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Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law Symposium on European Competition Law

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Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law

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> The statutory phrase "contract, combination or conspiracy" conjures up the classic image of robber barons gathering clandestinely to carve up a market. The statute, classically conceived, aims at a bad conduct, at conspirators who deliberately decide upon evil, who eschew competition, who plan and execute action to strike market forces who, conscious of their own wrongdoing, take precautions to hide their own conduct or disguise it.[1]

I. INTRODUCTION

The U.S. Department of Justice's effortless assumption of leadership in the "war on cartels" should not obscure the record of the European Commission ("Commission") in tracking down and fining huge international price fixing rings. As early as 1980, highly sophisticated and entirely clandestine Europe-wide cartels, organized at the highest level, had been uncovered in billion dollar industries and were later sanctioned with individual corporate fines of $10 million or more that exceeded by many times those being collected by the U.S. Department of Justice under Section 1 of the Sherman Act.[2]

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[1] LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF ANTITRUST LAW 311 (1977).

[2] *See, e.g.*, Commission Decision on Peroxygen Products, 1985 O.J. (L 35) 1; Commission Decision on Polypropylene, 1986 O.J. (L 230) 1; Commission Decision on PVC, 1989 O.J. (L 74) 2; Commission Decision on LdPE, 1989 O.J. (L 74) 21; Commission Decision on Cartonboard, 1994 O.J. (L 243) 1. *See* Sherman Act, 15 U.S.C. §§ 1-7 (2003).

With the Commission as the only body with the supra-national competence to act against pan-European cartels during the early 1980s, there was little existing practice and conceptual thinking that rendered it an apt body for tracking down, proving to an acceptable legal standard and punishing major cartels in European industries. During the 1970s, most analysis, whether judicial or academic, had centered on what some considered the "distinction without a difference" between "agreement" and "concerted practice" in Article 81 of the EC Treaty,[3] whereas a more fruitful line of inquiry might have been to distinguish these prohibited forms of collusive behavior from lawful, albeit anti-competitive, conduct.[4] With its focus on assessing for compatibility with the EC Treaty openly-practiced commercial agreements and encouraged by the availability of the "notification" mechanism, the Commission likely believed it had its hands full enough, and even if it had suspected the existence in European industry of a vast underground network of cartel behavior, it would not have regarded hunting down conspiracies as a priority. The Commission's culture in competition cases fostered a methodology of fitting the clauses of a commercial contract into one or another compartment marked with a convenient legal label. None of this static analysis provided the Commission with a legal rule for dealing with cartels.

With the arrival of a new generation of officials from common law countries in 1973, the borrowing, never explicit, but nonetheless progressive, of the common law notion of "conspiracy" from the Sherman Act provided the Commission with both the evidential and the legal framework for tackling the phenomenon of covert, sophisticated and devious cartel behavior.[5] Conspiracy has long been one of the most controversial areas of criminal law on both sides of the Atlantic. The word itself is redolent with unpleasant connotations of behavior that is illegal, furtive, treacherous and difficult to prove. Conspiracy may be an amorphous concept that is not amenable to easy definition,[6] but it provided

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[3] *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3, (1997) [hereinafter EC TREATY].

[4] *See, e.g.*, Cases T-1/89–4/89, Rhone v. Commission, 1991 E.C.R. II-867 (review of academic writing on the definition of "concerted practice" in the opinion of Judge Vesterdorf, acting as Advocate General); Case 41/69, ACF Chemiefarma v. Commission, 1970 E.C.R. 661; Luis Miguel Pais Antunes, *Agreements and Concerted Practices under EEC Competition Law: Is the Distinction Relevant?*, 11 Y.B. OF EUR. LAW 57 (1990); Rene Joliet, *La Notion de Pratique Concertee et l'Arret I.C.I. dans une Pespective Comparative [The Notion of Concerted Practices and the Halt of the I.C.I. in a Comparative Perspective]*, 3-4 CAHIERS DE DROIT EUROPEEN 251 (1974); Valentine Korah, *Concerted Practices*, 36 MOD. L. REV. 220 (1973).

[5] *See* Sherman Act, 15 U.S.C. §§ 1-7 (2003).

[6] The evolution of the law of conspiracy in the United States had its judicial critics. For example, Justice Jackson deplored the "drift" in the federal law of conspiracy and eloquently described conspiracy as an "elastic, sprawling and pervasive offense," adding that "the

the means for the Commission to bring what is now recognized as the most insidiously harmful threat to a competitive economy within the purview of effective legal control.

This article charts the progress of, and the vicissitudes faced by, the incorporation into the European Community legal order of the peculiarly common law concept of conspiracy as the vehicle not only for analytical purposes, by characterizing full-blown cartels as "agreements" in the sense of Article 81 of the EC Treaty, but also to resolve the multiplicity of evidential issues presented by complex, pernicious and secretive behavior.

The article also shows how the uncovering of deliberate and secretive business delinquency, practiced at the highest levels in some of Europe's most respected corporations and summed up by the negative connotations of the concept of "conspiracy" has itself subtly contributed to altering hitherto tolerant European perceptions of cartel conduct, and has moved the paradigm for legal control of cartels in Europe from an administratively-minded concertation on the economic aspects to a conduct-based test that focuses on delinquency and recidivism.

A. Placing Article 81 in the Market Context

As a legal instrument for prohibiting cartels, Article 81 of the EC Treaty[7] at first sight provides the Commission with a seemingly well-aimed normative tool for assessing the legality of collusive conduct.

In terms that contain a distinct echo of the Sherman Act's condemnation of every "contract, combination. . .or conspiracy in restraint of trade or commerce among the several states," Article 81(1) prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market."[8]

The comfort zone for U.S. antitrust lawyers is, however, deceptive. Article 81 and the Sherman Act do not share the same position in the spectrum of condemnatory responses to cartel organization.[9] While the

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modern law of conspiracy is so vague that it almost defies definition. . . it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid." Krulewitch v. United States, 336 U.S. 440, 445 (1949). Justice Jackson was condemning bringing conspiracy charges when the evidence showed the commission of the full offense, but recognized that conspiracy in federal law "aggravates the degree of crime over that of unconcerted offending." *Id.* at 449.

[7] This Article was originally numbered as "Article 85" in the EC Treaty. References in this paper are made to Article 81, except where older cases are discussed. The two are, however, identically worded.

[8] *See* Sherman Act, 15 U.S.C. § 1 (2003); EC TREATY, *supra* note 3, at art. 81(1).

[9] For a concise comparison of the similarities and differences between E.U. competition law and U.S. antitrust law, *see* Stephen P. Reynolds, *International Antitrust Competence for*

Sherman Act is judicially enforced as part of the ordinary law of the land, and is backed by criminal sanctions on both corporations and individuals, Article 81 was conceived as part of a system of administrative control operated by the Commission, which has no powers over individuals, no criminal law jurisdiction and can impose fines only on companies. Moreover, the prohibition is by no means an absolute one. If it is expressed in broad terms, the object of Article 81's apparently clear prohibition on restrictive agreements and practices was not to outlaw and punish all restraints of competition. Rather, it was the morally neutral objective of bringing within the ambit of administrative surveillance the whole gamut of commercial arrangements and practices that could affect trade between the member states of the then European Economic Community and permit their economic evaluation in terms of the Commission's mission of breaking down trade barriers.[10] It would be a misconception to allow the tough-sounding language of the first paragraph with its explicit ban on price fixing, market sharing and quotas "in particular" to obscure the equally important provision that permits exemption under Article 81(3). The Commission and the Courts have always interpreted Article 81(3) broadly so as to favor the economic scrutiny of ordinary commercial arrangements that by no stretch of the imagination could be stigmatized as a "conspiracy." Indeed the Commission has throughout the years used its power to exempt and impose conditions under Article 81(3) as a potent instrument for the development of European competition policy.[11]

A more than perfunctory reading of Article 81, even without proceeding to Article 81(3), reveals its underlying rationale of economic evaluation. If an agreement or practice is prohibited (and thus void) it is because the real objection is not to its effect upon competition as such, but rather to its incompatibility with the common market. As one leading commentator observes: "[t]he essential feature of Article 81(1) is that its application in any given case depends upon the economic aims or effects of transactions entered into between undertakings."[12]

The immediate object of protection is thus not the consumer or even of the notion of "competition" as such but the European "vision" of a certain type of market organization. There is no trace of the moral censure that is found in the "conspiracy" language of the Sherman Act and fosters the

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a Company with Multilateral Observations, 8 INT'L Q. 76 (1996).

[10] CHRISTOPHER HARDING & JULIAN JOSHUA, REGULATING CARTELS IN EUROPE: A STUDY OF LEGAL CONTROL OF CORPORATE DELINQUENCY 109 (2003).

[11] Ian Forrester & Christopher Norall, *The Laicization of Community Law: Self-Help and the Rule of Reason: How Competition Law is and Could be Applied*, 21 COMMON MKT. L. REV. 11 (1984) (containing an account of the early development of EC competition law). *See also* D.G. GOYDER, EC COMPETITION LAW, chs. 3-4 (3d ed. 2001).

[12] SIR CHRISTOPHER BELLAMY & GRAHAM CHILD, EUROPEAN COMMUNITY LAW OF COMPETITION § 1-042 (5th ed. 2001).

criminalization of prohibited conduct. Indeed, in contrast with the peremptory notion of the *per se* violation which had emerged in Sherman Act jurisprudence by the 1940s,[13] there are in strict law no intrinsic infringements of Article 81. The European Court of First Instance has gone out of its way, not entirely helpfully, to observe that no restriction of competition is automatically disqualified as a matter of law from receiving the benefit of Article 81(3).[14]

Thus in Article 81, there is no clear differential treatment of cartel behavior as a distinct object of antitrust control. This broad brush treatment of restraints of trade in Article 81 underlines the significant gap in conceptual thinking towards the control of cartels in the United States and in Europe. The U.S. approach since the passage of the Sherman Act has been one of unalloyed censure of cartels with ready recourse to criminalization, while in Europe, legislators, regulators and lawyers have historically regarded cartels as morally neutral and based their assessment on an economic evaluation and analysis.[15]

B. The Nature of Conspiracy under Section 1 of the Sherman Act

The Sherman Act was passed "against a background of rampant cartelization and monopolization of the American economy."[16] Its basic objective was to preserve competitive pricing, and price fixing was rendered illegal.[17] The notion of combination or conspiracy as used in the

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[13] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (everything that is properly regarded as criminal under Section 1 is judged by a *per se* rule, but not all *per se* violations are considered apt for criminal prosecution). For the line between conduct that is considered appropriate for prosecution and that which is to be pursued civilly, *see* Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693 (2001); Donald I. Baker, *To Indict or not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405 (1978).

[14] *See, e.g.*, Case T-17/93, Matra-Hachette S.A. v. EC Commission, 1994 ECR II-595, para. 85 (no presumption in Community Law that any type of agreement is inherently capable of qualifying for exemption). This sounds rather like judicial hair-splitting, since in practice the phenomenon of the "serious violation" which will never qualify under Article 81(3) has been developed through case law. *See generally* CHRISTOPHER HARDING, EUROPEAN COMMUNITY INVESTIGATIONS AND SANCTIONS: THE SUPRANATIONAL CONTROL OF BUSINESS DELINQUENCY (1993). *But see* Guidelines on the Method of Setting Fines Imposed Pursuant to Article 15(2) Regulation 17/62, 1998 O.J. (C 3) 9 (in these court-approved guidelines, price fixing and market sharing cartels are categorized as "very serious infringements").

[15] HARDING & JOSHUA, *supra* note 10, at ch. 2; Christopher Harding, *Business Cartels as a Criminal Activity: Reconciling North American and European Models of Regulation*, 9 MAASTRICHT J. OF EUR. & CORP. L. 393 (2002).

[16] RICHARD POSNER, ANTI-TRUST LAW: AN ECONOMIC PERSPECTIVE 23 (1976).

[17] Section 1 of the Sherman Act provides that "every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Sherman Act, 15 U.S.C. § 1

Sherman Act was said by some to have been derived from the common law,[18] as was the concept of "restraint of trade." The latter assumption has been dismissed more recently as fundamentally mistaken since the common law of trade restraints had little to do with promoting competition,[19] but it was to embroil judicial interpretation of the Sherman Act in a controversy that split the U.S. Supreme Court into two bitterly opposed camps for years.[20]

What the Sherman Act took from the pure common law form of conspiracy was the notion of "agreement:" a conspiracy is in effect an agreement to commit an unlawful act.[21] Usually the objective has to involve committing an offense, the ostensible (and simplistic) policy rationale for the invocation of the criminal law at this early stage being the need to frustrate the commission of crime. In the normal criminal law setting, conspiracy is thus an "inchoate" offense. However, Section 1 of the Sherman Act was an example of the type of statutory conspiracy where neither the underlying end, nor the means adopted, were in themselves unlawful. Rather, it was the enacting statute itself which created the initial illegality. The usual common law justification cited above for the existence of the conspiracy offense is hardly apposite in the case of the Sherman Act conspiracy. For a company to set its own price, no matter how high it is, is of course entirely legal under the antitrust legislation: price fixing is only unlawful under the Sherman Act where it is the result of a "conspiracy." The gist of the crime of conspiracy to violate the Sherman Act centers on the agreement itself. Unlike some enactments of statutory conspiracies, no overt act is necessary. A conspiracy under Section 1 is on "the common

(2003). While the courts developed a "rule of reason" to mitigate the literal application of the prohibition to almost every business agreement, defendants are not allowed to argue that their fixed prices are "reasonable:" only competitively set prices are reasonable and collusively-fixed prices are deemed unreasonable.

[18] Standard Oil Co. v. United States, 221 U.S. 1 (1911) (explaining why the Sherman Act did not condemn all conduct which restrained trade); James Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743 (1950) (observing that to lawyers in 1890, a direct prohibition of a restraint of trade would probably have appeared meaningless, since it could not come into being without the exchange of promises between two persons, usually as ancillary to the execution of a property or employment agreement).

[19] *See* POSNER, *supra* note 16, at 23-24, citing Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 6 J. LAW & ECON. 7 (1966).

[20] RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA 1888-1992: HISTORY, RHETORIC, LAW 27-38 (1996) (describing the emergence of the "rule of reason" from the fractional conflict between the "Liberalists" and the "Rule of the Reasonists" which "involved a clash between factions holding opposite visions of society").

[21] English criminal lawyers invariably used to tell juries that conspiracy was an "agreement to commit an unlawful act or a lawful act by unlawful means," a formulation inaccurately known as "Lord Denman's Antithesis." Lord Denman, an eminent Lord Chief Justice, did not invent it; when he said it, he did not intend it as a definition, and when it was quoted back to him he said it was incorrect.

law footing:"[22] it is not dependent on the doing of any act other than the act of conspiring as a condition of liability. The crime of conspiracy is complete once the agreement is made, but while "the unlawful agreement satisfies the definition of the crime... it does not exhaust it."[23] The subsequent actions of the alleged conspirators are not only the usual means by which the initial agreement is proved but may also form part of the crime of conspiracy itself. If the conspirators continue their combined efforts in pursuance of the plan, the conspiracy continues until abandonment or success.[24] One of the many peculiar and contradictory characteristics of conspiracy which distinguishes legal analysis of the "conspiracy agreement" from that of a commercial contract is that it has a "timely" dimension and can indeed evolve and change over its duration. A continuous conspiracy is one that "contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up."[25] The approach which best illustrates this concept is a "partnership in crime," or more accurately, a partnership in criminal purposes. Thus Justice Holmes stated in *United States v. Kissel*:

> A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but the result of it. The contract is instantaneous; the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes.[26]

While the formulation comprehensively covers all forms of conspiracy, the connotations of mutual support and encouragement are particularly apt to

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[22] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (requirement of an "overt act" in execution of the conspiracy is not imposed by common law, but has been enacted in many statutes).

[23] United States v. Kissel, 218 U.S. 601, 607 (1910).

[24] The English law of conspiracy has never been comfortable with its application to the continuing combination, as opposed to the initial agreement. Perhaps the closest that English law has come to recognizing the temporal aspect of the conspiracy was in Director of Public Prosecutions v. Doot, App. Cas. 807 (1973), in which Viscount Dilhorne ruled that "a conspiracy does not end with the making of the agreement. It continues so long as the parties to the agreement intend to carry it out. It may be joined by others, some may leave it." In the same case, Lord Pearson conferred that "the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive." *Id.*

[25] *Kissel*, 218 U.S. at 607.

[26] *Id.* at 608. English law has been less successful in articulating the "temporal" dimension of conspiracy, emphasizing that subsequent actions are not part of the *actus reus* of the crime. *See* R. v. Hammersley, 42 Cr. App. R. 207 (1958) (stating that "[t]he agreement, and nothing but the agreement, is what the law is intended to punish"). This view has been excoriated by Lord Diplock, one of England's most distinguished judges, as "the height of sophistry." *See* Knuller v. DPP, 546 Cr. App. R. 633, 672 (1973) (observing that the law was using "agreement" as a fiction to punish conduct of which it disapproved).

encompass price fixing among ostensible competitors. Under the classic price fixing cartel, competitors cooperate so as to substitute collusion for competition and thus create an anti-competitive restraint that would not otherwise be possible. The participants, by replacing competition with collaboration, can enhance their market power and control a market which as individuals they could not.

It is possible that the wording of the Sherman Act—"contracts, combinations or conspiracies"—was simply the reflection of the Nineteenth Century draftsman's fancy for alliteration. "Combination" may not have had much of a statutory history in U.S. law but in England, indictments under the Treason-Felony Act charged defendants that they did "combine, conspire, confederate and agree with" other persons. While much scholarly effort in the United States was at one time devoted to demonstrating that "combination" had a meaning and content different from that of a conspiracy or contract,[27] U.S. lawyers now generally agree that the "disjunctive Triad" of Section 1 reduces "combination" to a single broad concept "roughly equivalent to concerted action."[28]

The choice by U.S. legislators to include conspiracy in the Sherman Act was serendipitous. With the application of the Sherman Act depending so heavily on the scope to be given to the idea of "agreement," its definition has for many years been an "important and continuous legal battleground." In the earliest cases, there were few definitional problems since the cartels put their arrangements into formal contracts and the government could establish the exact terms of the agreement.[29] The dispute turned not on the existence of the necessary element of agreement but on its legality.[30] The inevitable result was that the cartels went underground and while still

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[27] *See, e.g.*, Northern Sec. Co. v. United States, 193 U.S. 197, 403 (1904) (Holmes J., dissenting) (observing that "[t]he words hit two classes of cases, and only two – Contracts in restraint of trade and combinations or conspiracies in restraint of trade[]"); James E. S. Baker, *Combinations and Conspiracies – Is there a Difference?*, 14 ANTITRUST BULLETIN 71 (1969).

[28] LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 339 (3d 1977); Rahl, *supra* note 18, at 744 (pointing out that while the "moral overtones" of the two words are different, the desire "to advance some sensible distinction between 'combination' and 'conspiracy' has been abandoned").

[29] *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

[30] There was uncertainty during the late 1890s on the scope and reach of the Sherman Act and it was unclear whether judges would apply reasonableness standards to price fixing and other cartel agreements. Defendants in these early cases acknowledge the existence of the agreement but argued that these did not fall within the Section 1 prohibition. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). *See also* United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); Addyston Pipe & Steel Co., 85 F. at 271. *See also* William E. Kovacic, *The Identification and Proof of Horizontal Agreements Under the Antitrust Laws*, 38 ANTITRUST BULLETIN 5, 15-16 (1993).

maintaining their (now illegal) agreements in force as before, the participants made sure that no direct evidence was left lying around to help the authorities prove their case.[31]

If the criminalization of price fixing may have led cartel participants in the United States to cover their tracks, the adoption in the Sherman Act of the common law notion of conspiracy had the immense advantage for the government and for private plaintiffs, that the agreement could be proved by the same sort of evidence as the traditional criminal conspiracy. These benefits include the facts that no formal agreement is required, it may be express or implied, and it is not even necessary to prove the terms of any particular agreement or plan. Conspiracy may be demonstrated by concert of action between the participants all working together for a common purpose.[32] What is more, a conspiracy has to be viewed as a whole, the component parts—which may be unobjectionable by themselves or taken individually—are not to be weeded out and enquired into separately.[33] A lawful device may be part of the conspiracy.[34] As regards the practicalities of evidence, the recognition by Courts that by their very nature criminal conspiracies were rarely capable of proof by direct evidence or testimony allowed proof by circumstantial evidence alone. Most important perhaps is what in the United States is sometimes inaccurately called the "co-conspirator exception to the hearsay rule." Under this exception, once the existence of the joint enterprise and the identity of the participants in it are shown by "foundation evidence," the acts and declarations of one conspirator "in the furtherance" of the conspiracy are admissible in

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[31] The courts may in such circumstances take inferences from indirect evidence in reaching the conclusion that the conspirators entered into an express agreement to follow a given course. SULLIVAN, *supra* note 28, at 313. *See also* Kovacic, *supra* note 30, at 17.

[32] The U.S. Supreme Court has found that "[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, the conclusion that a conspiracy is established is justified." American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).

[33] The U.S. Supreme Court has stressed that in an antitrust conspiracy case the evidence should not be fragmented or compartmentalized: "[i]t hardly needs statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." United States v. Patten, 226 U.S. 525, 544 (1913) (citations omitted); *See also* Swift & Co. v. United States, 196 U.S. 375, 385-386 (1905). In Dyestuffs, the European Court of Justice also emphasized that the evidence must not be compartmentalized: "The question whether there was a concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole." Case 48/69, Imperial Chem. Indus. v. Commission, 1972 E.C.R. 619, at para. 68.

[34] It is not the form of the conspiracy but the result achieved that is condemned, so it is irrelevant whether the means used are in themselves lawful or unlawful. *American Tobacco Co.*, 328 U.S. at 809.

evidence against all the rest.[35] When the existence of the conspiracy itself is shown, relatively little evidence is then necessary to connect a party to it so as to render his statement or action admissible against the others.[36] The actors in a conspiracy do not have to take part in all its activities in order to be equally guilty of the offence along with the others.[37] They do not even all have to meet together.[38] The members can join it or leave it at any time, but the conspiracy goes on.[39]

C. The European Administrative Model

While U.S. policy officially condemned cartels and prosecuted them, however unevenly and leniently, under the Sherman Act, cartels continued to be a dynamic presence in Europe between the wars. Once the sinister role played by cartels in supporting totalitarian regimes had become apparent, U.S. sponsored post-war initiatives were undertaken but then foundered on the shoals of political unwillingness on both sides of the Atlantic to submit to a supranational system of control. Cartels remained the normal way of doing business in Europe and many of the old

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[35] A conspiracy is deemed to create an *ad hoc* agency relationship between the conspirators so what one does or says is considered to be the execution of the common purpose and therefore admissible as primary evidence against the rest of the parties. This is the so-called "co-conspirator exception to the hearsay rule," although strictly under Rule 801(d)(2)(E) of the Federal Rules of Evidence, a co-conspirator statement is not regarded as hearsay at all but as original evidence. In order for the co-conspirator statement to be admissible against all other parties, there needs to be "foundation evidence" that the joint enterprise existed between the declarant and the other parties. *See e.g.,* Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960); United States v. Johns-Mansville Corp., 231 F. Supp. 690 (E.D. Pa. 1963); *see also* United States v. E. I. Du Pont De Nemours & Co., 107 F. Supp. 324, 325 (Del. 1952) (finding that "[a] declaration of a co-conspirator is admissible even though made only to other members of the co-conspirator's organization"). *See also* Julian Mathic Joshua, *Proof in Contested EEC Competition Cases: A Comparison with the Rules of Evidence in Common Law*, 12 EUR. L. REV. 315, 324-28 (1987).

[36] "[O]nce a conspiracy is proved a relatively small amount of evidence connecting a particular defendant with that conspiracy will suffice to sustain a guilty verdict." Morton Salt Co. v. United States, 235 F.2d. 573, 580 (10th Cir. 1956). For the evidentiary advantages conferred on prosecutors by charging conspiracy, *see* W. A. Holman, *Evidence in Conspiracy Cases*, 4 AUSTRALIAN L. J. 247 (1930); Solomon A. Klein, *Conspiracy – the Prosecutor's Darling*, 24 BROOK. L. REV. 1 (1957).

[37] If a participant's act was done pursuant to the conspiracy, he is equally liable at law with all the other participants, irrespective of the greater or lesser degree of his role. United States v. Bausch & Lomb, 34 F. Supp. 267, 268 (S.D.N.Y. 1940).

[38] A participant may be part of a conspiracy even without having any knowledge of what the other conspirators are doing at any time. The conspirators may not necessarily be doing the same thing as the other conspirators at the same time. What is important is that they all intend to contribute to the common purpose or scheme. United States v. Atlantic Co., (DC Ga. 1950) 1950-1951 Trade Cases.

[39] Pinkerton v. United States, 328 U.S. 640, 646 (1946); Director of Public Prosecutions v. Doot, App. Cas. 807 (1973).

arrangements were resurrected.

While government attitudes towards cartels in Europe underwent a significant change during the 1950s with the adoption of national schemes for regulation of cartels, the approach to regulation that emerged, characterized as the "European model," was one of administrative control rather than legal prohibition. Cartel activity rarely attracted direct sanctions; rather regulatory efforts focused on the monitoring of arrangements with government intervention in the case of "abuse" being identified. Traditionally, European attitudes concentrated on the outcome of conduct rather than its characteristics, with regulatory efforts directed towards compliance based on recommendations and persuasion, or to put it in a modern way, control was a matter of "soft" law.

Even when Article 85 of the EC Treaty was enacted and the Commission was given the necessary powers under Council Regulation No. 17/62 to police its observance, the "notification" system, coupled with a (then) regime of legal certainty for operating restrictive agreements, meant that its main efforts, even in the direction of horizontal arrangements, were devoted towards the scrutiny of openly-practiced trading structures and organizations which were aimed at the protection of national markets against competition from other member states.

D. Early Experience with Cartels

The Commission's early experience in cartel matters mirrors that of the Sherman Act in that in the early cases no definitional problem of what "agreement" meant even arose. The parties to formal cartel agreements dutifully notified their arrangements to the Commission fully expecting to receive at the very worst an exemption under Article 85(3). They were quite hurt when the Commission—in what was perceived at the time as an overly harsh approach—recommended them to cease and desist on the basis of an informal settlement. Any action, such as it was, took place through a low profile process of negotiation, and fines were unknown. These early cases almost all involved contractual selling arrangements on a national market operated by trade associations and designed to protect the home team from inconvenient outside competition. Eventually the Commission's opposition to such arrangements became known. In two important "cement" cases, where the formal cartel agreements had been notified to the Commission, a prohibition decision was adopted, although no question of fines arose as the notification process protected the operators from penalties.[40] Even the most obstinate cartels have a learning curve and eventually the flow of notifications of overt quota and market allocation

[40] Cases 8/66-11/66, Société Anonyme Cimenteries v. Commission, 1967 E.C.R. 75; Case 8/72, Vereeniging van Cementhandelaren v. Commission, 1972 E.C.R. 977.

agreements dried up.

Although the lack of notifications should have aroused suspicion, cartel cases did not feature prominently on the Commission's agenda, even if the Commission had the means available under Council Regulation No. 17/62 to investigate and sanction price-fixers. In *Re in Cartel Quinine*, the first "'cartel" case involving fines to come to the Court, a defensive cartel had been set up between French, German and Dutch producers, and the Commission was not notified.[41] The arrangements only came to light through a U.S. Congressional investigation which had prompted a Commission enquiry and resulted in fines—then considered severe—of around $200,000 being imposed on the ringleaders in July 1969.[42] The fines were largely upheld by the Court of Justice[43] in what was a relatively clear-cut case. A so-called "gentlemen's agreement" with no legal sanctions to enforce it was treated as an Article 85 agreement. Thus, it was already clear by this time that the term "agreement" in Article 85 was not confined to legally binding contracts.

E. The Concept of Concerted Practice: The Legacy of *Dyestuffs*

In other cases around the time of *Re Quinine*, the direct evidence of an express agreement was sparse and the concept of the "concerted practice" came to the forefront to catch what was believed to be "informal" cooperation. In *Imperial Chemical Industries v. Commission*[44] (the "*Dyestuffs* case" or "*Dyestuffs* cartel") a cast of characters assembled that formed the dramatis personae of a series of repeat performances and desperately fought, with some success, rearguard actions that were to bog down the Commission and Courts in interminable sterile procedural arguments and delay the final resolution of some of the most important cartel cases for fifteen years.

It is significant in historical terms that the *Dyestuffs* cartel had been one of the most notorious organized international cartels dating from the late 1920s. Its durability was underlined by the fact that the main players had all been members of the original pre-war arrangements.[45] The record of

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[41] 1969 J.O. (L 192) 5.

[42] *Id.*

[43] Case 41/69, ACF Chemiefarma NV v. Commission, 1970 E.C.R. 661.

[44] *See* Imperial Chem. Indus., 1972 E.C.R. 619.

[45] As early as 1927, a syndicate of French dyestuff producers led by Kuhlmann reached a cartel agreement with I.G. Farben to respect each other's home markets, to sell jointly or according to prescribed quotas and to fix prices. This European cartel was joined in 1929 by a syndicate of Swiss producers, Imperial Chemical Industries ("ICI") joined in 1931, soon followed by producers from most other European countries. During the 1930s, the cartel controlled 60-70 percent of the world's total output of dyestuffs. *See* GEORGE W. STOCKING & MYRON W. WATKINS, CARTELS IN ACTION: CASE STUDIES IN INTERNATIONAL BUSINESS DIPLOMACY 505-507 (American Book-Stratford Press 1947).

both the Commission and European Court is strangely silent as to the sinister historical antecedents of the cartel. A reading of the decision and judgments almost leaves the impression that although orchestrated, the price-fixing that occurred between 1964 and 1967 was a spontaneous and "one-off" event. The Commission had been alerted of the cartel by complaints from customer trade bodies. Although it had conducted some inspections, and there was some evidence of meetings being held in Basel and elsewhere, the Commission had obviously not managed to obtain any damning documentary evidence. Its decision to prosecute ultimately relied on the similarities of timing and amount in the announced price increases as well as an "expert's report" concluding that the only explanation was prior concertation.

The Commission condemned the series of price rises as an illegal concerted practice contrary to Article 85(1) and imposed what, even by the standards of the time, were modest fines. Upholding the Commission's decision in a judgment that provoked a storm of controversy and was to have an interesting historical sequel,[46] the Court of Justice stated that if

> Article 85 draws a distinction between the concept of 'concerted practice' and that of 'agreement between undertakings;' the object is to bring within the prohibition of that Article a form of cooperation between undertakings which, without having reached the stage where an agreement so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.[47]

The Court seems to have been attempting to establish that a "concerted practice" was different from an agreement. It still had to search for some form of mutual awareness and cooperation other than "agreement" in order to attach liability and fines. The borderline, if any, between tacit agreement and concerted practice was to elude definition for many years. If U.S. lawyers feel a sense of *déjà vu*, it is because "conscious parallelism" had been a bone of contention in Sherman Act jurisprudence in a long line of cases beginning in 1939 with *Interstate v. United States*.[48] That case was often cited mistakenly as authority for the proposition that a conspiracy finding could be justified if firms acted in parallel and were aware of one another's actions. Although the U.S. Supreme Court had always stopped short of such a position, it was only in 1954 that it was settled that conscious parallelism on its own was not to be equated with Sherman Act conspiracy.[49]

It should be remembered that in the 1970's the Commission had not

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[46] *See infra* note 76.

[47] *Imperial Chem. Indus.*, 1972 E.C.R. 619, at para. 64.

[48] Interstate v. United States, 306 U.S. 208 (1939).

[49] *See* Theatre Enters. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954).

yet begun to use its full investigative powers under Council Regulation No. 17/62. Most "investigations" were carried out on notice, rarely simultaneously on all the suspected participants and without the benefit of a Commission decision. As a result, the Commission rarely discovered what U.S. practitioners call the "smoking gun." During this time both the Commission and the Court seem to have lost sight of the elementary proposition that a full "agreement" can still be proved entirely by circumstantial evidence. Instead, the label of "concerted practice" seems to have been used even if there had been such an express agreement. The terminology of the time perhaps reflected more differences in the type of evidence relied on than the robustness of the commitment. Interestingly, U.S. antitrust jurisprudence went through a similar period: the Courts often talked of "tacit collusion" when they really meant cases where the government or plaintiff relied on indirect evidence to prove the existence of an actual agreement.

Indeed by the time of the *Suiker Unie v. Commission*[50] in 1975, the Court of Justice had already refined and limited its characterization of "concerted practice" to make it clear that it considered this to refer to a far more specific and subtle form of coordination: adherence to a common business practice which reduces mutual uncertainty as to the present or future conduct of commercial competitors and thereby enhance the likelihood of coordinated behavior. In U.S. antitrust law this is known as the "facilitating device."

F. Tackling the Oligopoly Problem

If lawyers and judges generally feel happier dealing with factual issues, such as "good" or "bad" behavior or conspiracy doctrine rather than price theory, economics is always going to rear its head in any assessment of legal liability. After all, cartels may be delinquent conduct but they occur in a commercial and market environment. To borrow from Justice Clark in *Theatre Enterprises*, conspiracy has not yet read economics out of the Sherman Act entirely.[51]

Cartels are often discovered in concentrated markets in which there are only a limited number of suppliers. Competition authorities do not like oligopoly pricing. In fact, it is not uncommon to find an industry with few competitors who call themselves competitors but never seem to compete vigorously, have stable market shares and move their prices up in lockstep. The suspicion is always that their prices are higher than would be seen in a competitive market. As one distinguished former Assistant Attorney General has pointed out, antitrust enforcers are rather romantically attached

[50] Case 40/73, 1975 E.C.R. 1663.

[51] *Theatre Enters.*, 346 U.S. at 541.

to the notion that prices should be set by competition.[52] Even economists appear to agree that supra-competitive pricing is an unhealthy situation. The problem for both the framers and the enforcers of a viable antitrust regime is what to do about it. There are almost as many economic theories about oligopoly pricing as there are economists. In the absence of theoretical agreement on how such markets operate, the same parallel pricing pattern could be invoked with apparent conviction as proof of either cut-throat competition or of the darkest conspiracy. Viewed from the outside, the absence of competition could be the manifestation of anything from a common sense recognition by the individual operators that there is no point in competing vigorously, to a full-blown price fixing cartel meeting in the traditional smoke-filled room.

The phenomenon is fundamentally problematic for cartel enforcement, especially where the regime is based on a system of prohibition and sanction. The market structure may be relevant in two opposite ways: regulators may attempt to invoke the characteristics of the concentrated market, particularly the parallel movement of prices, as circumstantial evidence of collusion, while the defense will argue that the outcome is to be expected from the oligopolistic nature of the market. "Experts" will be found to support both sides of the argument with total plausibility. The economic evidence of parallel pricing is at best ambiguous, but economic assessment is not going away.

It is not necessary to rehash the problems of understanding oligopoly theory, which are exhaustively documented.[53] The traditional structural school contended that oligopolistic interdependence made higher-than-competitive prices almost inevitable in an oligopoly setting. However, this view was challenged by Stigler in his highly influential articles on antitrust theory in 1964 and led to a change in the way economists approached the question of coordination among competitors.[54] The cornerstone of economic analysis is the recognition that it is far from inevitable that oligopolists will behave in an anti-competitive way. Whether or not they collude expressly, in order to raise prices they will need to overcome the "complicating factors" that stand in the way of parallel behavior by achieving three critical elements: concurrence, co-ordination and compliance. Of course, even if Stigler's ground-breaking article revolutionized the thinking of economists and the courts, we are no nearer

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[52] John H. Shenefield, Antitrust—Looking Ahead, Remarks before the Financial Analysts Federation, Washington, D.C. (June 29, 1977), *in* 13 J. OF REPRINTS FOR ANTITRUST L. & ECON. 661, 663 (1982).

[53] *See generally* Kovacic, *supra* note 30; Dennis A. Yao & Susan S. DeSanti, *Game Theory and the Legal Analysis of Tacit Collusion*, 38 ANTITRUST BULLETIN 113 (1993); Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULLETIN 143 (1993).

[54] George J. Stigler, *A Theory of Oligopoly*, 72 J. OF POL. ECON. 44 (1964).

to any consensus among experts. For example, while some Chicago School adherents asserted that there can never be non-competitive pricing among oligopolists without conspiracy, others held the equally strong conviction that such conspiracies were intrinsically impossible as they would inevitably break down under the weight of their own inherent contradictions.[55]

The crucial issue is whether the players in an oligopolistic market garner their uncompetitive prices and supra-competitive profits as a result of ineluctable market forces or whether they have acted in a deliberate manner. The former is often invoked by defense advisers wishing to downplay an allegation of collusion, while regulators often challenge such an interpretation.[56] Unfortunately, economic analysis, far from providing a clear-cut answer, simply adds to the complexity of resolving the debate.

Theoretical economists have in fact been rather cautious in claiming that their theories represent some incontestable natural law. After all, literally dozens of theories of oligopoly of different orders of rigor have been developed. Lawyers are somewhat less reticent. The variable geometry of the oligopoly theory will fit almost every type of conduct. It can be invoked to explain why prices stick and why they go up. In almost every parallel pricing case, therefore, teams of expert economists are produced to testify that the parallel pricing is the result of free market forces—and on the other side equally distinguished economists will give exactly the opposite opinion.

Economists and lawyers have been uneasy bedfellows in the resolution of the almost intractable dilemmas presented by the need to identify some sort of agreement among competitors. Economists tend not to draw a distinction between "tacit" and "express" collusion, while for lawyers, used to a conduct-based test, one of the most difficult problems in the whole field of antitrust law is finding some "avoidable act" on which liability could be affixed. How could economic operators be enjoined and still be punished for doing something which the received knowledge taught was inevitable? The Sherman Act, in particular, with its requirement of a "contract, combination or conspiracy," raised the problem in an acute form.

As one distinguished legal and economic commentator observes: "[t]he difficult issue of proving an agreement to fix prices from parallel pricing and other circumstantial evidence is at the core of antitrust's

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[55] The Chicago School approach has come to dominate antitrust thinking and the approach of the courts since the mid-1970s, so that "tacit collusion" is often used to denote no more than an agreement proved through circumstantial evidence. Economic analysis of the structure of the market environment that makes coordination more or less plausible is relevant now only to determine whether an agreement exists in a parallel pricing case. Baker, *supra* note 53, at 145-46.

[56] HARDING & JOSHUA, *supra* note 10, at 148.

longstanding efforts to attack the 'oligopoly problem.'"[57]

The so-called 'attack' on the oligopoly problem has been dogged by evidential problems and attempts to reconcile two "poles" of the continuum of proof that demonstrate the existence of an agreement. At one extreme is proof of direct exchange of assurances between rivals, the classic form of evidence which shows the existence of an agreement. At the other end of the continuum lies economic proof of patterns of behavior, that the participants have followed similar business practices over a period of time.

As cartels went underground and the existence of direct and detailed evidence was no longer readily available, the challenge for the courts was to find a way of relying upon sufficient circumstantial evidence to establish the existence of an agreement, which edged towards being pure evidence of parallel behavior in the market, and yet remain within the legal meaning of an agreement for the purposes of Section 1 of the Sherman Act.[58] This dilemma highlights how economic theory could preclude courts from inferring the existence of cartel agreements.[59] Where economic analysis of a market suggests that the economic environment is not conducive to coordination, it will be irrational for the firms to reach an agreement not to compete. If coordination is implausible, circumstantial evidence is unlikely to demonstrate an agreement for the court. However, where the industry is shown to be conducive to coordination, an agreement may be unnecessary for the industry to reach the coordinated outcome. The court could conclude that absent any direct evidence it will not infer the existence of an agreement.

This dilemma has been grappled with in European cases. The *Dyestuffs* case was in fact the first occasion on which the Commission and Courts had to test the validity of "economic" evidence and argument. The characterization of the infringement in that case as a "concerted practice" was somewhat puzzling given the facts. While it is true that advance price announcements figured strongly—on three occasions the ten or so producers all announced identical price increases across the Community within a day or so of one another—the Commission's decision revealed that meetings had taken place in Basel and London to discuss prices just before the simultaneous announcements.[60] There was also other circumstantial evidence of pre-arrangement. This surely sounds like an open and shut "plus factors" case, inferring an actual agreement from circumstantial evidence.[61] Indeed, one leading U.S. commentator has observed that the

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[57] Baker, *supra* note 53, at 144-45.

[58] *See* Kovacic, *supra* note 30, at 18-19.

[59] Baker, *supra* note 53, at 146-47.

[60] *Imperial Chem. Indus.*, 1972 E.C.R. 619.

[61] "Plus factors" may fall into one of three main categories: (1) hard evidence, typically evidence of meetings that even without direct evidence of what was actually agreed may be

evidence cited in the decision would have been ample to convict for a full criminal price-fixing conspiracy in the United States.[62]

When the case came up on appeal, however, the Court of Justice[63] treated it as one of facilitating devices. It focused on the industry practice of making advance price announcements: as the Court explained, this price signaling tended to eliminate uncertainty between the producers as to their future conduct and thus the business risk associated with a unilateral price change.[64]

As for the necessary element of concertation, there was of course no direct evidence of an articulated agreement to adopt the facilitating practice of advance price announcements, but that was not required. The Court found that, viewed as a whole, the three successive price increases showed a progressive cooperation between the producers. The *Dyestuffs* case – just like *Interstate* in the United States—is a case which for many years continued "to fascinate the cognoscenti and to mislead the unwary."[65] In a much criticized and misunderstood passage, the Court stated that:

> Although parallel behavior may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market. . . . This is especially the case if the parallel conduct is such as to enable those concerned to stabilize prices at a level different from that to which competition would have led.[66]

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accepted as collusion; (2) parallel conducts that by its nature must be regarded as agreed rather than spontaneous and could not have ever occurred without agreement, and (3) evidence that the market structure and conditions are conducive to coordination. *See* HARDING & JOSHUA, *supra* note 10, at 151; *see also* Kovacic, *supra* note 30, at 5.

[62] BARRY E. HAWK, COMMON MARKET AND INTERNATIONAL ANTITRUST 67 (2d ed. 1986 & Supp. 1987). The pattern of meetings to discuss prices followed by price rises present little evidential challenge. *See, e.g.*, Cont'l Baking Co. v. United States, 281 F.2d 137, 143 (6th Cir. 1960). Hawk observes that the examples of "practical cooperation" cited by the Court of Justice have been recognized by United States courts and commentators both as facilitating devices and "plus factors:" "[t]herefore, the definition of concerted practices as parallel conduct and practical cooperation – facilitating devices – is not significantly different under Section 1 as parallel conduct and 'plus factors' – which in some cases are facilitating devices."

[63] *Imperial Chem. Indus.*, 1972 E.C.R. at 619.

[64] *Id.* at para. 110. HAWK, *supra* note 62 (observing that rather than attempting to rely on structural factors as proof itself of a concerted practice, the structural inquiry in Dyestuffs was made to evaluate whether the parallel announcements were a facilitating device, rather along the lines employed by the Department of Justice ("DOJ") in United States v. Container Corp., 393 U.S. 333 (1969)).

[65] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION at para. 1426 (Vol. VI, 2000).

[66] *Imperial Chem. Indus.*, 1972 E.C.R. 619, at para. 66.

Some academic writers attacked the Court's judgment in the *Dyestuffs* case on the ground that it declared conscious parallelism presumptively unlawful on the basis of economic evidence alone.[67] However, the Court's broad dictum has to be read in context: the judgment made it clear that standing on its own conscious parallelism could not be found unlawful. Whether or not there was actual collusion could be correctly determined only if all the evidence on which the contested evidence was based was treated not in isolation but as a whole—echoes here again of the constant U.S. antitrust case law on evidence in a conspiracy case.[68] There was in fact a good deal of collusion evidence, even if the Court's analysis was based more on the adoption of "facilitating practices" rather than on "plus factors" pointing to a conspiracy. It is also important to appreciate that the Court in its judgment relied on the so-called "structural factors" not as circumstantial evidence to prove collusion but in order to assess whether the advance price announcements could act as a facilitating device. The parallel with the line taken by the U.S. courts in facilitating practices cases where there was no explicit agreement or plan to adopt the device is striking: the U.S. cases show that such agreement could be inferred where adoption of the practice was motivated by an anticompetitive purpose or produced an anticompetitive result.[69]

In the later *Suiker* case,[70] the Court of Justice expanded on its earlier dictum regarding concerted practice and emphasized that the coordination in question did not in any way require the working out of an actual plan agreed in advance; these are direct echoes of *Interstate.*[71] Inherent in the Treaty was the notion that each economic operator should determine its behavior by itself. While nothing in Article 85 prevented firms from taking into account the conduct of its rivals and adapting intelligently (i.e., 'mere' conscious parallelism is not caught), it drew the line at "direct or indirect contact . . . the object whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course which they themselves have decided to adopt or

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[67] *See, e.g.*, F. A. Mann, *The Dyestuffs Case in the Court of Justice of the European Communities*, 22 INT'L & COMP. L.Q. 35 (1973); Valentine Korah, *Concerted Practices*, 36 MOD. L. REV. 220, 221 (1973); René Joliet, *La Notion de Pratique Concertée et L'arrêt I.C.I. dans une Perspective Comparative*, 3-4 CAHIERS DE DROIT EUROPÉEN 251 (1974).

[68] *See supra* note 33.

[69] *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d. 432, 446 (9th Cir. 1990) (stating that "...evidence concerning the purpose and effect of price announcements, when considered together with the evidence concerning the parallel pattern of price restorations, is sufficient to support a reasonable and permissible inference of an agreement, whether express or tacit, to raise or stabilise prices").

[70] *Suiker Unie*, 1975 E.C.R. at 1663.

[71] Interstate v. United States, 306 U.S. 208, 208 (1939).

contemplate adopting in the market."[72]

This dictum seems to bring "price signaling" that falls short of agreement expressly within the ambit of Article 85. There is perhaps something to be said for interpreting Article 85 so as to present a single concept of unlawful collusion rather than on the lines of the current U.S. notion of the "contract, combination and conspiracy." However, if a separate meaning does have to be attributed to the term "concerted practice," it must surely be the concerted adoption of a facilitating practice in circumstances where there is no obvious agreement. Separating the facilitating practice analytically from "agreement" in such a way might also reduce the risk of sanctions more appropriate to the full price fixing cartel being imposed on what is less reprehensible conduct.

The *Sugar* and the *Dyestuffs* judgments demonstrate that, far from endorsing decisions in cartel cases on parallel pricing alone, the Court was insisting on the need for "plus evidence" for a decision to be sustainable.[73]

G. *Woodpulp*: A Rude Awakening

However those who thought that the ground rules had now been settled were in for a rude awakening in the *Woodpulp*[74] case decided in March 1993. This case was the last direct appeal from the Commission to be heard by the Court of Justice. In its decision,[75] the Commission had condemned the pricing practices of the leading suppliers of bleached sulphate wood pulp between 1975 and 1981 and fined most of the forty-three addressees (the total was a paltry 4 million Euros).

Woodpulp was essentially a parallel pricing case. All the main producers supplying the Community pulp market invariably followed the long-standing industry practice of announcing quarterly price rises at least a few weeks in advance. The trade press gave wide coverage to the announcements. Everyone's announced price was exactly the same with only minor deviations. The whole industry used a standard delivered price system with only two zones and the use of dollars.

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[72] *Suiker Unie*, 1975 E.C.R. 1663, at para. 174.

[73] *See also* Cases 29/83 & 30/83, CRAM & Rheinzink v. Commission, 1984 E.C.R. 1679, 1702 (stating that:

> the Commission's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action by the two undertakings. Faced with such an argument, it is sufficient for the applications to prove circumstances which cast the facts established by the Commission in a different legal light and thus allow another explanation of the facts to be substituted for the one adopted by the contested decision).

[74] Case C-89/85, A Ahlström Osakeyhtoie v. Commission, 1993 E.C.R. I-1307.

[75] Commission Decision of 19 December 1984, Woodpulp v. Commission, 1985 O.J. (L 85) 1.

Besides the ambiguously worded main charge of "concertation" on pricing addressed to almost all the parties, the *Woodpulp* decision purported to identify a series of distinct infringements of Article 85—conspiracies within the main conspiracy, as it were—which were also vaguely characterized as "concertation."

Although there was a good deal of evidence of actual collusion, at least up to 1977, it was not clear in the decision whether the gist of the Commission's case on the main allegation was hardcore price fixing or something less sinister. The distinction between direct cartel behavior and price signaling was never really made; nor did the decision identify with any precision the terms or nature of any underlying agreement or attempt to spell out the role of each alleged participant. Some producers, however, were obviously more deeply involved than others. This omission was to prove fatal.

As evidence of the alleged "concertation" on the main charge, the Commission had relied primarily "on a series of economic or structural arguments and only in a subsidiary manner on 'hard' plus evidence – the parallel conduct coupled with different kinds of 'direct and indirect exchange of information.'" This formulation, which tends to play down the direct evidence, was curious, since the documents cited in the decision clearly go far beyond a mere exchange of data. They reveal that at least up to 1977 this was an industry where old fashioned price fixing was not unknown. Besides some fairly unambiguous evidence of face to face meetings implicating, in particular, many of the Scandinavian producers, it was clear that the whole industry shared an awareness of the need for one region to support another's prices so as to achieve stability and a uniform price level for pulp. Even if there were some shadowy areas in the evidence on price fixing, one might have been forgiven for thinking, based on the *Dyestuffs* case, that this was a clear case of price signaling. Advance price announcements and the universal adoption of a basing point system must have facilitated the achievement of the remarkable pattern of uniform price increases. In its judgment, however, the Court annulled virtually all of the Commission's findings.[76] The tone of the Court's judgment was intensely hostile to the Commission, and the Commission was not helped by the ambiguity of its decision as to whether the nub of its case was a classic cartel or simply price signaling, even if the low fines imposed were indicative of the latter.

[76] There is a curious historical twist in this case. The Reporting Judge in this case had himself achieved academic prominence by a disparaging critique of the Court of Justice's judgment in *Dyestuffs*. He had condemned what he considered to be the Court's willingness to conclude that there had been collusive behavior on the basis of price announcements without clear evidence of concertation (in fact there had been some) or a thorough analysis of the market. Joliet, *supra* note 67.

It should be noted that the U.S. antitrust authorities may well treat price signaling as part of a wider price fixing conspiracy. For the Court of Justice however, the two 'theories' were mutually exclusive; the Commission had to choose which of the two it was alleging. Was it asserting that the system of price announcements was an infringement as such, or was the phenomenon advanced as evidence of prior collusion? Considering that the Commission had hedged on its answer, the Court proceeded to examine both of these alternative hypotheses individually and in complete isolation from one another.

If the nub of the Commission's case was price signaling, the court stated that advance price announcements on their own did not lessen each undertaking's uncertainty as to what its competitors might do: at the time it made its announcement, it could not be sure of the future conduct of the others. Therefore, the system of price announcements did not *per se* infringe Article 85.

The Court then dismissed the separate "collusion" hypothesis out of hand by rejecting all the hard evidence of meetings and contacts. The court said that for each and every document relied upon, the Commission had to specify between which producers and for what period the collusion established by that document had occurred. The implication is that collusion evidence has no relevance outside its own intrinsic facts. Because the Commission had insisted that circumstantial evidence was not susceptible to such mechanical analysis, the Court held that this collusion evidence was completely inadmissible, stating tersely and in a baffling non-sequitur that "in the light of that reply those documents must be excluded from consideration."[77] Since this left on the factual record little more than the parallel pricing itself, the Court could perhaps have said that on the evidence the burden of proof was not satisfied. Instead, having declared inadmissible almost all the hard evidence of collusion, the Court then proceeded on the basis of competing economic theory alone to examine whether such collusion was likely – and found that it was not.[78] Despite the Advocate General's urging of caution in this regard, the Court relied heavily for its factual conclusions on an expert's report which it had commissioned itself and which, as it transpired, contained many contestable assertions.[79]

The Court's highly compartmentalized approach both to the evidence and the components of the alleged infringement is not easy for a common lawyer to comprehend. Circumstantial evidence surely has to be considered in its entirety: each item considered on its own may not establish the final

[77] Case C-89/85, A Ahlström Osakeyhtiö and others v. Commission, 1993 E.C.R. I-1307, at para. 69.

[78] *Id.* at paras. 126-27.

[79] *Id.* at para. 137.

probandum but taken together and in context each may reinforce the other with regard to the facts in issue.

The U.S. Supreme Court has always stressed that in an antitrust conspiracy case the evidence should not be fragmented: "[i]t hardly needs statement that the character and effect of a conspiracy is (sic) not to be judged by dismembering it and viewing its separate parts but only by looking at it as a whole."[80]

In *Woodpulp,* the Court seems even to have overlooked its own clear statement twenty years before in the *Dyestuffs* case: ". . . the question whether there was concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole."[81] It is no doubt true that the Commission could have drawn the evidential strings together more tightly. Perhaps it should have been wary of relying so heavily on "economic plausibility" factors when there was hard evidence of collusion by many of the producers. The evidence was not enough to draw all the fifty or so addressees of the decision into a single common price fixing cartel, but the sweepingly dismissive statement of the Court that "the Commission has no documents which directly establish the existence of concertation between the producers concerned,"[82] needs, at the very least, to be read with some qualification.

One can also be uneasy about the Court's complete exoneration of the undertakings within the "price signaling" hypothesis. It surely cannot have intended to create a rule for all future facilitating practices cases. The argument that there was no absolute "certainty" is a bizarre one: even in a full cartel with express exchange of assurance the conspirators can never be entirely sure that one or other will not cheat. The experts also justified the lockstep price increases as "natural" in view of the very market transparency which the Commission had characterized as artificial, i.e., pricing in dollars, a delivered price system with only two zones and quarterly list price changes. But natural or not, it surely involved deliberate and avoidable action on the part of all the producers. This was not simply a case of interdependent pricing, but of interdependent adherence to the facilitating practice. To put it at its most neutral, the adoption of this pricing mechanism by all the suppliers must at the very least have helped to maintain a single price level throughout Europe. The definition of the Court of a concerted practice in *Sugar* seems entirely apt to fit the conduct in question here.

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[80] United States v. Patten, 226 U.S. 525, 544 (1913).

[81] *Imperial Chem. Indus.*, 1972 E.C.R. 619, at para. 68.

[82] *A Ahlström Osakeyhtoie*, 1993 E.C.R. I-1307, at para. 70.

H. Conspiracy Comes to the Rescue

If the charitable assessment of the Court's *Woodpulp* judgment is to say that it should be limited to its own facts, the clear lesson for the Commission is that to prove collusion, economic factors are no substitute for hard evidence. It must demonstrate the precise involvement of each player in what might be a complex web of collusion. To do so adequately, the Commission has to have what U.S. prosecutors call a "theory" of the conspiracy. In cases which might lead to the imposition of fines, the Commission would have to set out the evidence carefully and explain its significance in terms of a system of proof. The heart of the issue is to frame the accusation explicitly and correctly. The Court's judgment also underlines the need to distinguish between the full price-fixing conspiracy and mere facilitating devices in an Article 81 analysis.

For the Commission, the problem was how to wrap up the involvement in varying degrees, and possibly for differing periods of time, of the participants in a complex, continuing and concealed scheme of collusion, in a manner that satisfied both the demands of specificity and the strict standards of proof demanded by the judicial instances. The answer, previously provided in a series of investigations and decisions in cartel cases, adopted a very different methodology from that employed in *Woodpulp* and had already received the endorsement of the Court of First Instance.

The essence of this approach lay in constructing and proving with convincing evidence an allegation which caught the overarching illegality of the common scheme, but at the same time, identified the precise involvement of each of the participants over the whole duration of the activity. In short, it amounted to importing into European competition law the concept of the conspiracy. This development was not so much the result of the conscious adoption at a high level by the Commission of a focused policy for dealing with cartels as the convergence of a number of various strands of initiatives.

Following the accession of new member States, including the first with a common law tradition, and a new intake of officials who may have been more instinctively sympathetic than their continental counterparts with "Anglo-Saxon" notions of conspiracy, the early 1980s saw a marked upsurge in the Commission's use of its investigating powers under Council Regulation No. 17/62.[83] The Commission's power to carry out investigations on the spot entitle the officials to have access to the business premises, to examine the books and other business records, to take copies

[83] At the time, the European Court of Justice had no common law jurists. If conspiracy as an inchoate crime is unknown in continental jurisprudence and the concept is generally viewed with suspicion by civilian lawyers, many European legal systems have shaped specific legislation against criminal organization. *See, e.g.*, Ital. C.P., at art. 416.

thereof and to ask for oral explanations. Now, in order to uncover major cartels, the investigations were being ordered by Commission decision without prior warning to the companies and were carried out simultaneously across the Community. Once inside, the officials are also entitled to search, in the sense that they can look actively for documents in the place they are kept rather than wait hopefully for the firm to produce them.

The Commission may not have had the sort of firepower which the U.S. Justice Department can bring to bear in a criminal cartel conspiracy in the United States. There are no grand juries, no telephone monitoring and no intimidating FBI "drop-by" home visits. The Commission has no jurisdiction over individuals. However, selective use of the "dawn raid" in these cases resulted in the discovery of a wealth of direct documentary proof of the systematic cartelization of some major European industries.

In some of these cases, the Commission discovered the original cartel "blueprint"—the planning documents detailing the common design and the mechanisms by which it was to be implemented. Across different industries, the pattern was almost invariably the same: a two-tier structure with senior directors from each company—called the "Popes" and "Elephants" (in the *Pre-Insulated Pipes* cartel), "Bosses" or "Heads of State" (in the *LdPE* cartel)[84]—making the strategic decisions, while a lower level of managers worked out the details. Meetings were held monthly, usually in Switzerland. Almost invariably, the same Swiss fiduciary company provided a supposedly "anonymized" data exchange system, which was used by the cartel participants to monitor the accuracy of their sales declarations to their fellow conspirators in meetings; at times the same "trustee" acted as the meeting chairman and cartel secretary. In some cases, information was discovered in locations and offices that the makers had forgotten about or failed to clean up while the officials were delayed by some pretext. This included full documentation recording the details of the negotiations and outcome of each meeting in explicit detail as well as the exhaustively detailed and complex annual calculations for allocating sales quotas. Memoranda of telephone conversations or pep talks by the cartel chairman with each of the members were also obtained. The internal instructions by which the head office of each participant ordered its sales subsidiaries in each country to implement price lists, often running to hundreds of items, which had clearly been agreed in the cartel meetings, completed the picture.

While there was direct evidence on all the central issues, particularly on the fact of "agreement," in each case it was necessary to resort to some extent to circumstantial evidence, if only to fill in gaps in the story. Not all

[84] More junior executives responsible for carrying out the agreements reached by the ringleaders were often given less illustrious titles.

producers, for instance, might have kept their full set of pricing instructions over the life of cartel, but their continuing participation in meetings during the whole time and their own involvement in the quota schemes was amply established by other evidence.

The participants, all major Blue Chip international companies with a presumably unlimited legal budget, including some U.S. producers, deployed every conceivable tactic to fight the cases. No procedural argument was left unexploited. Indeed, the defense tactic attracted the sympathy of some elements in the legal establishment. In one of the most bizarre episodes in the judicial history of the Communities, a judgment[85] by one chamber of the Court of First Instance (finding the Commission decision[86] in a cartel case "non-existent") threatened to derail the whole established body of Community decisions from the preceding twenty-five years. The Commission persisted and with a change in the composition of the deciding tribunal, the stance it had taken was vindicated in a series of judgments that both approved the Commission's "conspiracy" approach and dismissed procedural arguments that had previously found a measure of judicial favor.

Had this occurred in the United States, it is extremely doubtful whether the cases would ever have come to a full trial on such overwhelming evidence. Invariably revelations of such blatant conspiratorial behavior would have resulted in a plea bargain (with negotiated jail sentences) and a civil settlement with the injured parties.

I. Framing the Charge

The main contribution of those cartel decisions to European case law , taken by the Commission and subsequently approved by the Court of First Instance and later the Court of Justice, lies in establishing what has been identified as the "cartel as a whole" prosecution theory. In view of their identical purpose, the component elements of the cartel, consisting of a whole complex of interlinked schemes and arrangements to set prices, fix quotas and police the agreement, running over several years were not to be split up into a number of separate infringements. The component elements had to be treated as a whole, and the first explicit declaration of this principle is in *Polypropylene.*[87] The overall plan of the producers was to meet and reach agreement on specific matters, including the fixing of target prices, the modalities of concerted price initiatives, the allocation of quotas or other measures to control sales volumes, and the exchange of detailed information so as to facilitate the coordination of their behavior. However:

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[85] Case T-79/89, BASF v. Commission, 1992 E.C.R. II-315.

[86] PVC, 1989 O.J. (L 74) 2.

[87] Polypropylene Decision, 1986 O.J. (L 230) 1.

> [t]he Commission considers that the whole complex of schemes and arrangements decided in the context of a system of regular and institutionalized meetings constituted a single continuing 'agreement' within the meaning of Article 85(1).[88]

In *Polypropylene*, in contrast to the failed catch-all "group collusion" approach of *Woodpulp*, the Commission tackled the problem of characterizing the detailed operation of the cartel as participation "in an overall framework agreement which was manifested in a series of more detailed sub-agreements worked out from time to time."[89] By the time of the *PVC* decision three years later, the Commission felt confident enough to move from this half-way position and assert that:

> [T]he collusion is however to be considered not so much as a series of discrete agreements each with different adherents, but as the execution of a broad continuing agreement with the same participants, the same procedures and the same common object, namely to establish a mechanism for volume control and concentration on pricing.[90]

This approach was endorsed by the Court of First Instance in its ground-breaking 1991 *Polypropylene* judgment. Observing that it would be artificial to split up such continuous conduct, characterized by a single purpose, by treating it as a number of separate infringements, the Court added: "[t]he fact is that the [undertakings] took part – over a period of years – in an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices."[91]

In Article 1 of the operative part of its "re-adopted" decision in the *PVC II* case, which sums up its findings, the Commission held that the parties had

> Infringed Article 85 of the EC Treaty. . .by participating for the periods identified in this Decision in an agreement and/or concerted practice originating in or about August 1980 by which the producers supplying PVC in the Community took part in regular meetings in order to fix target prices and target quotas, plan concerted initiatives to raise price levels and monitor the operation of the said collusive arrangements.[92]

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[88] *Id.* at para. 81.
[89] *Id.* at para. 181.
[90] *PVC*, 1989 O.J. (L 74) 2, at para. 31.
[91] Case T-1/89, Rhône-Poulenc v. Commission, 1991 ECR II-867, at para. 126.
[92] PVC II, 1994 O.J. (L 239) 14, at art. 1.

The accusation thus focuses on the "conspiracy" aspect of the arrangement: (a) an over-arching plan, the essential characteristics of which are identified, and (b) the implementation of which each of the producers participated for specific periods and possibly in varying roles of involvement.

As the *PVC II* decision avers:

> [A]n agreement within the meaning of Article (81) may exist where the parties reach a consensus on a plan which limits or is likely to limit their commercial freedom by determining the lines of their mutual action or abstention from action in the market. No enforcement procedures such as might be foreseen in the case of a civil law contract are required.[93]

Further, just as had occurred in the United States, the Commission in these later decisions has "operationalized" the concept of the prohibited antitrust "agreement." In the past, given the relative paucity of direct collusion evidence, the starting point for any inquiry had of necessity been the observed parallel pricing itself: the Commission had to work backwards from the "outcome" of the cartel with all the tricky analytical problems that such work backwards might involve. However, with the evidentiary record now full of direct proof of the whole complex of secret discussions, negotiations and meetings, the focus of the prohibition of Article 85 is now upon the "process." This process includes the partnership for unlawful purposes with all the possible disagreements that may occur in a partnership or a family without affecting the cohesion of the overall shared purpose and common design. The Commission stated that:

> In relation to one or other aspect of the arrangements a particular producer or group of producers may from time to time have had reservations or been dissatisfied about some specific point . . . the agreement to which the Commission takes objection relates to a continuing enterprise or partnership between the producers to prevent, restrict or distort competition in the PVC market over a period of several years.[94]

The term "agreement" is applied not only to the specific agreement on the basic scheme which is to be operated by the parties or to the exact terms which may be agreed from time to time, but also to the whole continuing process in which they are involved. The term "agreement" covers the entire bargaining process leading up to or following the actual agreement in terms and may include reaching inchoate understandings or conditional agreements. Indeed, as was pointed out in *Pre-Insulated Pipe Cartel*,

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[93] *Id.* at para. 30.

[94] *Id.* at para. 31.

"[f]ormal agreement may never be reached on all matters. Agreement in one area may exist alongside conflicts in another. Competition may not be entirely eliminated."[95] The Commission went on to observe the fickle dynamic which characterized this typical cartel, in which the parties

> Had set up an infrastructure of regular meetings and were involved in a continuous process of business diplomacy aimed at reconciling their respective interests . . . [t]he discussions may have involved a shifting constellation of alliances, even threats of reprisal or hostile action, but as part of the developing process of understandings and partial agreements intended to fix prices, coordinate price increases and allocate markets and market shares they constituted cartel conduct prohibited by Article 85(1).[96]

Just as with the Sherman Act "conspiracy," this approach underlines the fact that the principal vice of the prohibited behavior lies in "collective decision making plus mutual assurance of compliance."[97] The *Pre-Insulated Pipes* cartel decision, in an echo of *Monsanto v. Spray-Rite Sun Corporation*,[98] condemns "joint decision-making and commitment to a common scheme."[99]

This approach—made possible only by the Commission's full use of its investigative powers to make a historical reconstruction of the cartel's activities despite all efforts at concealment—neatly moves the debate away from the semantics of whether the behavior complained of is an "agreement" or a "concerted practice." The concepts are fluid and may overlap. In all these cases, the Commission has stretched in order to describe the cartel principally as an "agreement." In *Pre-Insulated Pipes*, the drafter of the decision disposed of an old analytical fallacy which had been argued over so fruitlessly in earlier cases. The decision stated that "it is not a correct analysis to categorize the terms of the bargain struck by the parties at a particular moment as the 'agreement' and its subsequent implementation over time as a 'concerted practice.'"[100]

Drawing on the characterization of a "concerted practice" by the Court in the *Sugar* case as more of a "facilitating device," the Commission now tends to apply this particular label not to the full price fixing conspiracy but to the knowing adoption of or adherence to some collusive mechanism which encourages or facilitates the coordination of their behavior.

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[95] Pre-Insulated Pipe Cartel, 1999 O.J. (L 24) 1, at para. 134.

[96] *Id.* at para. 137.

[97] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 1404-19 (2003).

[98] *Monsanto v. Spray-Rite Sun Corp* , 465 U.S. 752, 768 (1984).

[99] *Pre-Insulated Pipe*, 1999 O.J. (L 24) at para. 129.

[100] *Id.* at para. 132.

Companies operating on the fringes of the cartel or knowingly going along with it may be described—charitably perhaps—as parties rather to a concerted practice than to an 'agreement.'

In any case, where there is a complex infringement of long duration, it is not necessary or even possible to untangle the two forms of prohibited conduct: the violation may present simultaneously the characteristics of both. Viewed entirely in isolation, a particular manifestation of the cartel could present one aspect more than another, but Article 81 lays down no specific category for a complex infringement.

The Commission's approach then is broadly that, as in conspiracy, all those who are clearly partners in the scheme – junior or senior does not matter – are parties to an "agreement." The Court of Justice confirmed this in January 2004 in an appeal against the Commission decision in the *Cement* case. It neatly summarizes the European approach which has now clearly endorsed the common law notions of a conspiracy:

> the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate is of no relevant to the establishment of the existence of an infringement .... Where it is established that an undertaking was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk, it is also regarded as responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement.[101]

J. Evidence in Cartel Cases

Regarding the treatment of evidence, the use, just as in a conspiracy, of the declarations of one participant made in furtherance of the conspiracy against all the others are in striking parallel with the common law. The Commission and the Courts are distinctly unimpressed by arguments from the others that the evidence is "inadmissible" because they were not aware of the existence of the document or party to its making. Where the members of a cartel are major corporations doing business worldwide, internal communications within each firm which were necessary to apprise superiors or others "in the know" of the negotiations with competitors and their outcome are clearly intended to further the conspiracy: without them, it simply could not operate.[102]

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[101] Case C-204/00, Aalborg Portland A/S v. Commission (Jan. 7, 2004), *available at* http://www.curia.eu.int/en/actu/communiques/cp04/aff/ cp040002en.htm (last visited Apr. 22, 2004).

[102] *See supra* note 35.

The Commission also generally adopts the system of proof—"Hornbook law" to any criminal practitioner – that while it is necessary to establish against each addressee of the decision, by coherent proof, that it participated in the violation, this does not (as the defense always argued) require that there be direct proof that every alleged participant expressly gave its assent to, or committed some overt act in support of, each and every individual aspect or manifestation of the cartel throughout its entire duration. This would simply be to reward those who are most successful in covering up their tracks or destroying the evidence.

As the Court of First Instance confirmed in one of its *Polypropylene* judgments – *Rhône Poulenc v. Commission*[103]—the proper approach is to demonstrate the existence, operation and salient features of the cartel as a whole. It is then to determine whether there is credible and persuasive proof to link each participant to the common scheme and during what period each one gave its adherence.[104]

K. Delinquent Behavior

Evidence of participation in a cartel may be established by various means, since cartel participants do not conduct their affairs with the convenience of fact-finders in the forefront of their minds. Cartels do not act in the same manner as criminals on the street. The practical difficulty for the Commission is to locate and seize evidence of activity which by its very nature is clandestine. Therefore, it was obliged to develop the technique of the "dawn raid" to a fine art, which proved successful as a detector of cartels. Later, in imitation of the U.S. Justice Department's prized weapon, the bait of leniency was used to extract confessions and cooperation from the participants themselves. Both of these proactive, sometimes aggressive, detection strategies attracted harsh criticism from legal and business interest groups. Curiously, for a long time the debate in Europe was not over the iniquity of the business conduct revealed by the Commission's investigations but on the human rights of the cartel participants.[105] Few if any commentators adverted to the harm done by cartels and the advocates of enforcement were almost a persecuted minority. If this was a deliberate strategy, in the end it was self-defeating for the cartels.[106] Insistence by the Courts on a high burden for the standard

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[103] *Rhône-Poulenc*, 1991 ECR II-867.

[104] *Id.*

[105] For students of industrial history, the regular invocation of human rights by certain major chemical companies has a certain historic irony. *See* Joined Cases 46/87 & 227/88, Hoechst v. Commission, 1989 E.C.R. 2859. *See generally* HARDING & JOSHUA, *supra* note 10, at 190-96.

[106] In an appeal by National Panasonic against one of the earliest dawn raids, the appellant company invoked Article 8 of the European Convention on Human Rights and

of proof and the intensive standard of review applied by the Court of First Instance, had the result that the Commission was obligated to dig deep to retrieve evidence. Instead of being able to rely, as in the earlier cases, on parallel pricing with a few not very "strong" plus factors, investigators had to find the smoking gun in order to stand any chance of being able to prove a case. In practice, the Commission uncovered a whole arsenal.[107]

In case after case, the full extent of the illegal cartel activities subtly but progressively influenced the official attitudes. The very scale of the turpitude was then revealed. It was highly organized, with senior level perpetrators and a deeply cynical attitude of the participants.[108] These characteristics meant that officialdom, however hesitatingly, came to accept the harmful nature of cartels. No longer could business supporters shrug off price fixing as normal entrepreneurialism. Authorities began to crack down on price fixing activity with a zeal that had not been manifest in the 1980's and 1990's despite the successes chalked up by investigators in individual cases. In 2000, Commissioner Mario Monti famously condemned cartels as "cancers on the open market economy."[109]

Once the ball began rolling, it became a self-perpetuating exercise. Enforcement agencies began imposing punitive corporate fines upon discovery of the broad range of industries engaging in systematic clandestine behavior. In turn, these high fines, previously a seven-day wonder, reported in the press but forgotten as soon as the next story came along, attracted an unprecedented level of public interest. The scandal generated by the *Pre-insulated Pipes* cartel in Scandinavian countries where public attitudes had hitherto been largely tolerant of cartels, as witnessed by reactions to *Cartonboard* cartel just a few years previously, may have contributed in no small measure to the hardening of perceptions in the Nordic area and the adoption of national legislation outlawing cartels. Although the legislation did not criminalize the conduct, it provided for administrative fines.

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argued that the surprise nature of the investigation violated basic rights of commercial privacy. The Court of Justice dismissed the appeal, finding that the public interest in law enforcement outweighed rights of privacy. Case 136/79, National Panasonic v. Commission, 1980 E.C.R. 2033.

[107] For example, during a 'dawn raid' on a company suspected of participating in the Polypropylene cartel, the Commission discovered the 'blueprint' for the *PVC Cartel* case, misfiled in the polypropylene folder.

[108] In many of the worst cartel cases, the Commission uncovered evidence that the illegal operations had continued as before after successful dawn raids had been conducted, but with even greater efforts to disguise them.

[109] Commissioner Mario Monti, Fighting Cartels Why and How: Why Should We Be Concerned with Cartels and Collusive Behavior?, Remarks at the 3rd Nordic Competition Policy Conference Stockholm (Sept. 11-12, 2000) (transcript available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/295|0|RAPID&lg=EN).

Of course it would be idle to pretend that the gradual change in attitudes towards cartels in Europe was solely the result of the Commission's successes. It is doubtful if international enforcement would ever have achieved the unstoppable momentum it did without the shocking revelations in the *Archer Daniel Midland* (*ADM*) case in the United States and the subsequent global crusade led by the U.S. Justice Department.[110] Enforcement efforts had to be redoubled after the U.S. Justice Department went around the world showing packed audiences at legal conferences its secretly-recorded videos of some of the most candid episodes in the cartel's life. One such video revealed a senior *ADM* executive confiding to his cartel colleagues:

> [t]he only thing we need to talk here because we are gonna get manipulated by these goddam buyers . . . . They can be smarter than us if we let them be smarter . . . they are not your friend. They are not my friend . . . . You're my friend. I wanna be closer to you than I am to any customer.[111]

The element of conspiracy revealed by such utterances in itself provides the policy ground for censure. Official attitudes in Europe have shifted from a purely "economic" approach – as manifested in the academic and scholastic debates surrounding the *Dyestuffs* saga—to one based on condemning bad behavior and bad attitude. Adopting the "conspiracy approach" in European jurisprudence has effected a major change in the way cartels are perceived and regulated. Even if the Commission has stopped short of using the actual word in its decisions, it is always hanging unspoken over every Commission decision in a cartel case and acts as a powerful agent for change.

Even if it can now justifiably be said that the notion of conspiracy has been embraced in European practice, this sits uneasily with the continuing evolution of cartel enforcement in Europe at a national level. In recent years there has been a trend towards a more high-profile and vigorous fight against the most serious international cartels.[112] A number of European countries have enacted penal legislation intended to bring the full force of the criminal law against price fixers.[113] While at first sight this

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[110] Audiotape: U.S. Department of Justice, Vitamin Cartel investigation from a recording of a cartel meeting in Maui, Hawaii (Mar. 10, 1994).

[111] Videotape: Remarks by an ADM executive at a cartel meeting (Mar. 10, 1994) (videotape on file with the U.S. Federal Bureau of Investigation).

[112] *See* OECD, *Statement on the Association by Non-Members with the OECD Council Recommendation on Effective Action Against Hard Core Cartels* (C(98)35/Final), Apr. 27-28, 1998, *available at* http://www.oecd.org/dataoecd/1/63/2380310.pdf (last visited Apr. 22, 2004).

[113] In the United Kingdom, Sections 188-190 of the Enterprise Act 2002, introduce a new cartel offence for individuals where they dishonestly agree to typical cartel arrangements.

development should bring European cartel enforcement even closer to the U.S. model of prosecution, there are a number of very real and practical difficulties which may undermine the level of sophistication reached at a European level by the Commission in cartel enforcement. In particular, there is a very stark juxtaposition between Member States who have criminalized cartels and those – the majority of Member States—who refuse to accept that the prosecution of cartels is a matter for criminal law. The European hardening of attitudes against cartels has, therefore, not given rise to a convergence of methodologies in mainland Europe but has had the effect of repositioning countries like the United Kingdom and Ireland.[114]

It remains to be seen how criminalization at a national level will interface with the administrative regulation of cartels at a European level. For example, the Office of Fair Trading in U.K. cases will concurrently investigate and prosecute an individual under the Enterprise Act 2002 and bring administrative proceedings against the company under the Competition Act 1998, while also potentially assisting the European Commission with its investigations under Article 81. Eventually, the Office of Fair Trading will have to apply Article 81 itself with the 'modernization' and delegation of the application of EC competition rules to national authorities in all but the most serious of cases starting on May 1, 2004. In other words, both criminal and administrative regimes, and national and European jurisdictions, will be brought together under the umbrella of a single investigation.

It is clear that the prosecution of cartels by individual Member States does not fit with the administrative enforcement regime of the Commission. Inevitably it will raise questions of consistency between decisions, and double jeopardy arguments may be raised against the same conduct being subject of both administrative and criminal sanctions. The precise role that may be placed by national prosecution, particularly criminal prosecution, remains to be seen.

Moreover, inherent in the national regimes themselves are legal problems which also undermine the evolution of conspiracy as a basis for cartel enforcement in modern European cartel law. The United Kingdom has defined its cartel offence without reference to either the European or

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Unlike the analogous provisions of the Sherman Act, the crime can only be committed by individuals. Corporations can only be proceeded against administratively. The maximum penalties are imprisonment for up to five years and/or a fine. *See also* Irish Competition Act (2002) (imposing a maximum penalty of five-year term of imprisonment), *available at* http://www.hmso.gov.uk/acts/acts2002/20040—n.htm#188.

[114] *See* Julian M. Joshua, *A Sherman Act Bridgehead in Europe, or a Ghost Ship in Mid-Atlantic? A Close Look at the United Kingdom Proposals to Criminalise Hardcore Cartel Conduct,* 5 EUR. COMPETITION LAW. REV. 231; *see also* Julian M. Joshua, *The U.K.'s New Cartel Offence and its Implications for the E.C. Competition Law: A Tangled Web,* 5 EUR. LAW. REV. 620.

Sherman Act frameworks. In an attempt to capture only the most serious of crimes and to define the offence in a way which is "both clear and easy for business and the courts to understand,"[115] the draftsmen have regrettably chosen perhaps one of the most confusing notions in English law – dishonesty.[116] Reluctance to use the notion of conspiracy is perhaps based upon a misunderstanding of the context in which "conspiracy" is used in the Sherman Act: it is not employed as a device to frustrate inchoate crime in the general criminal law, but simply to define the type of "'agreement" as the ground for finding liability in the special factual circumstances of covert cartels.[117] Having adopted "dishonesty" to define the offence, it is a case of "watch this space" until such time as the authorities and the English courts have grappled with and ultimately rationalized the offence. In the end, it is feared that the practical efficacy which the British government was so keen to impart into its crack-down on cartels may be undermined by the reluctance to follow the United States, and ultimately European, "conspiracy" approach.

[115] Department of Trade and Industry, *A World Class Competition Regime*, CM5233, at paras. 7, 19 (July 2001), *available at* http://www.archive.official-documents.co.uk/document/cm52/5233/5233.htm.

[116] An integral element of the offence is the agreement between the individuals, and the "dishonesty" requirement appears to have been an attempt to introduce an element of moral reprehensibility. It is unfortunate that "conspiracy" was not used, being a well-established term in English law. As this paper has shown, its particular rules of evidence suit it to the prosecution of the very particular crime of cartel activity, catching cartels even after they have gone underground. For a fuller discussion, *see* Julian M. Joshua, *The Criminalisation of Cartels in the U.K.: Rhetoric or Reality?,* Remarks at the IBC Financial Services Conference (Mar. 2003); Philip Lowe, *What's the Future for Cartel Enforcement,* Remarks at the Conference of Understanding Global Cartel Enforcement (Feb. 11, 2003), *available at* http://europa.eu.int/comm/competition/speeches/text/sp2003_044_en.pdf.

[117] In England and Wales, the general criminal law, embodied in the Criminal Law Act 1977, limits the use of the doctrine of conspiracy to agreements to commit crimes.