PLU S F A C T O R S  A N D  A G R E E M E N T  I N  A N T I T R U S T  L A W†

William E. Kovacic,*
Robert C. Marshall,**
Leslie M. Marx,***
Halbert L. White****

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* Commissioner, U.S. Federal Trade Commission; Professor, George Washington University Law School (on leave). The views expressed in this Article are the author’s alone and not the views of the FTC or any of its members. wkovacic@ftc.gov.

** Penn State University, rcm10@psu.edu.

*** Duke University, marx@duke.edu.

**** University of California, San Diego, hwhite@weber.ucsd.edu.
Plus factors are economic actions and outcomes, above and beyond parallel conduct by oligopolistic firms, that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action. Possible plus factors are typically enumerated without any attempt to distinguish them in terms of a meaningful economic categorization or in terms of their probative strength for inferring collusion. In this paper, we provide a taxonomy for plus factors as well as a methodology for ranking plus factors in terms of their strength for inferring explicit collusion, the strongest of which are referred to as “super plus factors.”

Introduction

Competition law treats agreements among rival firms to set the terms on which they trade as extremely serious offenses.¹ Most of the world’s

¹. See Organization for Economic Cooperation and Development, Cartels: Sanctions Against Individuals, 9 J. Competition L. & Pol’y 7, 36-46 (2007) (reviewing modern enforcement trends); David E. Vann & Ellen L. Frye, Overview, in Cartel Regulation 3 (William Rowley & Martin Low eds., Getting the Deal Through, Jan. 2009) (“In the past decade, nearly every jurisdiction with general competition legislation has either enacted specific anti-cartel statutes, significantly enhanced the civil penalties for cartel violations or added criminal sanctions for corporate executives who commit cartel violations. Indeed, in recent years regulators have been enforcing anti-cartel legislation with increased vigour, and have grown
approximately 120 systems of competition law assign the prosecution of cartels a high priority. The consequences of detection can be severe. The annual global sum of civil fines and treble damages for cartel participants today routinely exceed hundreds of millions—indeed, billions—of dollars, and individuals in a growing number of countries face potent criminal sanctions.²

Central to the operation of laws that aggressively punish collusion are the definition and proof of concerted action. Powerful consequences flow from whether price increases observed in the marketplace emerge from individual or collective initiative. A firm acting alone ordinarily can set its prices as high as it likes.³ If the same firm cooperates with its more sophisticated and savvier in their investigative and analytical techniques.”).


3. If implemented by a single firm, high prices have been said to be a sign of a healthy competitive process. Justice Antonin Scalia’s opinion for the Court in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) states: “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only lawful; it is an important element of the free-market system.”
competitors to achieve this result, its executives may go to prison. Despite the crucial role of the concept of concerted action to this framework, few elements of modern antitrust analysis in the United States and in other jurisdictions are more perplexing than the design of evidentiary standards to determine whether parallel conduct stems from collective or from unilateral decision making.\(^4\)

In the case of oligopolies, authorities have struggled to develop suitable evidentiary standards for identifying agreements. Firms in an oligopolistic industry recognize their mutual interdependence, understand that they are players in a repeated game, and act accordingly.\(^5\) In antitrust decisions about allegations of collusive pricing, this pattern of interaction—described by courts and commentators as “conscious


parallelism”—is viewed as insufficient to establish that firms are engaged in concerted action. This is because such pricing can emerge from firms acting non-collusively where they understand their role as players in the repeated oligopoly game.⁶ In antitrust cases, courts permit the fact of agreement to be established by circumstantial evidence,⁷ but they have required that economic circumstantial evidence go beyond parallel movement in price to reach a finding that the conduct of firms has crossed the line into the realm of potentially violating Section 1 of the Sherman Act.⁸ The additional economic circumstantial evidence are referred to collectively as “plus factors.”⁹


The interpretation of plus factors in the decision to prosecute and in the resolution of litigated cases has proven to be a vexing task for enforcement officials and judges. Many commentators have catalogued plus factors and discussed the critical mass of circumstances that ought to justify an inference that observed behavior is the product of concerted action.10 Numerous judicial decisions have wrestled with the evaluation of plus factors in cases dealing with questions of agreement.11 For all this effort, there is persistent dissatisfaction with the analytical methods commonly used in antitrust enforcement and litigation to distinguish plus factors in terms of their probative value.

The frailties of the existing analytical tests for assessing plus factors have at least two implications. First, they impede the economically sensible resolution of many high-stakes antitrust cases where

236 (3d ed., Aspen 2003) (“The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination or conspiracy” required for application of Section 1 of the U.S. Sherman Act).


11. See Antitrust Law Developments, supra note 4, at 11–16 (collecting authorities); American Bar Association, Section of Antitrust Law, Proof of Conspiracy under Federal Antitrust Laws (2010)
decisions made on the issue of conspiracy are decisive. Second, the inadequacies of the existing analytical framework may well be magnified in the future. The expanded use of powerful means of detection—including amnesty programs that give certain informants full dispensation from criminal penalties—and ever stronger remedies will encourage firms to achieve consensus through more subtle techniques that fall short of an express exchange of assurances in a covert meeting. If would-be cartel members take this path, in a number of cases government prosecutors and private plaintiffs may find themselves relying more extensively on circumstantial proof to establish the fact of coordination. Such a development would place still heavier weight upon a proper understanding of plus factors in the treatment of conspiracy questions.

This paper offers a way to raise understanding of plus factors and to improve the manner in which enforcement agencies and courts interpret them in individual cases. We advocate the use of basic probability theory to rank individual plus factors, and groups of plus factors, in terms of their probative value.\(^\text{12}\) We refer to plus factors, or groups of plus factors, that lead to a strong inference of explicit collusion as “super plus factors.”\(^\text{13}\) The taxonomy as well as the framework we provide for


\(^\text{13}\) We use the term explicit collusion to mean an agreement among competitors that relies on explicit communication and/or transfers to suppress rivalry.
assessing the probability of explicit collusion given a plus factor, or given a group of plus factors, provides an improved foundation from which enforcement authorities and courts can analyze conduct.

In this Article, we provide a foundation for courts and agencies to adjust the framework they now use to determine the existence of an agreement when the plaintiff lacks direct testimony or documents proving concerted action and instead relies on circumstantial evidence that the defendants conspired to fix prices or restrict output.¹⁴ Such an approach focuses on modern economic understandings of what cartel participants do to coordinate their behavior.

A key issue that is at the heart of assessing whether firm conduct is rooted in an agreement to suppress interfirm rivalry is the reaction of buyers to the actions of sellers in a marketplace.¹⁵ Each product/industry/market that is the subject of scrutiny for a potential

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¹⁴. Direct evidence would include a record of meetings or communication to discuss and agree upon the components of cartel activity, which may include any of the following: pricing, allocations of the collusive gain, monitoring, or enforcement of the agreements.

¹⁵. Business logistics and supply chain management are taught in many business schools throughout the world, including courses in competitive procurement. For example, a Masters in Supply Chain Management is offered through the Smeal School of Business at Penn State University where SCM820 is a course in Strategic Procurement http://www.smeal.psu.edu/mps/curriculum/fyear.html
violation of Section 1 of the Sherman Act\textsuperscript{16} involves a distinct set of participants, actions, and payoffs. The role of buyers, and their potential resistance to actions by sellers that increase seller payoffs at the expense of buyers, appears to be significant in the implicit thinking of many policy decision-makers and courts when considering whether an observed conduct or outcome in the marketplace is the consequence of explicit collusion.\textsuperscript{17} Yet this underpinning for assessing plus factors has

\textsuperscript{16} 15 U.S.C. § 1 (2006) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

\textsuperscript{17} "Oligopolists behaving in a legal and consciously parallel fashion could achieve high and rising prices, even as costs remain stable, by engaging in price leadership. The odds that they could achieve a price and profit increase and maintain incredibly high incumbency rates—that is, maintain the very same distribution of municipal contracts year after year—are miniscule, however, unless the oligopolists were communicating with one another." City of Tuscaloosa v. Harcros Chem., Inc, 158 F.3d 548, 565; (11th Cir. 1998). The clear presumption of the court in this case was that buyers, the municipalities in Alabama, would conduct competitive procurements and push back against price increases by the sellers to the effect that incumbency rates would be volatile. It was not the presumption of the court that the buyers were passive. Rather, the court presumed that the buyers were players in the game, and thus much different from the customers of the gas stations in Carlton, Gertner, and Rosenfield (1997)
not been explicitly recognized. We believe that every producer selling a product in an industry conditions their attempts to raise prices on the extent and nature of buyer reactions, whether the actions of sellers are part of coordinated cartel conduct or not.18


18. As described in Marshall, Marx, and Raiff (2008), the notion of price acceptance and resistance has received attention in European Commission (EC) decisions in cartel cases. In the EC decision in Vitamins, resistance to price increases is described as follows: “When BASF’s customers resisted the increase, Roche supported the rise by also announcing an increase to DEM 46/kg . . . . According to Daiichi, the concerted increase was unsuccessful because of customer resistance and the huge differential between D-calpan and the equivalent in DL-calpan.” (EC decision in Vitamins 2001, Case COMP/E-1/37.512 at 325). In the EC decision in Cartonboard, cartonboard producers sometimes faced resistance from converters to whom they sold their products: “There is on the other hand an upper limit in practical terms on the amount of any price increase that could be imposed unilaterally by the cartonboard producers on the converters. The converters have on some occasions resisted a proposed price increase for cartonboard on the ground that their own customers would in their turn refuse to accept a price increase for packaging. . . .” (EC decision in Cartonboard 1994, Case IV/C/33.833, at 19). The notion of acceptance of price increases by buyers appears in the EC decision in Amino Acids: “The five companies . . . exchanged
The paper proceeds as follows. Part I describes the existing legal standards that courts and antitrust enforcement agencies use to define concerted action and review the existing literature regarding plus factors. Part II discusses seller agreements as well as buyer responses to actions of oligopolistic sellers and the implications of each for plus factors. Part III presents a taxonomy for plus factors and identify several super plus factors. Part IV offers a methodology, grounded in basic probability theory, for ranking plus factors in terms of their probative value.

I. Definition of Concerted Action in Antitrust Law

Modern competition law treats the detection, prosecution, and punishment of concerted horizontal price and output restraints to be the chief priority of antitrust policy making.19 Commentators generally regard the enforcement of stringent rules against such agreements as antitrust’s information on the acceptance of the price increases in the different regions.” (EC decision in Amino Acids 2000, Case COMP/36.545/F3 at 81).

most important positive contribution to economic performance.\textsuperscript{20} With increasing intensity, antitrust authorities around the world prosecute bid-rigging, price-fixing, and market allocation schemes.\textsuperscript{21} Since the mid-1990s, a growing number of other jurisdictions have amended their laws to permit the prosecution of cartel offenses as criminal offenses.\textsuperscript{22} Private suits in U.S. courts to recover damages on behalf of cartel victims have

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\textsuperscript{20} See, e.g., Robert H. Bork, The Antitrust Paradox 263 (1978) (praising the per se ban against horizontal price-fixing and market divisions and concluding that “[i]ts contributions to consumer welfare over the decades have been enormous”).
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\textsuperscript{21} On the intensification of efforts by competition authorities outside the United States to prosecute cartels, see: International Competition Policy Advisory Committee to the Assistant Attorney General for Antitrust, Final Report 164 (2000), which notes a “heightened degree of international consensus among enforcers that cartels should be detected and prosecuted”); “Cartel Enforcement Goes Global: Jail, Fines, & Videotape,” Antitrust, vol. 14, no. 3, at 6-45 (Summer 2000), which is a collection of articles discussing expansion of efforts by competition enforcement bodies to attack cartels; Harry First, The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law, 68 Antitrust L.J. 711 (2001), which suggests that prosecution of vitamins cartel illustrates broader international acceptance of an anti-cartel norm.
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\textsuperscript{22} Kovacic, supra note 8; Hammond & O’Brien, supra note 17.
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generated substantial recoveries,23 and a number of jurisdictions outside the United States are contemplating an expansion of private rights to facilitate the compensation of victims of cartel offenses.

The litigation of agreement issues has inspired judicial complaints about conceptual uncertainty and doctrinal confusion concerning the boundary that separates lawful unilateral conduct from illegal collective behavior.24 Despite extensive judicial experience with the issue and despite major contributions by economists and lawyers concerning possible adjustments in the existing analytical framework,25 the definition and


24. See, e.g., Holiday Wholesale Grocery Co. v. Philip Morris, Inc., 231 F. Supp. 2d 1253, 1270 (N.D. Ga. 2002), aff’d sub nom. Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003) (law governing existence of agreement provides “little guidance” to determine when inference of concerted action is appropriate; legal standard sets line that is “ephemeral”).

25. Modern contributions that contain extensive discussions of the economic and legal literature include Phillip Areeda & Herbert Hovenkamp, Antitrust Law 68-101 (Aspen 2003); Richard Whish, Oligopoly Theory and Economic Evidence, in European Competition Law Annual 105 (Oxford 2006); Mark Armstrong & Steffen Huck, Behavioral Economics as Applied to Firms: A Primer, 6 Competition Pol’y Int’l 3 (2010); George A. Hay, Horizontal
proof of concerted action remain litigated issues in horizontal restraints cases under Section 1 of the Sherman Act. Courts continue to struggle to develop a satisfactory calculus for determining whether, without direct proof of agreement, the plaintiff has shown that the defendants conspired to restrain trade.

A. Doctrine Governing the Use of Circumstantial Evidence to Prove an Agreement

Antitrust litigants devote much effort to determining whether conduct stems from an agreement and therefore implicates Section 1’s ban against collective trade restraints. A law whose reach hinges on the existence of an agreement requires courts to decide when challenged conduct constitutes an agreement and how such an agreement may be proven in a trial.


Modern judicial efforts in the United States to define concerted action originate in four Supreme Court decisions, beginning with Interstate Circuit, Inc. v. United States\textsuperscript{27} in 1939 and ending with Theatre Enterprises v. Paramount Film Distributing Corp.\textsuperscript{28} in 1954. In sustaining the conviction of movie exhibitors for fixing the prices to be charged for first-run films, the Interstate Circuit Court defined the concerted action requirement in these terms:

While the District Court’s finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated or invited, the distributors gave their adherence to the scheme and participated in it.\textsuperscript{29}

The Court explained that “[a]cceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate

\begin{footnotes}
\item[27.] 306 U.S. 208 (1939).
\item[28.] 346 U.S. 537 (1954).
\item[29.] 306 U.S. at 226.
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commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.”

Seven years later, in American Tobacco Co. v. United States, the Court addressed the agreement issue in reviewing conspiracy to monopolize charges under Section 2 of the Sherman Act. The Court stated that “[n]o formal agreement is necessary to constitute an unlawful conspiracy.” The Court explained that a finding of conspiracy is justified “[w]here the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.”

In 1948 in United States v. Paramount Pictures, Inc., the Court reiterated Interstate Circuit’s agreement formula. In considering Section 1 and Section 2 conspiracy claims, the Court said “[i]t is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement.”

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30. Id. at 227.


32. Id. at 809.

33. Id. at 810.

34. 334 U.S. 131 (1948).

35. Id. at 142.
The formative period of agreement decisions ended in 1954 in Theatre Enterprises. There the Court said “[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but ‘conscious parallelism’ has not read conspiracy out of the Sherman Act entirely.”

As a group, the four cases established three conceptual points of reference. First, courts would characterize as concerted action interfirm coordination realized by means other than a direct exchange of assurances. Second, courts would allow agreements to be inferred by circumstantial proof suggesting that the challenged conduct more likely than not resulted from concerted action. Third, courts would not find an agreement where the plaintiff showed only that the defendants recognized their interdependence and simply mimicked their rivals’ pricing moves.

Subsequent Supreme Court decisions have tried to capture these principles in a new formula. In 1984, while addressing minimum resale price maintenance (RPM) conspiracy allegations in Monsanto Co. v. Spray-Rite Service Corp, the Court observed:

The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had

36. 346 U.S. at 541.

a conscious commitment to a common scheme designed to achieve an unlawful objective. 38

Neither Monsanto nor earlier cases provides a useful basis for identifying concerted action. 39 These tests show that the concept of agreement encompasses more than a direct exchange of assurances, yet they offer no useful operational means for determining when the defendants have engaged in something more than consciously parallel conduct.

For example, under the Monsanto formula, one could deem interdependent conscious parallelism to be a “conscious commitment to a common scheme.” Each firm in an oligopoly knows that the effect of its acts depends on the reactions of its rivals. All producers perceive that price increases will be accepted only if all firms raise prices. Realizing their interdependence, each firm decides, without consulting its rivals, to match competitor price increases. Repeated efforts to match rivals’ price moves arguably indicate the firm’s conscious commitment to achieve higher prices. The sole interfirm “communication” consists of each firm’s observation of its rivals’ price changes. By calibrating its own moves to conform with the decisions of its rivals, each firm can be said to have “consciously committed” itself to participate in a “common scheme.” As we discuss below, it is possible to improve upon this formula by focusing

38. Id. at 768.

39 Page, Communication and Concerted Action, supra note XX, at 410-23.
more precisely on forms of behavior that firms use to communicate their intentions and execute the tasks needed to achieve coordination on pricing, output, and other dimensions of effective collusion.

B. Plaintiff’s Burden of Proof

Plaintiffs in Section 1 cases bear the burden of establishing the fact of an agreement. The “conscious commitment to a common scheme” can be shown with direct or circumstantial evidence.40 As elaborated in later decisions, Monsanto’s articulation of the burden of proof has considerable importance where the defendant files a motion to dismiss or a motion for summary judgment on conspiracy issues.

The fear that mistaken inferences from ambiguous evidence might deter procompetitive or benign conduct led the Supreme Court in Matsushita Electrical Industrial Co. v. Zenith Radio Corp.41 to extend and apply

40. See, e.g., ES Dev., Inc. v. RWM Enters., 939 F.2d 547, 554 (8th Cir. 1991) (antitrust plaintiff may prove existence of combination or conspiracy “by providing either direct or circumstantial evidence sufficient to ‘warrant a ... finding that the conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement.’”) (quoting American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)).

Monsanto’s conspiracy standards to horizontal agreements. Where the plaintiff relies on circumstantial evidence to establish concerted action, Matsushita said that “antitrust law limits the range of permissible inferences from ambiguous evidence in a Section 1 case” and emphasized that “conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.”

Quoting Monsanto, the Matsushita Court then specified the plaintiff’s burden of proof when the defendant seeks summary judgment or a directed verdict against claims when circumstantial evidence alone is introduced to establish collective action:

To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of Section 1 must present evidence that ‘tends to exclude the possibility’ that the alleged conspirators acted independently. . . . [Plaintiffs] in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs].

42. Id. at 588.

43. Id.
As in Monsanto, the Court in Matsushita sought to reduce error costs associated with excessively broad application of liability standards. In Matsushita, Japanese suppliers of electronics equipment allegedly conspired to price below cost in the United States, drive American firms from the market, and later raise prices to monopoly levels. In such a case, the Court emphasized that mistaken inferences of conspiracy could injure consumers by deterring firms from offering low prices.

Matsushita had a deep impact on the litigation of cases in which the plaintiff relied on circumstantial evidence to prove the fact of concerted action. Among other effects, Matsushita expanded the ability of defendants to obtain summary judgment by inviting lower courts to scrutinize the economic plausibility of the plaintiff’s evidence of conspiracy. As it had done in Monsanto, the Court in Matsushita emphasized the costs that could flow from a failure to apply the agreement standard with sufficient rigor. Monsanto had mentioned the availability of treble damages in private cases and noted that resale price maintenance arrangements—like all other

44. Monsanto emphasized the dangers of discouraging legitimate discussions between producers and their dealers. 465 U.S. at 763.

45. 475 U.S. at 587. Matsushita’s policy rationale should have less significance for horizontal conspiracy cases that do not involve claims of collective below-cost pricing. Horizontal agreements to raise prices or cut output pose greater competitive dangers than the concerted low pricing challenged in Matsushita and therefore might be subject to more liberal standards of proof.
conduct forbidden by the Sherman Act—could be prosecuted as a crime. As noted above, Matsushita warned that careful examination of the economic plausibility of the plaintiff’s evidence was necessary to ensure that mistaken inferences of agreement did not lead to treble damage awards which would deter firms from offering low prices.

In 2007, the Supreme Court extended Matsushita’s plausibility screen back to the pleading stage of antitrust litigation. In Bell Atlantic Corp. v. Twombly, the Court considered allegations that Bell Atlantic and other incumbent local exchange carriers (ILECs) had conspired to impede entry by competitive local exchange carriers (CLECs) and had agreed among themselves not to enter each other’s traditional service territories. The Court reiterated the principle that proof of conscious parallelism alone is inadequate to establish conspiracy and endorsed the application of the Matsushita plausibility standard to evaluate motions to dismiss. In that context, “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice.” For purposes of pleading an antitrust

46. Monsanto, 465 U.S. at 763. The Justice Department seldom prosecutes resale price maintenance as a crime. Yet, when the Supreme Court issued the Monsanto decision in 1984, it had been barely three years since DOJ’s most recent use of criminal process to challenge an RPM agreement. United States v. Cuisinarts, Inc., 1981 WL 2062 (D. Conn. 1981).


48. Id. at 556.
claim, the plaintiff must present “enough facts to state a claim to relief that is plausible on its face.” The Court observed that a more rigorous examination of the plaintiff’s pleadings was necessary lest the plaintiff (and classes of plaintiffs) be permitted to set in motion the costly process of civil discovery and extract unjustified settlements from defendants.

As a group, the Court’s antitrust conspiracy cases highlight the interdependence among the six key elements of a competition law system: the substantive scope of the legal command, the volume and quality of evidence required to prove a violation, the means for detecting violations, the prosecution of violations, the adjudication process that determines innocence or guilt, and the sanctions imposed for infringements. The Court’s decisions about the evidentiary standard -- here, the circumstantial evidence needed to establish an agreement for Sherman Act purposes -- are influenced by other elements of the system. Perceived excesses with private rights of action (the prosecution element) and the mandatory trebling of damages for victorious plaintiffs (the remedy component) have caused the Court to engage in “equilibration” — the adjustment of one element of the antitrust system (namely, the evidentiary

49. Id. at 570.

50. Id. at 559–560.

51. This concept originated in Stephen Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System, 74 Geo. L.J. 1065 (1986).
standard) to offset imperfections in other elements. The inclination to
demand a more powerful evidentiary showing—to increase confidence that
observed behavior truly results from concerted action—is reinforced by
the Justice Department’s routine application of criminal sanctions to
cartels and the availability of a per se rule of condemnation for cartels,
where the only issue is whether an illicit agreement was formed and
considerations of actual effects are irrelevant.

To examine the links among liability rules, evidentiary standards,
the identity of the prosecutorial agent, and remedies is to see several
possible paths for future adjustments to the treatment of conspiracy
issues. One approach is to adjust the evidentiary standards to account for
the institutional context in which the litigation of antitrust claims
takes place. Specifically, one might lighten the evidentiary demands that
the plaintiff must bear when the institutional setting suggests that the
case does not pose severe error costs. For example, the concern for over-
deterrence should diminish when the plaintiff is a public prosecutor
proceeding in a civil suit in which the remedy sought consists entirely of
forward-looking injunctive relief. Given the crucial role that
institutional factors play in shaping the evidentiary test, there should
be a difference in the proof required when the Federal Trade Commission
uses its administrative adjudication process and seeks injunctive relief
compared to a private class action that will be tried before a jury and
will result in an automatic trebling of any damages awarded.

Another path, discussed in more detail below, is to develop a better
analytical approach to evaluating the probative value of various plus
factors and, as this paper suggests, to apply economic theory and past
enforcement experience to identify factors or clusters of factors whose presence typically reveals the existence of concerted action. If enforcement agencies, courts, and juries have more confidence in the probative value of certain factors, there presumably will be less hesitation to impose severe sanctions -- e.g., treble damages or criminal punishment -- when those factors suggest the defendants have engaged in pernicious misconduct.

C. Interdependence and the Role of Plus Factors

As noted in the introduction to this Article, in markets characterized by interdependence, each firm realizes that the effect of its actions depends upon the response of its rivals. In highly concentrated markets, the recognition of interdependence can lead firms to coordinate their conduct simply by observing and reacting to their competitors’ moves. In some instances, such oligopolistic coordination yields parallel behavior (e.g., parallel price movements) that approaches the results that one might associate with a traditional agreement to set prices, output levels, or other conditions of trade.

The line that distinguishes tacit agreements (which are subject to Section 1 scrutiny) from mere tacit coordination stemming from oligopolistic interdependence (which eludes Section 1’s reach) is indistinct. The size of the safe harbor recognized by Theatre Enterprises depends on what conduct courts regard as the “extra ingredient of centralized orchestration of policy which will carry parallel action over
the line into the forbidden zone of implied contract and combination.”

Courts enjoy broad discretion to establish the reach of Section 1 by defining this “extra ingredient” broadly or narrowly.

Legal scholars have recognized that certain industry structures, firm histories, and market environments are conducive to and/or facilitate collusion. However, courts have relied on operational criteria known as plus factors to determine whether a pattern of parallel conduct results from an agreement. The chief plus factors have included:

- Actions contrary to each defendant’s self-interest unless pursued as part of a collective plan.
- Phenomena that can be explained rationally only as the result of concerted action.
- Evidence that defendants created the opportunity for regular communication.
- Industry performance data, such as extraordinary profits, that suggest successful coordination.
- The absence of a plausible, legitimate business rationale for suspicious conduct (such as certain communications with rivals), or the presentation of contrived rationales for certain conduct.

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54. See Gavil et al., supra note 6, at 310-11.
Two basic problems have attended judicial efforts to identify and evaluate plus factors. One problem involves the absence of a methodology for ranking plus factors according to their likely probative value. The second problem arises from the suggestion in the economics literature involving repeated games that market outcomes associated with collusive schemes can result from interdependent, consciously parallel conduct in some industries. We look at each of these in turn.

First, courts have failed to establish an analytical framework that explains why specific plus factors have stronger or weaker evidentiary value or to present a hierarchy of such factors. Antitrust agreement decisions rarely rank plus factors according to their probative merit or specify the minimum critical mass of plus factors that must be established to sustain an inference that conduct resulted from concerted acts rather than from conscious parallelism. Nor do courts ordinarily devote great effort to evaluating the economic significance of each factor. This ad hoc approach makes judgments about the resolution of future cases problematic and gives an impressionistic quality to judicial decision making in agreement-related disputes.

The failure in modern cases to provide a hierarchy of plus factors and explain the competitive significance of each might be attributed to one of the least discussed but most important Supreme Court decisions of the 1960s. In Continental Ore Co. v. Union Carbide & Carbon Co., the Court stated that “plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components...

and wiping the slate clean after scrutiny of each.... [T]he duty of the jury was to look at the whole picture and not merely at the individual figures in it.”

At first glance, this passage might be criticized as an invitation to relax what should be a rigorous examination of evidence—a suggestion that lower courts are free to dispense with a careful assessment of the importance of each element of proof and fulfill their responsibilities by dropping difficult conceptual issues into the lap of the jury. There is another, more sympathetic interpretation. Continental Ore is consistent with the possibility, which we discuss below, that certain clusters of factors warrant especially close attention, and that some constellations of factors have competitive significance that will not be understood by looking at each factor in isolation.

The variation in judicial analysis of plus factors also suggests that the outcome in many agreement cases depends upon the Court’s unarticulated intuition about the likely cause of observed parallel behavior. Judges appear to vary in their acceptance of the proposition in Theatre Enterprises that conscious parallelism, standing alone, does not demonstrate concerted behavior. Some judges may regard pricing uniformity as a sign of likely collaboration. After noting Theatre Enterprises, these judges will expand the range and reduce the quantum of conduct that, when added to parallel behavior, can support a finding of agreement. Other judges may view see parallelism as a desirable, natural manifestation of rivalry. They will be more reluctant to give weight to asserted plus factors and will be more sympathetic to the defendants’ explanations about

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56. Id. at 699.
why such plus factors implicate conduct that is either procompetitive or essentially benign.

The second problem results from the development of new arguments, rooted in the modern economics literature dealing with repeated games, that market performance associated with collusive schemes can result from interdependent, consciously parallel conduct in some industry settings. Firms in a number of industry settings may be able to achieve collusive outcomes without resorting to conduct that might be characterized as an agreement. Under Matsushita, defendants might argue successfully that observed parallelism is as consistent with what agreement doctrine has recognized as independent action—namely, the recognition and response to interdependence—as with an inference of collusive behavior. Moreover, under Matsushita’s implausibility test, firms could assert that it makes no economic sense for them to use tactics that violate Section 1 of the Sherman Act when the recognition of interdependence can yield the same market results. Where the recognition of interdependence alone accounts for the market outcome, the difficulties in identifying and prescribing avoidable conduct are likely to preclude effective antitrust intervention.

The refinement of federal merger enforcement policy in the past twenty years has increasingly relied on economic theories that illuminate the conditions in which consolidation likely has net anticompetitive effects. Among other features, the versions of the DOJ/FTC Horizontal

57. The formative treatment of this point is Baker, supra note 5. See also Carlton et al., supra note 14.
Merger Guidelines issued in 1992\textsuperscript{58} and in 2010\textsuperscript{59} focus on how a transaction might increase the ability of firms to coordinate their activity. The economic understanding of the process by which firms cooperate successfully guides the analysis of coordinated anticompetitive effects.

A similar, economically-oriented reformulation of agreement jurisprudence in circumstantial evidence cases would focus on the components of successful cooperation by rivals. As a general rule, firms that successfully collude: (i) reach a consensus on pricing, output, or other terms of trade; (ii) design allocation mechanisms that divide the collusive gain; and (iii) monitor compliance and stand prepared to punish nonconformist deviant behavior.

A reformulated standard in circumstantial evidence cases would seek to fulfill these conditions. Where the evidence of collaboration is wholly circumstantial, the plaintiff’s prima facie case would consist of introducing proof that demonstrates how the defendants achieve consensus, divide the collusive gain, and monitor compliance. To survive a motion for summary judgment or a motion to dismiss, the plaintiff would need to provide a plausible explanation for how defendants have executed these tasks. The defendants could rebut this prima facie case by advancing benign or procompetitive rationales for specific challenged acts, or by

\textsuperscript{58} The 1992 Horizontal Merger Guidelines are reprinted in 4 Trade Reg. Rep. (CCH) & 13,104.

\textsuperscript{59} The 2010 Horizontal Merger Guidelines were issued on August 18, 2010 and are available at http://www.ftc.gov.
demonstrating that the observed market outcomes likely as not resulted from the recognition of interdependence alone.

The most important threshold element of proof in this framework would consist of evidence showing how the defendants communicate their intentions and confirm their commitment to a proposed course of action. Perhaps the most probative proof of the mechanism for achieving consensus would consist of evidence demonstrating that a pattern of extensive communication among the defendants preceded a complex, parallel adjustment in behavior that could not readily be explained as the product of the defendants’ independent efforts to identify and adhere to focal points for organizing their conduct. The existence of a means for dividing the collusive gain might be revealed by establishing the existence of transactions among the firms at non-market prices, swaps, or patent cross-licensing agreements. The existence of a means for monitoring compliance might be revealed by establishing a pattern of bilateral exchanges of pricing information among competitors or of exchanges of data through trade associations.

II. Agreements to Suppress Rivalry Assessed Through the Reactions of Buyers

Firms in oligopolistic industries recognize their mutual interdependence and act upon that recognition. It would be unreasonable to expect firms not to do so. As noted above, the assessment of what is and what is not an agreement when firms are given the right to recognize and act upon their mutual interdependence remains unclear from court decisions.
Consider the following example of a repeated game. Suppose a duopoly produces a commodity. The product is not differentiated except for the identity of the producing firm, and there are high entry barriers. Each firm can produce as much of the product as it wants for a marginal cost of $10. Each firm recognizes that the joint-profit-maximizing price for the product is $25. In each and every period, the firms simultaneously and publicly announce prices to all potential customers. There is no other interaction of any form that occurs between the two firms—they only interact as rivals in the marketplace. If we start with each firm announcing $10, there is no one who would characterize that pricing as being an agreement—from an economist’s viewpoint, pricing at marginal cost yields the largest surplus to consumers and zero profits for each of the two firms. However, suppose in one period, firm A calls out a price of $10 but firm B calls out $25. Firm A gets all the demand that period. Suppose in the next period the same prices are called out—same outcome. In the next period firm A calls out $15 while firm B calls out $25—now firm A gets all demand but earns a profit of $5 per unit. Suppose we get to a period where firm A calls out $25 and firm B calls out $25—now each firm splits market demand and earns profit of $15 per unit. Suppose firm B deviates one period and calls out $24.50 and captures all demand. But, the following period firm A calls out $10 and continues to call out $10 for a large number of periods until it finally calls out $25 again. Suppose after a large number of periods each firm is calling out $25, dividing the demand equally, and each earning a profit of $15 per unit.

Consider the question of whether the price of $25 per unit, which each firm is now charging, has emerged from an agreement. It is clear that
the price of $25 emerged from a substantial amount of interfirm communication through a sequence of public price announcements by each firm to potential customers. But it is also clear that the pricing outcome emerged from their recognized mutual interdependence. Additionally, given the nature of this duopoly industry, it is perfectly reasonable that each firm would learn of the other’s pricing for the current period at the end of the period. Yet, the $25 price outcome is highly profitable and highly damaging to consumer surplus. Were courts to decide the issue without regard to remedies, they would likely deem such conduct to be an agreement in violation of Section 1 of the Sherman Act. As discussed in Part I, courts and enforcement agencies cannot address the agreement question without being aware of remedial issues that stand in the background. Courts are left with a substantial conundrum because they cannot meaningfully instruct firms to not react to their rivals’ pricing.

Staying with our example, there has been an unarticulated assumption that the buyers are passive in this market, accepting prices as called out by the two firms.60 But suppose that buyers are not passive in our case. Rather, suppose that buyers strongly resist price increases. Specifically, when each firm calls out a price of $25, each buyer is doing whatever it can to get a special deal with one seller or the other. For example, one buyer may offer to contract at $22.50 with a particular seller for many time periods as opposed to just the current period. At the same time a

60. In fact, the well known example in Carlton et al., supra note 14, of two gas stations in a town calling out the monopoly price also presumes that buyers are passive.
buyer may falsely represent a secret offer made by one of the sellers as they try to generate a lower price offer from another seller. Or, a buyer may threaten to use a foreign supplier or alternative input if prices are not decreased.

Without any kind of additional interfirm communication between the sellers beyond the calling out of prices, or assurances between sellers that any deviant conduct will be rectified with the damaged seller through an interfirm transfer, it seems unlikely that the price of $25 can survive as a stable outcome in the market. There is an important implication of this observation—if the buyers are active players in the oligopoly game, then if the price of $25 persists by the sellers they must be communicating beyond the simple announcement of prices and potentially also transferring resources among one another since without such seller conduct the price would tumble toward $10 given the strength of the buyer resistance.

In this circumstance, there would also be an agreement in violation of Section 1 of the Sherman Act but, unlike the earlier scenario, the courts would be more likely to deny the defendants’ motion for summary judgment. In the background is an expectation of an aggressive buyer reaction. In other words, although in each case there would be an agreement, the critical issue for finding whether an agreement was a violation of the antitrust laws would be the assumption regarding the reaction of a third party, the buyers, to the elevated prices.61 The exact same pricing outcome by sellers would be viewed by the courts in a

61. See supra notes 14-15 and accompanying text.
completely different way depending on whether the buyers were passive, as in the first scenario, or aggressive, as in the second scenario.

The two scenarios above presume that the courts have an understanding of the firms’ costs and of the demand for their product. In the absence of such information the court would not know if $10 was a low price, if $25 was a high price, and if some other price, say $100, wasn’t the joint-profit-maximizing price. If $100 was conjectured as a possible joint profit maximizing price, then $25 might be viewed as the consequence of active buyer resistance. Then the court may find itself unable to rule against the duopoly as being in violation of Section 1.

Overall, firms in an oligopoly are players in a repeated game. The game has incomplete information and substantial information asymmetries. The firms know many things that buyers do not know. Each firm has information that other firms do not have. Courts can attempt to resolve information asymmetries through discovery, but that process is only a partial solution.

When the firms in an industry are players in a repeated game with substantial incomplete and asymmetric information, the Court can examine buyer actions to attempt to distinguish between conduct that is an agreement in violation of Section 1 of the Sherman Act and conduct that is not. To see this, note that the way individual consumers ordinarily buy products and services is not the way industrial buyers typically buy products and services. Individual consumers are accustomed to transacting in a posted-price environment. None of us conducts a competitive procurement for the toothpaste we want this month—we go to a pharmacy or grocery store and purchase toothpaste at the posted price. We are not
players in an oligopoly game when we buy toothpaste or bread or gasoline. Rather, our conduct, in aggregate, can be modeled through an industry-wide demand curve as well as firm-specific demands where cross-price elasticities of demand can be specified. In such cases, the only active or strategic players are the oligopolistic producers.

In contrast, even relatively small firms have procurement divisions or at least substantial resources devoted to procurement. Such buyers typically use competitive procurement processes, where firms who are qualified potential suppliers are invited to submit bids. Buyers use the competitive bidding as a way to police the market. Because suppliers are aware that others are bidding, they must account for that as they seek the highest expected profit. Expected profit equals the profit in the event a given firm wins times the probability that the firm wins. These two are inversely related, and a bidder seeks the optimal balance between them. Buyers rely on competitive bidding processes to police the market in that they reveal information that buyers may not have known about the suppliers, their products, and pricing. When buyers are engaged in competitive procurements to buy from suppliers, and the buyers can undertake a number of actions in that context to enhance their surplus, they are active players in the oligopoly game.

Suppliers recognize this policing function and, consistent with playing in a repeated game, may attempt to mitigate the policing function of the competition. If the sellers’ bids yield to pressure from buyers, then it may have been the case that the sellers, who are players in a repeated game with substantial incomplete and asymmetric information, were not doing anything additional to suppress competition among themselves.
other than recognizing their long-run interaction in a game setting. However, if the sellers do not yield and hold to their initial bids, which were seemingly at high prices, then each buyer must consider whether the price increase is a legitimate response to some underlying market conditions or the result of an agreement between sellers to suppress competition.

Buyers design the procurement mechanism that they use. Obviously, they are self-interested designers. If the mechanism is producing results that are inconsistent with their expectations for surplus, then the buyers will change the procurement design, in real time, in an attempt to secure greater surplus. This redesign can be costly. But, after seeing an initial round of bids, it can become quite clear to a buyer that the expected payoff from resistance more than offsets the increased costs. For example, qualifying a new seller might have such a low ex ante expected surplus.

Concerns regarding agency problems have sometimes led to an emphasis on ‘transparency in bidding,’ particularly with respect to federal government procurements. As shown by Marshall and Marx (2009), pre-auction transparency in the form of transparent registration, and real-time transparency in the form of revelation of the identities of some or all active bidders increase susceptibility to collusion. If the primary motivation for “transparency in bidding” is concern about the possibility of corruption by the auctioneer, then post-auction transparency, where auction results are made public after the conclusion of the auction, may provide sufficient information to monitor the auction process without being as pro-collusive as pre-auction or real-time transparency.
return that a buyer does not do it and thus initially excludes the new entrant, but after seeing an exceptionally high lowest bid from the procurement, a buyer may void the initial bidding and incur the expense of qualifying the new entrant so as to generate an extra bidder at a new procurement.

In a nutshell, buyers can behave as follows: be wholly passive and thus not be players in the oligopoly game; be vigorous in their pursuit of incremental surplus from sellers; or be anything in between, depending on the specific nature of the product/industry/market under consideration. In our view, courts need to understand the oligopoly game of a given product/industry/market before evaluating any economic circumstantial evidence with regard to its probative value. The Carlton, Gertner, and Rosenfield (1997) example of two gasoline stations in a small town achieving monopoly price without communication seems quite compelling,63

63. The gas station example of Carlton et al., supra note 14, fits well within the standard Folk Theorem environment—two firms compete by setting prices, where those prices are perfectly observable and can be adjusted instantaneously, and profit of each firm is determined by the two prices and a fixed demand curve. As Carlton et al. note, in this environment, one would not be surprised to find that tacit collusion can support the monopoly outcome. Any deviations from monopoly pricing would be immediately observed and met by a response from the other firm. The buyers in this environment are not players in the game and so have no ability to take actions that might disrupt the ability of the two firms to maintain their tacit agreement.
but it quickly wilts when contrasted with the market for vitamin A500 USP which was produced by only two firms throughout the 1990s. Despite being repeat cartel offenders (Roche and BASF), these firms needed an explicit agreement (communication and transfers) to elevate prices to monopoly levels. When duopolistic firms like Roche and BASF need an explicit agreement to get to a monopoly price, it becomes increasingly clear that the Carlton, et al. (1997) example is only a pedagogical device to illustrate the importance of understanding the specifics of the product/industry/market posed by each case and the extent to which the buyers are players in the oligopoly game.

However, one need only make small changes to the environment of Carlton, et al. (1997) in order to reach an environment where tacit agreement is insufficient to achieve the monopoly price. For example, if prices are not observable and demand has at least a small random component, then one enters the environment of Green and Porter (1984).  

64. This is consistent with Stigler’s (1964) assumption that firms do not observe their rivals’ prices but rather infer them imperfectly from their own demand. George J. Stigler (1964), "A Theory of Oligopoly," Journal of Political Economy 72, 44-61.

Green and Porter show that in their environment equilibria exist that allow the firms to obtain supra-competitive profits, but they argue that such equilibria would be expected to require an explicit agreement among the firms.66

Other changes in the environment reinforce the need for an explicit agreement, including moving away from posted prices to, for example, competitive procurements and allowing buyers to be true players in the game. When buyers are players, they have an incentive to pursue strategies that disrupt equilibria that allow the sellers to capture supra-competitive profits. Buyer resistance limits the ability of firms to maintain collusive prices through only tacit agreement because buyer resistance exploits the lack of communication, monitoring, and enforcement characterizing a tacit agreement.

III. Taxonomy of Cartel Conduct

If an effective cartel uses a market share allocation scheme, then we will observe fixed relative market shares among those firms. This statement is not logically equivalent to, “if we observe fixed relative market shares among a subset of firms then the firms exhibiting those

66. Green and Porter observe in their footnote 5 that “It is logically possible for this agreement to be a tacit one which arises spontaneously. Nevertheless, in view of the relative complexity of the conduct to be specified by this particular equilibrium and of the need for close coordination among its participants, it seems natural to assume here that the equilibrium arises from an explicit agreement.”
relatively fixed shares are effectively colluding through the use a market share allocation scheme.” But, since “A implies B” does not logically yield “B implies A,” what then is a plus factor?

One issue with the current characterization of plus factors is that there is no taxonomy for them. Relatedly, there is no ranking of plus factors, even within broad groupings, of their relative probative value. It is common to note that much depends on the nature of a specific product, industry, and marketplace in considering a given plus factor; however, at the current time, all plus factors tend to reside in the same five-gallon bucket, essentially without distinction.

As an example, we can contrast two plus factors. Consider fixed relative market shares among a subset of firms in an industry to be one. There are numerous non-collusive explanations that can exist for fixed relative market shares among firms in an industry. In contrast, consider vertical foreclosure conducts by a subset of firms in an industry, targeted at one or a few small firms in the industry, where no single firm in the subset has sufficient market power to act unilaterally as a dominant firm. The former plus factor appears to be quite weak while the latter is strong and compelling. If a ranking is that easy between two plus factors, without describing any features of the product, industry, or marketplace, then it is clear that at least a broad ranking of plus factors is possible. As will be clear from our examples, and as we formally establish below, the strength of any plus factor is crucially determined by the contrast between the likelihood of an action in the presence of an agreement and its likelihood otherwise.
Accordingly, consider the actions, broadly construed, of an explicit cartel.

A. Raise prices above what they would have been without the conspiracy.67

B. Reduce total industry-wide quantity below what it would have been without the conspiracy.68

C. Change within-firm incentives so as to inhibit interfirm competition and foster higher prices.

D. Allocate the collusive gains among members.

E. Redistribute gains and losses among members so as to maintain compliance with the agreement.

F. Monitor compliance with the agreement and communicate regularly regarding all relevant features of the conspiracy that require discipline.

67. Stigler (1964) emphasizes “pricing structures” as opposed to the more narrow concept of elevating prices. A cartel may find price discrimination to be quite profitable. If so, then some buyers may actually experience price decreases as a consequence of profit enhancing conduct by the cartel. In practice, however, this would be highly untypical. Also, this caveat would create an ongoing difficulty for exposition. Therefore, we simply discuss price increases by a cartel.

68. Related to the previous footnote, it is well known that extensive price discrimination can actually increase quantities brought to the market (while extracting large amounts of consumer surplus). Again, this would be highly untypical and, in addition, would create ongoing exposition difficulties, so we simply discuss the restriction of quantity by a cartel.
G. Stand ready to abandon collusive conduct if some cartel members continually engage in substantial non-compliant conduct.

H. Once interfirm rivalry has been suppressed successfully, seek additional profits through activities such as dominant-firm conduct.

If these are the eight components of cartel conduct, then any plus factor has to be consistent with one or more of these. So, at a minimum, plus factors can be classified by these eight. Consider the list of 14 plus factors from Posner (2001): 69

1. Fixed relative market shares
2. Marketwide price discrimination
3. Exchanges of price information
4. Regional price variations
5. Identical bids for non-standard products
6. Price, output, and capacity changes at the formation of the cartel
7. Industry-wide resale price maintenance
8. Declining market shares of leaders
9. Amplitude and fluctuation of price changes
10. Demand elastic at the market price
11. Level and pattern of profits
12. Market price inversely correlated with number of firms or elasticity of demand
13. Basing-point pricing
14. Exclusionary practices

Directly or indirectly, nine of these concern action A, cartel pricing (“2,” “4-7,” “9-10,” “12-13”). Only “3” concerns action F—

interfirm communication and monitoring—and that only addresses the 
exchange of price information. None of these plus factors concerns action 
E—the redistribution of gains and losses among cartel members so as to 
maintain compliance with the agreement. Only “6” is related to action G—
the threat of abandoning collusive conduct if there is substantial non-
compliant conduct—and that relation is quite indirect. Only “1” concerns 
action D—the allocation of the collusive gain among members—and “1” only 
concerns one type of allocation mechanism. Factors “7” and “14” address 
action H, a cartel undertaking dominant-firm conduct, but again in a 
restrictive sense.

None of the Posner plus factors addresses action C, changing within-
firm incentives. Nor do they address action B—reducing industry-wide 
quantity—even though in certain cases, effective cartel management may 
require agreements in this dimension.

The strength of an inference of collusion that can be drawn from 
individual Posner (2001) plus factors is a mixed bag. On the one hand, if 
we observe a subset of firms in an industry engaging in dominant firm 
conduct, and none of the firms is large enough on its own to act as a 
dominant firm, then the inference of collusion is strong. On the other 
hand, the observation that a subset of firms is experiencing higher 
profits is consistent with entry barriers and a positive demand shock 
(and/or a negative factor price shock), so the inference of collusion is weak. Some of Posner’s plus factors are relatively simple to observe in 
the marketplace (such as “13”), whereas others require access to detailed 
internal records of the cartel members (such as “3”), while yet others 
require sophisticated econometric analysis (such as “12”).
It is our contention that the actions of an explicit cartel, and the outcomes of those actions, should be the light illuminating the path to identifying plus factors. Furthermore, any of those actions that are almost surely not part of unilateral conduct should be given special attention, because those lead to the strong inference of collusion. In addition, there are individual plus factors that do not lead to the strong inference of collusion, but two or more plus factors seen together may lead to a strong inference. Finally, there are plus factors that are relatively simple to observe and draw strong inferences from, while others are only available after considerable economic analysis.

A cartel is solving a multidimensional problem; the actions it takes will not be one dimensional, as our list of cartel actions A through H above makes clear. We now consider in greater detail each of the cartel actions A through H that can act individually and jointly as plus factors.

**A. Price Elevation**

Given that a plus factor is supposed to be something beyond conscious parallelism in conduct from which to infer collusion, such as parallel pricing, it seems a bit odd to have 9 of Posner’s 14 plus factors be about price. In fact, cartels have taken great comfort in the fact that, at the end of the day, courts are typically not going to rely on economic evidence about price to infer collusion.70

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70. See 94/601/EC: Commission Decision of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833—Cartonboard) saying, “Had they been challenged, the producers could as a result of this
This being said, many cartels spend a great deal of energy on coordinating price announcements. For example, international cartels in the vitamins industry coordinated announcements of price increases, including the designation of which company would lead the price increase.\(^71\) As another example, in Rubber Chemicals, one of the components of the conspiracy was “issuing price announcements and price quotations in accordance with the agreements reached.”\(^72\) Similar charges have been made elaborate scheme of deception have attributed the series of uniform, regular and industry-wide price increases in the cartonboard sector to the phenomenon of ‘oligopoly behaviour’. They could argue that it made sense for all the producers to decide of their own volition to copy an increase initiated by one or other of the market leaders as soon as it became publicly known; unlawful collusion as such would not necessarily be indicated. Customers might well suspect and even accuse them of operating a cartel; and given the relatively large number of producers, economic theory would be stretched to its limits and beyond, but unless direct proof of collusion were forthcoming—and they went to some lengths to ensure it was not—the producers must have had hopes of defeating any investigation into their pricing conduct by the competition authorities by invoking the defense of oligopolistic interdependence.” (para 73)


\(^72\) U.S. Department of Justice Press Release, “Crompton Corporation Agrees to Plead Guilty for Participating in Rubber Chemicals
against firms in sorbates, monochloroacetic acid and organic peroxides, polyester staple, high pressure laminates, amino acids, carbonless paper, cartonboard, and graphite electrodes.

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77. EC Decision in Amino Acids at 53 and 164.

78. EC Decision in Carbonless paper, 2001, Case COMP/E-1/36.212 at 233 and 236.

79. EC Decision in Cartonboard at 20 and 76.
Since prices are typically determined by a major industrial buyer through competitive procurements, the direct manipulation of those prices is a matter of bid-rigging by sellers, and given that many transactions do not occur at announced prices, even after the “effective” date, it is natural to wonder why oligopolistic firms go through such efforts regarding price announcements.

Price announcements are largely about sellers adjusting buyers’ expectations in a publicly observable way and, as a consequence, lowering buyer resistance to price increases. To illustrate this, consider two scenarios. In the first scenario, there are no price announcements, but buyers are confronted with surprisingly higher prices at their competitive procurements. In the second scenario, the same bids are submitted by sellers, but in the weeks prior to the bidding, the sellers make similar price announcements with similar justifications for the price increase. In the first scenario, buyers will be more apt to resist the higher prices than in the second. In the second scenario, buyers can be more confident that all their competitors are confronting similar price increases, whereas in the first scenario they have no such assurance. In the first scenario, they need to take measures to assure that their firm is not being comparatively disadvantaged. This is consistent with the fact that all procurement divisions at major firms have limited budgets and must

allocate scarce administrative resources over all of their acquisitions so as to procure a large number of factors at least cost, in absolute terms as well as relative to their competitors.\textsuperscript{81} Any product market where sellers are regularly using price announcements is one where sellers are fully cognizant of the fact that buyers will actively resist price increases if they are too high or unexpected.

Marshall, Marx, and Raiff (2008, p.774) emphasize the distinction between public price announcements and private notification by sellers to buyers.\textsuperscript{82} A buyer that receives private notification of a price increase may resist because of concerns that it is being disadvantaged relative to other buyers. A public announcement mitigates this concern. In addition, public announcements allow suppliers to monitor actions of their rivals.

Marshall, Marx, and Raiff (2008) characterize collusive price announcements in the vitamins industry as: 1. made relatively more frequently than non-collusive price announcements; 2. occurring at

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\textsuperscript{81} If procurement divisions at major firms had unlimited budgets, they would maximally resist all price increases and so actions on the part of a cartel to minimize price resistance would have no effect.

somewhat regular intervals;\textsuperscript{83} 3. gradual in the sense of involving relatively modest individual price increases; 4. typically “joint announcements,” with one firm leading and then others matching soon thereafter; and 5. typically having long lead times before the new price becomes effective.

The gradualism of price increases, the use of joint announcements, and lead times before the effective date of the price increase directly address buyer resistance. The value of gradualism is apparent in Electrical and Mechanical Carbon and Graphite Products,\textsuperscript{84} where cartel members faced buyer resistance because of the size of the price increase

\textsuperscript{83} The regularity of cartel price announcements reflects the common use by cartels of a regular meeting schedule. For example, each quarterly cartel meeting might be followed by a new price announcement, giving a quarterly structure to the price announcements. That said, if buyers or enforcement authorities were to emphasize the regularity of price announcements in detecting cartels, a cartel could move its price announcements to a more random schedule.

they announced. Joint announcements are valuable because if buyers observe that all the firms in an industry, or at least an important subset of firms in an industry, have announced identical price increases, they will be less likely to expect aggressive price negotiations with the firms to be worthwhile. Lead times for the effective dates of public price announcements allow the cartel to monitor acceptance of the price increase and retract an announced increase that is being heavily resisted by buyers before incurring disruptions in cartel market shares.


86. The EC decision in Vitamins states that, “The parties normally agreed that one producer should first ‘announce’ the increase, either in a trade journal or in direct communication with major customers. Once the price increase was announced by one cartel member, the others would generally follow suit. In this way the concerted price increases could be passed off, if challenged, as the result of price leadership in an oligopolistic market.” (EC decision in Vitamins at 203-204.) Case COMP/E-1/37.512–Vitamins, Comm’n Decision, 2001 O.J. (L 6) 1, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_006/l_00620030110en00010089.pdf.

87. Approximately 50% of the price announcements made by the Vitamins Cartel were made well prior to the effective dates for the price
Now turn to the actual bidding that occurs at the competitive procurements of the buyers. Identical bids can arise in many non-collusive environments. Further, it is difficult to imagine that participants in an explicit cartel assembled in a hotel room and determined that the right decision with respect to a procurement was to submit identical bids. The primary way to determine whether any bids at a procurement, or a set of procurements, came from an explicit cartel requires a benchmark that is thought to be non-collusive. That could be a time period, a geographic increases; however, in an earlier benchmark period where explicit collusion was unlikely, only 5% of price announcements were made prior to the effective dates for the price increases. (See Marshall, Marx, and Raiff, 2008) Because of the role that the pre-announcement of price increases can play in supporting a collusive agreement, competition authorities have in certain cases prohibited the announcement of prices prior to their effective date. Such a prohibition was imposed on an association of sugar refiners in 1934, (U.S. v. Sugar Inst., 15 F. Supp. 817, 830, 908 (S.D.N.Y. 1934)) but the Supreme Court reversed that portion of the district court order. (Sugar Inst. v. U.S., 297 U.S. 553, 603 (1936)) More recently, a prohibition on advance price announcements was included in the 1967 consent agreement in U.S. v. Pennsalt Chem. Corp. (U.S. v. Pennsalt Chem. Corp., 1967 Trade Cas. (CCH) P71,982, at 83,475 (E.D. Pa. 1967)) In addition, in Ethyl Corp., (In re Ethyl Corp., 3 Trade Reg. Rep. (CCH) at 22,546 (F.T.C. Mar. 22, 1983), enforcement denied sub nom E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984)) the Federal Trade Commission found advance announcement of price changes to have an anticompetitive effect.
region, or a related but separate product. But the analytic requirements are substantial in evaluating bid data relative to a benchmark. If that analysis is done well, the results can constitute a super plus factor—i.e., actions or conducts (in this case, pricing) that are highly unlikely to occur in the absence of a collusive agreement.\textsuperscript{88} To do this analysis well requires that a reliable predictive econometric model be estimated for a benchmark, usually a time period, where conduct is thought to be non-collusive.\textsuperscript{89} The predictive model would account for those demand and cost factors specific to the product market not potentially manipulable by a cartel (and only those), and it would similarly account for industry characteristics that are not potentially manipulable by a cartel. This model would be used to predict prices during a time period where there was a suspicion of collusion. If actual prices fall outside the range of prices that would have prevailed under the non-collusive benchmark, with the range determined by a specified high confidence level, then this outcome can constitute a super plus factor.

\textbf{B. Quantity Restrictions}

If we think of an industry-wide demand curve for the product in question, a cartel is elevating price and reducing quantity relative to

\textsuperscript{88} “Super” plus factors are defined more precisely below.

what would be accomplished if the sellers simply acted as oligopolists in a repeated game without explicit collusion. The reduction in quantity often does not require even the mention of quantity by cartel members. Committing to an increase in price along with a commitment to a market share allocation rule is all that a cartel needs to implement a supply restriction—nothing needs to be discussed about supply because the market share allocation accomplishes the supply restriction.

There are industries where explicit restrictions in supply are needed for the implementation of the cartel agreement. As a well-known example, the OPEC Cartel operates by establishing petroleum output limits for its member countries. By suppressing output of oil, they increase the market clearing price for oil above what it would have been without the constraints. Likewise, the role of quantity reductions to increase prices is well understood by governmental agricultural price support programs that pay farmers not to grow certain crops or to leave fields fallow. Recently, a suit was filed claiming that the United Potato Growers of America Inc. and others “conspired to manipulate potato prices by controlling and reducing supply, taking coordinated steps including agreeing to limit potato planting acreages, to pay off farmers to destroy potatoes or not grow additional potatoes, and to diminish the overall number of potatoes available to direct purchasers.”

Reduced supply is often observed at the trough of a business cycle as a natural part of unilateral conduct in response to reduced demand in a

recession. Supply restrictions that stem from a cartel agreement will be weaker evidence of collusion at the trough of a business cycle than if the same conduct occurred at the peak of economic activity. However, restrictions in supply by subsets of firms when demand is strong, profits are high, and prices are relatively high, leads to the strong inference of collusion - namely, it is a super plus factor - for two reasons. First, there are substantial foregone profits from collusion by restricting supply when demand is strong. Second, buyers will be taking measures to resist price increases in such an environment and it is quite unlikely that unilateral conduct by sellers would not take advantage of the opportunity to sell incremental units at high prices.

C. Internal Incentive Shifts

When a cartel forms, the firms participating in the conspiracy cannot issue a memo to all staff about the fact that upper management has opted for the suppression of interfirm rivalry through an agreement with other sellers. The issue of sales force incentives arose for the cartel in Amino Acids:

During this meeting, ADM alluded to the importance of a company controlling its sales force in order to maintain high prices, and explained that its sales people have the general tendency to be very competitive and that, unless the producers
had very firm control of their sales people, there would be a price-cutting problem.\(^91\)

Cartel firms may likely find themselves needing to change the incentives of their sales force after the inception of the cartel in order to comply with the agreement. In the pre-cartel period, many sales forces have incentives to pursue increases in market share. Such incentives are counter to cartel allocation agreements.

Consider a market share allocation. A sales force that has incentives to pursue increased market share will put upper management in a difficult position with respect to other cartel firms because the sales force will drop prices to secure incremental business, both of which are likely violations of the cartel agreement. To rectify this internal issue, cartel firms will often change the incentives of their sales forces to be along the lines of “price before volume.”\(^92\) This means that the sales

\(^{91}\) EC Decision in Amino Acids at 98.

\(^{92}\) “In their ‘top-level’ meeting in Zurich in September 1989, the divisional chairmen of Roche, BASF and Rhône-Poulenc had agreed to a policy of ‘price before volume’.” (EC Decision in Vitamins at 200). “While Managers are instructed to hold the worldwide market at 48 %, they are ordered to put ‘price target before quantity/market share target: do not overshoot quantity by not achieving price target’ c.f. the ‘price before tonnage’ maxim.” (EC Decision in Vitamins at 206–207) A “price before tonnage” policy is also described in the EC Decision in Cartonboard at 51–52.
force will be rewarded for maintaining prices at relatively high levels and will not be rewarded for gaining market share. In an industry where the product made by different firms is largely homogeneous, this kind of shift in the incentives of a sales force could not be justified as a unilateral non-collusive action. If a firm did this individually it would likely find itself losing market share to rivals at a remarkable pace. Buyers resisting price increases would shift away from such a firm to other sellers who were still pursuing increases in market share. In an industry where the product made by different firms is largely homogeneous, a shift in the incentives of sales forces across firms in an industry to “price before volume” leads to the strong inference of explicit collusion — namely, it is a super plus factor.

D. Allocation of Collusive Gains

The allocation of collusive gains can occur through a market share agreement, a customer allocation, a geographic allocation, or some combination of these. As noted above, these allocations are also part of implementing the supply restriction and are not just in place to divide the collusive gain. If a firm sells beyond its market share allocation, then some other firms are below theirs, and the former will be required to buy product from the latter at cartel prices at the end of the year. The latter firm is thus made whole while the former is incurring a penalty for overselling—buying product at cartel prices that it could produce at much lower cost. Observationally, each of the allocations has an implication—stable market shares for a subset of firms, no customer churn, and certain regions being serviced only by specific firms, respectively. But each of
these may arise as part of non-collusive conduct by oligopolists in a repeated game setting.

However, strong buyer resistance when firms are acting without explicit collusion will produce more variability in market shares, the sellers that customers select, and the penetration of geographic regions by sellers, than when there is explicit collusion. In the face of relatively high or rising prices, we expect stronger buyer resistance and thus more variability in these three measures when firms are acting non-collusively. To see these measures actually become more stable and have less variability when prices are relatively high or rising, especially when firms have excess capacity, leads to the inference of explicit collusion and is a super plus factor.93

E. Redistribution of Gains and Losses

Cartels will often need to redistribute gains and losses to maintain their agreements. In some circumstances, the observation that one seller buys output from another seller at market prices leads to the strong inference of collusion, for example when each seller has excess capacity, the product made by each seller is physically identical, and the value to weight ratio of the product is high. These types of transactions are

93. However, the inference is weaker if the sellers are functioning at full capacity than if the sellers actually have excess capacity when prices are rising. But collusive sellers, who understand that this weakens the inference, may be able to manipulate capacity utilization to give the appearance of full capacity.
consistent with "true-ups" to comply with the terms of a market share agreement where one firm has produced more than its share while others have produced less. In addition, if one seller buys anything from another at non-market prices, then a resource transfer is being made for which there is no reasonable non-collusive explanation. If the transaction were non-collusive in nature there would be no need to disguise it through the purchase of product. Other transactions require scrutiny, such as patent licensing, cross-licensing, and patent pools, as well as the settlement of seemingly frivolous lawsuits. In summary, if firms engage in interfirm transfers of resources that are largely void of productive non-collusive motivations, then these transactions are super-plus factors.

94. True-ups are described in the EC Decision in Vitamins. For example, when Rhône-Poulenc did not meet its market share target "the other two European producers would purchase product from it to compensate for the shortfall. Compensating purchases were made by Roche in 1996 and by Roche and BASF in 1997." European Commission Decision Case COMP/E-1/37.512. Vitamins, 2001.

95. It is a relatively simple matter for firms in an oligopoly to be engaging in contractual relationships with regard to a broad range of activities, many of which are completely meaningless from a productivity standpoint, and to use allegations of contract breach, and ensuing settlements, to legitimize cartel side-payments.
F. Communication and Monitoring

Communication is a central part of the operation of a cartel.\textsuperscript{96} We are concerned with communication that reflects the ongoing nature of the conspiracy. In general, if a seller (receiver) knows something about another seller (sender) an immediate question arises—was there no legitimate unilateral function for the sender in communicating such information to the receiver? Overall, information is a valuable commodity. For one seller to know information about a rival is to give that seller a competitive advantage. A competitor has no unilateral interest in disadvantaging itself relative to its rivals.

Suppose one seller knows the customers who purchased from another seller in the past quarter and knows the price and quantity of each transaction with each customer during the past quarter. The receiver will argue that it wants to know these things in a competitive marketplace and that it cannot be expected to ignore such information when it comes to its attention. However, why would the sender convey such information? Sloppiness and incompetence with respect to the management of critical business information are not legitimate reasons. The sender may argue that it did not convey the information, but instead, each buyer gave this information to the receiver. But how would a buyer gain by conveying information to a non-awardee about the terms offered by an awardee? In the absence of direct evidence that such conveyances were made, it is

\textsuperscript{96} Page, Communication and Concerted Action, supra note XX; Page, Neo-Chicago Approach to Concerted Action, supra note XX.
reasonable to assume that the sender transmitted the information to the receiver. But the sender would have no unilateral self-interest in doing so. Thus, the motivation must be explicit collusion and, furthermore, there is an expectation of reciprocation.

With regard to firm-specific production information, again there is no reasonable explanation for such a conveyance by a non-collusive seller to another non-collusive seller. For example, unilateral knowledge of a rival’s capacity utilization, inventory levels, or production costs will increase expected returns in any competitive bidding process. The conveyance of firm-specific production and sales information is important for monitoring compliance with many cartel agreements. For example, market share allocations require knowledge of exactly this kind of information, as well as the ability of cartel members to verify such information. Sometimes cartels will use trade associations, export associations, or outside consultants to convey such information among themselves.

Other information conveyances also yield a strong inference of explicit collusion. One example is knowledge of transactions between two sellers by a third seller. If one seller is buying a large amount of product from another seller, there is no reasonable non-collusive reason for a third seller to be aware of such a transaction. From a cartel perspective, however, every member wants assurance that transactions necessary for the peaceful, stable maintenance of the cartel agreement have occurred between members.

Overall, each of the three information conveyances discussed above lead to the strong inference of collusion among the sender and receiver sellers, and thus each is a super plus factor.
G. Enforcement

Because courts will not enforce cartel agreements, a cartel must devise enforcement mechanisms and threats. A common threat is to hold excess capacity, but excess capacity is often observed in industries without collusion. The economics literature devotes much attention to the threats required to enforce outcomes in repeated games. What distinguishes those threats and enforcement mechanisms from the ones we would observe with explicit collusion? Cartels from the early 1900s often required members to post bond with the central committee of the cartel. A firm would forfeit its bond if it was deemed to have violated the cartel agreement.97 This kind of obvious paper trail appears to be largely absent from modern cartels. Overall, it seems that modern cartels are more focused on monitoring, communication, and redistribution so as to prevent breakdowns in cartel discipline than on some punishment. A cartel’s demise implies a return to a standard oligopoly repeated game. The drop in the price level that ensues is consistent with such a breakdown, but it may be consistent with many non-collusive factors as well.

Many cartels struggle to suppress interfirm rivalry and remain continually focused on solving that problem. Other cartels reach a peaceful and concordant equilibrium, and essentially act as a single firm in the marketplace. Once a cartel has solved the issues associated with suppression of interfirm rivalry and can act like a single firm, it looks to other ways to increase profits. One of these other ways is to adopt dominant firm conducts. These may include predation against non-cartel producers, exclusive dealing, and other kinds of monopolization activities. This kind of conduct is relatively easy to observe and, if no member of the cartel is large enough on its own to undertake dominant firm conduct, it is an indication of the presence of a cartel. In other words, dominant firm conduct by firms in an industry where there is no one dominant firm leads to the inference of collusion. The strength of the inference depends on the conduct as well as the product/industry/market.

A typical Section 2 investigation begins with determining whether there is a dominant firm in the industry. If so, then specific dominant-firm conduct is analyzed to determine if it is anti-competitive. In contrast, we begin with the determination that there is no dominant firm in the industry, and then inquire if there are specific conduct that are typically associated with dominant firms, regardless of whether the conduct is pro or anti competitive, and draw the inference of a cartel from the presence of that conduct.

Of course, some conduct that is the focus of Section 2 investigations can be undertaken legitimately by smaller firms in an industry. So, the observation of dominant firm conduct, by itself, does not necessarily imply collusion. But there are two general guideposts that can be used to strengthen the inference. First, is the conduct something that would be defeated by competitive forces? Consider an industry with three firms who each have 33% of the market and one firm that has 1% of the market. Suppose the three large firms control a critical factor input that the small firm needs for production. If one of the large firms refuses to sell to the small firm, but it is profitable for either of the other two large firms to sell to the small firm, it is unlikely that the conduct will survive due to the competitive pressure from the other two large firms. Second, if a conduct has industry-wide benefits, such as entry deterrence, it may be too costly for a single firm to undertake the conduct. Furthermore, if one firm undertakes the activity on its own it is automatically disadvantaged relative to rivals since it bears a cost that rivals did not, but all share equally in the benefit.
With these guideposts in mind, the strongest inference of collusion comes from joint vertical foreclosure where, again, there is no dominant firm in the market. Bundling, tying, predation, and exclusive dealing can be compelling evidence of collusion depending on the product/industry/market. In general, if a subset of firms that in aggregate have sufficient market power, and jointly engage in a dominant-firm conduct where no single firm has the market power to act unilaterally as a dominant firm, then there is a strong inference of a cartel and, thus, such conduct is a super plus factor.

I. Cartel Response to Factors Identified as Super Plus

If collusive firms come to understand that super plus factors will be used by courts to draw a strong inference of a Section 1 violation, then colluding firms will try to avoid conduct that creates super plus factors. But to avoid super plus factors greatly encumbers the profitability and stability of a cartel, perhaps even deterring the conspiratorial conduct. For example, if cartels come to understand that interfirm transfers will be treated as super plus factors, then they will either need to avoid these transfers or further disguise them. The avoidance of such transfers can greatly increase the monitoring burden of a cartel. Specifically, it requires a market share cartel to have no year-end deviations from the agreed-upon shares. As another example, if the absence of market share variability in the face of relatively high or increasing prices and profits is treated as a super plus factor, then cartel firms will be forced to artificially manufacture market share volatility. This greatly threatens a market share cartel, especially if interfirm transfers are no longer possible. As yet another example, in a
homogenous product industry, cartel cohesion could be disrupted if firms must leave the incentives of the sales force intact so that the sales force continues to pursue market share gains instead of enforcing new higher price levels. Overall, because super-plus factors are actions/outcomes that would almost never be observed in the absence of collusion, it is reasonable to presume that the cartel finds these conducts/outcomes important with respect to the implementation and operation of the collusive structures.

IV. Inferences Based on Plus Factors

Detecting a cartel is much like diagnosing whether a disease is present or not. The plus factors are symptoms that can make the diagnosis more reliable. In medicine, there are definite rules for arriving at a diagnosis based on the presence or absence of given symptoms. If these rules are useful in medical matters of life and death, they should also be useful in legal matters involving potentially vast sums and the health of firms and markets because the underlying principles are the same.

The rules just alluded to are not rules of thumb, but are embodied in a precise mathematical formula for probabilities set forth almost two hundred fifty years ago by Thomas Bayes (1763).99 In the context of cartels, as in any legal setting, it is recognized that certainty is not always possible. Instead, uncertainty is common. Uncertainty can be

measured by probabilities. Probabilities are numbers between 0 and 1 inclusive that indicate the likelihood of an event.

We are interested in whether a cartel was operating given the evidence. We write the probability of this as

$$P [\text{collusion} \mid \text{evidence}],$$

or just $P[C \mid E]$. The “$P$” stands for “probability”; “$\mid$” is to be read as “given.” When $P[C \mid E]$ is close to one, the evidence indicates a cartel was almost certainly operating. When it is close to zero, the evidence indicates a cartel was almost certainly not operating.

Consider how the evidence of plus factors can be used to assess $P[C \mid E]$. Suppose our evidence consists of just one plus factor. As a shorthand, write this as $F$ ($F$ is for “factor”). We would like to know the probability that a cartel was operating, given the evidence provided by the plus factor, $F$, that is, $P[C \mid F]$. According to what is known as Bayes Theorem,\(^\overline{100}\)

$$P[C \mid F] = \frac{P[F \mid C] \times P[C]}{P[F]} = \frac{P[F \mid C] \times P[C]}{P[F \mid C] \times P[C] + P[F \mid \text{not } C] \times P[\text{not } C]},$$

---

\(^\overline{100}\) Applying the definition of conditional probability gives $P[C \mid F] = P[C \text{ and } F]/P[F] = (P[F \mid C] \times P[C]) / P[F]$. The law of total probability states that $P[F] = P[F \mid C] \times P[C] + P[F \mid \text{not } C] \times P[\text{not } C]$. Substituting this last expression for $P[F]$ in the denominator of the expression obtained from the definition of conditional probability gives Bayes Theorem.
where “not C” denotes the event “no collusion,” so that \( P[F \mid \text{not } C] \) is the probability of observing plus factor \( F \) given that there is no cartel.

The elements of this formula all have natural interpretations and can be computed more or less accurately from economic knowledge and/or experience. There are four different elements on the right side of the equation. We tackle each in turn.

The simplest element is \( P[C] \). This is the “baseline” probability that a cartel was operating, in the absence of any evidence about firm conducts. \( P[C] \) typically depends on the product/industry/market. For example, for certain chemical products \( P[C] \) might be quite high, while for certain agricultural products it might be quite low. In addition, \( P[C] \) presumes that parallel conduct, often in pricing, has already been observed.\(^{101}\) For the sake of illustration, suppose \( P[C] \) is .25 (baseline odds of three to one against a cartel operating).

\(^{101}\) It would be more precise to introduce as formal conditioning arguments structural characteristics of a product/industry/market that predate the cartel or are outside the cartel’s potential control or influence, along with parallel conduct (most likely pricing), but we suppress this for notational simplicity. The value of \( P(C) \) for a product/industry/market may be larger as a result of such facilitating factors.
The next simplest element is \( P[\text{not } C] \). This is the baseline probability a cartel was not operating.\(^{102}\) We always have \( P[\text{not } C] = 1 - P[C] \), so once we know \( P[C] \), we also know \( P[\text{not } C] \). If the baseline probability that a cartel was operating is .25, then the baseline probability that it was not operating is .75 = 1 - .25.

The next element is \( P[F | C] \). This is where the plus factor is first taken into account. It represents the probability of observing the plus factor given that a cartel was operating. For example, suppose that the plus factor is the evidence that one or more of the alleged conspirators changed within-firm sales incentives to “price before volume.” We can estimate \( P[F | C] \) as the proportion of the time that a known cartel changed incentives in this way. Suppose we observe this in about 15 percent of relevant cartels. Then \( P[F | C] = .15 \).

The information provided by a plus factor is not determined just by the probability of observing that factor given the cartel. The final and crucial determinant of the plus factor’s worth is whether it distinguishes cartel behavior from non-cartel behavior. This is determined by the last element in the formula, \( P[F | \text{not } C] \). This represents the probability of observing the plus factor given that a cartel was known not to be operating. Economics can often play a crucial role in assessing this. Specifically, suppose the behavior is one that a non-collusive rational competitor would be highly unlikely to engage in, like “price before

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102. This probability implicitly conditions on all the same product/industry/market structural elements, and parallel conduct (most likely pricing), that are in \( P[C] \).
“volume” sales incentives. Then $P[F|\text{not } C]$ is quite small. Other behaviors with this property, depending on the product/industry/market, can be information conveyance, inter-firm purchases at non-market prices, and dominant-firm conduct.

These latter examples clearly illustrate the concept of super plus factors: specifically, super plus factors are actions or conduct that could occur in the presence of a collusive agreement, but that are highly unlikely to occur in its absence. Super plus factors necessarily have the property that $P[F|\text{not } C]$ is quite small.

Now put together the pieces. If $P[F|\text{not } C] = .001$, then from the formula above, we get

$$P[C|F] = \frac{(0.15 \times 0.25)}{(0.15 \times 0.25 + 0.001 \times 0.75)} = 0.9804$$

Because this plus factor is one that would almost never be observed in a non-collusive environment but that can occur in a collusive environment, we have a high degree of certainty (0.9804) that a cartel was operating, given this plus factor.

Now consider a different plus factor, say, stable market shares. Suppose we observe stable market shares in relevant cartels two-thirds of the time, so $P[F|C] = .667$. Suppose we observe stable market shares in non-collusive markets one-fifth of the time, so $P[F|\text{not } C] = .2$. Using the Bayes Theorem gives

$$P[C|F] = \frac{(0.667 \times 0.25)}{(0.667 \times 0.25 + 0.2 \times 0.75)} = 0.5264$$
Now the evidence for cartel operation is not nearly as strong. Nevertheless, the evidence of this plus factor shows that it is more likely (.5264) than not (.4736) that a cartel was indeed operating.

As these examples suggest, the strength of a plus factor is governed by the relation between \( P[F|C] \) and \( P[F|\text{not } C] \). We let \( S \) represent the “strength” of a plus factor, calculated as the ratio

\[
S = \frac{P[F|C]}{P[F|\text{not } C]}.
\]

In our first example (price before volume), we had \( S = 0.15/0.001 = 150 \). In our second example (stable market shares), we had \( S = 0.667/0.2 = 3.33 \). This directly shows the contrast between super plus factors (large \( S \)) and non-super plus factors (moderate \( S \)).

We can relate \( P[C|F] \) directly to plus factor strength, \( S \), by making use of the baseline odds against a cartel,

\[
O = \frac{P[\text{not } C]}{P[C]}.
\]

A little math then gives

\[
P[C|F] = \frac{1}{(1+O/S)}.
\]

In our example, we have \( P[\text{not } C] = 0.75 \) and \( P[C] = 0.25 \), so this gives \( O = 3 \) (baseline odds of three to one against a cartel).

From this relationship between \( P[C|F] \) and \( S \), we see that whenever \( S \) increases, so does \( P[C|F] \), the probability of a cartel given the plus factor. And whenever \( S \) decreases, so does \( P[C|F] \), justifying our calling \( S \)
a measure of plus factor strength. We can also check that when \( S = 1 \) (unit strength), then \( P[C|F] = P[C] \). Accordingly, \( F \) is formally defined to be a plus factor if and only if \( S > 1 \), because this is mathematically equivalent to the condition that taking \( F \) into account increases the likelihood of a cartel having operated - that is, \( P[C|F] > P[C] \) if and only if \( S > 1 \).\(^{103}\)

Plus factors are typically not observed in isolation. Just as there may be multiple symptoms in medicine, there may be multiple plus factors in cartel matters. Given the life-or-death stakes in medicine, multiple symptoms cannot be ignored or their information wasted; the same should be true in law. Thus, whether in medicine or in law, when multiple diagnostic factors are observed, the proper way to treat these is as a constellation, rather than in isolation. To see this, note that a particular constellation of symptoms can confirm or rule out a particular diagnosis that individual symptoms by themselves cannot resolve. The necessity in law of looking at the entire cluster of factors is precisely the principle articulated in \textit{Continental Ore Co. v. Union Carbide & Carbon Co} discussed earlier.\(^{104}\)

Mathematically, the information provided by a constellation of plus factors is properly accounted for by treating the joint occurrence of the

\[^{103}\] In fact, there are also “minus” factors. These have \( S \) less than one, associated with behaviors that are more likely to be engaged in by non-colluders than by colluders.

\[^{104}\] See supra notes 55-56 and accompanying text.
plus factors as if this were a single plus factor. That is, when there are $k$ plus factors $F_1, \ldots, F_k$ observed, we let

$$F = F_1 \text{ and } F_2 \ldots \text{ and } F_k.$$  

With this convention in place, the remaining formulas remain unchanged. The challenge comes in determining the strength $S$ of the plus factor constellation.\(^{105,106}\) The particulars can vary from case to case.

105. When many plus factors operate together, this can in principle result in the combination being either stronger or weaker than any single factor as an indicator of cartel operation.

106. More specifically, as defined above, $P[C \mid F_1] = 1 / (1 + O_0/S_1)$, where $O_0 = O = P[\text{not } C \mid \text{not } F_1] / P[ C \mid \text{not } F_1]$ is the odds against a cartel given zero plus factors, and $S_1 = P[F_1 \mid C] / P[F_1 \mid \text{not } C]$ is the strength of plus factor 1. With two plus factors, $F_1$ and $F_2$, then

$$P[C \mid F_1, F_2] = 1 / (1 + O_1/S_{2|1}),$$  

where $O_1 = P[ \text{not } C \mid F_1, F_2] / P[ C \mid F_1, F_2]$ is the odds against a cartel given plus factor $F_1$ and $S_{2|1} = P[F_2 \mid C, F_1] / P[F_2 \mid \text{not } C, F_1]$ is the strength of plus factor 2 given plus factor 1.

In the general case of $n$ plus factors, $F_1, \ldots, F_n$, then

$$P[C \mid F_1, \ldots, F_n] = 1/(1 + O_{n-1}/S_{n\mid n-1}),$$  

where $O_{n-1} = P[ \text{not } C \mid F_1, \ldots, F_{n-1}] / P[ C \mid F_1, \ldots, F_{n-1}]$ is the odds against a cartel given $n$-1 plus factors and $S_{n\mid n-1} = P[F_n \mid C,$
Nevertheless, economic experience and knowledge can often be applied to determine that the combination of plus factors increases strength beyond what one might obtain from a single plus factor. In fact, such a group or constellation can be a super plus factor even when none of the individual plus factors that make up the constellation is itself a super plus factor.

A. Plus Factor Categorization

To explore further the implications for this way of thinking about plus factors, assume that a court, in the absence of any direct evidence of a conspiracy, requires that the probability of collusion given the economic circumstantial evidence be greater than 90% in order to reach a guilty verdict in a criminal trial.\textsuperscript{107} Given this hurdle for the

\[ P[C | F_1, \ldots, F_{n-1}, F_n] / P[F_n | not C, F_1, \ldots, F_{n-1}] \] is the strength of plus factor \( n \) given plus factors 1, \ldots, \( n-1 \).

As a mathematical property, adding plus factor \( n \) increases the inferred probability of collusion, i.e.,

\[ P[C | F_1, \ldots, F_n] > P[C | F_1, \ldots, F_{n-1}] \]

if and only if the strength of plus factor \( n \) given plus factors 1, \ldots, \( n-1 \) is greater than one, \( S_{n|n-1} > 1 \). The plus factor strengths can be related to one another through the recursive formula,

\[ S_{n|n-1} = S_n / S_{n-1} \]

where \( S_n = P[F_1, \ldots, F_n | C] / P[F_1, \ldots, F_n | not C] \).

\textsuperscript{107} As a rough approximation, we can translate general legal standards into percentage probabilities. For finding of guilt in a civil matter, assuming no direct evidence of a conspiracy, the probability of collusion given the economic circumstantial evidence must be at least 50.1%. When the FTC proceeds under a pure Section 5 theory, the
probability of collusion, we can ask what strength would be required of an individual plus factor in order for the 90% threshold to be passed conditional on the observation of that single plus factor. For example, suppose a particular factor $F_1$ has a strength of $S_1 = 10$. This means the factor is ten times more likely conditional on collusion than conditional on no collusion. Suppose we assume a baseline of even odds for collusion so that $O_0 = 1$. (Note the change: in our earlier discussion, we had $O_0 = 3$.) It then follows from Bayes Theorem that the probability of collusion given that factor is

$$P[C|F_1] = 1/(1 + O_0/S_1) = 1/(1 + 1/10) = 91\%.$$ 

Thus, a factor such as this would by itself be sufficient for the inferred probability of collusion to exceed 90%.

We can define a next level of plus factor to be such that the observation of two plus factors of this level is sufficient to conclude that the probability of collusion is at least 90%, assuming the two plus factors are conditionally independent, i.e., their strengths are

requirement may fall somewhat below 50 percent. To survive summary judgment in any matter, it must be the case that the probability of collusion given the economic circumstantial evidence available at the time of summary judgment exceeds the prior (i.e., baseline) probability of collusion. On the application of Section 5 of the FTC Act, see William E. Kovacic & Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 antitrust L.J. 929 (2010).

Kovacic: Add cite to Dan Crane’s new volume on antitrust institutions.
independent so that $S_{2|1} = S_2 = P[F_2|C]/P[F_2|\text{not } C]$.\textsuperscript{108} We refer to these plus factors as level-two plus factors and denote a level-two plus factor by $F^2$. A plus factor would be level two if it has a strength of $S = 4$ so that it is four times more likely conditional on collusion than conditional on no collusion, assuming a baseline of a 50-50 chance of collusion. To see this, note that when $O_0 = 1$, two conditionally independent plus factors each with a strength of four deliver a probability of collusion that exceeds 90%:

$$P[C|F_1,F_2] = 1 / (1 + O_1/S_{2|1}) = 1/(1+(1/4)/4) = 94\%,$$

where $S_{2|1} = S_2 = 4$ and $O_1 = P[ \text{not } C | F_1 ] / P[ C | F_1 ] = O_0/S_1 = 1/4$.

Similarly, one can consider how many plus factors one would need to reach the 90% threshold if the plus factors were independent and each was three times more likely conditional on collusion than on no collusion. The results are summarized in the table below.

\textsuperscript{108}. A previous footnote describes how to handle cases where independence is not present. \textit{Supra} note 101. The assumption of independence is made here for ease of exposition to illustrate how multiple plus factors can be combined for probative value.
Table 1
Plus Factor Categorization

<table>
<thead>
<tr>
<th>Conditions to Exceed a 90% Probability of Collusion</th>
<th>Assuming baseline odds against collusion of $O_0 = 1$ and conditional independence</th>
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Although the analysis based on Bayes Theorem can in theory be used to calculate the exact probability of collusion given a particular constellation of plus factors, this table provides a way to categorize plus factors into distinct categories based on the number of times more likely it is to observe the plus factor conditional on collusion than on no collusion.\(^{109}\) The different levels of plus factors allow a loose interpretation that a level-$k$ plus factor is one that would require $k$ such plus factors in order for the inference as to collusion to exceed 90%. Given more detailed information about the interactions between plus factors, one could take that into account using a more sophisticated analysis. But even without such information, this categorization emphasizes the value to considering constellations of plus factors rather than artificially focusing on the implications of plus factors on an individual basis.

\(^{109}\) This table is for the specific value $O_0 = 1$. An analogous table can be constructed for any other specified value of $O_0$. 
We emphasize that this categorization of plus factors applies to a 90% threshold, assumed appropriate for criminal proceedings. For civil cases, presuming a 50.1% probability threshold would apply, when the baseline odds of collusion are even, $O_0 = 1$, the plus factor strengths required to reach each given level are very close to one.  

B. Estimating Probabilities

The aforementioned probabilities can emerge from economic theory. For example, theory can tell us that the strength $S$ of a plus factor is high if the plus factor is highly unlikely to emerge from non-collusive conduct. Thus, economics alone can provide us with super plus factors. But for many plus factors, it is not the case that theory provides such stark implications for the probabilities in question. For example, if $F$ is “fixed and temporally stable market shares,” then theory does not provide us with a definite statement about the plus factor’s strength independent of the specific product, market, and industry. As an example, consider the linerboard industry. Linerboard is produced by machines that run at a single speed for 24 hours a day, seven days a week. Machines typically are turned off for maintenance for ten days per year. Production market shares will be essentially fixed and stable in such an industry without any

110. In order to meet a threshold probability of 50.1% given baseline odds of collusion of $O_0 = 1$, one need only have one plus factor with a strength of at least 1.004.

111. Linerboard is the brown flat outer layer on cardboard boxes/packaging.
collusion, \(^{112}\) so the strength of the factor “fixed and temporally stable market shares” would be low. Alternatively, in the vitamins industry where production is more variable, relatively fixed and stable production market shares are unlikely without explicit collusion. In this case, the strength of the factor is high.

We could enumerate all cartel decisions by the Department of Justice and European Commission in recent years and identify a number of conducts by the cartels for each case. However, this will almost surely not provide useful information about the strength \(S\) of various plus factors. First, none of the cases has anything to do with non-collusive conduct; these are apprehended cartels. Second, apprehended cartels are only a subset of the set of cartels “\(C\).” If apprehension is not random, then there is an unknown bias in extrapolating from the apprehended cartels to all cartels. Third, as noted above, the strength \(S\) of a plus factor is a function of the specifics of the product in question, including the specifics of the market and the industry that makes the product. Aggregating over different products, different markets, and different industries to construct measures of plus factor strength is not sensible.

If aggregation over products/markets/industries is not sensible then, except for some super plus factors, we are left assessing plus factor strength for a given product/market/industry. For example, for a given product/market/industry, stable market shares during a period of price increases may be viewed as a strong plus factor if buyers are

\(^{112}\) Note that here we reference production market shares, not sales market shares.
characterized as vigorously resisting price increases, but it may be viewed as a weak plus factor if buyer resistance is weak or non-existent.

C. Harms from Decisions and Types of Errors

In the previous Section, we considered specific probability thresholds relevant to findings of criminal, civil, or FTC Section 5 liability. Use of such probability thresholds to test liability balances the harms associated with the possible ways that a decision can be wrong. In the contexts where these tests apply, there are two ways a decision can be wrong: (1) a party can be found liable, when in fact they are not (known as “Type I Error”) or (2) a party can be found not liable when in fact they are (“Type II Error”).

To see how this balance works, suppose the harm associated with a Type I Error is some number, $h_1$, whereas the harm associated with a Type II Error is $h_2$. It is convenient and appropriate to think of $h_1$ and $h_2$ as dollar amounts. Suppose also that the probability of collusion, based on all the evidence $E$ is $p = P[C|E]$. Then the expected harm of a finding of liability can be shown to be the harm $h_1$, multiplied by the probability that there was no collusion given the evidence, $(1 - p)$; that is, the expected harm of a finding of liability is $(1 - p) h_1$. Similarly, the expected harm of a finding of no liability equals $p h_2$. Applying the

113. This follows from elementary rules of probability and the calculation of expected values, assuming, as is standard and appropriate, that the harm associated with a correct decision of liability or no liability is zero.
principle of choosing the decision that results in the least expected harm, it follows that a finding of liability should be returned when (and only when)

$$(1-p)h_1 < p h_2.$$ 

After a little algebra to rearrange this\textsuperscript{114}, it follows that a finding of liability should be returned when

$$p > 1/(1 + h_2/h_1).$$

The term on the right represents the probability threshold required for a finding of liability. This means that any probability threshold, such as .9 (criminal), .501 (civil), or .4 (FTC Section 5) corresponds to a specific harm ratio, $h_2/h_1$, that balances the harms.

For example, consider the harm ratio corresponding to the criminal liability test, .9. Setting $1 / (1 + h_2/h_1) = .9$ and solving for $h_2/h_1$, we obtain $h_2/h_1 = .111$. In words, this says that the .9 criminal threshold embodies the view that the harm $h_1$ of finding an innocent party criminally liable is nine times greater than the harm $h_2$ of finding a guilty party not criminally liable.

A similar computation shows that the harm ratio corresponding to the civil test (.501) embodies the view that the two harms are about the same ($h_1 = 1.004 h_2$). On the other hand, suppose the threshold for an FTC

\textsuperscript{114} $(1-p)h_1 < p h_2$ implies $h_1 < p (h_1 + h_2)$. This implies $p > h_1 / (h_1 + h_2)$, which gives the result above.
Section 5 test is .4. Since this is less than .5, this embodies the view that the harm $h_1$ of a liability finding in the absence of a true violation is less than the harm $h_2$ of finding no liability in the presence of a true violation. With a .4 threshold, the harm ratio implies $h_1 = .667 h_2$.

A significant implication of this analysis is that real-world applications of fixed probability thresholds may or may not accurately reflect the true underlying relative harms corresponding to the two different decision errors for a given matter. This may lead to decisions that violate the principle of least expected harm; however, such fixed thresholds have the considerable virtue of practicality in situations where the true harm ratio $h_2 / h_1$ may not be easy to determine.

We close this section by noting that the analysis of harms relates directly to plus factors. Specifically, some algebra shows that a liability finding that results in the least expected harm occurs when (and only when) the plus factor strength, $S$, exceeds the inverse harm ratio, $h_1/h_2$, multiplied by the baseline odds, $O$; that is, when $S > (h_1/h_2)O$.

**Conclusion**

The resolution of many antitrust cases hinges upon the determination of whether observed conduct is the product of unilateral behavior or collective action. In a large number of disputes, the plaintiff seeks to establish the fact of concerted conduct by way of circumstantial evidence. Because antitrust conspiracy doctrine does not recognize proof of parallel price movements, by itself, to sustain an inference of agreement,
plaintiffs seek to introduce plus factors to show that it is more likely than not that parallel conduct resulted from concerted action.

The analysis of plus factors is one of the most unsettled and perplexing doctrinal issues of modern antitrust law. This paper proposes a formal definition of plus factors, a taxonomy for plus factors, and a coherent methodology for ranking them in terms of their probative value. We identify super plus factors, which lead to the strong inference of collusion. Plus factors should be considered in groups or constellations whenever such groups are present, because the probative value of a constellation of plus factors can be far greater than each individual plus factor that comprises the constellation. In fact, a group or constellation can be a super plus factor when none of the individual plus factors that make up the constellation is itself a super plus factor.

In closing, we offer a review of the partial list of super plus factors discussed in Part III.

1. A subset of firms restricts production when prices and profits are relatively high or increasing.

2. Among a subset of producers, market shares, customer incumbency, or geographic dominance is stable when the firms have excess capacity, and prices and profits are relatively high or increasing.

3. A reliable predictive econometric model that accounts for all material non-collusive effects on price, estimated using benchmark data where conduct was presumed non-collusive, produces predictions of prices that do not explain the path of actual prices in the period or region of potential collusion, at a specified high confidence level.
4. A firm or subset of firms has knowledge of the details of another firm’s transactions, production, sales, and/or inventories where the latter firm would be competitively disadvantaged by conveying that information unilaterally.

5. Firms engage in interfirm transactions that are transfers of resources and are largely void of productive non-collusive motivations.

6. In an industry where the product made by different firms is largely homogeneous, there is a discrete change in the intrafirm incentives of sales forces, across a subset of firms during a given period, that shifts from the pursuit of market share to maintenance of elevated prices (such as a shift to “price before volume”).

7. A subset of firms with an aggregate market share large enough to have dominant-firm market power jointly engage in a dominant-firm conduct when no single firm has the market power to act unilaterally as a dominant firm by engaging in that dominant-firm conduct.
### About this Table of Contents:

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