Introduction

Tacit collusion has become the ordinary way for companies to collude, especially in oligopoly. Strategic interdependence of companies, which is typical of oligopoly, may facilitate the establishment of standards of behaviour or *modus operandi* aimed at maximizing companies' joint profits.

In its pure form, tacit collusion is established and maintained by a mechanism of mutual observation and repeated interaction, even in the absence of communication between companies. This outcome, however, may be achieved only in the presence of specific factors seconding the alignment of conducts and, therefore, in a market framework conducive to collusion. Game theory has contributed to the understanding of tacit collusion, by identifying the behavioural strategies that support parallelism and the market factors that may facilitate the alignment of conducts. Also, behavioural economics teachings have noticeably affected antitrust control of tacit collusion and have contributed to improving antitrust enforcement.

Although collusion is a crucial topic for both *ex ante* and *ex post* antitrust control, the best results, in terms of enforcement, have been achieved in merger control. Despite the intrinsic complexity of this preventive control, the adoption of the analytical means provided by behavioural economics has ensured an effective antitrust control on oligopolistic mergers. This outcome has probably been seconded by the specific regime of merger control. Prohibitions rest on the proof that the merger project, once implemented, is very likely to create the conditions for the resulting company and its closer rivals to collude. Instead, proof of actual collusion is not required. Therefore, merger control does not incur the main obstacle, which negatively affects the *ex post* control on tacit collusion, of showing the existence of a meeting of minds behind parallelism. This way, both EU and US systems of merger control have resulted in being quite effective in addressing parallelism of conducts.

On the contrary, enforcing antitrust rules against collusion in the *ex post* perspective remains a challenge for antitrust authorities. While parallelism of conducts is frequently observed in oligopoly, and economic theories have explained how and under which conditions this

phenomenon may arise, antitrust proceedings about tacit collusion are quite rare, and rarely successful. It is, in fact, extremely difficult to address business conducts that seem as strictly connected to oligopoly as to appear quite unavoidable. Even by recognizing the absence of deterministic links between oligopoly and collusion, as fierce competition may also take place in oligopoly, it remains extremely difficult to demonstrate that parallelism embeds a deliberate choice of following a common course of action.

This demonstration is particularly difficult when the antitrust enforcement against parallelism is framed in the rule addressing cartels, as in this case proof of consciousness or intention is properly a requirement for the inference itself of infringements.

The US antitrust enforcement has sought to overcome this difficulty when admitting the inference of infringement by indirect evidence and, particularly, by the allegation of plus factors providing evidence of collusion. This approach, however, has not been very successful, especially due to the reluctance towards the adoption of economic evidence for the scope of that demonstration.

In Europe, the problem of tacit collusion has originally been addressed by the notion of concerted practices, under article 101. Even in this case, however, the difficulty of showing concertation, and therefore, of providing evidence of cooperation, resulted in a sub-optimal antitrust enforcement against tacit collusion. Poorly effective results under art. 101 and the evolution that occurred under art. 102, especially with regard to the objective notion of abuse, pushed the Commission and Courts to address parallelism by art. 102 and to consider the case of more independent companies, which act as if they were a single entity and realize anticompetitive outcomes, as a case of collective dominance.

The value that collective dominance was expected to add to antitrust enforcement involves the case of tacit collusion and, specially, those cases in which proof of conscious conduct falls short of the threshold required for the application of art. 101. Also, Courts admitted that, in oligopoly, companies could, simply by exploiting their interdependence, establish parallelism and realize collusive strategies even without communicating with each other. It follows that, when parallelism results in anticompetitive effects, it amounts to abuse of collective dominance.

However, Courts have never exploited this achievement; instead, they have been inferring the existence of abuses of collective dominance only when there was also proof of collusive links between companies – that is, when evidence also met the requirements of cartels. In all these cases, Courts have cumulatively applied arts. 101 and 102, as the factual situation supported the inference of both infringements, but have always

imposed one fine, based on one of the two rules, without clarifying the reason why, in the presence of two infringements, only one fine was imposed. Evidence of interference between arts. 101 and 102 in the area of collective dominance and, at the same time, inconsistency in the Courts' statements about fines, call for an in-depth and comparative analysis of those rules, with the aim of considering whether the relationship between arts. 101 and 102 may be redefined and no longer described in terms of distinction or dichotomy.

Such an analysis reveals that, as a consequence of the evolutionary process that has involved the EU antitrust system, those rules have become closer and closer to each other. Analogies evidently involve the mechanism of enforcement, the burden of proof, the method for the inference of infringements, and the consequences provided for their violation.

This evolutionary process, if examined through the lens of collective dominance, has resulted in a systemic change and has shaped new roles for arts. 101 and 102, by making art. 101 substantially redundant, compared to art. 102 and, at once, by attributing to art. 102 the role of *general rule*, capable of addressing all business conducts significant for *ex post* enforcement.

This book aims to examine EU and US approaches to parallelism, by considering their path of evolution and their effectiveness in dealing with collusion. The real focus of this analysis, however, is on the European system, to which I dedicate the *pars construens* of this work.

In spite of the central role reserved to the EU system, my analysis starts from the US approach to parallelism. The influence of US experience on the origin and development of EU policy toward collusion, in fact, has been determinative. US antitrust enforcement had revealed the potential of parallelism to harm competition and provided some solutions for dealing with tacit collusion, even before the EU Treaty came into force. Moreover, the 'parallelism plus' doctrine, developed by US Courts for proving unlawful cartels, has been imported into the European system and adopted as a standard for demonstrating concerted practices. Also, the need for controlling oligopolistic mergers and banning coordinated effects has been included in the scope of US antitrust control many years before the establishment of a European system of merger control. Finally, US antitrust scholarship has been crucial for defining the objectives of antitrust control and, thus, for orienting antitrust enforcement.

In spite of the influence of the US system, EU antitrust policy has evolved autonomously from that of the US in many aspects. While there remains substantial homogeneity between US and EU merger control, the *ex post* control of pure parallelism has been qualified in Europe as an

abuse of collective dominance and assessed by the theoretical means provided by behavioural economics. This difference, combined with the prevalence in Europe of a more interventionist approach, has resulted in a more effective antitrust policy towards collusion and created a significant divergence between US and EU systems.

It follows that examining the US system appears the necessary premise for understanding in depth the evolution occurring in the EU system; equally, analysis of the elements that have increased the effectiveness of EU policy towards collusion and the strategies that may improve that policy could also provide useful insight to US authorities when enforcing antitrust laws.