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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from the European Commission

-- Session II --

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Introduction

1. Article 81 of the EC Treaty prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. More in particular the direct or indirect fixing of purchase or selling prices or any other trading conditions, the limitation and control of production, markets, technical development, or investment and the allocation of markets or sources of supply are prohibited.

2. In order to effectively fight these practices, the European Union legislator has given the European Commission extensive enforcement powers. These have most recently been laid down in Council Regulation No. 1/2003[1] and further specified in the Commission Implementing Regulation No. 773/2004[2]. These regulations give the Commission the power, for instance, to carry out unannounced inspections at undertakings or associations of undertakings in order to obtain evidence and, in case a cartel has been detected, to impose fines of up to 10 % of annual (group) turnover on undertakings involved in anticompetitive activities.

2. The definition of a cartel

3. Cartel behaviour can vary in intensity and scope. Hard core cartels are considered to be the most serious infringements of competition rules. Although Article 81 EC does not define the concept of "cartel" (or the concepts of "agreements" or "concerted practices" underlying cartel activities) guidance for the definition can be found from the Commission notices and guidelines.

4. A more detailed definition of a hard core cartel is given in the Commission's "leniency notice"[3]:

> *"This notice concerns secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports. Such practices are among the most serious restrictions of competition encountered by the Commission and ultimately result in increased prices and reduced choice for the consumer. They also harm European industry."*

5. Second, the Commission's guidelines on the method of setting fines[4] set three categories of infringements for the purposes of calculating fines: minor, serious and very serious infringements. Hard core cartels would be seen as very serious infringements, which, following the guidelines "will generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardize the proper functioning of the single market".

6. However, the categorisation of infringements into minor, serious and very serious as well as any distinction between "hard core cartels" and other anticompetitive agreements, decisions or concerted practices prohibited by Article 81 EC does not have, per se, an impact on the question of standard of proof. This categorisation serves in first place to determine the level of any possible sanction. The standard of proof stays for all kinds of infringements the same, as long as they lead to an imposition of a fine[5].

3. Agreements and concerted practices

7. As mentioned above, following Article 81 EC the core elements underlying any horizontal cartel activity are agreements between undertakings, decisions by associations of undertakings or concerted practices. Most commonly cartels discovered by the Commission have been based on either publicly known or secret agreements or tacit agreements that express themselves through a concerted practice. The categorisation of the concrete circumstances of the case under the terms ”agreement” or “concerted practice” will have an impact on the question of standard of proof.

8. In EC competition law an **agreement** can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing, no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, to have agreed in advance upon a comprehensive common plan and the concept of agreement would also apply to the inchoate understandings and partial and conditional agreements which are short of definitive agreement.

9. In order to prove the existence of an agreement it is, according to the European Court of First Instance (CFI)[6] “well established in the case law that for there to be an agreement within the meaning of Article [81(1) EC] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way”.

10. An agreement for the purposes of Article 81(1) EC does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term “agreement” can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the European Court of Justice (ECJ) has pointed out it follows from the express terms of Article 81 EC that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.[7]

11. Conduct may as amount to a **concerted practice** even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour[8]. Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also be characterised as a concerted practice.

12. To prove the existence of a concerted practice the Commission has to demonstrate in a first place the alleged concertation between the undertakings. Although in terms of Article 81 EC the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market. This presumption applies all the more when the concertation occurred on a regular basis and over time. Consequently such a concerted practice is caught by Article 81 EC even in the absence of evidence of anticompetitive effects on the market[9].

13. Finally in cases of a **complex infringement** over time, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The anticompetitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. It would be artificial analytically to sub-divide what is

clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time[10].

14. Accordingly the CFI has stated that "in the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty".[11]

15. It remains, however, essential for the Commission to prove participation for each individual undertaking concerned. When this burden of proof is met, it belongs to the companies confronted with the evidence of their culpability to prove that this evidence is either insufficient or the conclusions based upon it are unsound[12]... In line with the above the Court spelled out in the *Cement* case: *"When the Commission establishes that the undertaking in question has participated in an anticompetitive measure, it is for that undertaking to provide, using not only the documents that were not disclosed but also all the means at its disposal, a different explanation for its conduct. It follows that the complaints alleging reversal of the burden of proof and breach of the presumption of innocence are unfounded."* [13]

4. Administrative nature of the Commission's proceedings

16. Cartel proceedings conducted by the European Commission are directed at undertakings, not individuals, and accordingly the investigative measures are targeted essentially at undertakings. Also the sanctions imposed by the Commission are administrative in nature. There are no criminal sanctions in EC competition law.

17. However the **administrative character** of the proceedings does not significantly lower the standard of proof which lies upon the Commission in comparison to criminal proceedings found in common law jurisdictions. The Commission *"must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place"*[14]. Furthermore any doubt in the Commission's evidence to prove an infringement of competition rules has to be construed in favour of the suspected undertaking[15]. This means that the undertakings accused *"do not necessarily have to go so far as to show that the Commission's assertions are wrong, but merely had to show that they are unsafe or insufficiently proven".*[16]

5. Direct and indirect evidence

18. To comply with the burden of proving an infringement the Commission can rely on both direct and indirect evidence. It is sometimes hard to make a distinction between these two forms of evidence as there is just a very thin dividing line between them[17] and until now the Community Courts have not given any clear cut definition of the one or the other. On the basis of the case law of the EC Courts, certain principles can, however, be drawn.

19. Firstly, regarding **direct evidence,** which allows the Commission to establish that precisely designated companies (or persons in charge of these companies) concluded an agreement that has as its object or effect to restrict competition, the following principle holds whether the evidence is provided in writing or orally: the greatest probative value comes from the so called "smoking guns", which can be contemporary documents such as formal agreements[18], gentlemen's agreements[19], minutes or notes of meeting or contacts, budget notes and meeting notes[20] or notes about monitoring systems.

20. Corporate statements from undertakings directly involved in the infringement have become more and more important in the Commission's fact finding. The CFI ruled in the *Graphite electrodes case* that such statements may be used as direct evidence and that the Commission can prove an infringement solely on the basis of statements, as long as there is sufficient mutual corroboration of the respective statements[21].

21. It has become a common practice to provide corporate statements in the framework of cooperation under the Commission Leniency Notice. These corporate statements often include recollections of employees involved in the infringement[22]. Finally oral evidence can be obtained during the oral hearings under Art. 27 of Regulation 1/2003.

22. Furthermore, evidence in the form of statements can be obtained at different stages of the procedure. The Commission is entitled to conduct interviews during the inspections[23] or at any time procedure pursuant to Article 19 of Regulation No 1/2003 (the Commission may interview any "natural or legal person" who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation)[24].

23. The Commission also has to bear in mind that a statement by one company accused of participation in a cartel, the accuracy of which is contested by other alleged participants, cannot be regarded as constituting adequate proof of a violation unless it is supported by other evidence[25]. This issue was recently addressed by the CFI in the *Seamless Steel Tubes* case[26]. To prove the cartel, the Commission had relied heavily on a written statement made by an executive of one undertaking during the dawn raid in response to oral requests for explanations. In the decision, it sought to find corroboration for his statement in various contemporaneous documents that each confirmed different parts of the declaration. On appeal, although the CFI acknowledged certain concerns as to the corroborative effect on the statement of a few of the documents, which in some respects contradicted the declarant, it held that the statement was intrinsically "of particularly great probative value" so that the degree of corroboration required was correspondingly less.

24. Summing up the factors cited by the CFI on how to evaluate the probative value of statements, the CFI stressed the importance of the following factors[27]:

- whether the answers had been given on behalf of a company or in an individual capacity;
- was the author under a professional obligation to act in the interest of the company:
- was the author a direct witness speaking from personal knowledge of the facts;
- were the statements made deliberately and after mature reflection;
- did the individual supplement and confirm the statement at a later stage in the investigation;
- was the statement against the own interest of the individual or against the interest of the employing company.

25. The CFI has also pronounced that, if the Commission could not base the proof of incriminating facts exclusively on statements of the accused, or on the statements of other accused undertakings, "*the Commission's burden of proving conduct contrary to Articles* [81] *and* [82] *of the Treaty would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the Treaty*"[28].

26. The notion of **indirect or circumstantial evidence** in contrast comprises of evidence which is appropriate to corroborate the proof of the existence of a cartel by way of deduction, common sense, economic analysis or logical inference from other facts which are demonstrated. For example, the Commission often finds evidence on the precise rates of prices increases implemented by the companies suspected having participating in a cartel. Parallelism of behaviour for instance in price increases is only an indication and does not in itself constitute evidence of collusion and this indication can only be appraised

in the light of the anticompetitive object that the parallel behaviour is supposed to have[29]. It will be necessary, therefore, to uncover other elements of proof or indications from which the existence of collusion may be inferred.

27. Accordingly indirect evidence gains its evidential value normally when it is seen in conjunction with other facts[30].

28. However, by the 1980's, on one hand with the increased awareness in the European business circles of the scope of EC competition law and the fact that the Commission decisional practice also had become stricter as regards to cartels and, on the other hand, with the increased use of modern communication and information technologies by companies, it had become more difficult to discover direct documentary evidence during unannounced inspections (the Commission continued to find direct evidence, but in smaller numbers). Therefore, the use of indirect evidence – in addition to direct evidence - had become indispensable[31].

29. In most cases the Commission will discover only a limited amount of direct evidence explicitly proving unlawful contact between traders, such as the minutes of a meeting, which will normally be only fragmentary and sparse. In these cases it is necessary to reconstitute certain details by deduction. To meet the burden of proof under these circumstances the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules[32].

30. In the Suiker Unie case the Advocate General pointed out that "the evidence of concerted practice may, in most cases, only consist of evidence or presumptions which the investigations of the Commission have brought to light. It is the combination of these presumptions - provided they are strong, precise and relevant - which more often than not alone enables the existence of a concerted action corroborated by the actual conduct of the undertakings concerned to be proved [...]"[33].

31. Consequently the assessment of an infringement can be based on circumstantial evidence if an overall pattern of guilt emerges and in absence of any other reasonable hypothesis that could be predicated on that evidence.

32. As the European Commission is free in choosing the evidence for the demonstration of infringing behaviour and as there is no enumerative list of admissible pieces of evidence, no complete list of indirect evidence can be compiled. However some kinds of indirect evidence are very typical for cartel cases, such as travel orders, travel expenses or diary entries (which can be used to confirm the attendance at a meeting), e-mail or telephone records (demonstrating the fact of contacts without showing the concrete context), meeting invitations, and the constitution of a trade association or economic evidence[34].

33. The past experience of the Commission has shown that it is very difficult to base a decision imposing fines on undertakings relying exclusively or in a large extent on economic evidence[35]. Until now the Commission's efforts to rely on economic data were not seen as sufficient by the European Courts, as the allegedly infringing parties can often come up with plausible alternative explanations for market movements, which were sufficient to render unsafe inferences that might be drawn to support the finding of a cartel.

34. Most essential for the use of indirect evidence is that it always has to be seen in conjunction with all the other direct and indirect evidence available in the concrete case. The picture of a cartel as a whole emerging in a case can be reason enough to interpret one piece of evidence in one way or another. Accordingly the CFI stated in the PVC II case: "*Moreover, items of evidence should be regarded not in*

isolation but in their entirety […] and individual items of evidence cannot be divorced from their context.[36]" This applies with regard to both the pieces of direct and indirect evidence.

35. Finally, it should be mentioned that the quality or the probative value of evidence do not have to be uniform throughout the entire life of a cartel. It is normal that there are gaps or period of lower activity. Evidence should be looked at as a whole.

36. The European Courts have repeatedly confirmed this argumentation, stating that "*an infringement of Article [81] of the Treaty may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision. […] When the different actions form part of an overall plan, because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole. […] In the context of an overall agreement extending over several years, a gap of several months between the manifestations of the agreement is immaterial. The fact that the various actions form part of an overall plan owing to their identical object, on the other hand, is decisive".*[37]

NOTES

1. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003 p. 1.

2. Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (the Implementing Regulation), OJ L 123, 27.4.2004, p. 18.

3. Commission notice on immunity from fines and reduction of fines in cartel cases. OJ C 45, 19.2.2002, p. 3.

4. Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, OJ C 9, 14.1.1998, p. 3.

5. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para 176.

6. Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, paragraph 715.

7. Case C-49/92P *Commission v Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 81.

8. Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 256.

9. Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraphs 158-166.

10. Case T-7/89 *Hercules v Commission*, paragraph 264.

11. Judgment of the Court of First Instance of 20 April 1999 in Joined Cases T-305/94 to T-307/94, T- 313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, para 696.

12. Opinion of Advocate General Sir Gordon Slynn in joined cases 100-103/80, SA Musique diffusion Française [1983] ECR 1825, 1931.

13. Judgment of the Court of 7 January 2004 in joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C- 213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and others v Commission*, Para. 132.

14. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para 179, see also CfI *Limburgse Vinyl Maatschappij NV and others v Commission*, Para. 517, 518.

15. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para 177.

16. CfI *Limburgse Vinyl Maatschappij NV and others v Commission*, Para. 519.

17. *Woodpulp* judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission*, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

18. Judgment of the Court of 27 September 1988, *Bayer AG and Maschinenfabrik Hennecke GmbH v Heinz* Süllhöfer, ECR [1988], Page 05249.

19. Judgment of the Court of 15 July 1970, *ACF Chemiefarma NV v Commission*, Case 41-69, ECR [1970], p. 00661.

20. *Graphite electrodes* judgment of the Court of First Instance of 29 April 2004 in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v Commission.*

21. *Graphite electrodes* judgment of the Court of First Instance of 29 April 2004 in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v Commission*, para. 430 f.

22. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para 130, 194.

23. Council Regulation (EC) No 1/2003, Art. 20 (2) e).

24. See also Article 3 of the Commission Regulation (EC) No 733/2004.

25. Judgment of the Court of First Instance of 14 May 1998 in case Case T-337/94, *Enso-Gutzeit Oy v Commission.*

26. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission.*

27. Judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para. 189 f, especially para. 210, 21.

28. CfI: *Limburgse Vinyl Maatschappij NV and others v Commission*, Para. 512.

29. The Judgement of the Court of Justice in Case 48/69 *ICI*, [1972] ECR 619, at paragraphs 66-68.

30. The only case which relied exclusively on indirect evidence (in form of economic studies) was annulled by the court, see Woodpulp Judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission*, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

31. CfI *Limburgse Vinyl Maatschappij NV and others v Commission*, Para. 529.

32. Judgment of the Court of 7 January 2004 in joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C- 213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and others v Commission*, Para. 57, 277.

33. Opinion of Mr Advocate General Mayras delivered on 16 June 1975 in *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission*, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, page 2061 - ECR [1975] page 01663; see also: Julian Mathic Joshua: Proof in Contested EEC Competition Cases – A Comparison with the Rules of Evidence in Common Law, European Law Review, Vol. 12, 1987, p. 330.

34. Woodpulp judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission*, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

35. Woodpulp judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission*, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

36. CfI *Limburgse Vinyl Maatschappij NV and others v Commission*, Para. 529.

37. Judgment of the Court of 7 January 2004 in joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and others v Commission*, Para. 258-260.