Ay and the state of affairs (SO) that X is morally obliged to do Ay'.[58] Black's discussion here is somewhat marred by his talk (based on the talk in the literature he is addressing) of *moral* obligation. It is indeed difficult to see why, or how, there need to be moral obligations present for a concerted practice to obtain. In that sense, Black's notion of reliance is preferable. But what if there was a model of obligation, as contained in an account of joint action, that is not moral in character, and that helped us distinguish concerted practices from rational or intelligent adaptation in oligopolistic contexts – and, furthermore, doing so in a way that reliance may not be able to do? This is a question we must postpone to the next part of the paper, where the debate between two theorists, one who

[56] *Ibid.*, p. 440. The closest that Black comes to offering a test, based on his revision of the notion of communication (Black 2005b), that, he says, courts may rely on is the following: 'In raising prices by 5%, Y intends that X's recognition that Y, in raising prices by 5%, intends to cause X to believe that Y, in raising prices by 5%, relies on X to raise prices by 5% be part of what causes X to believe that Y, in raising prices by 5%, relies on X to raise prices by 5%' (Black 2005b, p. 346). The problem here, as Black himself recognises, is that this is by no means straightforward to apply. Indeed, at one point Black even argues that those daunted by the difficulties here, ought 'to abandon the concept of a concerted practice and…make do with that of an agreement, together possibly with an increased range of structural remedies' (*ibid.*). I do not think we should give up the concept so easily, given that it clearly does have its uses in competition law.

[57] Black 2005a, p. 167. Black criticises the decisions that refer to obligations as being uninformative; I take this differently, as a challenge to articulate what they might involve.

[58] *Ibid.*, p. 169.

defends the presence of obligations in joint action, and another whose account is arguably closer to Black's notion of reliance, will be particularly apt.

Before we do so, it is time to offer a summary of the current state of the law on concerted practices, also indicating where we may need to look for more assistance.

### *C. A Rational Reconstruction of the Current State of the Law*

It appears that there are two streams for the investigation of concerted practices in the European context. Both begin by the investigating authorities (the Commission in the European context) noting what they regard as unusual or abnormal simultaneity or near-simultaneity, or parallelism, of prices (or other trading conditions) in a particular market. Typically, such parallelism[59] has deleterious effects on competition, hence the duty of the Commission to investigate it, and indeed to seek to punish and deter it.

The first stream, which we may also refer to as conduct analysis, can be instructively broken down into an evidentiary target and an evidentiary platform. To recall, an evidentiary target of a legal concept is designed to identify what the evidence ought to be aiming at, e.g. what kind of conduct is prohibited. The evidentiary target in the context of the concept of concerted practices (at least in this first stream of investigation) is a form of direct or indirect contact that reduces the uncertainty of the conduct of the other undertakings in the market or erodes or depletes the independence of any one undertaking to carve out its own future path – its own way of doing business – in the market. The evidentiary platform – which, to recall, is meant to point to bits of evidence or kinds of circumstances on the basis of which we can infer that the evidentiary target has been met – consists, in this context, in the intentional exchange of information (intentionally sent and intentionally received) and / or in the participation of meetings. The inference from such exchange or participation will be all the more warranted where the information exchanged is not readily available in the public sphere, and where the

[59] It is not strictly necessary that the Commission observe the matching of trading conditions; they could, for instance, have notice simply of the intention to collude; in practice, however, it is likely that some such collusion would have taken place. Further, it may be that any prosecution of an intention to collude is better conceived of as an agreement rather than a concerted practice.

meetings in question are organised in a spirit of secrecy. On its own, the evidentiary platform does not help us much, for it is not the mere contact between the undertakings that is prohibited; rather, it is contact of a certain prohibited kind, hence the need for a link (a rational inference) between the evidentiary platform and its target (as described above).

The second stream, based on economic analysis, proceeds by an analysis of the market, and considers whether there are any alternative, plausible explanations[60] of the parallelism in question. If there is no other explanation, then even in the absence of evidence of the kind mentioned in the first stream, the Commission may find (and the Court may uphold the decision) that there was concerted practice. This task, based as it is solely on the analysis of the market, will be very difficult (i.e. it will often be easy to find an alternative plausible explanation) where the market is an oligopolistic one, with inelastic demand, and particularly one that has a history of close-knit long-term relationships amongst a limited number of producers and consumers. In such markets, there is likely to be an alternative explanation for the parallel conduct, this being an explanation that indicates the transparency is not artificial but simply the result of market conditions. Indeed, where the market is of that kind, the Commission is probably better off going only down the first stream, and thus, if it does not find evidence of the kind mentioned above, not to proceed with charges against the undertakings.[61] The particularities of this second stream are illustrated particularly powerfully in the *Wood Pulp* case.[62]

[60] Given the relative ease in finding any simply plausible explanation, it seems preferable to require the explanation to be the *most* plausible, not plausible per se. Nevertheless, the current state of the law appears to only require a plausible per se explanation.

[61] Of course, by nevertheless proceeding with charges, the Commission may simply want to scare the undertakings, rather than be actually hopeful for success in the case. This kind of strategy obviously needs to be tempered by the ethical duty to not prosecute hopeless cases.

[62] In this case, the ECJ dismissed evidence that may have otherwise provided guidance as to what is called above the first stream of investigation (the evidence consisted of documents and telexes, indicating direct contact between the undertakings, but the problem was that the Commission did not specify exactly who was present at the relevant meetings). This left the Court to consider the second stream. In that respect, it relied heavily on two expert reports that both offered not only plausible alternative explanations of the simultaneity or near-simultaneity of prices (based on the argument that the market was already naturally transparent because it was oligopolistic), but also argued that the alternative explanations were the most plausible. It is interesting to note that prior to this case, the leading case, the *Suiker Unie* case, had used language with respect to the notion of concerted practices that many considered to be too wide, leading many to fear that any announcement of prices when followed by others would amount to concerted practices (the *Suiker Unie* case had itself extended the definition of concerted practices in the prior leading judgement, *ICI and Others v Commission (Dyestuffs)* Cases 48-57/69 [1972] ECR 619; CMLR 557). Arguably, then, the Court in the *Wood Pulp* case may have sought to narrow down the circumstances in which concerted practices could be proved.

The stream that is of most interest to this paper is the first one. Indeed, the matter can be narrowed down even further: what exactly is it that the evidence ought to target, and be based on, so as to distinguish between mere conscious parallelism on the one hand, and concerted practice (or genuine joint action) on the other hand? One of the requirements that has on occasion been mentioned (e.g. by Jones and Sufrin above) points to the presence of obligations, i.e. of the undertakings being bound, or obligated, though not in the legal sense, to perform what has been tacitly and informally agreed to. What this mutual binding might amount to, however, and how one could go about proving it, has not received a great deal of attention, either judicial or scholarly. For assistance, we need to turn to the analysis of joint action in social philosophy.

## III. JOINT ACTION IN SOCIAL PHILOSOPHY

It will not be possible, nor desirable, to review the entire literature on joint action here. I have, instead, chosen two theorists, based to a large extent on the problems and concerns that have been canvassed above. The two theorists are Margaret Gilbert and Michael Bratman, and even with respect to their work, given their proficient output, my focus will be very selective. In the first two sections of this part, I will look at their work successively, briefly summarising the principal elements of their view. Then, in the third section, I will consider and compare how their models of joint action might translate into an evidentiary target and an evidentiary platform for the legal concept of concerted practices.

### *A. Walking with Gilbert*

Gilbert's famous analysis of walking together (1990) has undergone many modifications in the last twenty years. In what follows, my focus will be on the account in her 2006 book, *A Theory of Political Obligation*.[63]

Although Gilbert lists many examples of acting together (everything from conversing with one another to founding a nation together), Gilbert's account is based on her analysis of her original example of walking together. The key question is: what distinguishes

[63] In subsequent papers, e.g. Gilbert 2008, Gilbert has noted that the 2006 book offers a particularly comprehensive statement of her view.

us merely walking side by side for a while, or walking together accidentally, from really walking together?

There are two conditions: first, a special standing to rebuke and make demands; and second, the presence of obligations. Let us take each in turn.

Imagine two walkers walking together, 'James' and 'Paula' in Gilbert's example, one of whom, let us say James, naturally walks fast and draws on ahead of Paula. In such a scenario, says Gilbert, if they are walking together, Paula has the standing – and both James and Paul understand that Paula has the standing – to 'demand that he act in a manner appropriate to their joint activity, and to rebuke him should he act in a manner inappropriate to it'.[64] Having presented standing in this way, Gilbert clarifies that to have standing is not necessarily to be justified to rebuke; nor does the understanding that one has such a standing mean that it is likely (it is not a prediction) that Paula will rebuke James. Rather, 'the standing of the participants is a function of their joint activity'.[65]

The second feature, that of the presence of obligations, is tied in with the first. If Paula has standing, and this standing is 'sourced' in the joint activity,[66] then it ought to follow, argues Gilbert, that 'she had some kind of right against James to action appropriate to the joint activity. James would then have correlative obligations to Paula'.[67] James' obligations would include 'walking alongside her when this is feasible and taking corrective action should he find himself drawing ahead'.[68] Evidence of these rights, and especially these obligations, is provided precisely by the kind of rebukes (including potentially apologies and self-rebukes) that we witness when one partner in the joint activity, say, walks on ahead. Gilbert clarifies here that she is not speaking of moral obligations: she is speaking of internal obligations, internal as it were to the joint activity, which would include, for instance, two robbers carrying out a burglary.[69]

[64] Gilbert 2006, pp. 103–104.

[65] *Ibid.*, p. 104.

[66] *Ibid.*

[67] *Ibid.*, p. 105.

[68] *Ibid.*

[69] This is important, for it distinguishes Gilbert's account from Black's critique (mentioned in section II.B above), and also makes it applicable to cases of representatives of undertakings co-ordinating anti-competitive practices and realising as they do so that it is at least legally wrong, if not prima facie morally wrong, to do so.

This second feature is critical to Gilbert's account. Indeed, it may be thought that the standing condition is really only a lead-up to the obligation condition. As Gilbert herself puts it, any account of joint action, on her reading of it, must meet the obligation criterion, i.e. it 'should explain how it is that, at least failing special background understandings, each participant has obligations towards the other participants to behave in a way appropriate to the activity in question…it should explain how such obligations and the correlative rights are *grounded in the joint activity itself*'.[70]

There is another way to explain the obligation criterion, and that is by way of what Gilbert refers to as the 'need for concurrence'.[71] The need for concurrence dictates that 'no one party is in a position unilaterally to decide on the details of a joint action'.[72] Further, and perhaps in a manner that echoes the importance of direct or indirect contact in competition law, Gilbert further notes that 'the parties must make it clear to one another either verbally or by means of other behaviour that each is ready to endorse the detail in question'.[73] An example here, in the case of walking together, might be Paula and James agreeing that James will make decisions about where to go; if, this having been communicated, Paula then unilaterally dictates the route, James would have standing to rebuke her, indicating that James had the right and Paula the obligation to respect his right to decide where to go.[74]

Gilbert goes on here to show that the relevant concurrence, whatever it is, may be 'given in advance, as a result of an ad hoc agreement or prevailing conventions',[75] though she is also careful to note that by no means is she arguing that agreements are necessary as a preface to joint action.[76] Indeed, this last point is important – certainly, if agreements were necessary then this would diminish the applicability of Gilbert's model to competition law (for, to recall, this area of the law distinguishes between agreements and concerted practices). Gilbert's example here is one where Paula runs into James by chance, asks him what he is up to, and he replies that 'he is on his

[70] Gilbert 2006, pp. 105–106; original emphasis.
[71] *Ibid.*, p. 106.
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid.*, p. 111.
[76] *Ibid.*, p. 112.

way to take a walk in Central Park', saying no more, but looking at her 'expectantly'.[77] Paula asks to make a call first, and having done so, turns to James and says 'I'm ready'.[78] This example is interesting because it points to the emergence of rights and obligations in something that is not an agreement, but rather precisely an interchange of sorts. Even here, one should not read 'interchange' too strongly, for one can, for instance, says Gilbert, engage in a quarrel together without any prior 'preamble'.[79]

If not an agreement, then, and not a strong sense of interchange, nor an anticipatory preamble, then what – from where do the relevant rights and obligations emerge? Some kind of 'mutual expressions of readiness for participation in joint action'[80] is necessary, but what kind exactly? Gilbert adds that more than such expression will be necessary; such mutual expression ought also to be 'common knowledge between the parties', i.e. there ought to be 'a fact that is entirely out in the open between them' such that 'it would not make sense for any one of these persons to attempt to hide the fact from another of their number'.[81]

I shall return to these two requirements below, but first we must ask, where does Gilbert ground the presence of rights and obligations, as these are illustrated in the special standing of participants in a joint activity? Gilbert's famous answer here is that we 'jointly commit to espousing' a collective goal 'as a body'.[82] What, then, is a joint commitment, and how does it 'ground' rights and obligations?

It will be impossible to go into all the necessary details here, but a few points must be made. A commitment of the type with which Gilbert is concerned is something 'one intended to bring about'.[83] A neat illustration of it is that of a 'personal decision', such as Joe's decision, made in the morning, to go swimming in the afternoon.[84] The important point about such a decision is not that it be produced by a deliberative process (for Gilbert recognises that the idea for going swimming may have just 'popped into Joe's head'); rather, the

[77] *Ibid.*, p. 116.
[78] *Ibid.*
[79] *Ibid.*, p. 118.
[80] *Ibid.*, p. 121.
[81] *Ibid.*
[82] *Ibid.*, p. 124.
[83] *Ibid.*, p. 127.
[84] *Ibid.*

key element is that the decision (or intention, as the case may be) issue from the *will*; that it be an 'exercise of the will'; that it result 'solely from an act or state of a will or wills'.[85]

Having made the decision, or formed an intention, one has bound oneself in the sense that one has given oneself reason to conform to the decision. This is notably different to having reasons to do something or in favour of something. Having 'sufficient reason', as Gilbert puts it, has nothing to do with 'something to be said in its favour given its nature or expected consequences'; rather, having sufficient reason to do what one is committed to doing is just 'what rationality requires one to do'.[86]

Thus far, the commitments above have no social content; the examples all point to personal commitments (e.g. in the form of personal decisions). The next step, then, is to see that the factors above (in particular, commitments of the will that bind in the sense of providing one with sufficient reason) can be extended to a joint commitment – existing separately, over and above, any individual commitments.

'People may jointly commit', says Gilbert, 'to accepting, as a body, a certain goal',[87] e.g. they can commit 'together to constitute, as far as is possible, a single body that believes democracy is the best form of government'.[88] Or, better yet, in relation to the running example (pardon the pun) of us walking together, 'if we are jointly committed to accept as a body the goal of going for a walk, we understand that this goal will be achieved by our constituting as far as is possible a single body that goes for a walk'.[89] It follows, given what is said above about commitments in general, that 'when people have a collective goal, on this account, the underlying joint com-

[85] *Ibid*., p. 128. Gilbert does not elaborate further on this notion of the 'exercise of the will', saying only that 'there is an intuitive sense in which a person's making a decision is an exercise of his will': *ibid*. The important point, in any event, is to be clear that the commitment in question 'comes through' (*ibid*.) the decision or intention of the will.

[86] *Ibid*; p. 129; original emphasis. Relying on 'what rationality requires' certainly has the effect of increasing the normative demandingness of Gilbert's account. The debate over nature and reach of the requirements of rationality is a popular and burgeoning one in contemporary philosophy of normativity, and lies outside the scope of this paper.

[87] *Ibid*., p. 136.

[88] *Ibid*., p. 137.

[89] *Ibid*., p. 138. Gilbert emphasises that this 'single body' is not 'a plurality of members', e.g. of 'a body of persons'; it is, she argues, 'neutral with respect to the question whether the body in question is in some sense composed of individual human beings', *ibid*., p. 137. This has led some to worry about Gilbert's metaphysical commitments – a debate I cannot cover in this paper.

mitment gives each sufficient reason to direct his forces in a particular way. More precisely, each has sufficient reason to coordinate his behaviour with that of the others in pursuit of the goal in question'.[90]

We now have all the ingredients before us to conclude that obligations sourced in the joint activity are grounded in joint commitments because insofar as the parties have jointly made it the case that each one has sufficient reason to act in a certain way, each is obligated to each to act in that way.[91] It is only 'by virtue of the existence of the commitment, and that alone', that 'the parties have rights against each other to actions that conform to the commitment', which also means that 'they have the standing to demand such actions of each other and rebuke each other for not so acting'.[92]

Having reached this far, Gilbert then asks how it is that commitments are formed. In asking this question, she comes up against the same difficulty we encountered above, namely, what kind of mutual expression of readiness is needed, and in what form must this be common knowledge between the parties (recall that we needed to address the difficulty in order to avoid the positing of a prior agreement)? In this context, Gilbert gives a more extended answer, particularly with respect to mutual expressions of readiness (her definition of common knowledge was given above).[93]

These expressions, she says, may come in a variety of forms. Gilbert argues that there is a spectrum here, from those expressions that are 'agreement-like' to those where one's readiness is manifested in action. Manifestations in action may include, for instance, a bystander rushing to join others at the scene of an accident and, without any explicit agreement, all parties combining together to rescue a person.[94] Or, such manifestations may not become commitments to a joint activity until they re-occur on a number of

[90] *Ibid.*, p. 146.

[91] I am grateful to an anonymous reviewer for suggesting something close to this formulation.

[92] *Ibid.*, p. 147. Recall, again, that for Gilbert these obligations, grounded as they are in joint commitments, need not have any moral content, which certainly makes Gilbert's account more applicable to the phenomenon of concerted practices.

[93] Notice here that a distinction is being made (not addressed by Gilbert explicitly) between something that grounds something, and a story about how something emerges (or is formed). The distinction is used twice: first in the context of obligations, and second in the context of commitments.

[94] *Ibid.*, pp. 139–140.

occasions (persons come to expect, though in a stronger sense than mere expectation, to see each other at a certain time each week).[95]

Helpfully, Gilbert also adds that it need not be the case that persons need to mutually express their readiness 'to uphold *that particular goal* as a body';[96] rather, they express their readiness 'to be jointly committed to espousing whatever goal is specified by the operations of a specified mechanism', e.g. Penny and Pam jointly commit to Penny's say-so (whatever its content may be). This again is useful for competition law purposes, where undertakings may commit to being bound (though not legally) to, say, a blacklist of buyers, without necessarily thereby committing to uphold the goal of, say, co-operating in order to diminish competition between each other.[97]

We have reached the conclusion of Gilbert's model. I next turn to briefly outline Bratman's view, and then to comparing their views in light of their applicability to competition law.

### *B. Painting with Bratman*

Like Gilbert, Bratman has developed his account of joint action in many places, and in increasingly sophisticated forms. I cannot expect to match that sophistication here, in what is essentially an all-too brief summary. I shall take my cue from the first classic paper: 'Shared Co-Operative Activity' (1992).[98]

Like Gilbert, Bratman focuses on small group interaction; indeed, on two-person cases of doing things together, such as singing a duet together, painting a house together, taking a trip together, building something together, etc.[99] Again, like Gilbert, Bratman notes that we can, for instance, both paint a house without doing so together, the question being what is required for the latter (for 'shared co-operative activity', SCA).

[95] *Ibid.*, p. 140.

[96] *Ibid.*

[97] The blacklist example comes from a US case, *Eastern States Retail Lumber Dealers' Associated v. United States* 234 U.S. 600 (1914), discussed by Page 2007, p. 437.

[98] Reprinted in Bratman 1999. Given that I do not consider Bratman's more recent modifications of his view, I do not aim here to offer an up-to-date representation of his account. Nevertheless, based on the later publications I am familiar with (e.g. Bratman 2009) nothing that is said here contradicts his more recent views.

[99] Bratman 1992, p. 327.

Bratman begins with three factors: mutual responsiveness, commitment to the joint activity, and commitment to mutual support. All three are required for SCA. For instance, we can imagine cases of mutual responsiveness without either of the second and third factors, such as a case of opposing soldiers in battle, in which each responds to the other, acting on his expectations of the other in the spirit of 'reciprocal expectations', but where each is pursuing their own goal and 'neither is prepared to help the other'.[100] Or, we can imagine cases where feature two is missing, e.g. we are both painting a house, we are even committed (in a general sense) to both painting the house, but our commitments do not match up because I want to paint the house in blue and you in red.[101] Finally, we can imagine cases where the third feature is missing, such as two singers singing, but each waiting for the other to fail (e.g. sing a false note), and not willing to help the other through to the end of the activity. Let us now consider each of the three factors in a little more detail, ending up with the final schema or model of SCA.

Let us begin, as Bratman does, with the second feature, commitment to the joint activity. The first point is that such a commitment typically involves 'an intention in favour of the joint activity', though this intention can be one each of us has for different reasons.[102] Second, in order to avoid circularity, these intentions ought not be intentions to act together co-operatively, i.e. they must be cooperatively neutral.[103] Third, and perhaps most importantly, these intentions must be ones that involve our subplans (i.e. plans that contribute to the plan to, say, paint the house together) meshing. Meshing is the preferred term over something like agreement: we do not need to agree down to the last detail, but our subplans do need to mesh sufficiently so that 'there is some way we could' paint the house 'that would not violate either of our subplans, but would, rather, involve the successful execution of those subplans'.[104] Fourth, and finally, these intentions must interlock, i.e. 'I must intend that we', say, paint the house 'in part because

[100] *Ibid.*, p. 328.
[101] *Ibid.*, p. 332 and p. 340.
[102] *Ibid.*, p. 329.
[103] *Ibid.*, p. 330.
[104] *Ibid.*, p. 332.

of your intention that we' paint the house 'and its subplans'.[105] To this general picture of the second feature, Bratman adds two further components: namely, first, that our intentions not be coerced; and second, that our intentions are common knowledge between us (he does not elaborate on this, saying only that he refers to common knowledge 'as an unanalysed idea').[106]

Now to the third feature: the commitment to mutual support. Bratman recognises there is room for manoeuvre here, with some participants in a SCA being more inclined than others to help others, but he does think that there is a threshold necessary for a SCA to obtain (this is a minimum threshold, so that there may be occasions in which participants will need to help more).[107] Bratman presents the characteristics of this feature in terms of the following scenario: imagine, first, that you need help from me in order to help us carry out painting the house together successfully; second, imagine that I could help you without damaging my own contribution to our painting the house together; third, imagine that there are no new reasons for me to help you, e.g. you do not offer me an extra incentive; and fourth, we all know this to be so (again, it is common knowledge between us).[108] In such a case, in order for a SCA to exist, I need to be prepared to help you. Bratman's way of phrasing this is that our intentions, introduced in the first feature above, must be 'minimally cooperatively stable'.[109]

We have already given some indication of Bratman's notion of mutual responsiveness, the first feature of SCA. It was noted that there needs to be some reciprocal expectations. In the context of features two and three, this means that we need to have mutual responsiveness of intention; Bratman clarifies that there also needs to be mutual responsiveness in action.[110] The second of these is important, for it helps Bratman to distinguish his account from 'pre-packed cooperation', i.e. cases where we work out in advance what 'roles we each will play'.[111] Of course, such 'pre-packaged cooperation' may itself amount to a SCA, but the point is that there can be

[105] *Ibid.*, p. 333.
[106] *Ibid.*, p. 335, fn. 15.
[107] *Ibid.*, p. 337.
[108] *Ibid.*
[109] *Ibid.*, p. 338.
[110] *Ibid.*, p. 339.
[111] *Ibid.*

SCA without such pre-packaged cooperation, as long as there is mutual responsiveness in action, e.g. when we sing together, not only do I intend to assist you if you, say, sing a false note, but I also pay attention, 'I listen closely to when and how you come in, and this helps guide my own singing; and you are similarly responsive'.[112]

We now have the full picture of the SCA. Bratman formalises it in the following way (keeping in mind the internal definitions, e.g. such as what is involved in 'meshing' and 'minimally cooperatively stable intentions'; 'J' here stands for the relevant activity):

(1)(a)(i) I intend that we J;
(1)(a)(ii) I intend that we J in accordance with and because of meshing subplans of (1)(a)(i) and (1)(b)(i);
(1)(b)(i) You intend that we J;
(1)(b)(ii) You intend that we J in accordance with and because of meshing subplans of (1)(a)(i) and (1)(b)(i);
(1)(c) The intentions in (1)(a) and in (1)(b) are not coerced by the other participant;
(1)(c) The intentions in (1)(a) and in (1)(b) are minimally cooperatively stable;
(2) It is common knowledge between us that (1).[113]

We have here the basic elements of Bratman's view. Before going on to compare their view, it is worth noting that Bratman has himself explicitly criticised Gilbert's model. Part of his dissatisfaction is with Gilbert's alleged metaphysical commitments to a supra-agential body, a 'plural subject'. More importantly for present purposes is his criticism of Gilbert's claim (as Bratman characterises it) that in acting together each participant 'has associated nonconditional obligations to act and nonconditional entitlements to rebuke the other for failures to act'.[114] On Bratman's view, 'if you and I have a shared intention to J then you ought to perform your role if you continue to intend that we J', whereas, he says, on Gilbert's view, there is a 'guarantee that by virtue of our having a shared intention you have a nonconditional obligation to perform'.[115] Bratman argues

[112] *Ibid.*
[113] *Ibid.*, p. 338.
[114] Bratman 1993, p. 110.
[115] *Ibid.*

that his account builds in all the stability we need for joint action; further, he also argues that sharing an intention can be, and is 'frequently accompanied by such obligations'; it is just that he does not think that nonconditional obligations are, as it were, constitutive of or a necessary part of sharing an intention.[116]

There are a number of things to say in reply to this critique. First, the association of agreement or promise with Gilbert's view of how obligations are formed and maintained is inaccurate (at least based on her 2006 account). As we have seen, Gilbert is at pains to note that obligations need not be generated by agreements or promises. Second, although I have not discussed it here, Gilbert makes plenty of room within the relevant obligations that do emerge and are present for flexibility: there is nothing to suggest that they are 'nonconditional' (they are constitutive, but that does not necessarily make them nonconditional).[117] But aside from these gripes, there is a more general point here – at least from the perspective of the applicability of the respective models to competition law. To discuss it, we need to turn to the third and final section of this part of the paper.

### *C. Gilbert and Bratman Compared*

Let me immediately put my cards on the table. I find Bratman's account, including his insistence that not all cases of joint action need by necessity to generate and maintain obligations, more psychologically plausible and more resonant phenomenologically. However, what Bratman gains in plausibility, he loses in applicability to competition law.[118] In terms of the latter, it is Gilbert's more

[116] *Ibid.*, pp. 110–111.

[117] Part of the problem in adjudicating on this issue is that Bratman does not clarify what he means by nonconditional, and thus it is not quite clear what view he is attributing to Gilbert. In later writings, e.g. Bratman 2009, Bratman seems to attribute a very strong, almost moral, reading of obligation to Gilbert. In other words, he seems to argue that one cannot have the kind of obligation Gilbert wants without it being necessary that the obligations survive 'the scrutiny of normative reflection' (Bratman 2009, p. 152), and since Bratman believes that such scrutiny is not necessary for joint action, so he thinks Gilbert's view implausible. But we have seen that Gilbert herself does not understand obligation in this way, e.g. she extends it to such cases as robbers being obligated to each other in performing the joint activity of robbing. Admittedly, Gilbert does not explicitly say whether she allows for the robbers to be aware that they are not doing a good thing, but this does seem to be implied by the very mentioning of the example. In that sense, Bratman's criticism of Gilbert seems unfair (of course, he could still disagree with her about whether the obligations, even on the softer reading, are constitutive or not).

[118] Of course, Bratman does not set out to make his model so applicable, so by no means is this an argument against his approach taken on its own terms.

demanding view that offers a much clearer and more useful evidentiary target and evidentiary platform for the concept of concerted practices. Let us proceed a little more slowly however.

Bratman admits that, on one view of it, his account is 'softer' than Gilbert's,[119] but he does not shy away from this conclusion, arguing instead that the conception of shared intention he has in mind (at least as he puts it in 1993) 'is primarily a psychological – rather than primarily a normative – phenomenon'.[120] I will come back to this remark in the conclusion. For now, let us see how Bratman's emphasis of the psychological element and Gilbert's emphasis of the normative element place them at opposite ends of applicability to competition law.

At first blush, Bratman's picture of interlocking intentions, including the requirement for a minimally co-operative element to those intentions, looks as if it might provide us with an evidentiary target of the right kind (recall that an evidentiary target of a legal concept points to what kind of evidence the concept needs to aim at, e.g. what kind of conduct is prohibited). After all, it explicitly sets out to distinguish between both of us painting a house (by accident) and us painting a house together; in other words, it is not just any painting together – it is painting together of a special kind, characterised by certain requirements and conditions. But when looked at closely, it is clear that Bratman's model is designed more to set up a cooperative structure within which not only bargaining and negotiation may take place, but also one in which we can compete with each other. He makes this explicit when he says that 'A joint activity can be cooperative down to a certain level and yet competitive beyond that',[121] providing the example of playing chess together, where we share a certain background structure, 'keeping the pieces in place, making our moves public, following rules about the movements of pieces, and so on',[122] while nevertheless pursuing different aims (we each want to win, but we do not want both of us to win; notice, further, that each aiming to win may be compatible, for instance, with both of us wanting to play a beautiful game).

[119] Bratman 1993, p. 111. This is Bratman's own term; as far as I can tell, he means by it that his account is less normatively demanding.

[120] *Ibid.*, p. 112. That this remains Bratman's view is signalled by his use of such terms as 'modest sociality' (see Bratman 2009).

[121] Bratman 1992, p. 340.

[122] *Ibid.*

Bratman does say that playing chess together is 'not a full-blown SCA',[123] but what is striking about his inclusion of such examples, and others, is that he wants to leave room for manoeuvre in how persons cooperate; for degrees, one might say, in cooperation. His talk of 'mutual responsiveness', and of a 'minimum' level of mutual assistance, all suggest precisely less normatively demanding versions that arguably are more psychologically plausible and pliable (fit a greater variety of human practices) than Gilbert's account.

All these aspects of Bratman's picture are laudable; indeed, I confess to finding his picture more appealing. For instance, I find it more phenomenologically intuitive to say that although I may sometimes feel entitled to rebuke someone for walking out ahead, this is a contingent matter of fact and not something constitutive of, or necessary to, us taking a walk together. Its presence, for instance, may be more influenced by certain aspects of my relationship, or the history of prior encounters, with my walking partner, than they are by the very exercise of walking together (e.g. I may be aware my partner is unhappy with me, and for good reason, thereby not triggering any feelings of entitlement to rebuke her). Gilbert could argue that her requirement for the presence of obligations is not a prediction: it is not a claim that I will rebuke my partner; but without any phenomenological resonance, the mode of necessary existence of the obligations in question seems somewhat mysterious. It does seem more plausible to argue, as Bratman does, that the existence of rights and obligation is contingent, and that they are better understood as resources that emerge from a psychological base. Further, it also seems more plausible to think that the participants are not bound in any strong sense, thereby allowing much more room (certainly more than Gilbert does) for each participant to unilaterally unbind himself at will.[124]

But the problem, from the perspective of finding an evidentiary target and evidentiary platform for the legal concept of concerted practices, is that by being less normatively demanding though arguably more psychologically plausible and phenomenologically resonant, Bratman's account is rendered less amenable to applicability in a legal context.

[123] *Ibid.*

[124] I am grateful to one of the anonymous referees for this observation and its formulation.

These difficulties are compounded by the lack of analysis in Bratman's account of joint action (at least in his 1992 and 1993 papers) of 'common knowledge', which he uses in its 'unanalysed' form. His notion of mutual assistance helps, but being counterfactual (the relevant circumstance would have to occur to see if we would help), it makes it difficult to translate into an evidentiary platform (i.e., it makes it difficult to enumerate the kinds of bits of evidence or circumstances thanks to which we could reasonably draw an inference that the evidentiary target has been met). There is, for instance, no discussion, as there is in Gilbert, as to what kinds of expression of readiness and rebuke (precisely elements of an evidentiary platform) that might help us to justify an inference to contact of the prohibited kind.

Contrast this with Gilbert's proposal. Gilbert gives us a clear evidentiary target: the presence of obligations, as grounded in joint commitments. She also gives us a clear evidentiary platform: first, those rebukes (as these may be illustrated, for instance, by penalties and punishments); and second, mutual expressions of readiness to participate and be bound by the relevant rights and obligations (as these may be illustrated by, for instance, the matching of prices over a certain period of time, the consistent participation in joint meetings, the exchange of information on a series of occasions).[125] Further, Gilbert's willingness to see a spectrum of forms of expression, extending it to include non-agreement-like forms of interaction (both in specific instances and over time) suggests that her account could be usefully relied on to help us understand the concept of concerted practices *as distinct from* agreements (while nevertheless recognising that the matter may be one of degrees than differences in kind).

Clearly, more work would need to be done. For instance, one would need to clarify what kinds of expression of readiness and rebuke would fall within the evidentiary platform (e.g. what effect might secrecy have on these expressions? One can imagine it

[125] Interestingly, Gilbert's acknowledgement of the relevance of a history of interaction would arguably render the expert economic analysis in the *Wood Pulp* case problematic; after all, such a history is precisely evidence for (not explanation of) the existence of rights and obligations that constitute a concerted practice to establish and maintain prices, and thereby secure (if not maximise) profits. Whether this conclusion is warranted depends in the end on how sharp a divide one wishes to establish between the two streams of investigation referred to above (in section II.C.).

would only strengthen the relevant commitments). Of course, such work is never possible to complete in advance: we can only point to certain examples, thereby creating a resource for the making of analogies, revising our pool of illustrations as we accumulate new cases. The point is that Gilbert's emphasis on looking for rights and obligations, as these are grounded in joint commitments and reflected in expressions of readiness and rebuke, provides the right kind of evidentiary package (composed of both an appropriate target and a corresponding platform) that arguably does help distinguish between mere rational or intelligent adaptation in oligopolistic contexts and concerted practice. After all, adapting rationally or intelligently to each other does not ordinarily lead us to believe that we have either expressed readiness to participate or that we would have the standing to rebuke fellow participants, such that one of us can claim certain rights that correlate with the obligations of the other.

Recall, now, what was noted above about the first stream of investigation into concerted practices in European competition law. The law as it stands indicates that the Commission will look for evidence of illegal concertation by revealing the exchange of information and/or participation in meetings that has the object or effect of reducing uncertainty as to the future conduct of competitors or eroding or depleting the independence of any one undertaking in deciding how they ought to conduct their business. It was also mentioned that there is some authority for the proposition that there is a need to show some form of mutual binding, i.e. of the undertakings being bound, or obligated, though not in the legal sense, to perform what has been tacitly and informally agreed to.

Gilbert's model allows us to flesh this out and also understand it better. For instance, in relation to the last point, Gilbert shows how there are forms of mutual expressions of readiness that ought not to be conceptualised as 'tacit or informal agreements'. Further, her model offers further support for the proposition that there is a need to show the presence of obligations, and, as noted above, her reference to expressions of readiness and rebuke, and common knowledge, also help us see how this could be done. Much more so than Bratman, Gilbert's model shows us just how joint action eats

into and erodes the independence of undertakings: this is because the focus in her account is on how we are obligated to each other, not on how we might negotiate and bargain with each other in the context of some framework. Finally, Bratman's model purposely does not show the reduction of uncertainty in the actions of the other participants (again, his notion of mutual assistance is designed to be weak and minimal), whereas Gilbert's insistence on a special standing to rebuke, and the presence of not just reciprocal expectations and interlocking intentions, but obligations, shows us the kind of target we need to have, especially if we are to distinguish concerted practices from rational or intelligent adaptation in oligopolistic markets.

Given the wildly different purposes that Gilbert is constructing her model of joint action for (presumably, she wishes to give us a philosophically consistent and persuasive understanding of the nature of joint action), my argument here is not that Gilbert's model may itself be directly applicable to cases of concerted practices that arise before the Court. Rather, my argument is that her analysis and definition, including her examples, can help us understand and flesh out the evidentiary target and platform of the concept of concerted practices in such a way as to make it easier for the authorities to distinguish between concerted practices and rational or intelligent adaptation in oligopolistic markets.[126]

## IV. CONCLUSION

I mentioned above Bratman's aim for a model that characterises shared intention as 'primarily a psychological – rather than primarily a normative – phenomenon'.[127] Aside from some exceptions, it seems fair to say that the trend in the literature has been towards psychological plausibility and phenomenological resonance. Said more strongly, it seems fair to think that many have sought to 'demystify' references to such phenomena as 'normative force' or 'binding commitment' etc. Others, in turn, have attempted to establish continuity between both the psychological and the nor-

[126] I am grateful to one of the anonymous reviewers for pressing me on this point.

[127] Bratman 1993, p. 112.

mative elements, arguing that both are necessary for a fuller picture of joint action.[128]

From the perspective of this paper, and thus the view from competition law's struggle with finding a distinction between concerted practice and conscious parallelism, this trend towards psychological plausibility and phenomenological resonance makes things more difficult. Certainly, at the most general level in which theories aim at true descriptions of human nature (in the scientific sense of tested and falsifiable, but not yet disproved hypotheses), the evaluation of theories from the perspective of such plausibility and resonance, as well as metaphysical parsimony, is to be applauded. From the legal perspective, however, where concepts are developed for use in the evaluation of behaviour, in some normative context with certain normative aims (e.g. the context of competition regulation with the aim of protecting competition for the purposes of consumer welfare etc), the standards of plausibility, resonance and parsimony are not so venerated and their application does not necessary lead to useful results.

If we attempted to understand the notion of concerted practices solely on a factual level, looking, say, for a psychologically plausible, phenomenologically resonant and metaphysically parsimonious account of it, we would not only be frustrated in our efforts, but we would also fail to understand how this area of the law does its regulatory job. The law's artificiality is seen everywhere, e.g. in its imposition of binary distinctions rather than shades of degrees. Legal concepts, as has often been said, are legal fictions, designed to play certain evaluative roles in certain normative contexts. Indeed, perhaps the best way to understand their specificity is via an understanding of the evidentiary aspects of legal practice: the law's artificiality resides precisely in the concepts it uses for the purposes

[128] Unfortunately, space restrictions forbid me from entering into a discussion of the sources here. An elaboration could trace this tendency in such recent papers as Alonso 2009 (who argues for a 'socio-psychological basis' from which interpersonal obligations are generated) and Kutz 2000, who argues that both Gilbert and Bratman make 'implausible attributions of…high degrees of interdependence and mutual consciousness' (p. 2), and who thus sets out to offer a 'minimalist conception of joint action', which, *inter alia*, is parsimonious in its metaphysical commitments and philosophical psychology. It is also worthwhile noting papers such as Pacherie and Dokic 2006 and perhaps also Tomasello et al. 2005, which seek to find continuity between the normative and psychological elements, while also stressing that the normative is not entirely explicable in terms of the empirical (e.g. Pacherie and Dokic argue that mirror neurons do not explain the kind of sophisticated forms of agency and meta-cognition inherent in human shared intentionality). Such attempts are important, but it nevertheless does not seem unfair to say that the trend is towards the psychological, rather than normative, elements.

of framing and collecting 'facts'. That is why, in section III.C above, I tried to see how philosophical models of joint action might translate into an evidentiary target and an evidentiary platform for the concept of concerted practice. We have seen that, in order to do so, one must understand the regulatory aims of the area: what kinds of behaviour and attitudes it seeks to promote, what ideal circumstances (e.g. perfect competition) it strives impossibly for, etc.

This immediately preceding point connects up with what was noted at the outset of this paper: there are obvious and important differences between the practice of competition law and that of social philosophy. Different values are at stake; different consequences follow. By no means has it been my aim to neglect these differences. Certainly, I have not attempted to force a dialogue where no room for one can be found. Nevertheless, it does seem to me that if we pay attention to the details of conceptual analysis and the need for conceptual understanding in both domains, we will find ways of enabling the two to talk to each other. Sometimes, this dialogue will be modest, as when we hold up mirrors to each other, showing each other that although our activities do resemble one another in all sorts of ways, we have different concerns and organise ourselves differently. At other times, as when we translate philosophical analyses and definitions into evidentiary targets and evidentiary platforms for legal concepts, that dialogue can yield more robust mutual assistance. I hope this paper contributes, no matter how little, to the flourishing of dialogues of both kinds.

ACKNOWLEDGEMENTS

I gratefully acknowledge the funding of the Swiss National Science Foundation. A version of this paper was presented at the Collective Intentionality IV Conference, University of Basel, 23–26 August 2010. My thanks to the members of that audience. I am particularly grateful for assistance and advice from the editors of *Law and Philosophy*, and for very helpful comments from two anonymous referees. Thanks are also due to Zenon Bankowski, Ross Carrick, Randy Gordon and Laurence Kaufmann.

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